



Legitimation of the Economic Community of West African States (ECOWAS): A Normative and Institutional Inquiry

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ABSTRACT

This study is an attempt at determining the normative legitimacy of the Economic Community of West African States (ECOWAS). At its core, it scrutinizes the current mandate of the organization following the layering of economic integration objectives with human rights protection, sustenance of democracy, and the rule of law. The study discusses the elements of legitimacy across disciplines mainly, international law, international relations and political science. Legitimacy is eventually split along two divides, the normative and descriptive/sociological aspects. The study traces the normative content (shared/common values) underlying integration in Africa, concluding that integration has been born on new ideals such as human rights, democracy and the rule of law. Expectedly, Regional Economic Communities (RECs) as building blocks of the prospective African Economic Community (AEC) under the African Union (AU) regime are mandated to play a vital role in moving the continent forward upon these values. The inquiry is extended to the institutions of ECOWAS to determine their capacity to effectively implement the new mandate of the organization and operate supranationally. In the process, key legal and institutional shortcomings are discussed, particularly in relation to national institutions. It is argued that while human rights protection enhances the normative legitimacy of ECOWAS, it must not be pursued in isolation. Economic integration and protection of citizens' rights are co-terminus and mutually reinforcing. Hence, community institutions must reflect this link if they are to be effective. The study concludes on the note that, while ECOWAS possesses layers of legitimacy, and have carried out legitimation steps, it cannot be considered a legitimate organization if Member States continue to be non-compliant with community objectives and if key legal questions remain unaddressed. It is submitted that ECOWAS is merely undergoing legitimation, whether it can eventually be considered a legitimate organization is dependent on addressing the identified challenges.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACJHR – African Court of Justice and Human Rights

ACPHR – African Court on Human and Peoples’ Rights

AEC – African Economic Community

AfDB – African Development Bank

AMU – Arab Maghreb Union

APR – African Peer Review

APRM - African Peer Review Mechanism

ASEAN - Association of Southeast Asian Nations

AU – African Union

CARICOM – Caribbean Community

CEMAC – Central African Economic and Monetary Union

CENSAD – Community of Sahel-Saharan States

COMESA – Common Market for Eastern and Southern Africa

CU – Customs Union

EAC – East African Community

EACJ – East African Court of Justice

ECCAS – Economic Community of Central African States

ECCJ – ECOWAS Community Court of Justice

ECJ – European Court of Justice

ECOMOG – ECOWAS Monitoring Group

ECOWAS – Economic Community of West African States

EU - European Union

FTA – Free Trade Area

ICC – International Criminal Court

ICJ – International Court of Justice

IGAD – Intergovernmental Authority for Development

IMO – International Monetary Organization
MRO - Mano River Union
NEPAD – New Partnership for Africa’s Development
NGO – Non-Governmental Organization
OAS – Organization of American States
OAU – Organization for African Unity
OHADA – Organisation Pour l’Harmonisation en Afrique des Droites des Affaires
REC – Regional Economic Communities
RTA – Regional Trade Agreement
SACU – South African Customs Union
SADC – Southern Africa Development Community
SEARAP – Socio-Economic Rights and Accountability Project
UEMOA - Union économique et monétaire ouest-africaine
UN – United Nations
UNCTAD – United Nations Conference on Trade and Development
UNDP – United Nations Development Programme
UNECA - United Nations Economic Commission for Africa
VCLT – Vienna Convention on the Law of Treaties
WTO - World Trade Organization

AFRICAN LAW REPORTS

A.H.R.L.R. African Human Rights Law Reports
G.L.R Ghana Law Reports
N.W.L.R Nigerian Weekly Law Reports
W.L.R. Weekly Law Report

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DEDICATION

This thesis is dedicated to the founders, heroes and heroines of African integration, past and present, who work for a united, economically progressive, and politically emancipated continent, one at peace with itself and the world.

CHAPTER 1

1.1 INTRODUCTION

The inauguration of the Economic Community of West African States (ECOWAS)¹ in Lagos, Nigeria on 28 May 1975 was greeted as ‘a critical breakthrough in efforts to institute a framework for economic co-operation and integration that embraced the entire sub-region’.² 38 years down the line, two treaties in, and several reforms to the institutional structure of the organization, question marks still hang over the relevance of the institution to the teeming population of the West African Sub-region. Most observers have raised doubts over the success of ECOWAS as an economic organization due to the slow pace of integration,³ which is the primary goal of the organization.⁴ Despite these concerns, the organization has continued to make strides in other areas of integration, seeking to further solidify its crucial role in the sub-region and also fulfil its mandate as one of the recognized pillars of the African Economic Community (AEC)⁵ under the framework of the African Union (AU).

Numerous problems plagued the first regime of the organization.⁶ Some of these problems include inadequacy of the legal framework, failure to meet objectives of the community such as the Trade Liberalization Scheme (TLS), non-ratification of community protocols and a general sense of distrust towards the intentions of the regional hegemon, Nigeria.⁷ In essence, ECOWAS under the first regime was nothing short of an agora, or a platform for discussion, ‘where things cannot just get done, and just cannot get

¹ The fifteen signatories of the Treaty of Lagos were: Cote d’Ivoire, Dahomey (now Benin), Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta (now Burkina Faso). The island of Cape Verde became a member of the Community in 1997. Mauritania withdrew from ECOWAS in 2000.

² S. Bah, ‘ECOWAS and the Legitimacy Question: A Normative and Institutional Approach’ in D. Zaum (Ed), *Legitimizing International Organizations*, (Oxford: Oxford University Press, 2013), p.90.

³ See latest statistics on the low level of intra-African trade in, UNECA, *Assessing Regional Integration in Africa ARIA V: Towards an African Continental Free Trade Area* (Addis Ababa: UNECA, 2012), pp.19-20.

⁴ See K. O Kufour, *The Institutional Transformation of the Economic Community of West African States*, (Ashgate Publishing, 2006), p.127.

⁵ See, Treaty Establishing the African Economic Community adopted June 3, 1991 available at <http://au.int/en/treaties> (Accessed 15 April 2014).

⁶ Here, the first regime refers to the period which the 1975 treaty was in operation until its revision in 1993.

⁷ Kufour (2006), pp. 21-34.

done'.⁸ The emergence of violent conflicts in the early 90s changed the trajectory of the community's objectives culminating in the revision of its treaty and giving it a human rights overlay. The intervention of ECOWAS in troubled Member States notably Liberia and Sierra Leone triggered legal and political debates not just on the role of the ECOWAS in peace and security but also culminated in greater emphasis on protecting universal values such as human rights, democracy and the rule of law.

Economic integration still remains one of the key objectives of the Community and the general continent. The benefits of economic integration are not in dispute.⁹ The urgency with which it should be pursued is expressed in the following words of the United Nations Economic Commission for Africa (UNECA);

This shift [the global move to integrate economies] is nowhere more urgent than in Africa, where the combined impact of relatively small economies, international terms of trade, and the legacy of colonialism, mis-rule, and conflict has meant that we have not yet assumed our global market share-despite our significant market size.¹⁰

It is envisaged that uniting African economies will permit exploitation of economies of scale, ensure competitive markets, provide access to wider trading and investment environments, promote exports to regional markets, provide the requisite experience to compete in the multilateral trade system, and to provide a framework for them to cooperate in developing common services for finance, transportation and communication.¹¹

However, the limited progress in economic integration and the pre-occupation of the organization with human rights protection, peace and security has drawn the attention of scholars to the legitimacy of ECOWAS. The emergent norms in the practice of the organization since its intervention in troubled Member States has also raised important questions about the limits an organization originally dedicated to economic integration,

⁸ J. Klabbers, 'Two Concepts of International Organization' 2 *International Organization* (2005), p.282.

⁹ See, R. Fernandez & J. Portes, 'Return to Regionalism: An analysis of non-traditional gains from Regional Trading Arrangements', 12 *World Bank Economic Review* (1998), 197; T. Mulat, 'Multilateralism and Africa's Regional Economic Communities' 32 *Journal of World Trade*(1998) , 115.

¹⁰ *Assessing Regional Economic Integration in Africa* (Addis Ababa: UNECA, 2004), p.ix. See also, United Nations Conference on Trade and Development, *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development* (Geneva: UNCTAD, 2009).

¹¹ R.F Oppong, *Relational Issues of Law and Economic Integration in Africa*, Doctoral thesis (University of British Columbia, 2009), p.2.

but whose mandate has extended to peace and security, and human rights spheres. The legitimation practices of ECOWAS as an international organization is where the inquest of this study lies. It is argued that the capacity of community institutions to deliver the vast mandate in human rights protection, peace and security, and the rule of law in line with a paradigm shift in regional integration in the continent is fundamental to the long term success of the organization.

This study joins a pool of emerging works that examine the legal aspects of economic integration in Africa,¹² albeit with a special focus on human rights and the rule of law. Kiplagat bemoans the ‘lack of meaningful institutional analysis and excessive emphasis on economic inquiry’.¹³ He argues that since economic integration has been seen as the answer to the plight of developing countries, the success or failure of integration attempts has depended upon and is gauged by economic outcomes.¹⁴ His argument appears to be valid, although both disciplines (economics and law) are increasingly becoming co-terminus.¹⁵ Hence, it is understandable that scholars of regional integration organizations depend largely on economic inquiry for answers. This study does not attempt to provide definite solutions to the lack of progress on economic integration neither does it reject alternative constructs on the way forward. It merely examines the normative and institutional practice of ECOWAS in human rights under the new treaty regime, in an attempt to ascertain the possible impact on the future success of the community and its peoples. Admittedly, it is at most an ambitious attempt at deciphering the possible destination of the organization.

¹² Notable recent works on the legal aspects of integration in Africa include, R.F Opong, *Legal Aspects of Economic Integration in Africa*, (Cambridge: Cambridge University Press, 2011); J.T Gathi, *African Regional Trade Agreements as Legal Regimes*, (Cambridge University Press, 2011).

¹³ P.K Kiplagat, ‘An Institutional and Structural Model for Successful Economic Integration in Developing Countries’, 29 *Texas International Law Journal* (1994), p.50.

¹⁴ Ibid.

¹⁵ On the relationship between legal institutions and economics, see, K.N Llewellyn, ‘The Effect of Legal Institutions upon Economics’, 15 *The American Economic Review* (1925), 665.

1.2 STATEMENT OF RESEARCH PROBLEM & RESEARCH QUESTIONS

ECOWAS, like most international organizations, is faced with the challenge of establishing its legitimacy, especially when it concerns delivering on its human rights mandate. Under the first regime, the legitimacy of ECOWAS was hardly contested, perhaps due to Cold War and the limitations it imposed on the organization's role.¹⁶ It was viewed by both its members and other states as focused on, and established primarily for economic integration. Hence it lacked the mandate to interfere in the internal affairs of its members. However, the emergence of violent domestic conflicts which has had lasting repercussions on the role of ECOWAS in member states has expanded the understanding of peace and security and human rights in the organization. More importantly, the legitimacy question was brought to the fore primarily due to the military interventions in Liberia and Sierra Leone.

From an international law perspective, debates about the legitimacy of international organizations has gained traction over the last two decades due to the growing scope of international organization's practice to regulate actions of states (and increasingly individuals), and the intrusiveness of some organizations such as ECOWAS into areas traditionally considered to be within the sovereign domain of States.¹⁷ The debate spurred has cast the searchlight on the institutions and decision-making processes of international organizations. For example, an extensive literature has emerged on the challenge that the European Union's 'democratic deficit' poses to the organization's legitimacy.¹⁸ Additionally, these debates about the roles of international organizations have also raised questions concerning the character of legitimacy in international society more generally, and the function of international organizations as 'collective legitimizers'¹⁹ of state conduct at international level.

¹⁶ Bah (2013), p.90.

¹⁷ J.C Coicaud & V. Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo: United Nations University Press, 2001); B. Cronin & I. Hurd, *The UN Security Council and the Politics of International Authority* (Abingdon: Routledge, 2008).

¹⁸ V. Schmidt, 'The European Deficit: Democratic Legitimacy in a Regional State?' 42 *Journal of Common Market Studies* (2004), pp. 975-97; T. Pogge, 'Creating Supra-National Institutions Democratically: Reflections on the European Union's "Democratic Deficit"', 5 *Journal of Political Philosophy* (1997), pp. 163 – 82.

¹⁹ See, I. L Claude, 'Collective Legitimization as a Political Function of the United Nations', 20 *International Organizations* (1966), 367.

However, legitimacy is an ‘extremely slippery concept’ for various reasons.²⁰ First, legitimacy is slippery because it is historically contingent and dynamic.²¹ As Hurrell observes, legitimacy is ‘quite literally meaningless outside of a particular historical context and outside of a particular set of linguistic conventions and justificatory structures.’²² As a result, notions of legitimacy as well as definitions of practices that qualify as legitimate are altered as normative and political contexts change. It is also slippery because ideas of legitimacy vary with the social terrain under examination.²³ As Ian Clarke observes, since ‘legitimacy possesses no independent normative content of its own [...] it is always mediated through a composite of other norms’²⁴ be they legal, moral, political or constitutional. A third reason why legitimacy is an evasive concept is its subjectivity. Consequently, legitimacy belongs to groups/societies which cannot be controlled unilaterally. Put differently, legitimacy is for collectivities to judge not just for scholars to control.²⁵ In other words, legitimacy is centrally concerned with those elements that explain why certain actors and activities generate normative compliance, i.e. compliance pull without coercion – amongst relevant audiences.²⁶

Despite the conceptual variations in the study of legitimacy, scholars of international law seem to agree on one common factor. This common denominator is the right of a legitimate institution to rule. Under this disciplinary approach, a wide variety of factors might give an actor the right to rule: democratic accountability, legality, preservation of order, respect for human rights and so forth.²⁷ These factors of legitimacy under the disciplinary approach were all given consideration in this study. This brings us to the questions that form the nucleus of this study.

²⁰ A. Hurrell, ‘Legitimacy and the use of force: can the circle be squared?’ 31 *Review of International Studies*, (2005), p.17.

²¹ P. Williams, ‘Regional and Global Legitimacy Dynamics: The United Nations and Regional Arrangements’ in Zaum (2013), p.43.

²² Hurrell (2005), p.29.

²³ Williams (2013), p.44.

²⁴ I. Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), p.207

²⁵ Williams (2013), p.44.

²⁶ T.M Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), p.6; See also T.M Franck, ‘Legitimacy in the International System’ 82 *American Journal of International Law* (1988), p.712.

²⁷ D. Bodansky, ‘Legitimacy in International Law and International Relations’ in J.L Dunoff & M.A Pollack (Eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, (Cambridge: Cambridge University Press, 2013),p.324.

I) The first question considered in this study is the normative content of African integration. What are the shared norms or values on which integration in Africa is based? It is fundamental for the purpose of the inquiry of this study that the component values of African integration are evinced to assess the legitimacy or lack of, of the ECOWAS regime. ECOWAS is instrumental to the greater integration agenda at continental level due to its position as a Regional Economic Community (REC) which is a pillar of the African integration system. Hence any examination of its legitimacy ought to start at the top.

II) Having already indicated the role of ECOWAS as a building block for continental integration, the study moves on to examine the role of ECOWAS in human rights protection. This is a direct result of the fact that human rights has been established as a central norm in Africa, a constituent value of the notion of Pan-Africanism which holds all African states together. The old wave of regionalism²⁸, in Africa embodied the values that reflected the colonial past of the continent. The zeitgeist of African states at the time hinged upon sovereignty and non-interference in domestic affairs of the newly emergent states. With civil unrests and conflicts slowly beginning to dot the landscape of the continent in the early 90s, a shift in paradigm occurred. In ECOWAS, this resulted in the development of a strong ‘interventionist norm’.²⁹ This precipitated the restructuring of community institutions into ‘supranational-like’ entities with the mandate to act independently in areas decided upon by Member States under community law. Therefore, the second research question is, what are the dimensions to the human rights framework of the current ECOWAS regime bearing in mind the troubled past of the region and the continent?

III) Since the main thrust of this study is the legitimacy of ECOWAS, the next line of inquiry is the capacity of community organs, particularly the ECOWAS Community Court of Justice (ECCJ) which is clearly mandated to protect human rights by an enabling protocol. It is accepted in legitimacy studies that International Courts (ICs) ‘have the unique capacity to confer legitimacy on other institutions’³⁰ of a regime, on the norms they apply and through the fairness of their decisions. Consequently, the

²⁸ Here old wave of regionalism refers to the period under the leadership of the OAU. New wave of regionalism therefore connotes the new regime under the African Union.

²⁹ Bah (2013), p.89.

³⁰ Y. Shany, *Assessing the Effectiveness of International Courts*, (Oxford: Oxford University Press, 2014), p.137.

question is asked, what role does the ECCJ play in the legitimation of the ECOWAS regime? To what extent has the Court successfully carried out its mandate as a supranational court with human rights competence (halo effect)³¹ and an enforcer of community law in general? The ECCJ is but one of the organs of the community. Therefore, the roles of other organs are also examined. Here, I argue that the Authority of Heads of State has overbearing influence on other community organs and that the lack of full legislative powers for the ECOWAS parliament is one manifestation of this gap. It is also argued that this incompetence of the parliament further erodes the democratic legitimacy of the organization.

1.3 RESEARCH METHODOLOGY

The main approach to this work was doctrinal. Analysis of existing literatures on the practice of legitimacy and human rights protection in regional organizations were undertaken. This was primarily based on library and desktop research.

Primary and secondary sources of data were consulted. The primary sources here include official documents of the ECOWAS, the AU, UNECA, and jurisprudence of national and regional courts. Other primary documents utilized include those of the United Nations and its institutions, the European Union (EU) and other relevant international organizations. References were made to official papers and reports of ECOWAS, particularly as it relates to the official version of protocols in force. Where formal documents were unavailable, resort was made to working papers and other informal documents of ECOWAS organs and institutions available on the internet. The textual analysis undertaken in this study adopts a critical approach to avoid description. The main secondary sources consulted will be published works of scholarship in the relevant areas. These include books, journals, articles, working papers, dissertations, newspapers and magazines as well as relevant internet sources.

³¹ Shany speaks of a 'halo effect' through which ICs may derive initial legitimacy capital. This term refers to the efforts of an IC to tackle serious problems of considerable importance in the eyes of the public, such as human rights violations, international criminality, and international conflicts among others. *Ibid.*, p.146.

This research also adopts a multi-disciplinary approach. Thus, materials from international law, international relations, political science and economics which shed light on the legal analysis were routinely consulted. The aim of this multi-disciplinary approach is to better understand the discourse of legitimacy and the legal and institutional make-up of ECOWAS as an international organization in human rights protection.

In addition to the desk and library research undertaken, field visits were made at different stages of this study. Field visits made included visits to the ECOWAS Commission, the ECOWAS Parliament and the ECOWAS Community Court of Justice (ECCJ). During these visits, some community documents were sourced from the respective libraries of community institutions, informal interviews were also conducted with a few community officials. These interviews do not indicate a methodological approach; rather they were conducted to improve my understanding and appreciation of the ECOWAS institutional framework. Thus, these interviews are not reflected in my footnotes or in the bibliography. The field visits and interviews contributed immensely to my understanding of ECOWAS and provided a glimpse into the institutional workings of ECOWAS in some respect.

1.4 RESEARCH LIMITATIONS

There are limitations on the methodology and scope of this study which should be immediately noted. Firstly, legitimacy of international organizations largely depend on norms but it also has an ‘intrinsically social quality and depends on people’s beliefs’.³² Thus, one of the limitations of this study was the inability to conduct empirical research to determine the sociological legitimacy of ECOWAS. Due to limited resources and time constraint, a survey of the magnitude that would seek feedbacks on the acceptability of ECOWAS from community citizens could not be carried out. An empirical study on the legitimacy of an international organization would determine the key factors that contribute to its perceived legitimacy and those factors related to effectiveness. That does not diminish the value of this research to the discourse on legitimacy of regional organizations because it examines the normative aspects of ECOWAS’s legitimacy. This study contributes to the understanding of

³² Bodansky (2013), p.327.

the subject of legitimacy of regional organizations which is still considered to be in its infancy.

Another limitation of this study is the sheer make up of international organizations. International organizations are amalgamations of state governments and supranational institutions that have many moving parts which do not always interact in a uniform or transparent manner. Thus understanding of the inner workings of many international organizations, especially in Africa is often problematic for outside observers. This is evident in the difficulty experienced in getting access to some key documents of community institutions. The ECOWAS website is not updated in time with decisions of the Court, which makes it a challenge to access some of the ECCJ's recent jurisprudence for research purposes.

1.5 CHAPTER BREAKDOWN

This study consists of seven chapters. Chapter one provides the general introduction on which the thesis is based. It sets out the statement of research problem and research questions. It also highlights the research methodology and the limitations of the research. It also contains a multidisciplinary examination of key concepts such as Legitimacy, Regionalism/Regional Integration and Supranationalism.

Chapter two contains the background of regional integration in Africa discussing the ideological foundations of regionalism. The chapter also discusses the evolution of the OAU and the movement to the AU. On the part of ECOWAS, the chapter demonstrates the evolution of the organization from the first regime to the second regime. The chapter ends by examining the centrality of human rights and humanitarian intervention in regional integration as well the AU institutions for human rights protection.

Chapter three examines the normative framework for human rights protection in ECOWAS. Sources and structures of human rights in the sub-region are also examined. The essence is to establish the shared values and norms that make-up the ECOWAS human rights framework. This would establish the legitimacy or not of the ECOWAS human rights system as well identify possible weaknesses in the normative framework of ECOWAS. Such concepts as

Traditional human rights, democracy, good governance and the rule of law, peace and security and the right to development are all examined. To aid the understanding of the topic in this regard, international standards and instruments are discussed.

Chapter 4 moves the inquiry to the practice of human rights protection to the institutions of the community, starting with the ECCJ. The ECCJ is given priority because it is the only community institution with a clear human rights mandate to protect individual rights. The importance of the Court as a judicial entity to the legitimization efforts of the community and the general human rights obligations of the organization cannot be overemphasized. The jurisdictional problems in the human rights mandate of the Court are examined. The relationship of the Court with national courts are discussed with a view to establishing possible ‘impact’ of the Court in standard setting in human rights. Overall, the role of the Court in the African human rights system and the economic integration objectives of the community are discussed.

Chapter 5 discusses the human rights mandate of other community institutions. The Assembly of Heads of States of Government (AHSG), the ECOWAS Council of Ministers, the ECOWAS Parliament, the ECOWAS Commission and other community institutions are all examined. The essence is to establish the effectiveness of these institutions in human rights protection on the one hand, and also investigate the democratic legitimacy in the inter-institutional relations.

Chapter 6 concludes the study and recommends possible solutions towards the practice of human rights and rule of law in ECOWAS. This Chapter also addresses potential concepts that may be explored to further legitimize ECOWAS in its quest to deliver on its regional integration promises. It is envisaged that these recommendations can apply to other RECs in the continent.

1.6 CLARIFICATION OF KEY CONCEPTS

1.6.1 LEGITIMACY: A MULTIDISCIPLINARY DISCOURSE

Several substantive changes in the international system have sparked the interest of scholars in legitimacy. Bodansky attributes this shift in thinking to three factors. First, international governance is increasing both in depth and breadth. Second international governance increasingly affects not only states but also individuals and other non-state actors. Finally, he says, international governance is increasingly being exercised by private and public-private institutions, as well as by intergovernmental institutions.³³ The focus on legitimacy in contemporary studies appear to be one of the several responses to the trend towards greater international governance which has found expression in other related concepts as good governance, constitutionalism, accountability, human rights,³⁴ and the nascent global administrative law (GAL).³⁵ Kingsbury and Casini add that increasing concern on legitimacy of international organizations lies in the fact that the emerging field of international institutional law has begun to confront the demands for deeper conceptual foundations and more expansive and theoretical and policy understanding.³⁶

Historically, neither international law (IL) nor international relations (IR) had paid much attention to the issue of legitimacy.³⁷ International lawyers tended to focus on legality rather than legitimacy. They question if there is any real distinction between the two terms.³⁸ Franck for example focuses on the legitimacy of rules rather than institutions.³⁹ Like many other international lawyers he looks at a specific theory of legal legitimacy based on the Fullerian

³³ Bodansky (2013), p.321.

³⁴ For a philosophical enquiry on human rights as a moral foundation of international law, see, A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, (Oxford: OUP, 2004).

³⁵ See, B.Kingsbury, N. Kirsch & R.B Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005), 16; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' 17 *European Journal of International Law* (2006), 187; N. Kirsch & B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' 17 *European Journal of International Law* (2006), 1.

³⁶ B. Kingsbury & L. Casini, 'Global Administrative Law Dimensions of International Organizations Law' *Public Law and Legal Theory Research Paper series*, Working Paper No. 10-04 (2010), p.6.

³⁷ Bodansky, (2013), p.321.

³⁸ See, I. Clark, *Legitimacy in International Society*, (Oxford: Oxford University Press, 2005).

³⁹ Franck identifies determinacy, symbolic validation, rule coherence, and adherence as the elements of legitimacy in the international legal order. See, Franck (1998), pp. 705-759.

approach which considers the internal qualities of the legal system⁴⁰ (for example, whether rules are clear, prospective, and public, and whether they were adopted in conformity with a legal system's secondary rules about norm creation) as opposed to the political process by which the rules were produced or the rules were produced.

Bodansky observes that most studies on legitimacy assume that normative standards of legitimacy such as transparency, participation and representativeness, are, in fact widely shared; that actors use these standards to assess the legitimacy of international institutions and make them more effective.⁴¹ Hence, there is little empirical work on the legitimacy of international institutions per se. Instead there is only a study on the legitimacy of international law. Here, he believes international relation scholars take a different perspective. International relation scholars, he argues, focus on the legitimacy of international institutions rather than of international law although he admits that international lawyers have been the more theoretically active of the two disciplines. International law scholars have developed theories of legitimacy on a variety of approaches, including “interactional law”,⁴² constitutionalism⁴³ and GAL.

From a mainstream IR perspective, legitimacy is normally associated with relationships of authority, with hierarchical relationships between rulers and ruled.⁴⁴ Contemporary IR scholars, recognizing the increasing importance of this relationship in international institutions have devoted more attention to ‘governance’.⁴⁵ Although there is no widely accepted definition of governance, the essence remains the same, irrespective of approach. Governance at all levels, involves making decisions for a collective- decisions that not merely affect other, but are in fact, directed at them with the intention to constrain behaviour. The decisions may be general rules in intended to guide behaviour or more specific decisions

⁴⁰ Fuller originated the “internal morality of law”. He identifies eight criteria of generality, publicity, non-retroactivity, clarity, non-contradiction, constancy and congruity as the requisite conditions which the lawmaker must fulfil to appeal to the practical reasoning of citizens. See, L. Fuller, *The Morality of Law*, (New haven, CT: Yale University Press, 1964).

⁴¹Bodansky (2013), p.323.

⁴²See, J. Brunnée & S. J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).

⁴³ See, J. Klabbbers, A. Peters & G. Ulstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

⁴⁴ H. Arendt, ‘What is Authority’, in H Arendt, *Between Past and Future: Eight Exercises in Political Thought* (New York: Viking Press, 1954), pp. 91-141.

⁴⁵ S. Bernstein, ‘When is Non-state Global Governance Really Governance?’ 1 *Utah Law Review* (2010), 91.

related to a specific issue.⁴⁶ But, in either case, they have a social implication, aiming to substitute the ruler's judgement for that of its subjects. A wide variety of actors exercise governance authority, thus they raise questions of legitimacy, including governments, IOs, expert groups, market actors, and civil society groups.⁴⁷ IR scholarships have explored private and public-private governance regimes.⁴⁸ It is in this aspect of legitimacy that political scientists have been most visible in the discourse of legitimacy in recent years.⁴⁹ The legitimacy of some private governance arrangements (such as the World Commission on Dams, the Forest Stewardship Council, or the supply-chain authority of Wal-Mart) than on public (binding) regimes such as the WTO, the Security Council, or the ICC), where the interest of international lawyers lie.⁵⁰

Legitimacy may also be understood in international law literature, by comparing two other bases of influence: rational persuasion and power. Rational persuasion depends on convincing another that a decision is the right one. If an institution exercises influence through rational persuasion, then issues of legitimacy might not arise, because the audience has been convinced. In contrast, when an institution governs, it limits its judgement to the will of those subject to its authority. Thus, a decision influences behaviour not exactly because it persuades its addressees that it is the 'right rule', but because the institution has a 'right to rule.'

For example two different reasons might justify why the U.S Supreme Court might obey a decision of the ICJ. First it might be persuaded by the ICJ's *ratio decidendi*; second it might comply because it perceives the ICJ as an authoritative source. The second reason would often raise questions of legitimacy. Does the ICJ have the right to govern a national Supreme Court? In general, judges often attempt to convince others that their decisions are correct are correct by writing lengthy decisions, but their decisions remain authoritative even where they fail to convince.⁵¹ Along these lines, a legitimate decision or norm isn't necessarily one that

⁴⁶ Bodansky (2013), p.325.

⁴⁷ As this study demonstrates in subsequent chapters, civil society groups have been instrumental catalysts in the transformation and legitimation of ECOWAS, particularly under the new treaty regime.

⁴⁸ See, M.Hlavac, 'A Developmental Approach to the Legitimacy of Global Governance Institutions', in D. A Reidy & W.J Riker (eds.), *Coercion and the State* (New York: Springer, 2008).

⁴⁹ Bodansky argues that political science as a discipline are consumers of other theories produced by other disciplines, such as sociology and psychology, and is yet to develop its own theory of legitimacy. See, Bodansky (2013), p.324.

⁵⁰ Ibid., p.326.

⁵¹ Ibid.

may be correct as a matter of substance – for example because it is just. Instead, it is one which emanates from the authors right to rule. It is a legitimate authority, whose decisions are entitled to respect.⁵²

The above paragraphs have highlighted a variety of approaches about legitimacy. The discourse of legitimacy is very vast, even within disciplines there are different approaches. It is no surprise that the concept is termed a ‘slippery’ one.⁵³ However, the next paragraphs attempt to sift out what appear to be, arguably, reconcilable variables, at least in the minds of a few scholars. Legitimacy would be discussed along the normative and descriptive axis.

1.6.2 NORMATIVE AND DESCRIPTIVE ASPECTS OF LEGITIMACY

International Organizations are ‘Janus faced’⁵⁴ entities which makes them even more difficult to frame conceptually. However, questions may be continuously asked about their role and the legitimacy of their activities. Why do we care so much about the legitimacy of international organizations? Bodansky puts this inquiry down to two factors. The first is to determine whether ‘an institution is worthy of our support’.⁵⁵ Do we think the Security Council, ECOWAS, or the ICC has the right to rule in a given domain? Is its exercise of authority grounded in moral or normative reason? Secondly, we might care about legitimacy because we think that a legitimate institution is more likely to succeed. The first issue relates to an institution’s normative legitimacy – with whether it has a right to rule as a matter of moral theory. The second issue is the basis for an institution’s descriptive or sociological legitimacy – a widely held belief in the right to rule, determined by the relevant audiences such as states and civil society groups. Whether it enjoys a reservoir of support so strong that people are willing to sanction even its unpopular decisions, and help sustain it despite difficult times.⁵⁶

The relationship between normative and descriptive legitimacy can be problematic. There appears to be some uncertainty and links between both concepts are not as lucid. On the one hand, descriptive legitimacy seems to depend on normative legitimacy since beliefs about

⁵² Ibid.

⁵³ Hurrell (2005), p.17.

⁵⁴ D. Zaum, ‘International Organizations, Legitimacy, and Legitimation’ in D. Zaum (2013), p.13.

⁵⁵ Bodansky, (2013), p.327.

⁵⁶ Ibid.

legitimacy are usually based on whether an institution, as a normative matter has the right to rule.⁵⁷ On the other hand, an opposite argument is put forward that normative legitimacy is conceptually tied to descriptive legitimacy. It has an underlying social quality based on people's beliefs. An institution would not be normatively legitimate if no one thought so of it.⁵⁸

Other than the search for a connection in both concepts, normative and descriptive legitimacy are quite clear when considered independently. Perhaps this confusion is a result of description, 'legitimacy is one of the few words that refer both to beliefs and to the thing about which beliefs are held'.⁵⁹ This confusion could be avoided if different terms were used to refer to normative and descriptive legitimacy. Clearly, normative legitimacy depends on whether an institution objectively has a right to rule while descriptive legitimacy concerns whether actors subjectively accept an institution's right to rule. Descriptive legitimacy reflects 'not the truth of the philosopher but the belief of the people'.⁶⁰

Another confusion plaguing the proper definition of normative and descriptive legitimacy is the difficulty in identifying where international law scholarship stands. The common interest of international lawyers and IR scholars in legitimacy as the basis for compliance and effectiveness suggests that both disciplines are interested primarily in descriptive legitimacy.⁶¹ Both disciplines lay emphasis on the lack of institutions at the international level that can compel obedience with international norms.⁶² On whether people think an institution is legitimate- since that affects their behaviour towards the institution. The same is

⁵⁷ This line of thought tallies with Steffek's observation that both Weber and Habermas viewed legitimacy as the "conceptual place where facts and norms merge, where de facto validity (Geltung) of a social order springs from a shared conviction about the normative validity of values (Gültigkeit)". J. Steffek, 'The Legitimization of International Governance: A Discourse Approach', 9 *European Journal of International Relations* (2003), 249, p.263.

⁵⁸ Bodansky (2013), p.327.

⁵⁹ Ibid.

⁶⁰ T. Schabert cited in Clark (2005), p.18.

⁶¹ This is to the exception of the likes of Kumm who have an explicitly normative orientation. Kumm classifies the constitutionalist model of legitimacy into four principles: formal legitimacy (international legality), jurisdictional legitimacy (the principle of subsidiarity); procedural legitimacy (the principle of adequate participation and accountability), and outcome legitimacy (achieving reasonable outcomes). See, M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004), 907.

⁶² See for example, Franck (1990), p.3; See also I. Hurd, 'Legitimacy and Authority in International Politics', 53 *International Organization* (1999), 379.

true of other perceived benefits of legitimacy such as effectiveness and compliance; they are a function of an institution's descriptive rather than normative legitimacy.⁶³

Despite this general assumption by IL/IR scholars that normative and descriptive legitimacy go hand in hand, recent scholarship across the IL/IR fields have articulated less demanding normative standards for legitimacy. Taking the increasing governance role of international organizations into cognizance, international lawyers and political scientists have sought to articulate less demanding normative standards that might be appropriate for international organizations. This has stemmed in part from the preconceived unattainability of global democracy as a precondition for the legitimacy of international organizations,⁶⁴ due to the lack of global *demos* – a community that is a prerequisite for democracy in the classical sense.⁶⁵ Their functions are more akin to administrative agency – hence the recent focus by a section of international lawyers on the administrative aspect of international governance.⁶⁶

Some authors have advanced a wide array of procedural and substantive factors that contribute to normative legitimacy. This group occupy the middle space between global democracy and the state system. Worthy of mention is the approach of Buchanan and Keohane who put forward what they refer to as a “complex standard of legitimacy”, that combines a wide variety of factors, including substantive elements such as minimal moral acceptability and comparative benefit, procedural elements such as transparency, institutional integrity, as well as a variety of factors such as channels of accountability to civil society, on-going consent by democratic states and other “epistemic virtues”.⁶⁷

Powerful arguments have emerged that international law should escape from the limits of a view of normative legitimacy of the international legal system based on state consent and, instead, seek to build legitimacy around a shared conception of substantive justice. A strong account of this position is given by Allen Buchanan who argues that the international legal system should bear a natural duty of justice and that there should be a ‘limited moral

⁶³ Bodansky (2013), p.329.

⁶⁴ Ibid.

⁶⁵ The thesis on the relationship between *demos* and democratic legitimacy was advanced by Weiler. See, J. Weiler, ‘Does Europe Need a Constitution? *Demos*, *Telos* and the German Maastricht Decision’, 1 *European Law Journal* (1995), 219, pp.224-231.

⁶⁶ See, n.35 *supra*.

⁶⁷ See generally, A. Buchanan & R. Keohane, ‘The Legitimacy of Global Governance Institutions’, 20 *Ethics and International Affairs* (2006), 405.

obligation to contribute to ensuring that all persons have access to just institutions (including legal institutions)' where this implies primarily institutions that protect human rights.⁶⁸ This is the view that this study supports. The movement from economic integration to greater political integration in Africa has shifted the attention from market aspect of regional organizations to the emergent practice in human rights, democracy and good governance. This study attempts to show that the layering of economic integration with human rights need not deter regional organizations from pursuing both goals with equal effort. At the same time, this study also assesses the normative and descriptive legitimacy of ECOWAS predominantly on the human rights mandate of the new ECOWAS regime while also suggesting practical ways on equally strengthening the organization as an economic union.

Proponents of GAL have also drawn on specifically legal constructs in developing a more general theory of international legitimacy. GAL combines input and output based elements.⁶⁹ Input legitimacy in the GAL sense includes procedural requirements such as notice and comment, reason-giving, and review, whereas output legitimacy is provided by technical expertise.⁷⁰ International lawyers have also proposed that constitutionalism may provide a basis for input and output legitimacy. Input legitimacy by delineating the procedures for how authority may be exercised, and output legitimacy by restraining institutional activities substantively.⁷¹

The normative content of the legitimacy of international institutions may not be strictly definable, but there are values that appear consistent when all definitions are closely examined. Much of the works thus far, appears to be on assumptions, rather than on the actual practice of international institutions. Hlavac argues that institutions vary in their 'capacities and functions, and as they do what legitimacy demands of them may change

⁶⁸ A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (Oxford: Oxford University Press, 2004), p.86.

⁶⁹ Fritz Scharpf writing on democracy coined the terminology *inputs* and *output* in reference to the *process* of decision making, and *result* of democracy. Bodansky adapts it to the concept of legitimacy. According to him, input legitimacy refers to the process of decision-making including processes such as transparency, participation and representation. On the other hand, output legitimacy refers to the results of governance. See, F.W. Sharpf, 'Economic Integration, Democracy and the Welfare State,' 4 *Journal of European Public Policy* (1997), 18, p.4; Bodansky, (2013), p.330.

⁷⁰ See, D. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 *Yale Law Journal* (2006), 1490, pp.1524-1536.

⁷¹ Ibid.

too.⁷² Hence, Bodansky has advised that normative legitimacy of a particular institution may be determined by a contextual approach which takes into cognizance; the kind of authority an institution is exercising, the issue area or domain, and how much authority an institution is exercising.⁷³ This is the approach adopted by the study in determining the legitimacy of ECOWAS and its continued existence. All three factors mentioned above are taken into cognizance in this study.

A crucial aspect of legitimacy is the social practice of legitimation. Legitimacy as an attribute of an international organization needs to be claimed, sustained and recognized.⁷⁴ This practice involves the rulers from above and the ruled from below, and can be exercised by both groups.⁷⁵ It is these practices of legitimation by ECOWAS and its Member States, the ways in which they have communicated and justified their right to rule in agreed areas, and the effect of this authority on community citizens that are at the heart of this study. Incidental to this exercise is the potential impact of this new found authority on the practice of international organizations and its impact on the future of the organization.

1.6.3 REGIONALISM, REGIONAL INTEGRATION & CO-OPERATION

Conventionally speaking, regional integration is often associated with a union or perceived as a prelude to unification. In this wise, regional integration represents the existence of a uniform set of rules and principles governing behaviour in a given spatial area.⁷⁶ This notion of regional integration isn't exactly correct as examples of regional groupings such as the Association of South-East Asian nations (ASEAN) shows, integration may not automatically progress to a union⁷⁷. Union in this sense refers to a product of a region with similar outcome as that of Europe bearing some political and economic resemblance to the EU. Conversely, a

⁷² M. Hlavac, 'A Developmental Approach to the Legitimacy of Global Governance Institutions' in D. A Reidy & W. Riker (eds.), *Coercion and the State* (New York: Springer, 2008), p.210.

⁷³ Bodansky (2013), p.332.

⁷⁴ Zaum (2013), p.10.

⁷⁵ Ibid.

⁷⁶ N. Bourenane 'Theoretical and Strategic Approaches' in R.P. Lavergne (ed.), *Regional Integration and Cooperation in West Africa: A Multidimensional Perspective*, (Trenton, New Jersey: Africa World Press, 1997), p.31.

⁷⁷ ASEAN's trade and investment integration is well advanced but the institutional set up is loose and less developed. For further details on the pattern of ASEAN's open regionalism see L. Thanadsillapakul 'Legal and Institutional Framework for open regionalism in Asia: A case study of ASEAN' in T. Nakamura (ed) *East Asian Regionalism from a Legal Perspective: Current features and a vision for the future*, (New York: Routledge Publishers, 2009).

union can exist without integration as early colonial unions in Africa suggest.⁷⁸ The colonial unions that existed in West Africa and other parts of Africa were a product of binding the colonies together under a common umbrella to preserve colonial interests, rather than being a result of an integrative process by willing member states.

A key problem area often experienced by scholars of regional integration across various fields remains the definitional clarity hanging over the word 'region'. The meaning of a region cannot be stipulated. Stipulated definitions would not only stir intellectual confusion but would invite faulty parameters of comparison. Nye defines a region as “a limited number of states linked by a geographical relationship and by a degree of mutual interdependence, and could be *differentiated according to the level and scope of exchange*”⁷⁹ (emphasis mine). This definition would not by the least solve the theoretical problem of regions the world over. The flaw of this definition by Nye would lie in what a particular regionalising enterprise is based on. Each regional endeavour must be determined on a case by case basis considering the fact that all have unique historical roots, even if they may produce similar results.

To give further clarity to the concept it is important to distinguish the notion of integration from cooperation. These two concepts are commonly juxtaposed with cooperation often seen as a means of reaching eventual integration. However, cooperation is not a means to achieving integration and both concepts have different rationales behind them. Cooperation implies a collaborative venture between two or more partners with common interests in a given issue.⁸⁰ Co-operation ranges from, but is not limited to, a single issue, field of activity, or a particular sector. It is contractual in nature meaning that they are time bound, and reversible. Arrangements such as the Economic partnership Agreement (EPA) between the European Union and some ACP countries is an example of such agreement.

Integration is more closely related to the sense of community and community building. This sense of community as would be demonstrated at a later stage in this study, formed a crucial part of other regional arrangements other than the EU, especially in Africa. Professor Chigara

⁷⁸ British and French arrangements such as the National Congress of British West Africa (NCBWA) and The West African Monetary Economic Union (UEMOA) are examples of colonial unions which did not lead to eventual integration of Western African states per se.

⁷⁹ J.S Nye, *International Regionalism: Readings*, (Little Brown, 1968), p. vii.

⁸⁰ Bourenane (1997) p.32.

simplifies this further by explaining the presence of *Humwe/Ubuntu* in pre-colonial Africa.⁸¹ Integration reflects collectiveness and an irreversible willingness by partners to share a common destiny in a politico-institutional framework pre-established via negotiation, based on a strategic vision of their common future. Integration and cooperation can both take place without members being contiguous or share the same geographical boundaries.

Regional Integration and economic integration are also often used interchangeably but differ. Economic integration implies integration which primarily concerns economic activities or the pursuit of economic advantage of some sort by members. Free Trade Areas (FTAs) are a good example of economic integration as constituent member countries seek economic advantage of some sort over non-participants and are not necessarily located in the same geographic location. Economic integration may also be referred to as 'Regionalization' because it describes the intensity of economic interdependence and can be exclusively market driven rather than political/institutional.⁸² Regional Integration is co-terminus with spatial specificity; it cannot be detached from a given geographic and physical space. Hence, it becomes a determining factor around which a sense of community, cultural and political marriage and a shared vision for a future of a defined group may be founded upon. It is a process in which units (often represented as states) move from a condition of total or partial isolation towards a complete or partial unification.⁸³

Acharya has suggested the use of a more rounded term 'regionalism' in the stead of regional integration. He argues that 'integration studies have always been heavily influenced by the EU's history and experience'.⁸⁴ The founding theories of integration studies were heavily drawn from the early life of what we call the EU today. By contrast, regionalism has a much more diverse beginning and a global heritage than regional integration and comparative regional integration studies. For him, regionalism has a much older origin and the

⁸¹ See B.Chigara, 'The *Humwe* principle: A social-ordering grund norm for Zimbabwe and Africa' in R. Home (ed.) *Essays in African land law*, (Pretoria: Pretoria University Law Press, 2011), p.118.

⁸² L.Fioramonti, 'Conclusion – Building Regions from Below: Has the Time Come for Regionalism 2.0?', 47 *Italian Journal of International Affairs* (2012), 151, p.152.

⁸³ L. Van Langenhove 'Regionalism as a political vision' UNU-CRIS Working Paper available at <http://www.cris.unu.edu/fileadmin/workingpapers/20051202103043.O-2005-15.pdf> (accessed on 15 April 2014).

⁸⁴ A. Archaya, 'Comparative Regionalism: A field whose time has come?,' 47 *Italian Journal of International Affairs* (2012), 3, p.12.

theorization of regionalism have been endowed by contributions from other regions, including Africa, Asia, Latin America and the Middle East.⁸⁵

Van Langenhove a leading proponent of ‘comparative regionalism’⁸⁶ defines regional integration as the formation of supranational spaces of co-operation between states. He goes further to ‘unpack’ the concept of regions according to three dimensions namely;

- 1) Economic single space;
- 2) Provision of public goods;
- 3) State actorness and Sovereignty

In essence, for complete integration to occur in regions, the three teloi above must be present in all ramifications in the right proportion.⁸⁷ Development in this regard would depend on level of comprehensiveness (competence), capacity and autonomy from the nation state. Most scholars of integration would accept without much resistance that regional integration encompasses interactions among non-state actors and also between states and non-state actors in a given policy area. In essence integration cannot be manifested through a linear process – excluding the dictates of national (state actorness) and economic forces. This would be tantamount to ignoring the realities of the state-centric global framework.

Overall, the concept of regional integration would be for the purpose of this study, defined along three lines:

- a) It is *voluntary*;
- b) It is *collectively undertaken*, bringing into play the concept of community-building (in contrast to the contractual and temporary nature of regional co-operation);
- c) It is *geographically defined* (in contrast to the notion of economic integration in the generic sense of the term).⁸⁸

⁸⁵ Fioramonti (2012) p.153.

⁸⁶ Comparative Regionalism is a thriving sub-discipline of political science which focuses on studying the process of regional integration and their comparisons.

⁸⁷ Van Lagenhove coined the term ‘Unpack’ in comparative regionalism studies to explain the polysemous nature of regions and the variation of characteristics which each region may possess. See, L. Van Lagenhove, ‘Why We Need to ‘Unpack’ regions to Compare Them More Effectively’ 47 *Italian Journal of International Affairs* (2012),16.

⁸⁸ Bourenane (1997) p.32.

ECOWAS falls into the category described above and it is only apt that these three parameters are most suitable to the integration arrangement in West Africa under the framework of ECOWAS. This definition is in the light that elements of the wider discourse of regionalism are left out due to its discursive and often contentious nature in comparative research.

1.6.4 ECONOMIC INTEGRATION

The Bela Balassian model breaks economic integration into five stages, namely: ‘a free trade area, a customs union, a common market, an economic union, and complete economic integration.’⁸⁹ In a free trade area members agree to eliminate import tariffs and quotas between themselves. However, each country maintains its own tariff rate against non-members. FTAs can include formal mechanisms to resolve trade disputes. A customs union requires, other than removal of internal barriers to trade, harmonization of external trade policy by member countries. This includes establishing a common external tariff (CET) and import quotas on products coming into the region from third-party countries, as well as establishing common trade remedy policies such as anti-dumping and countervailing measures. A common market represents a significant step towards achieving complete economic integration. In a common market, all barriers as to mobility of people, capital and other resources within the area in question are removed. A common market is typically associated with a broad convergence of fiscal and monetary policies as a result of increased economic interdependence with the region.

An economic union is the deepest form of economic integration. An economic union requires some degree of harmonization of national economic policies since it would be counter-productive to operate divergent policies, because all countries would share the same economic space. Total economic integration presupposes the unification of monetary, fiscal, social and countercyclical policies and requires the setting up of a supranational authority, the decisions of which are binding on member countries.⁹⁰ The table below culled from the

⁸⁹ B. Balassa *The theory of Economic Integration*, (London: Allen and Unwin, 1962), p.2.

⁹⁰ R. F. Oppong *Legal Aspects of economic Integration in Africa*, (Cambridge: Cambridge University Press, 2011), p.6.

United Nations economic commission for Africa (ECA) report lists political union as the last stage of regional integration.

Table 2.2: Forms/stages of economic integration

Preferential Trade Area	An arrangement in which members apply lower tariffs to imports produced by other members than to imports produced by non-members. Members can determine tariffs on import from non-members.
Free Trade Area	A preferential trade area with no tariffs on imports from other members. As in preferential trade areas, members can determine tariffs on import from non-members.
Customs Union	A free trade area in which members impose common tariffs on non-members. Members may also cede sovereignty to a single custom administration.
Common Market	A customs union that allows free movement of factors of production (such as capital and labour) across the national borders within the integration area.
Economic Union	A common market with unified monetary and fiscal policies including common currency.
Political Union	The ultimate stage of integration, in which members become one nation. National governments cede sovereignty over economic and social policies to a supranational authority, establishing common institutions and judicial and legislative processes including a common parliament.

Source: *Assessing Regional Integration in Africa (ARIA I)*, (Addis Ababa: UNECA 2004), p.10.

Caproso & Choi writing on the stages of economic integration note that, at best, what is obtainable is a set of tags that may be useful for categorising the path of members undergoing integration, rather than that a natural sequence which all integrating states must undergo.⁹¹ This is understandable, due to the fact that every regional integration process is peculiar to the region, states involved, as well as the public and private participants.

⁹¹ J. Caproso & Y. Choi, 'Comparative regional integration' in W. Carlsnaes et al (eds.), *Handbook of International Relations*, (London: Sage Publishing, 2002), p. 483.

1.6.5 LEGAL INTEGRATION

Weiler narrates the process of integration as being determined by law (constitutionalism). In recounting the process of European integration, he states that the process of constitutionalism is the most important of every concept of European integration. For him, constitutionalism is the ‘meeting ground’ of various disciplines chiefly political science, international relations, political economy, law and more recently sociology that seek to theorize and conceptualize about integration.⁹² Law it is, that houses these other disciplines as member countries in an integration process seek to create a legal order. Member states usually start off the integration process by agreeing on legal instruments which unambiguously state the rights and obligations of all parties involved, it also outlines their programmes and actions.⁹³ Weiler makes a case for the legal analysts of integration when he averred thus:

“Political theories of...integration [are] largely wedded to a certain notion about the outcome of the process and embodies a certain predictive element about continued progress. In addition, political theory laid great emphasis on the social, political and economic substantive achievements and less emphasis on the ways and means.”⁹⁴

Rather than regard on assumptions, legal analysts `investigate the evolution and step-by-step implications of the integration process. Hence, legal theories of integration are based on the ‘continuous process of integration’⁹⁵, the interpretation and effect of treaty provisions on integration, the position of regional bodies as international organisations under international law and the effects of such laws emanating from regional bodies in the municipal realm of member states.

In an attempt to explain integration or the legal control of politics academic lawyers have had to grapple with the recurring theme of ‘constitutionalization of international law’ or the

⁹² J.H.H Weiler, *The Constitution of Europe: Do the new clothes have an emperor? And other essays on European integration*, (Cambridge: Cambridge University Press, 1999), p. 221.

⁹³ Ibid., p.270.

⁹⁴ J.H.H Weiler, ‘The community system: The dual character of Supranationalism’, 1 *Yearbook of European Law* (1981), 267, p.270. Here Weiler explained that Europe underwent a period of constitutionalism, which was the first stage towards embarking on the journey of integration which was eventually achieved.

⁹⁵ Ibid.

internationalization of constitutional law'.⁹⁶ These two concepts have often been in the mix, with some scholars claiming that both concepts are not so much a creation of academic imagination rather that these concepts actually exist, especially the former.⁹⁷ The former denotes the changing structure of the international legal system and its increased focus on the rights of individuals⁹⁸, while the latter refers to the transfer of constitutional functions from the national to the international level (by virtue regional bodies and international organizations generally).⁹⁹

However, the result of both concepts is one and the same; they paint exhaustively a picture of the growing influence of international organizations and the existence of an overarching framework by which domestic constitutions are measured. As Werner aptly notes, these concepts under the term constitutionalism is “an attempt to explain existing developments in international law in terms borrowed from domestic constitutionalism, with the aim of furthering a normative agenda of internationalism, integration and legal control of politics.”¹⁰⁰

One of the central concepts of legal integration is ‘Supranationalism’. Supranationalism would help clarify the role of institutions that operate in ECOWAS as an international organization, which are expected to act independently of member states. Supranationalism is an often contested concept, and by Weiler’s philosophy is an ideal or the result of an ideal.¹⁰¹ Supranationalism is a ‘politically descriptive’¹⁰² concept but certainly made up of legal components. What then in ‘legal terms’ could be said to be the key components of

⁹⁶ See, T. Cottier & M.Hertig, ‘The prospect of 21st century constitutionalism’ 7 *Max Planck Yearbook of United Nations Law* (2003), 261.

⁹⁷J. Klabbers, A. Peters & G.Ulfstein, *The Constitutionalization of International Law*, (New York: Oxford University Press, 2009), p.5.

⁹⁸ Cottier & Hertig (2003), p.271.

⁹⁹ Originally the term ‘Constitutionalization’ was introduced in the context of the European experience referring to the “process by which the European court of Justice (ECJ) transformed treaty into constitution, mainly by attributing direct effect and supremacy to community law and in the process developing a fundamental rights doctrine for the European Union”. See F. Synder ‘General course on constitutional law of the European Union: Principles, Processes and Culture’ in Academy of European Law (ed.), *Collected Courses of the Academy of European Law 1995 Vol. VI, No.1*, (Deventer: Kluwer, 1998), p.56.

¹⁰⁰ W. Werner ‘The Never-ending Closure: Constitutionalism and International Law’ in N. Tsagourias (ed.) *Transnational Constitutionalism: International and European Perspectives*, (Cambridge: Cambridge University Press, 2007), p. 330.

¹⁰¹ Weiler (1999), p.246.

¹⁰² P. Hay, *Federalism and Supranational Organisation: Patterns of a new legal structure*, (Urbana: university of Illinois, 1966), p.69

Supranationalism? Hay postulates that Supranationalism is made up of four key elements, namely:

- institutional autonomy of an organisation from member states
- ability of an organisation to bind its member states by a majority of weighted majority vote
- direct binding effect of law emanating from the organisation on natural and legal persons
- attribution of powers which differ markedly from powers bestowed on other organisations¹⁰³

Weiler goes ahead to class Supranationalism along the axis of norm creation (normative Supranationalism) and decision making (decisional supranationalism). Normative Supranationalism connotes that the laws of an international organisation should possess the following features:¹⁰⁴

- have direct effect in member states
- are superior to the laws of member states
- member states are pre-empted from enacting contradictory legislation

Decisional Supranationalism refers to the institutional framework and decision-making processes by which community policies are initiated, debated and formulated before eventual promulgation and execution.¹⁰⁵ Weiler also adds nationhood and statehood as parameters to Supranationalism.¹⁰⁶ By this, he was referring to the notion of nationhood which replaces the international society with a community one.

The renowned European jurist Pescatore identified three elements of Supranationalism as: the recognition of common values and interests; the creation of an effective power, and the autonomy of powers. The failure of an organisation to meet with the aforementioned requirements means that such organisation is an intergovernmental organisation.¹⁰⁷ While Supranationalism emphasizes on the role of non-national actors in the integration process, Intergovernmentalism focuses on the role of the state as the key actors and negotiators in the

¹⁰³ Ibid.

¹⁰⁴ Weiler (1981) p.271.

¹⁰⁵ Ibid., p.273-280.

¹⁰⁶ Weiler (1999) p.247.

¹⁰⁷ P. Pescatore, *Le droit de l'integration*, (Leiden: A.W Sijthoff, 1974), pp.51-52.

international arena. However, Supranationalism ideally thrives on the interplay between member states and supranational institutions as it eliminates the excesses of narrow “national interest”¹⁰⁸

1.6.6 SOVEREIGNTY AND REGIONAL INTEGRATION

Traditional public international law is premised on the theory that the nation state is the basic entity of the international order. Thus, any assertion that non-state actors/entity should share state-centric features seeks to expand the conceptual focus of international law on state sovereignty. The increasing clout of non-state actors such as international organizations is indicative of a paradigm shift in the conceptualization of sovereignty.¹⁰⁹ What then makes up the concept of sovereignty and what are the elements of sovereignty that make it difficult for states to balance the protection of their sovereignty with their roles as central actors in the operation of supranational organizations?

Sovereignty in the traditional form can be divided into two: internal and external sovereignty. Internal sovereignty refers to the ‘exercise of supreme authority by states within their individual territories’.¹¹⁰ Jean Bodin describes this aspect of sovereignty as the exclusive right ‘to give laws unto all and every one of its [...] subjects and to receive none from them.’¹¹¹ Internal sovereignty is also known as ‘legal sovereignty’¹¹² due its ‘dependence on constitutional independence’.¹¹³ Thus, a state still under colonial control cannot lay claim to sovereignty because such right resides with the colonial administration. External sovereignty or ‘Westphalian sovereignty’¹¹⁴ on the other hand connotes the arrangement of the international political arena based on the division of the world into territorially exclusive units and includes the right to exclude external actors from interfering in domestic political

¹⁰⁸ Weiler (1999), p.104.

¹⁰⁹ B.O Fagbayibo, *A Politico-legal Framework for Integration in Africa: Exploring the Attainability of a Supranational African Union*, unpublished doctoral thesis, (University of Pretoria, 2010), p.32.

¹¹⁰ G. Godwin, ‘The erosion of external sovereignty?’, 9 *Government and Opposition* (1974), p.61.

¹¹¹ Ibid.

¹¹² Meltzer refers to legal sovereignty as involving “jurisdiction independence and equality of states”. See, J.P Meltzer, ‘The Legitimacy of the WTO’, 26 *University of Pennsylvania Journal of International and Economic Law* (2005), 693, p.697.

¹¹³ A. James, *Sovereignty and statehood: The basis of international society*, (London: Allen & Unwin, 1986), pp. 24-25.

¹¹⁴ See, S.D Krasner, *Sovereignty: Organized Hypocrisy*, (Princeton, NJ: Princeton University Press, 1999), p.20.

structures.¹¹⁵ External sovereignty therefore implies the equality of nation states, regardless of differences in capacities, in the international community. The inclusion of the term ‘sovereign equality’¹¹⁶ in the United Nations Charter further reinforced the sanctity of statehood in international law.¹¹⁷

The discourse of integration, the level of which most regional organizations seek, oft involves ceding some sovereignty to supranational institutions. The degree of such transfer of sovereignty may determine the level of integration and the effectiveness of the institutions.¹¹⁸ Since regional integration involves multi-level governance, then the notion of divisibility of sovereignty becomes inevitable. Hartog argues that ‘as a matter of fact, integration is usually connected with the transfer of national sovereignty to supranational agencies’.¹¹⁹ To address the issue of divisibility, parallels have been drawn between the devolution of powers under a federal system of government and the transfer of powers to regional organizations.¹²⁰ Hay has pointed out that a state owns the totality of sovereign rights and has the prerogative to share such bundle of rights with other states or institutions.¹²¹ Hay’s formulation regards external sovereignty as a direct output of internal sovereignty. In essence, when a state transfers part of its legal sovereignty for example in relation to certain aspects of human rights, to an international organization, there is also a corollary understanding that the organization will have the powers to represent such state in the agreed area when dealing with third states.¹²²

In agreement with Hay’s postulations on the original sovereign powers of states, Lauterpacht adds that such powers terminate where international obligation starts.¹²³ In line with this reasoning, states may for example, enact legislations, as long as it does not conflict with their

¹¹⁵ Meltzer (2005), p.698.

¹¹⁶ According to the Friendly Relations Declaration of the United Nations General Assembly, the term ‘sovereign equality’ chiefly implies the jurisdictional exclusivity of states, equal rights and duties of states and political independence of states. See, GA 2626 (XXV) 1970.

¹¹⁷ Article 2(1) of the UN Charter, states that ‘the organization is based on the principle of sovereign equality of its entire Members’. Article 2(7) of the Charter prohibits the UN from intervening in matters within the domestic jurisdiction of member states.

¹¹⁸ Hay argues that the degree of transfer of sovereignty determines the level of integration. See, Hay (1966), p.68.

¹¹⁹ F. Hartog, ‘European Economic Integration: A Realistic Conception’, 71 *Weltwirtschaftliches Archiv* (1953), 165, p.165.

¹²⁰ Fagbayibo (2010), pp.33-34.

¹²¹ Hay (1966), p.70.

¹²² Fagbayibo (2010), n.119 supra.

¹²³ E. Lauterpacht, ‘Sovereignty – myth or reality?’ 73 *International Affairs* (1997), p.149.

obligations under international law.¹²⁴ Mitrany is more cautious, urging that it would be wiser to speak of a ‘sharing of sovereignty’,¹²⁵ rather than a total vesting of legal sovereignty in an international organization in agreed areas. Mitrany, a functionalist, sees sovereignty as a functional concept, which implies that states may pool sovereignty authority for the joint performance of a particular function.¹²⁶

The concept of absolute sovereignty has undergone several changes over the years. The advent of globalization and the development of human rights law mean that the absoluteness of sovereignty has arguably diminished. States are continuously probed about the treatment of their citizens, natural resources and the environment.¹²⁷ Even when states have not explicitly or impliedly limited their sovereignty, their actions are increasingly being judged by ‘universal or community values’.¹²⁸ The increasing competence of the EU, the influence of Bretton Wood institutions (International Monetary Fund and the World Bank) on the monetary and fiscal policies of developing countries, the UN and the AU’s right of military intervention in member states are some of the obvious pointers to the continuous evolution of sovereignty in international law.¹²⁹ As Jackson aptly notes ‘there is no teleological terminus, no determinate and final destination, and no end of history in the evolution of sovereignty’.¹³⁰ The rules are clearly changing, and states continue to compromise in the face of global change.

¹²⁴ Ibid.

¹²⁵ D. Mitrany, *A Working Peace System*, (Chicago: Quadrangle Books, 1966), p.31.

¹²⁶ Ibid.

¹²⁷ Fagbayinbo (2010), p.35.

¹²⁸ W. Werner, ‘Constitutionalisation, Fragmentation, Politicization: The Constitutionalisation of International Law as a Janus-faced Phenomenon’, 8 *Griffin’s View on International and Comparative Law* (2007), p.17.

¹²⁹ Fagbayinbo (2010), n.126 supra.

¹³⁰ R. Jackson, *Sovereignty: Evolution of an idea*, (New York: Polity, 2007), p.112.

CHAPTER 2

BACKGROUND OF REGIONAL INTEGRATION IN WEST AFRICA

2.1 INTRODUCTION

The African integration process borrows considerably from the European experience, not just by way of institutional design, but also in terms of the ideologies and theories that have formed the foundation of most arrangements.¹³¹ This is understandable given the colonial history between African countries and the European powers. The advent of globalization, the evolution of the multilateral trading system, the regulation of state affairs through international organizations led to the inevitability of African integration arrangements bearing close semblance to other regional organizations around the world. Expectedly, a proper analysis of regional integration in West Africa the greater continent ought to pay considerable attention to the historical and ideological foundations that precipitated the eventual establishment of institutions for integration. This is fundamental in identifying the goals of integration and whether they have so far been achieved on the one hand. Determining the first question helps answer the other, which is whether these lofty goals can be reconsidered, processes reformulated, and potential matched by realistic expectations? These are salient questions in African integration study and this study seeks to find potential solutions.

The objective of this Chapter is to place integration in West Africa in perspective by sketching its origins, ideological contributions to the idea, and the possible benefits of integration for the sub-region and the continent. Thus, this Chapter would also take a close look at the framework for integration under the first ECOWAS regime and the problem that plagued its institutions. The essence here is also to identify the variables, if any, that could be said to form a characteristic part of integration at the sub-regional and the continental levels.

Since Africa does not exist in isolation, the recent global shift from economic integration to greater protection of human rights is bound to manifest in African integration arrangements at

¹³¹ To this, Fagbayibo agrees that 'the trajectory of its integration process, either at the continental or sub-regional levels, relates closely to the classical theories of regional integration'. Fagbayibo (2010), p.35.

all levels. Hence, it is important to examine if there has been an ideological shift from non-intervention to greater emphasis on human protection in the form of human rights and human security. Has this shift in paradigm affected in anyway the institutional design of sub-regional and continental institutions? Has this idea always formed a part of integration arrangements in Africa or is it a recent enterprise sparked by external factors? Is it necessitated by events in the continent? As Pannikar suggested;

The conditions of different regions in the world differ so much that promotion of higher standards of living, for example, has a different meaning in relation to the people of South-East Asia to what it has in European countries. The programme of any action to give effect to this object has to be worked out in terms of particular regions. Similar is the case with conditions of social progress... Besides, from the point of view of standards of living, social and economic progress, and the observance of human rights and fundamental freedoms, it is the regions further away from Europe and America that require urgent attention.¹³²

Overall, the content of this Chapter is crucial in determining the normative content of integration in Africa. This is imperative to ascertain the normative aspects of legitimacy which is the central focus of this study. Since legitimacy cannot be considered outside a particular justificatory structures,¹³³ and since legitimacy possesses no independent normative content of its own,¹³⁴ history can help explain the shared substantive values and goals upon which the legitimacy claims may be made.

2.2 PAN-AFRICANISM

Any narration of the history of integration in Africa is incomplete without the discussion of the root ideology of Pan-Africanism. In fact, interstate cooperation in Africa is believed to be the offspring of the concept of African unity. This ideal of African unity culminated in Pan-

¹³² K.M Panikkar 'Regionalism and World Security' in, K.M. Panikkar et al (eds.), *Regionalism and Security*, (New Delhi: Indian Council of World Affairs, 1948) p 5-6.

¹³³ Hurrell (2005), p.29.

¹³⁴ Clark (2005), p.207.

Africanism which originated in the Americas and Europe.¹³⁵ The chronological events in Africa's history, slavery and the balkanisation of its territories by European superpowers provided the impetus for rallying all Africans towards a common purpose of seeking a united people.¹³⁶ Pan-Africanism has defied any generally accepted definition. Legum refers to the concept as 'a movement of ideas and emotions'.¹³⁷ At best, Pan-Africanism could be described as a multi-dimensional concept, which culturally refers to the 'common ancestry' of people with a black skin and politically as a means to encourage the unification of African states.¹³⁸ In line with Legum's definition of Pan-Africanism as a movement of emotions, Murithi refers to Pan-Africanism as a recognition that there were unwarranted divisions among Africans and in that context, an invitation to all Africans to look inwards for strength.¹³⁹ Despite the variation in definitions of Pan-Africanism, what is certain is that the movement 'stands as the precursor to unity, co-operation and integration in Africa'.¹⁴⁰

Pan-Africanism has undergone several modifications in various forms over the years to emerge in its present guise as institutionalised in continental organizations. The founding fathers of the movement such as WEB Du Bois, Marcus Garvey, George Padmore and Sylvester Williams, all of which are Africans in diaspora, originally intended the movement as a rallying call for the idea of unity of black people on the basis of a common ancestry in Africa. It was a medium for resistance against the oppression of black people.¹⁴¹ However, during the pre- independence struggle, native Africans such as Kwame Nkrumah and Jomo Kenyatta adopted pan-Africanism as an emotive tool for political mobilisation to fend off the colonialist.¹⁴² Recognizing that a successful struggle against colonialism was only possible by collective action on the basis of unity and cooperation, African elites leveraged pan-

¹³⁵ The expression Pan-Africanism came into use in the beginning of the 20th century when Henry-Sylvester Williams of Trinidad, and William Edward Burghardt DuBois of the United States of America both Africans in the diaspora used it at several pan-African congresses. See K.Nkrumah, *Africa Must Unite*, (New York: Praeger, 1963), p.132.

¹³⁶ See, V. Thompson, *Africa and unity: The evolution of pan-Africanism*, (London: Longman, 1969), p.33.

¹³⁷ C. Legum, *Pan Africanism; A short political guide*, (London: Pall Mall Press, 1962), p.14.

¹³⁸ F. Viljoen, *International Human Rights in Africa*, 2nd Edition (Oxford: Oxford University Press 2007), p. 157-158.

¹³⁹ T. Murithi, *The African Union; Pan-Africanism, Peacebuilding and Development*, (Ashgate Publishing, 2005), p.8.

¹⁴⁰ S.T Ebobrah, *Legitimacy and Feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Community of West African States*, unpublished doctoral thesis (University of Pretoria, 2009), p.33.

¹⁴¹ Murithi (2005), n.136 supra.

¹⁴² Viljoen (2007), p. 158-159.

Africanism as a platform for political action. Consequently, the independence struggle coincided with initial attempts at collective and economic arrangements.¹⁴³

The earliest manifestation of Pan-Africanism as an integrative agenda dates back to the 1920s.¹⁴⁴ At the time, a group of intellectuals from four British colonies in West Africa namely; Nigeria, Sierra Leone, Gambia and Ghana (then Gold Coast) called for closer cooperation and integration of the West African region.¹⁴⁵ In pursuit of this ideal, John Casely Hayford (Ghana) sent a request to the colonial office in London for the establishment of a West African Court of Appeal and a West African University.¹⁴⁶ Initially, the request was dismissed by colonial authorities as premature, but it eventually laid the foundation for nationalist movements of the 1940s, with Nkrumah at the forefront. The 40s and 50s marked the era of bridging the colonial divide between Francophone and Anglophone West Africa (the 'integrative agenda').¹⁴⁷ The West African National Secretariat led by Nkrumah was an offshoot of the 1945 Fifth Pan-African congress in Manchester. Here, the necessity for well-organized, firmly knit movements as a primary condition for the success of the national liberation struggle in Africa was stressed.¹⁴⁸ In 1946 Nkrumah resolved along with his peers to use the idea of a West African Federation as an indispensable platform for the ultimate realisation of a United States of Africa.¹⁴⁹ From this point on, the consciousness of continental integration became inevitably aroused in the corpus of the Pan-Africanism narrative, laying the foundation for regional integration in Africa.

The independence of Ghana in 1957 provided Nkrumah with further impetus to vigorously agitate for the African unity project. Nkrumah was bold to assert that Ghana's independence was inconsequential without the total independence of other African states. This statement indicated not only the readiness of African elites to pursue the Pan-Africanist cause but also demonstrated the readiness to give practical effect to the integrative agenda. Consolidating on the momentum of the 1945 Fifth Pan-African congress, and the 1946 West African National

¹⁴³ S.C Saxena, 'The African Union: Africa's giant step toward continental unity' in J. M Mbaku & S. C Saxena (eds.), *Africa at the crossroads: Between regionalism and globalization*, (Westport, Connecticut: Praeger, 2004), p.165.

¹⁴⁴ Fagbayinbo (2010), p.39.

¹⁴⁵ Thompson (1969), p.28.

¹⁴⁶ Ibid.

¹⁴⁷ A crucial step at the time was Nkrumah's trip to France to consult with African intellectuals of francophone extraction. Notable among them were Leopold Sedar Senghor, Houphouet-Boigny, Lamin Gueye and Sourou-Migan Apithy to mention a few. See Ibid.

¹⁴⁸ Nkrumah (1963), p.132.

¹⁴⁹ A. Ajala, *Pan-Africanism: Evolution, progress and prospects*, (St Martin Press: London, 1973) p.12.

congress, Nkrumah convened the first conference of independent African states in 1958. In attendance were the eight already independent African states- Ethiopia, Libya, Liberia, Morocco, Sudan, Tunisia, the United Arab Republic and Ghana. The participating states agreed to establish a Joint Economic Research Committee, charged with the promotion of trade amongst African countries, coordinating economic planning and investigating the feasibility of an African common market.

The Second Conference of Independent African States (CISA) was held in Addis Ababa in 1960. In addition to the eleven independent states,¹⁵⁰ invitations were extended to the yet to be independent African states such as Nigeria, Mali Federation, Congo Kinshasa, Madagascar and Somalia.¹⁵¹ The conference recommended, amongst other provisions, the establishment of a joint African Commercial Bank and a preferential trade area.¹⁵² The Ghanaian delegation, supported by their Guinean counterpart, advocated a political union and immediate unification of the African states. The Nigerian delegation and their Liberian counterpart (who had not yet attained independence) felt such calls were premature. This ideological deadlock culminated in the emergence of two groups – Casablanca and Monrovia – with differing views on the appropriate method for African integration. The Casablanca group was a juxtaposition of two elements: an immediate political union and functional cooperation.¹⁵³ On the other hand, the Monrovia group found common ground in their call for functional cooperation at regional levels as the best approach.¹⁵⁴

The creation of the Organization of African Unity (OAU) in 1963 was the climax of decades of efforts aimed at giving the debate on unity a practical manifestation. Although the OAU charter as would be discussed below represented a triumph of state-centric functional approach as canvassed by the Monrovia group, it was able to unite the differing ideologies under one banner. The idea of pan-Africanism started as a sentimental attachment to a common heritage which eventually culminated in the actualization of realistic and practical objectives in the form of institutions. As would be demonstrated later, the creation of various institutions such as the Pan-African Parliament (PAP), the New Partnership for Africa's

¹⁵⁰ Cameroon, Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, Sudan, Togo, Tunisia and the United Arab Republic.

¹⁵¹ A. Ajala, *Pan-Africanism: Evolution, progress and prospects*, (London: St Martin Press, 1973), p.25.

¹⁵² Resolution of the Second Conference of Independent African States, June 15-24, 1960, cited in Legum (1962), p.158.

¹⁵³ Legum (1962), p.56-57.

¹⁵⁴ Ibid.

Development or the African Peer Review Mechanism (APRM), the African Charter on Human and Peoples' Rights (ACPHR) are all expressions of Pan-Africanism. At the sub-regional level organizations like ECOWAS are nuanced and adaptative forms of Pan-Africanism.

Thomas Franck argues that symbolic validation, ritual and pedigree provide the cultural and anthropological dimension of legitimacy. He argues further that these three elements are part of the legitimation strategy of all communities, all compliance-inducing rule systems.¹⁵⁵ The notion of Pan-Africanism and a united Africa are integral to the African integration order. It is the symbol and foundation of integration in the continent.

Thus, Pan-Africanism can be considered as the mainstay of integration arrangements over the various regimes in Africa, irrespective of the specific institutional objectives of regional organizations. It is against this backdrop, that the origins and evolution of ECOWAS would be discussed below, to establish whether Pan-Africanism has influenced policy making of the respective ECOWAS regimes and most importantly if it has served to enhance the compliance pull of integration arrangements. This analysis is important for the greater goal of the study to assess the legitimacy of the ECOWAS regime.

2.3 THE EVOLUTION OF WEST AFRICAN INTEGRATION AND THE BIRTH OF ECOWAS

The earliest inspiration for West African integration can be traced to the middle of the 19th century. From that era to present times, various institutional arrangements for regional co-operation in West Africa have swung from being driven by non-state actors, keen to secure greater economic opportunities and also to champion a sense of West African nationalism on the one hand, to the unification of post-colonial states into a single political entity on the other hand. As Kufour explains, the origins of West African economic integration in individuals and non-state actors are eventually manifested in subsequent regimes. He further argues that the integration process is driven by individual motives and decisions.¹⁵⁶

¹⁵⁵ Franck (1988), p.727.

¹⁵⁶ Kufour (2006), p.20.

The first ideas for economic co-operation in West Africa were private ones which began in the 19th century. Two West Africans most celebrated for pioneering integration in the sub-region were the Sierra Leonean, Africanus Beale Horton and the Liberian of West Indian heritage Edward Wilmot Blyden. Like on their Pan-Africanist contemporaries, they premised their arguments for regional co-operation mainly on the notion of cultural solidarity. But they were visionaries in their quest for integration on the basis of economic necessity. Horton for example argued for the establishment of a “University for West Africa” based in Freetown, Sierra Leone.¹⁵⁷ Blyden on the other hand, had as his ultimate aspiration a single West African state with Liberia as its centre.¹⁵⁸

The idea of West African unity remained just an idea until the formation of the National Congress of British West Africa (NCBWA) during the colonial era. The NCBWA operated as a conduit through which Britain maintained control of its estate in West Africa. This was reflected in its constitution, and also in a speech by its founder, Joseph Casely-Hayford.¹⁵⁹ However, the organisation sought the representation of the natives in the affairs of the respective colonies. Therefore, for the NCBWA this objective was most realisable through an organized platform that unified all of Britain’s colonies in West Africa. In furtherance of this objective, the NCBWA adopted a constitution for British West Africa complete with an Executive Council, Legislative Council, and a House of Assembly.¹⁶⁰

The NCBWA folded in the 1940s due to concerns that it was an elite organisation.¹⁶¹ The NCBWA was criticized for only being critical for what it argued were flaws in the colonial system. It only sought the application of democracy to British West Africa. This was to enable the social classes behind the NCBWA to capture the economic benefits of colonial rule. Thus the NCBWA’s failure to advocate the end of colonial rule cast it as a conservative institution that would eventually fall to the ideologies of the post-World War II era.¹⁶²

¹⁵⁷ D.Nicol (ed), *Africanus Horton, The Dawn of African Nationalism: Extracts from the Political, Educational Scientific and Medical Writings of J.A.B Horton*, (London: Longmans, 1969), p.97.

¹⁵⁸ H.R Lynch, *Edward Wilmot Blyden: Pan-Negro Patriot 1832-1912* (London: Oxford University Press, 1967), p.210-211.

¹⁵⁹ M.J Sampson, *West African Leadership: Public Speeches delivered by J.E Casely-Hayford*, (London: Frank Cass, 1969), p.39. See also presidential address delivered during the fourth session of the NCBWA, Lagos, Nigeria, December, 1929, p.86, p.88, *ibid*.

¹⁶⁰ *J.A Langley, Pan-Africanism and Nationalism in West Africa, 1900-1945: A Study in Ideology and Social Classes*, (Oxford: Clarendon Press, 1973), p.128.

¹⁶¹ *Ibid*.

¹⁶² *Ibid*.,pp.356-357.

The movement for decolonization in the late 1950s and 1960s also bore other co-operation arrangements aimed at political and economic integration in West Africa. Some resulted in meaningful co-operation between participants, others did not. The Mali Federation was an example of the former category and the Ghana-Guinea-Mali tripartite union was an example of the latter. The Ghana-Guinea-Mali Union began by decreeing the existence of a single country although a few structures were created to merge these three independent states together.¹⁶³ The Ghana-Guinea-Mali had no impact on efforts at regional integration and eventually wound-up. The Mali Federation was a more serious attempt at creating structures for integration but was met with challenges that proved it was too ambitious.¹⁶⁴ The federation was an attempt to merge Mali and Senegal into a federation. It failed to succeed because Mali was the less prosperous of the two states and was viewed by the leadership class of Senegal as an economic burden.¹⁶⁵ The Senegambia federation was a similar scheme to the Mali Federation. The Senegambia Confederation put Senegal and Gambia together in 1982. It eventually collapsed in 1989 after the Gambia refused to continue under the union. Other regional integration arrangements of note in the sub-region include the Mano River Union and the West African Economic and Monetary Union (WAEMU).

2.3.1 THE 1975 ECOWAS TREATY

In 1973 Nigeria and Togo at a conference held in Lome presented a draft treaty titled “The Evolution of a West African Economic Community”.¹⁶⁶ The document was the subject of a meeting of experts and jurists in 1974 and after consultations, the ECOWAS treaty was signed in Lagos, Nigeria on May 28, 1975. The treaty¹⁶⁷ was signed by the Heads of States and Government of 14 West African nations, namely Benin, Burkina Faso, Cote d’Ivoire,

¹⁶³ The Union was launched in 1960. It was to have its own legislature and was aimed at harmonizing of its member’s economic and financial policies. See, ‘Ghana, Guinea and Mali Unite’, *West Africa*, (31st December 1960), p.1486 cited in Kufour (2006), p.21.

¹⁶⁴ Ibid.

¹⁶⁵ L.K Mytelka, ‘A Geneology of Francophone West and Equitorial African Regional Organizations’, *12 Journal of Modern African Studies* (1974), pp.297-320, pp.298-299. See also, W.J Foltz, *From French West Africa to the Mali Federation*, (New Haven, Connecticut: Yale University Press, 1965); D.M Kurtz, ‘Political Integration in Africa: the Mali Federation’, *8 Journal of Modern African Studies* (1970), pp.405-25.

¹⁶⁶ E. Edozien & E. Osagie (eds) *Economic Integration of West Africa* (Ibadan University Press, 1982) p.52.

¹⁶⁷ 14 ILM 1200 (1975), pp.1200-09.

Gambia, Ghana Guinea, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.¹⁶⁸

The 1975 treaty describes the aim of the community as follows: “... to promote co-operation and development in all fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions and in social and cultural matters for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic, stability, of fostering closer relations among its members and of contributing to the progress and development of the African continent”.¹⁶⁹ The treaty in Article 2(2) explains that the community shall by stages realise its principal objectives by:

- (a) The establishment of a customs union through the creation of a free trade area and the adoption of a common external tariff by gradually abolishing all custom duties and taxes of equivalent effect and quantitative and administrative restrictions on trade among the Member states as well as all other obstacles to the free movement of goods, services, capital and personnel;
- (b) The harmonisation of policies and promotion of Community projects in all the main socio-economic sectors, including transport, communications, agriculture, industry, natural resources, energy, social and cultural matters; and
- (c) The harmonisation of monetary and financial policies of member states.

To achieve the afore-mentioned objectives of the Community the treaty provided five principal organs namely:

- i) The Authority of Heads of State and Government (the Authority), the principal governing institution of the Community whose decisions and directives shall be binding on all Community Institutions¹⁷⁰
- ii) The Council of Ministers consisting of two representatives of each Member state and subordinate only to the Authority. The mandate of the Council is to keep under review the functioning and development of the Community and to make

¹⁶⁸ Guinea Bissau acceded to the treaty later in the same year. In 1979 Cape Verde became the 16th member nation. Mauritania withdrew from the community in 2002 after it had complied with the provision of Article 91 of the 1993 Treaty (herein ‘Revised Treaty’) bringing the present number of member countries of ECOWAS to 15.

¹⁶⁹ Article 2(1) 1975 Treaty.

¹⁷⁰ Ibid., Article 5.

recommendations to the Authority on matters of policy aimed at the efficient and harmonious functioning and development of the Community.¹⁷¹

- iii) The Executive secretariat headed by an Executive Secretary who acts as the principal executive officer of the Community. The Executive secretary and other officers of the Secretariat, in the discharge of their duties, are to act in the best interest of the community which they owe their loyalty to.¹⁷²

To play a supportive role in terms of policy formulation and implementation the 1975 treaty also established four technical and specialized commissions in the fields of: Trade, Customs, Immigration, monetary and payments; Industry, agriculture and natural resources; Transport, telecommunications and energy and Social and cultural affairs.¹⁷³ Each of the Commission shall have a representative nominated by each member state and to be assisted by advisors.¹⁷⁴ The revised treaty also granted judicial power to a Tribunal. The Tribunal was mandated to interpret Treaty provisions¹⁷⁵ and to settle disputes referred to it under Article 56 of the Treaty.¹⁷⁶

Other key provisions of the 1975 Treaty were contained in protocols and decisions. One of such key legislations was the Protocol Relating to Free Movement of Persons, Residence and Establishment.¹⁷⁷ It provides for the establishment of the right of entry, residence and establishment over a fifteen-year period from its entry into force. Another major legislation under the 1975 Treaty was the Protocol on Non-Aggression (NAP).¹⁷⁸ The NAP was to guarantee regional peace and stability, seen as essential for rapid integration and development. Under the NAP, ECOWAS Member States were to refrain from the threat or use of force or aggression in their relations with one another¹⁷⁹ or

¹⁷¹ Ibid., Article 6.

¹⁷² Ibid., Article 8.

¹⁷³ Ibid., Article 9.

¹⁷⁴ Ibid., Article 9 (3).

¹⁷⁵ Ibid., Article 11(1).

¹⁷⁶ Ibid.

¹⁷⁷ Protocol Relating to Free Movement of Persons, Residence and Establishment reprinted in Protocols Annexed to the Treaty of ECOWAS, *supra*, pp. 87-95.

¹⁷⁸ Protocol on Non-Aggression, reprinted in Protocols Annexed to the Treaty of ECOWAS, *supra*, pp.81-86.

¹⁷⁹ Ibid., Article 1.

allowing its territory to be used as a base from which other Member States can be destabilized.¹⁸⁰

The Protocol relating to Mutual Assistance on Defence (PMAD)¹⁸¹ is another key legislation under the 1975 Treaty regime. The PMAD deepened military relations within the Community by creating specialized military institutions and reaffirming the commitment of Member States.¹⁸² The PMAD established the ECOWAS Defence Council¹⁸³ and the Defence Commission.¹⁸⁴ In case of armed intervention, the Defence Council assisted by the Defence Commission was to supervise with the authority of the State or States concerned, all measures taken by the ECOWAS Force Commander and ensure that all necessary means for the intervention are reported to him. The Force Commander was to act strictly under orders from Member States or States concerned.¹⁸⁵

For the first time, ECOWAS Member States outlined conditions for intervention in times of conflict requiring assistance. Under Article 16, intervention was allowed when there was an external armed threat of aggression against a Member State. Intervention was also allowed when there was a conflict between two Member States of the Community.¹⁸⁶ The Community was also empowered to intervene when, as defined under Article 18, there was an internal conflict in a Member State of the Community that was actively maintained and sustained from outside. Community forces were prevented from intervening in purely internal conflicts.¹⁸⁷

The 1975 treaty covered every aspect of the socio-economic life of member states. The treaty envisaged that the integration process of the community ranged from the establishment of a free trade area, to a customs union, to a common market involving the integration of infrastructural bases, production systems and the domestic markets of member states. The 1975 treaty regime was undermined by various legal, political,

¹⁸⁰ Ibid., Article 2.

¹⁸¹ Protocol relating to Mutual Assistance on Defence, reprinted in 3 *Official Journal of the Economic Community of West African States*, (June 1981), p. 9- 13.

¹⁸² See Preamble of the PMAD. These commitments are the obligation under Article 2 of the UN Charter to refrain from the use of threats of force, and the obligation under Article 3 of the OAU Charter which calls on all African States to respect the sovereignty and territorial integrity of one another.

¹⁸³ Ibid., Article 7.

¹⁸⁴ Ibid., Article 11.

¹⁸⁵ Ibid., Article 4.

¹⁸⁶ Ibid., Article 17.

¹⁸⁷ Ibid., Article 18 (1) – (2).

institutional and political obstacles. The treaty was eventually revised in 1993 to address some of the weaknesses and omissions in the treaty as well as restructure the institutions of the community.

2.3.2 SHORTCOMINGS OF THE 1975 TREATY REGIME

A) INADEQUATE LEGAL FRAMEWORK

One of the key shortcomings of the 1975 treaty was the lack of clarity of the role of community organs. Article 5(2) of the 1975 Treaty stipulates in relation to the powers of the Authority, that ‘The Authority shall be responsible for, and have the general direction and control of the performance of the executive functions of the community and achievement of its aims’. Under Article 5(3) the decisions and directions of the Authority shall be binding on all institutions of the Community. While the decisions of Authority are binding on institutions of the community, it is not clear if it is equally binding on member states. This style of language arguably represented the cautious approach of ECOWAS Member States at the time. The provision of Article 5(3) represents an attempt to bind community institutions that were under the control of the Authority and no provision was made under the treaty as to the level of effect that community law had in member states. This simply meant that the member states did not intend that the provisions of the treaty and community law in general would be binding on them.

The Committee of Eminent Persons (CEP) established to review the 1975 ECOWAS regime produced a report which elaborated further on the non-binding nature of the 1975 treaty.¹⁸⁸ The CEP faulted the vagueness of the mandate of the Authority to determine the general direction and control of the executive functions of the Community under Article 5(2).¹⁸⁹ The imprecision of the powers and mandate of the Authority was evident with regards to appointment of other community organs. For example, the Council of Ministers’ powers were restricted and thus it had no original or delegated powers. The Council could not give directions to Member States and the Authority had no such clear

¹⁸⁸ Committee of Eminent Persons for the Review of the ECOWAS Treaty (1992) ECOWAS: Lagos, Nigeria (copy on file with the author and reprinted in K.O Kufour, *Institutional Transformation of the Economic Community of West African States* (Ashgate pub, 2006).

¹⁸⁹ CEP Report, supra, p.14.

powers to entrust such responsibility to it.¹⁹⁰ In this regard, the CEP recommended that the new Treaty should empower the Authority to delegate responsibility to the Council of Ministers especially in the key areas of harmonisation and co-ordination of Member States' policies.¹⁹¹

Additionally, there was no parliament to exercise advisory and supervisory powers over the Authority and the Council. However, the 1975 treaty established an Executive Secretariat mandated with servicing and assisting the institutions of the community in the performance of their functions; keeping the functioning of the community under continuous examination; and submitting a report of the activities to all sessions of the Council of Ministers and all meetings of the Authority. It was also to undertake work and studies and perform such services relating to the aims of the community as assigned to it by the Council.¹⁹² The Executive Secretariat had little impact on the integration process as a whole. Judicial power in the community was vested in a community Tribunal under Article 11 of the treaty. The tribunal was charged with ensuring the observance of law and justice in the interpretation of the provisions of the treaty.¹⁹³

The CEP also suggested that ECOWAS make the transition from an inter-governmental organization to a supranational one. Under the 1975 Treaty, sovereignty of the Member States was sacrosanct and non-interference was the guiding principle. As a result, there was only a general undertaking in the Treaty to the effect that Member States would plan and direct their national policies with the aims of ECOWAS in mind.¹⁹⁴

B) TRADE LIBERALISATION UNDER THE 1975 TREATY REGIME

The Trade liberalisation scheme of the community was one of the important objectives of the community in the quest to integrate the economies of member states for the prosperity of community citizens. The treaty aimed to establish within fifteen years a customs union among member states; eliminate tariffs and custom duties within the union; remove quantitative restrictions and administrative obstacles to trade and adopt a common custom

¹⁹⁰ Kufour (2006), p.30.

¹⁹¹ CEP Report, supra, p.15.

¹⁹² Article 8 of the 1975 Treaty.

¹⁹³ Ibid., Article 11(1).

¹⁹⁴ Article 3.

tariff against third countries.¹⁹⁵ No concrete action was taken by the community until 1978 when the Authority met in Dakar, Senegal and adopted a two-tier tariff and non-tariff barrier consolidation scheme which is still in place.¹⁹⁶ In 1980 the Authority fully adopted the TLS aimed at the total removal of tariffs on all unprocessed goods and handicrafts, to be followed by a progressive elimination of tariffs on all industrial products from 1981 to 1989.¹⁹⁷

The failure of TLS remains one of the major causes of the collapse of the first regime of integration under ECOWAS. A few economic and political calculations were responsible for this setback coupled with clash of interests and dwindle in fortunes of the regional hegemony at the time.

Firstly, there was the problem of over-reliance of ECOWAS members on trade taxes as a source of government revenue. Just after the 1975 treaty was adopted, trade taxes collected in member states amounted to 47% of government revenue. This raised the suspicion of national policy-makers about any programme that would threaten their interests, eventually leading to a lessened enthusiasm for and compliance with the TLS.¹⁹⁸ At the heart of the political haze obscuring the TLS was the question of who exactly the TLS is designed to profit? The economic indigenization programmes of Ghana and Nigeria coincided with the emergence of ECOWAS. The implication of this clash of historical events was that the government of both countries were bound to support their respective commercial and industrial classes.¹⁹⁹ These two Members of ECOWAS were apprehensive of the influence of French firms that had bases in West Africa- especially in Senegal and Cote d'Ivoire.²⁰⁰

¹⁹⁵ Article 12.

¹⁹⁶ 'Economic Community of West African States (ECOWAS): Summit Conference (Lagos)', 15 Africa Research Bulletin, Financial and Technical Series (May 1978). pp. 4666-7.

¹⁹⁷ Y. Omorogbe, 'The Legal Framework for Economic Integration in the ECOWAS Region: An Analysis of the Trade Liberalisation Scheme', in Spring Communications (ed), *The Trade Liberalisation Scheme of the Economic Community of West African States (ECOWAS); Papers Presented at the 2nd National Seminar on TLS*, (1992) Kano: Kaduna Chamber of Commerce, Industry and Agriculture, pp. 20-32.

¹⁹⁸ C.E Adibe, 'ECOWAS in Comparative Perspective', in T.M Shaw and J.E Okolo (eds.) *The Political Economy of Foreign Policy in ECOWAS* (1994), St. Martin's: New York, pp. 187-217, p.206.

¹⁹⁹ Ibid p.207. For a discussion of the economic nationalism in Ghana during this epoch, see S. Adei, *The Growth of Foreign Investment and Economic Nationalism in Post-Independence Ghana: 1957-1975*, (1980) University of Sydney Department of Economics Working Paper no.34, University of Sydney, Australia.

²⁰⁰ Ibid.

Any treaty or economic arrangement that mandated the reduction of tariffs would most likely profit the multinational firms in Senegal and Cote d'Ivoire. The relatively small companies in Nigeria and Ghana that were still in their embryonic stages would not pull much weight in same market as the French firms in these two countries. Bearing this in mind, Nigeria convinced the rest of the community to adopt a set of conditions for firms that wished to benefit from the TLS. These conditions were outlined in the Community's rules of origin (ROO).²⁰¹ At the 1989 summit of the community the Council of Ministers submitted a list of regional businesses that met the eligibility criteria set out in the ROO, only 17 manufacturing firms made the cut under the listed conditions.²⁰² Applying Stigler and Olson's institutional theory, Kufour argued that the failure of the TLS boiled down to import-competing domestic forces, benefitting from their ability to lobby effectively, hence securing favourable legislation through restrictive rules of origin.²⁰³

Article 52 of the 1975 treaty established a fund to compensate member states whose markets are adversely affected either due to loss of revenue to tariff reduction or otherwise.²⁰⁴ One of the attractions of regional integration is the fact that smaller markets can feed off the larger markets, but for African countries, majority of who are under-industrialized, customs duties is a major source of revenue. Therefore, any compensation mechanism for the loss of tariff revenues should be meaningful enough to guarantee the success of the TLS. The ECOWAS fund like majority of the arrangements under the 1975 treaty, failed due to inaction on the part of member states. Member states failed to make regular contributions to the Fund's budget as stipulated. By 1990 only 7 member states had agreed to contribute about 1.3 million West African Units of Account (WAUA) and only Nigeria, Mali and Burkina Faso had actually done so.²⁰⁵ In addition, a major stop

²⁰¹ ROOs are designed to prevent third countries in an FTA from using low tariff countries as points of entry into an FTA. ROOs are highly restrictive and selective and as a result distort economic outcomes by discouraging trade flows and eventually diverting trade. For general discourse on the dangers of ROOs in economic integration see W. Choi, 'Defragmenting Fragmented Rules of Origin of RTAs: A building block to Global Free Trade' 13 *Journal of International Economic Law* (2010); A. Estevadeordal, J. Harris & K. Suominen, 'Multilateralising Preferential Rules of Origin around the world' available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspxdocnum=1803029> (accessed 15 April 2014).

²⁰² Official Journal of ECOWAS, (June 1989) pp. 13-14, cited in Adibe (1994), p. 208.

²⁰³ Kufour (2006, p.28).

²⁰⁴ Article 25 gives the Council of Ministers the authority to recommend, on the report of the Secretary General, the compensation to be paid to a Member State whom has suffered a loss of import duties as a result of the application of the TLS.

²⁰⁵ The WAUA is an artificial currency used in monetary transactions between the West African Clearing House, (now the West African Monetary Agency) and the Central Banks of the Member States. E. Osagie, 'West

gap in the institutional design of the 1975 treaty contributed to the collapse of the fund. The Secretariat's lack of enforcement powers led to the non-payment of the ECOWAS fund.

C) NON-PARTICIPATION OF COMMUNITY CITIZENS

Another key omission in the 1975 treaty was the failure to provide for popular participation. There was hardly any provision in the ECOWAS Treaty that allowed national interest groups to participate in the decision-making process at the Community level. Asante described this omission as a result of the 'elite-mass gap' that plagued African regionalism.²⁰⁶ He criticizes the defiance of neo-functionalist logic evident in the failure to enlist the interests and energies of non-governmental organizations. He tagged the institutional structure of ECOWAS as being 'the brain-child of the elite', with no 'popular roots'.²⁰⁷

In recent times, international society has been characterized by value pluralism and a demand for inclusion by the diverse range of actors (both states and non-state actors). International organizations seeking legitimacy are charged with addressing a range of distinct audiences with different interests, expectations, and normative reference points.²⁰⁸ NGOs and civil society groups are arguably the most scrupulous audience in demanding legitimacy from international organizations. The failure to accommodate their populist influence and 'norm-diffusion' function,²⁰⁹ by creating institutional space, denied the regime vital input in sound policymaking. However the focus of most African regional organizations at the time was solidarity and sovereignty for the purpose of banishing the remaining vestiges of colonialism on the continent. This meant that little attention was paid towards an all-inclusive integration process. Later on in this study, the role of NGOs and civil society in expanding the mandate of the second ECOWAS regime into human rights would be revealed.

African Clearing House, West African Unit of Account and Pressures for Monetary Integration', XVII *Journal of Common Market Studies* (1979), p.227-35, p.231.

²⁰⁶ S.K.B Asante, *The Political Economy of Regionalism in Africa*, (New York: Praeger, 1986), p.75.

²⁰⁷ Ibid.

²⁰⁸ Hurrell (2005), pp 15-32.

²⁰⁹ On the role of NGOs in the diffusion of norms, see M. Keck & K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998).

In this regard, the CEP reminded Member States that one of the ultimate objectives of the regional grouping was to raise the standard of living of the Community's peoples.²¹⁰ Hence, it was important that ordinary citizens and non-state actors be involved in policy formulation and implementation in the community. The CEP cited the strong appeal which popular participation has gained at the time within Member States and advocated provisions for similar consultations at regional level.

The CEP therefore recommended the creation of two new community organs to carry the mandate of ensuring popular participation in the integration process: the ECOWAS Economic and Social Council (ECOSOC), to be composed of representatives of socio-economic organizations and the ECOWAS Parliament. ECOSOC's role was to serve as the primary consultative forum. Community organs should be made to consult the ECOSOC on all proposals that have implications for regional interest groups. The ECOWAS Parliament was to have a wider remit than the ECOSOC. The CEP envisaged that the Parliament would have the power to make proposals for legislation on its own initiative; it was to be given supervisory power over the activities of the Community; and it would be authorized to scrutinize the manner in which Community organs function through written and oral questions.²¹¹

D) OTHER PROBLEMS OF THE 1975 TREATY REGIME

The CEP also identified other institutional weaknesses that hampered the 1975 ECOWAS regime. The non-binding nature of the decisions of community institutions as earlier highlighted, served as a fundamental weakness of the 1975 Treaty regime. Excluding sanctions for the non-payment of budgetary contributions no other community institutions, be it the Authority, the Council or the Executive Secretariat could make binding decisions on the Member states. As Bankole Thompson observed:

“Since the establishment of the Economic Community of West African States (ECOWAS) the status of ratification of its Treaty and Protocols has been a nagging problem. Between 1978 and 1989 the Authority ... adopted and signed a total of 21 protocols. Up to the time of this writing, only one protocol had been ratified by all 16 of the member States. Only 10 have been ratified by more than half of the ECOWAS membership. Viewed from a less positive perspective, it is a fact that no Member State has ratified all 21 protocols. Nigeria

²¹⁰ See, Article 2(1) of 1975 Treaty supra.

²¹¹ See, CEP Report, supra, pp.24-5.

and Togo show the best ratification record. Each has ratified 19 protocols. Some Member States have not ratified more than 3 or 4 since the creation of the community.”²¹²

This attitude of non-ratification of protocols by Member States and the loose wordedness of the 1975 treaty on the binding nature of community decisions led to a call by the CEP for a transition from an exclusively inter-governmental organisation to a supranational one. As this study reveals the transition to supranationalism has led to layering of economic integration objectives with human rights and security, although both objectives can be pursued simultaneously with greater compliance and a change in political will.

Another point highlighted by the CEP as a major cause of organizational paralysis within ECOWAS was the issue of voting. There seemed to be no laid down procedure for voting within the community. Hence, in practise, it was presumed that decisions were to be arrived at by unanimity.²¹³ The ECOWAS fund was the only protocol that provided for a means of voting. It provides in Article 27 of its protocol that decision making was to be by a simple majority.²¹⁴ Some observers argue however, that under Article 6 (6) decisions of the Council of Ministers were to be by unanimity.²¹⁵ With regard to the AHSG, there was no express Treaty provision as to how it should make decisions although practically, the AHSG adopted its decisions by unanimity and consensus. The result of this approach was slow decision making that plagued that regime. A fallout of this lack of clarity in decision-making as Kufour points out culminated in the inability of the Council of Ministers to solve problems and constantly referred technical issues to the AHSG.²¹⁶ This frustrated decision making and delayed speedy policy making as the AHSG were unable to comprehend such technical issues it was confronted with.

Though not considered by the CEP, the decline in the fortunes of the regional hegemon Nigeria was also partly responsible for the failure of the 1975 regime.²¹⁷ Nigeria is considered a hegemon because it is considered a powerful state willing and capable to act as

²¹² B. Thompson, 'Legal Problems of Economic Integration in the West African Sub-Region', 2 *African Journal of International and Comparative Law*, (1990) p.87.

²¹³ Asante (1986) , pp. 69-72.

²¹⁴ "Protocol relating to the Fund for Co-operation, Compensation and Development of the Economic Community of West African States", (1976) Article 27(2) reprinted in Protocols Annexed to the Treaty of ECOWAS, supra, pp. 39-61.

²¹⁵ Article 6 (6) stipulates that " Where an objection is recorded on behalf of a Member State to a proposal submitted for the decision of the Council of Ministers, the proposal shall, unless such objection is withdrawn, be referred to the Authority for its decisions".

²¹⁶ Kufour (2006) p.30.

²¹⁷ Ibid., p.32.

“regional paymaster, easing distributional tensions and thus smoothing the path of integration”.²¹⁸ The sheer size of the Nigerian population and the boom in oil resources in the 1970s convinced Nigeria that she could shoulder the cost of integration in the sub-continent. This led the Nigerian government to persuade other Member states about the success of regional integration in the sub-region.²¹⁹ The decline in Nigeria’s economic fortunes starting in 1983 triggered by the collapse in world oil prices and general economic mismanagement led to an economic crisis in that country. Frustration grew amongst the Nigerian populace and her government, leading to a general loss of enthusiasm in the ECOWAS project. Nigeria was no longer willing to bear the costs of economic integration and this led to wholesale expulsion of Community nationals in 1983.²²⁰ Despite the strict provisions of the Community protocol on the Free Movement of Persons, and the Right of Residence permitting citizens to live in any Member.

The 1975 treaty regime reflected not only the experimental nature of sub-regional arrangements at the time, but also the unreadiness of African states to build regional groupings around norms such as democracy, peace and security and human rights that help guarantee the protection and empowerment of the individual. Although the legitimacy of the 1975 regime was hardly contested,²²¹ the absence of these universal norms renders any attempt at examining regime-legitimacy effete. It would be recalled that these values have been described as constitutive elements of normative legitimacy, especially in a continent whose past has been riddled with internecine war.

²¹⁸ W.Mattli, ‘Explaining Regional Integration Outcomes’ *Journal of European Public Policy* 6/1 (1999) p.56.

²¹⁹ O.J.B Ojo, ‘Nigeria and the Formation of ECOWAS’, 34 *International Organization* (1980) p.584.

²²⁰ ‘Nigeria: Mass Expulsions’, 20 *Africa Research Bulletin: Political, Social and Cultural Series* (January 1983) pp. 6697-9.

²²¹ Bah attributes this to Cold War and the limitations it imposed on ECOWAS’s role. See, Bah (2013), p.88.

2.4 THE NEW ECOWAS REGIME

Amongst the conclusions reached by the CEP, Member States were advised that for ECOWAS to be meaningful and effective the new treaty must represent a shift from exclusive focus on government by states, to government involving individuals, NGO's and the private sector. Member States were also advised to improve upon decision-making processes and procedures so as to make its decisions binding and automatically enforceable in Member States; to pay greater attention to promoting and sustaining internal peace, stability and security in Member States for the continued survival and success of ECOWAS.²²²

The Revised Treaty in its fundamental principles reflects the values advised by the CEP. In the fundamental principles, Member States declared to adhere to principles such as equality and inter-dependence of Member States; non-aggression between Member States, maintenance of regional peace, stability and security; peaceful settlement of disputes among Member States, recognition, promotion and protection of human and peoples' rights; accountability, economic and social justice and popular participation in development; promotion and consolidation of a democratic system of governance in each Member State; and equitable and just distribution of the costs and benefits of economic co-operation and integration.²²³

The main aim of the community under the new regime is to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations-among Member States and contribute to the progress and development of the African continent. To achieve this aim, the Community shall, most importantly, ensure the harmonisation and co-ordination of national policies and the promotion of integration programmes; the establishment of a common market; the establishment of an economic union through the adoption of common policies in the economic, financial, social and cultural sectors, and the creation of a monetary union; the establishment of an enabling legal environment to mention a few.²²⁴

²²² CEP Report supra.

²²³ Article 4 of the revised treaty.

²²⁴ Article 3 of the revised treaty.

These principles represent a significant change from those under 1975 treaty regime. It also opened up the areas of activity of ECOWAS in the new regime. Therefore, it became imperative on Member States to create supranational institutions to implement community policies and enforce laws in agreed areas. The revised treaty made provision for the following institutions:

- I) the Authority of Heads of States and Government;
- II) the Council of Ministers; the Community Parliament;
- III) the Community Court of Justice;
- IV) the Executive Secretariat (now the Commission);²²⁵
- V) the Fund for Co-operation, Compensation and Development; and
- VI) Specialised Technical Commissions; and any other institutions that may be established by the Authority.

Consequently, the new regime introduced new organs to concretize the move towards supranationalism as advised by the CEP. The revised treaty also introduced more robust laws guiding these institutions. But the question that comes to mind is what factors that actually acted as catalysts for the move to supranationalism?

Kufour reveals that a combination of factors led to the move towards greater supranational institutions. He identifies the need for institutional efficiency, the search for political legitimacy by ECOWAS leaders, a change of ideology in the sub-region, the need for stronger regional security architecture, and the need to be a major player in international trade as the trigger for supranational institution building. While these factors are all salient, it is the history of armed conflicts across the sub-region that has been most influential in the institutional transformation of the community. The operationalization of a supranational security mechanism has further legitimized the ECOWAS regime and institutionalized the protection of universal norms that ensures the protection of the individual.

²²⁵As part of reforms underscoring the mission to transform community institutions into supranational entities, the Authority, in June 2006, approved the transformation of the Executive Secretariat into a nine-member Commission with a President, a Vice-President and seven Commissioners. See, *Decision A/DEC.1/06/06 Relating to the Commission of the Economic Community of West African States*, (2006) Vol. 49 ECOWAS Official Journal.

The ECOWAS security mechanism is the most effective supranational organ in the community, granting it the status as the best on the continent,²²⁶ and considered by some as modernizing international law by setting the pace for the institutionalization of humanitarian intervention (HI) at regional level in Africa. This feat is hardly acknowledged in academic circles outside the continent. The community has successfully intervened in hot-spots such as Liberia, Sierra Leone, and Guinea Bissau. Learning from past mistakes of interventions in the continent such as Rwanda, ECOWAS has established an overarching, all-inclusive security mechanism²²⁷ which consists of Mediation and Security Council,²²⁸ Defence and Security Commission, and a Council of Elders.²²⁹ The Mediation and Security Council is made up of ten members, and decisions are made by a two-thirds majority of six members. Civil society plays an important role in this new all-inclusive institutional arrangement as part of the ECOWAS Early Warning and Response Network (ECOWARN).²³⁰

Despite the widening of institutional capacity and the establishment of supranational organs, impediments, the type which stalled integration under the first regime, still persist. There is a general lack of political will to domestically implement international law in the form of integration programmes such as elimination of tariffs and free movement of persons. This is manifested in problems such as bureaucratic procedures pertaining to rules-of-origin, discordant customs systems and procedures, difficulties with insurance and bond guarantees for transit cargo, and other non-tariff barriers involving roadblocks and demands for informal payments continue to obstruct integration across ECOWAS frontiers.²³¹ Recently, the Ghanaian government implemented a law²³² on the request of Ghana Union Traders Association protesting the economic activities of Nigerian Traders. The GUTA sought greater implementation of the law which reserved economic activity for Ghanaians.²³³ This law was

²²⁶ J. Cilliers, *The African standby force: An update on progress*, Pretoria: Institute of Security Studies Paper, (2008), p.13-14.

²²⁷ Protocol relating to the mechanism for Conflict prevention, Management, Resolution, peace-keeping and Security, adopted 10th day of December, 1999, available at <http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en> (accessed 15 April 2014).

²²⁸ *Ibid.*, Article 4.

²²⁹ *Ibid.*, Article 17.

²³⁰ See Article 23 of the Conflict Prevention Protocol. See further, ECOWARN profile at <http://ecowarn.org/Login.aspx>.

²³¹ E.U Kizito & U.N Patrick, 'The Role of Parliament on Economic Integration in Africa: Evidence from ECOWAS Parliament', 4 *Journal of Humanities and Social Science* (2012), p.7.

²³² Ghana Investment Promotion Centre Act, 1994, Act 478.

²³³ The 1994 Act expressly prohibits non-Ghanaians from engaging in particular economic activities. Article 18 of the Act states that the enterprises specified in the schedule to the Act are reserved for Ghanaians and may not be undertaken by non-Ghanaians.

in violation of ECOWAS law²³⁴ which grants all citizens of ECOWAS the right to set up and manage enterprises, and in particular companies, under the same conditions as defined by the legislation of the host member state for its own nationals. The Protocol further states that in matters of establishment and services, the members of ECOWAS undertake to accord non-discriminatory treatment to nationals and companies of other member states.²³⁵

While it is evident that Pan-Africanism continues to sustain the sentimental value of African integration to Member States, it has not been sufficient in compelling obedience or compliance with integration objectives. The non-implementation of community law is partly attributable to weak institutional arrangements at national and regional level, but more so a lack of political will to vigorously pursue integration which appears to be far from the desired level. However, ECOWAS continues to legitimate the current regime by placing economic integration at the centre of its long-term vision. ECOWAS has abolished the visa requirements for citizens of member states by the introduction of a Brown Card, the equivalent of a sub-regional passport. ECOWAS has also embarked on mammoth infrastructural programmes such as the trans-ECOWAS highway²³⁶ and the West African Power Pool (WAPP).²³⁷

At the continental level, economic integration has not met expectations.²³⁸ A number of African countries have attempted to enhance their regional groupings but figures of intra-African trade remain lower than expected. The lack of success in economic integration is equally attributable to slow implementation of regional integration arrangements designed to eliminate tariff and non-tariff barriers, even though a number of trade agreements have been signed among member states.²³⁹ While countries that have managed to intensify their trade relations with the global economy through trade and investment have grown more rapidly over a sustained period and have consequently experienced larger reductions in poverty, the overall picture still remains uncertain.

²³⁴ Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence).

²³⁵ *Ibid.*, Article 2.

²³⁶ The six-lane trans-West African highway project is expected to connect Lagos to Abidjan. The highway will link Ghana, Benin Republic and Togo. See more at, <http://www.thisdaylive.com/articles/ecowas-leaders-approve-50m-for-trans-west-african-highway/170195/> (accessed 15 April 2014).

²³⁷ The West African Power Pool is a specialized institution of ECOWAS. It covers 14 of the 15 countries (excludes Cape Verde) of the regional economic community. See, <http://www.ecowapp.org/>, (accessed 15 April 2014).

²³⁸ UNECA (2010), p.10.

²³⁹ *Ibid.*

Intra-regional trade flows in Africa have been generally low compared with other regions, primarily because of poor infrastructure development, maintenance and connectivity, conflicts and security issues among the regions and the presence of trade barriers.²⁴⁰ The table below demonstrates the low level of intra-regional trade in recent years

Table 2.1 Destination of African REC exports and imports 2000-2009.

Exports

	US	China	EU	Africa	Rest of the World
CEMAC	32.0	0.1	26.7	3.4	34.5
CEN-SAD	17.3	0.1	42.8	9.1	26.3
COMESA	5.3	0.1	50.2	9.1	32.8
EAC	3.8	0.9	30.2	33.6	29.4
ECCAS	29.0	0.2	22.2	3.9	43.0
ECOWAS	28.7	0.1	29.3	13.7	22.2
IGAD	2.4	0.4	17.6	19.4	53.1
SADC	13.7	1.0	26.3	13.5	41.1

Source: UNECA (2012) pp.19-20.

Another major hindrance to the realization of economic integration is the crowded integration landscape. For political, economic and strategic reasons many countries belong to more than one REC. The multiplicity of RECs and the concomitant multiple state memberships have created a complex patchwork that complicates decision-making for states, community officials, individuals and businesses.²⁴¹ Studies have revealed that the twin phenomena of many Recs and multiple memberships impact adversely on the achievement of goals of the

²⁴⁰ Ibid.

²⁴¹ R.F Oppong, 'Redefining the relations between the African Union and Regional Economic Communities in Africa', 9 *Monitoring Regional Integration in Southern Africa Yearbook* (2009), p.5.

AEC.²⁴² The greater effect is the inability of RECs to operate as supranational entities frustrating the economic integration initiative at all levels. The phenomena also negatively affect Africa's international trade relations.²⁴³ The overlapping nature of the African integration landscape is described in the following words of the United Nations Economic Commission for Africa:

Even though the African Union recognizes only eight [regional economic communities], the continent currently has fourteen inter-governmental organizations (IGOs), working on regional integration issues, with numerous treaties and protocols governing relations among them, and between them and the Member States. This proliferation of institutions and protocols means that out of the 53 Member States of the African Union (AU), 26 belong to two of the fourteen IGOs, 20 belong to three of them, and one country belongs to four.²⁴⁴

Despite the prominence of the 'spaghetti bowl'²⁴⁵ phenomena in Africa, suggestions that the level of intra-African trade is low should be approached with caution. Official national trade statistics in Africa are often difficult to access, and the level of unrecorded trans-border trade is estimated to be high, if not higher than recorded trade.²⁴⁶ In addition to the above, there are other socio-economic and political factors that challenge economic integration and can undermine its effectiveness as this study will further reveal. These include the absence of mutual trust, diversity in political ideology and political systems, lack of homogeneity in the level of economic development, the issue of skewed distribution of benefits of integration, and, hegemonic threats.²⁴⁷

²⁴² See, *Assessing Regional Integration in Africa: Rationalising Regional Economic Communities (ARIA II)*, (Addis Ababa: UNECA, 2006).

²⁴³ C. Jakobeit et al, *Overlapping Membership in COMESA, EAC, SACU and SADC: Trade Policy Options for the Region and for the EPA Negotiations*, (Eschborn: GTZ, 2005), p.62-132.

²⁴⁴ UNECA (2006), p.X.

²⁴⁵ Professor Bhagwati originated the term 'spaghetti bowl' during the early years of the WTO, to refer to the problem of proliferation of RTAs. See, '*U.S. Trade Policy: The Infatuation with Free Trade Agreements*' in Jagdish Bhagwati and Anne O. Krueger, *The Dangerous Drift to Preferential Trade Agreements*, (AEI Press, 1995).

²⁴⁶ F. Foroutan & L. Pritchett, 'Intra Sub-Saharan African Trade: Is it little?,' *2 Journal of African Economies* (1993), 74, p.98.

²⁴⁷ Fagbayibo (2010), p.104-117.

2.5 ECOWAS IN THE AFRICAN ECONOMIC COMMUNITY (AEC)

It is important for the purposes of this study, to state that ECOWAS is part of a continental infrastructure. It is envisaged that RECs eventually stabilise to form the African Economic Community, as a result there is a symbiotic relationship between ECOWAS and other recognized RECs as part of a continent-wide regional economic bloc known as the African Economic Community (AEC). ECOWAS and seven other RECs form the building blocks of the AEC and are vital components of the AU regime. The AU recognizes the Arab Maghreb Union (AMU), the Economic Community of Central African States (ECCAS), the Common Market for Eastern and Southern Africa (COMESA), the South African Development Community (SADC), the Intergovernmental Authority for Development (IGAD) and ECOWAS as the officially recognized RECs under its regime. It is expected that these RECs also co-ordinate and harmonize their policies among themselves and with the AU Commission with a view to accelerating Africa's integration process.²⁴⁸ Hence, the success of ECOWAS is not only crucial in the achieving a continent-wide market, but is also directly linked to the economic development of other sub-regional blocs.

The AEC was born on June 3 1991, when 49 out of 51 African states signed the Treaty establishing the African Economic Community into law in Abuja, Nigeria. This singular event was celebrated as 'a new chapter in the history of African integration' and also 'firmly committed the continent along the path of economic integration and collective development'.²⁴⁹ The Abuja treaty was a result of the earlier held Lagos Plan of Action (LPA)²⁵⁰ which institutionalised the continental blue print for economic integration and development.²⁵¹ Though the Abuja treaty was created under the institutional framework of the OAU, it represented 'Africa's boldest attempt at any sort of concrete integration for the

²⁴⁸ See, AU Doc Assembly/AU/Dec.112 (VII) July 2006.

²⁴⁹ R.N Kouassi, 'The Itinerary of the African Integration Process: An Overview of the Historical Landmarks', 1 African Integration review (2007), 1, p.5.

²⁵⁰ The LPA is an endogenous development policy under the OAU regime, where African Heads of States reaffirmed the commitment to 'establish by the year 2000, on the basis of a treaty to be concluded, an African Economic Community in order to ensure the economic, cultural and social integration of Africa'. The policy also focuses on self-centred and self-supporting development, rejection of exogenous lifestyles and dependence as well as resolute fight against neo-colonialism, by cultivating 'the image of self-sufficiency, declaring economic war against the interest of the North, reducing the current extreme dependence of African countries on the export of primary commodities and internalising the factors and means of production'. Ibid., p.4.

²⁵¹ Africa has been credited with being the first continent to create an economic community which includes all its states. See, M. Mbenge & O. Illy 'The African Economic Community' in A. A Yusuf & F. Ouguerouz (eds.), *The African Union: Legal and Institutional Framework*, (Leiden: Martinus Nijhoff Publishers, 2012), p.187.

entire continent. It also represented a tilt towards the creation of supranational institutions and organs for the achievement of set objectives. The Abuja Treaty entered into force on 12 May 1994.

The Abuja treaty reflects some of the key values and ideologies which were beginning to gain prominence among African states at the time. Member States declared to adhere to principles such as the ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and peoples’ rights; and ‘accountability, economic justice and popular participation in development’.²⁵² African States also agree to ‘create favourable conditions for the development of the Community and the attainment of its objectives’ and also ‘take all necessary measures to ensure the enactment and dissemination of such legislation as may be necessary for the implementation of the provisions of this Treaty’. This approach hints at a realisation that economic integration can only flourish in the midst of a stable environment which can only be guaranteed by protection of human rights and empowerment of the individual through political and social participation in the decision-making process. Ebobrah states that this new approach under the AEC Treaty is advantageous to the actualization of human rights in the continent. He argues that ‘there is arguably a sense that African States are more willing to relax attachment to economic integration’ which is ‘more favourable for human rights realization’.²⁵³

The Abuja treaty pays considerable attention to means of implementation or ensuring greater compliance. Under the Article 5(3) any Member State, which persistently fails to honour its general undertakings or fails to abide by the decisions or regulations of the Community, may be subjected to sanctions. Such sanctions may include the suspension of the rights and privileges of membership. Along these lines, decisions of the Assembly of Heads of State and Government (the highest decision-making organ of the Community) binding on member states, other organs of the community and RECs. By making the decisions of Community institutions binding on Member States, the Abuja treaty prioritizes implementation of proceeds of decision-making. The decisional autonomy also reflects a key element of supranationalism as highlighted in the preceding chapter. But as would be argued subsequently in this study, by placing overarching powers on the Assembly of Heads of States

²⁵² Article 3 of the Abuja treaty.

²⁵³ Ebobrah (2009), p.46.

and government, the Abuja treaty follows a pattern of institutional design which unbalances most regional organizations in the long run.

The AEC is expected to be established progressively over a transitional period not exceeding forty years, from the entry into force of the treaty. In this regard, the AEC would be achieved in six stages which include; strengthening existing RECS and establishment of new ones, freezing trade barriers within each REC, transformation of all RECs into FTAs then into Customs Unions (CU), coordination and harmonisation of the regional CUs and the African CU, establishment of a common market and, the establishment of the Pan-African economic and monetary union respectively.²⁵⁴ The Abuja Treaty also envisages coordination, harmonisation and gradual integration of the activities of the REC's into its framework.²⁵⁵ This recognition arguably permits RECs to pursue objectives at a sub-regional level but which are not too dissimilar with the economic integration roadmap for the continent envisaged under the treaty.

In reality, the AEC is a distant reality and almost a chimera with the under-performance of RECs for reasons already mentioned above. The greatest challenge towards meeting the AEC is the issue of implementation which is often reflected in the constant push-backs of set targets. It is imperative that RECs such as ECOWAS are formidable as single economic groupings before the AEC can be a reality. The new ECOWAS regime appears to have made a transition from economic integration to human rights which may distract from the realisation of economic integration and its benefit towards Member State economies. However, this shift is not limited to ECOWAS but is a result of a greater movement by the entirety of African States. This is evident in the legal framework of the African Union (AU) which is continental leviathan. Expectedly, the values which emanates from the AU, like the OAU its predecessor, dissipates towards other regional arrangements in the continent. These values become shared ones, charged by the notion of Pan-Africanism which holds African people and institutions together. The next section discusses the AU regime and its key principles.

²⁵⁴ Article 6 of the Abuja treaty.

²⁵⁵ Article 4(2) and 6 of the Abuja treaty.

2.6 THE AFRICAN UNION

After years of operating the OAU, an organization focused solely on banishing colonialism on the continent and securing the new found sovereignty of nascent African states, African leaders recognized the need to move onto a stronger organization. The defunct OAU was incapacitated by constraints imposed on action under the charter. The OAU also faced competition from sub-regional organizations which were more effective at securing public goods for their members.²⁵⁶ This eventually led to the dissolution of the continental leviathan which failed to match expectations of African states in an evolving world.

The successor organization was therefore expected to cope with the socio-economic challenges within the continent. Consequently, the Assembly of Heads of State and Government of the OAU unanimously adopted the Constitutive Act of the AU (the Constitutive Act)²⁵⁷ in its thirty-sixth ordinary session in Lomé, Togo, on 11 July 2000. Subsequently, at its fifth extraordinary session held in Sirte, Libya on 2 March 2001, the Assembly declared the establishment of the AU. The Constitutive Act entered into force on 26 May 2001, following its ratification by two-thirds of the Member States of the OAU, as provided for in its Article 28.²⁵⁸ The adoption of the Constitutive Act was the final outcome of the process that effectively began with the adoption of the Sirte Declaration of 1999.²⁵⁹ The adoption of the Constitutive Act marked ‘a significant milestone in the history of the African integration’,²⁶⁰ but like the pre-OAU era is a diluted version of the more radical pan-Africanist integration attempts sought by past African leaders.²⁶¹

²⁵⁶ The OAU maintained a rather deleterious approach to tackling security in Africa during its time. The OAU lacked effective policy strategies and structures to address Africa’s security problems, but chose to be guided by the principle of non-interference upon which the newly independent African States were organized under its leadership. The absence of effective continental structure for tackling Africa’s security problems galvanized sub-regional mechanisms such as ECOWAS that adopted strong interventionist norms. See section 3.3 infra.

²⁵⁷ See, Constitutive Act of the AU at <http://au.int/en/content/constitutive-act-african-union> (accessed 15 April 2014).

²⁵⁸ All the former fifty-three OAU Member States are parties to the Constitutive Act and thus AU Member States. This leaves Morocco as the only state within the African continent that is not a member of the organization.

²⁵⁹ In September 1999, at the invitation of the Libyan President, Colonel Muammar Ghaddafi OAU leaders met in an extraordinary session in Sirte, Libya to discuss issues around the question of African integration. The Sirte session resulted in the adoption of the Sirte Declaration. EAHG/Draft/Decl. (IV) Rev.1. This document is the precursor to the Constitutive Act.

²⁶⁰ T. Maluwa, ‘The Transition from the Organization of African Unity to the African Union’, in Yusuf & Ouguergouz (2012), p. 32.

²⁶¹ Past African leaders like Kwame Nkrumah and most recently Muammar Ghaddafi courted the idea of a United States of Africa to the opposition of contemporary African leaders who favoured a gradualist approach

The AU compared to its predecessor, creates more robust institutions and organs aimed at achieving a range of economic, social and political objectives.²⁶² The Constitutive Act is considered a major improvement over the OAU Charter in terms of providing an organizational framework for the political integration of the continent.²⁶³ However, the adoption of the Constitutive Act gave rise to many questions, relating to the substantive aspects of the proclaimed objectives of the AU, particularly the project of African integration, and to the modalities and processes for carrying them out. Some of the questions revolved around the following issue: first the extent to which the new AU regime would offer substantive and qualitative difference from the institutional framework of its predecessor, whether it was not just ‘old wine in new bottle’; and second, the extent to which it represents the readiness of African leaders to collectively respond to the twin-challenges of globalization and the new wave of regionalism.²⁶⁴

The Constitutive Act enumerates an expansive list of 14 objectives and principles²⁶⁵ that go well beyond those enshrined in the OAU Charter.²⁶⁶ For a change, the objectives of the AU go beyond the rather limited objectives found in Article II of the OAU Charter. The objective of the OAU was primarily limited to the promotion and achievement of the unity and solidarity of African states and the defence of the sovereignty, territorial integrity and independence of African States. The Constitutive Act on the other hand upholds such values as the promotion of peace, security and stability of the continent; the promotion of democratic principles and institutions; popular participation and good governance; the promotion and protection of human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant instruments; the promotion of sustainable development at the economic, social and cultural levels to mention a few.²⁶⁷

The added value of the long catalogue of principles of the Constitutive Act supremely reflects a major shift in the economic integration agenda in the continent. Reference to human rights related values consistently appear throughout the Constitutive Act (the preamble, objectives

to integration. See, T.K Tiekou, ‘Explaining the Clash and Accommodation of Interests of Major Actors in the Creation of the African Union’, *103 African Affairs* (2004), 249,p.260; See also Sexena (2004),p.165.

²⁶² See Constitutive Act, above, Article 3.

²⁶³ Maluwa (2012), p.51.

²⁶⁴ *Ibid.*, p.32.

²⁶⁵ Article 3 (a) – (h). of the Constitutive Act.

²⁶⁶ For a comparative comparison of the OAU and the AU, see, Kouassi (2007), pp.13-15.

²⁶⁷ Articles 3(a) – (h).

and principles of the AU).²⁶⁸ This has led to conclusions that by including a wide human right framework in the Constitutive Act, ‘the AU regime mainstreams human rights in the continental scheme of things and installs the AU as some kind of specialised international human rights organisation in Africa’.²⁶⁹ In addition to the commitment to democracy, respect for human rights and the rule of law established in the Constitutive Act, the New Partnership for Africa’s Development (NEPAD) a continental framework for development also upholds these values.²⁷⁰

Also worthy of note is that there is no provision in the Constitutive Act that suggests any cession or surrender of sovereignty to the AU by its members. This is a clear indication that the AU regime is ‘predicated on Intergovernmentalism, and is not conceived as a neofunctionalist supranational institution’.²⁷¹ However, Article 5 of the Abuja treaty lays down provisions that are arguably tantamount to a partial surrender of sovereignty for the implementation of the treaty. Along these lines, it could be argued that the Abuja treaty contained strict provisions on implementation because it was recognized as an economic integration agreement, which requires partial surrender of sovereignty strictly for the purpose law and policy-making in the economic aspect. In terms of sanctions for non-compliance, Article 23(2) of the Constitutive Act provides for sanctions to be imposed on member states for failure to comply with decisions and policies of the Union. But this is insufficient in comparison to the Abuja treaty which defines in specific details the punishment that states face if they fail to fulfil their obligations under the treaty.

From a human rights perspective, the Constitutive Act fails to make any reference to any of the human supervisory bodies such as the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights, although it recognizes the African Charter on Human and Peoples’ Rights (ACHPR). While this omission can possibly be construed as a lack of commitment to these institutions under the AU regime,²⁷² the

²⁶⁸ Viljoen (2007), p.173.

²⁶⁹ Ebobrah (2009), p.50.

²⁷⁰ See, website: <http://www.nepad.org/about>

²⁷¹ Maluwa (2012), p.48.

²⁷² B. Manby, ‘The African Union, NEPAD and Human Rights: The Missing Agenda’, 26 *Human Rights Quarterly* (2004), 983, p.987.

Constitutive Act still ‘represents a serious commitment to the promotion and protection of human rights, at least in comparison to the Charter of the OAU’.²⁷³

Generally, the AU is supposed to represent a new political, legal and institutional order for Africa, and not a case of old wine in new bottles. The AU provides a framework within which to pursue the decades-old project of deepening the unity and cohesion of the continent, and improve in the economic, political and social spheres of the African continent. The AU framework based on the shared vision encapsulated in the objectives and principles enumerated in the Constitutive Act, provides a new beginning for Africa. However the success which this new beginning promises is heavily reliant on the political will and commitment of African states to implement these objectives faithfully.

It is also noteworthy that the AU is expected to thrive on the success of sub-regional organizations as foundations. The OAU at its 2001 Summit in Lusaka, Zambia reaffirmed the role of REC’s as building blocks for the proposed AEC. The OAU expressed the need for a closer involvement of RECs in the formulation and implementation of all programmes of the AU.²⁷⁴ The additional recognition of RECs as building blocks for non-economic integration has been confirmed in the role allocated to these regional organizations in the AU initiatives that were introduced after the 2001 Lusaka Summit. At its 5th meeting held in Abuja on 3 November 2002, the NEPAD Heads of State and Government Implementation Committee (HSIC) observed that, in line with the Constitutive Act of the AU, the RECs are essential building blocks for the integration and economic development of Africa. Along these lines, it is recognized that RECs are instrumental to the implementation of NEPAD programmes and projects.²⁷⁵

With regards to the proposed AEC, the Abuja treaty aims to strengthen existing RECs and establish new ones where they do not exist as the first target on the six-stage implementation framework.²⁷⁶ In addition, the Protocol to the Treaty establishing the African Economic

²⁷³ J.M Isanga, ‘The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation’, 11 *Santa Clara Journal of International Law* (2013), 269, p.270.

²⁷⁴ See, ‘The role of the regional economic communities as the building blocks of the African Union’, (2003) Document of the South African Department of Foreign Affairs (South African DFA Document) available at <http://www.dfa.gov.za/docs/2003/au0815.html> (accessed 15 April 2014).

²⁷⁵ Ibid.

²⁷⁶ Articles 3(2)(a) and 6(1) of the Abuja treaty.

Community relating to the Pan-African Parliament (PAP Protocol),²⁷⁷ also emphasize the role of RECs in the integration objectives under the Abuja treaty. Also worthy of note is Article 16 of the Peace and Security Protocol²⁷⁸ which recognizes regional mechanisms are recognized as part of the overall security architecture of the AU. The PSC is required to coordinate and harmonize the activities of subregional security mechanism towards strengthening the continental security architecture. All these point to the centrality of RECs to the integration objective of the AU. They represent molecular parts of the overall architecture of the AU and the AEC in all aspects of integration.

2.7 EXPLAINING THE TRANSITION FROM ECONOMIC INTEGRATION TO GREATER POLITICAL INTEGRATION.

As mentioned above the continental Leviathan generates norms that always have implications on sub-regional organizations. There appears to be a layering of economic integration with greater focus on political integration. This transition potentially tips institutional activities in favour of the latter sphere. This is evident in the change in legal framework of both the AU and RECs. Is this change in focus the result of a demand for greater political co-operation in the aftermath of the de-colonization of the continent? Is it borne out of the need to hold African states together to solve common challenges brought about by the global market? Is there a legitimate attempt by African States to legitimize their regimes and ensure a politically stable environment upon which economic integration can now thrive? Better yet, is spillover a natural progression from economic integration to a political union as exemplified by the EU?

Theoretically speaking, economic integration and political integration occupy two extremes in integration studies. Whereas economic integration *prima facie* involves ‘non-controversial’ and largely technical issues requiring total surrender of a state’s law-making power in the field of economics in exchange for a right to participate in collective law-making for the interest of the wider area, political integration often involves the partial surrender of sovereignty in exchange for security and conflict resolution which require authoritative

²⁷⁷ Adopted 2 March 2001 and entered into force in March 2004, available at <http://www.au.int/en/> (accessed 15 April, 2014).

²⁷⁸ Adopted 10 July 2002 and entered into force 26 December 2003, available at <http://www.au.int/en/> (accessed 15 April 2014).

decision-making.²⁷⁹ It appears African leaders have always preferred to ‘embrace initiatives that left controversial issues to domestic control in accordance with the spirit of domestic jurisdiction’.²⁸⁰ However, regional organizations in Africa appear to have taken complex institutional paths, converging goals in otherwise distinct fields and compressing them into common organizational goals. The gradual transition into peace and security, democracy and the rule of law is indicative of the gradual move towards non-economic aspects of integration *stricto sensu*.

It is trite that there is a link between economic integration and political integration. One may not totally be distinguishable from the other. For instance, it is unlikely that economic allies would be at war with each other. Also, political instability suggests that governments committed to the course of integration may agree readily to community policies to avert the risk of the rejection of the policies when there is the possibility of a change of government.²⁸¹ In international organizations, this may explain the convergence of the economy and polity as distinct subsystems. In terms of the development goals of the African RECs, one can argue that limiting the modes of operation to exclusively economic and socio-economic aspects can deny them important benefits of development accruable through political integration.²⁸²

Some European integration scholars have argued that integration initiatives in developed societies do not pursue integration in distinct different fields. Rather they engage in a sort of straightforward path of integration that follows a clockwise sequence proceeding from the adaptive sectors (economic) to the goal-attainment (political) to the integrative and pattern-maintaining sectors.²⁸³ This is the classical integration trajectory associated with Jacob Viner. It is worth emphasizing that the Vinerian model was developed in an industrial context, while many developing countries are agrarian and raw materials producing.²⁸⁴ With political integration always placed at the end of the spectrum, the assumption is that non-political/economic aspects of integration enhance trust and experience amongst participating states. From the trust and experience member states build dealing economically, a wider net

²⁷⁹ J. A Caporaso, ‘Functionalism and regionalism integration: A Logical and empirical assessment, (Beverly Hills: Sage Publications, 1972), p.31.

²⁸⁰ Maluwa (2012), p.32

²⁸¹ Oppong (2011), p.28.

²⁸² D. W te Velde, *Regional Integration and Poverty*, (Aldershot: Ashgate, 2006), p.3.

²⁸³ Etzioni (1964) cited by Caporaso (1972), p.24.

²⁸⁴ J.T Gathi, ‘African RTAs as flexible legal regimes’, *Albany Law School working paper series*, No, 20 (2009), p.24.

of institutional agreements whose agreements would usurp the political eventually emanates. This relationship naturally progresses into a ‘community in which interest and activity are congruent and in which politics is replaced by problem-solving’.²⁸⁵ This assumption must be approached with caution when examining the African situation as the socio-economic conditions in Europe are a far-cry from the African condition. However, what is certain, as the African experience suggests is that economic integration can only succeed if political stability is guaranteed.

As earlier discussed, the emergence of the concept of Supranationalism has given integration studies a different angle from the Vinerian model, and the role of international organizations. Attainment of Supranationalism has been described by some as the ‘highest level of integration’.²⁸⁶ Although supranationalism is usually associated with EU studies, it provides an interesting analytical perspective on integration studies the world over. Supranationalism implies the level and depth of integration activities assigned to community institutions can be embarked upon independently of government input in designated areas. Supranationalism is a product of the new wave of regionalism which is a ‘multidimensional, plural and comprehensive regionalization process’.²⁸⁷ In essence, Supranationalism represents the move from strictly economic integration towards higher aspects of integration. The movement from old regionalism, which is marked by ‘strict compartmentalization’²⁸⁸, to new regionalism appears to be taking place in Africa. Accordingly, African RECs are experiencing ‘deeper levels of integration’ in the economic field and are expected to contribute to ‘the welfare of their members... as insurance against future global political or economic dislocations’.²⁸⁹

Theories of regional integration are divided over supranationalism. The pessimists (realist, state centrists) argue that Supranationalism is not necessarily an attainable height given the preponderance of states in international relations. The optimists (functionalists, neo-functionalists, federalists) on the other hand, believe that regional organizations are capable of attaining a supranational status through different means such as spill over and the activities

²⁸⁵ Caporaso (1972), p.27.

²⁸⁶ B.H Yaya & B. Malam, ‘The End of the Cold War and the Emergence of ECOWAS towards Supranationalism’, *2 Indian Journal of Research in Management, Business and Social Sciences* (2014), 100, p.101.

²⁸⁷ M.Schulz, F. Söderbaum & J. Öjendal, *Regionalization in a Globalizing world*, (Zeb books, 2001), p.2.

²⁸⁸ Ebobrah (2009), p.66.

²⁸⁹ Kufour (2006), p.X, XIV.

of transnational forces.²⁹⁰ The concept of spillover is essential in explaining the transition from economic integration to political integration, a trait often present in supranationalism. Furthermore, it offers a theoretical interpretation of the transition rules through which integration moves from economic to the political'.²⁹¹

Schmitter describes spillover as:

the process whereby members of an integration scheme agreed on some collective goals for a variety of motives but unequally satisfied with their attainment of these goals – attempt to resolve their dissatisfaction either by resorting to collaboration in another, related sector expanding the scope of the mutual commitment) or by intensifying their commitment to the original sector (increasing the level of mutual commitment), or both.²⁹²

Spillover could also be sectoral (scope) or boundary. Sectoral spillover refers to the 'expansion of integrative habits from one sector to another'. Boundary spillover, on the other hand, refers to the occurrence of a 'spread of integrative habits from one analytically distinct part of a sector to another analytical part of the same sector'.²⁹³ Hence sectoral spillover may for example be from banking to investment while boundary spillover could be from economic to political sphere. Schmitter's analogy of spillover implies the presence of the following factors in the integration process:

- A defined policy area or transaction (Scope)
- Collective agreement from members (level)
- Play of interests/disagreements/conflict
- Issue density
- Unintended consequences
- Role of regional political elite²⁹⁴

A deeper reading of the neo-functionalist conception of spillover suggests that 'institutions develop a life of their own' at a later stage.²⁹⁵ But this institutional autonomy is the product of

²⁹⁰ Yaya & Malam (2014), p.111.

²⁹¹ Caporaso (1972), p.31.

²⁹² P.C Schmitter, 'Three Neo-Functional Hypotheses about International Integration', 23 *International Organization* (1969), 161, p.162.

²⁹³ Caporaso (1972), p.32.

²⁹⁴ Schmitter (1969), p.164.

states being in a trapped situation as integration progresses. According to Nye, spillover occurs as a result of a ‘reduction of alternatives open to decision-makers once the integrative process is in motion’.²⁹⁶ Along these lines, when states raise the ‘level’ of integration, ‘more tasks become interrelated through inherent links or package deals’ and ‘the cost of disintegrative actions becomes greater because there is the danger of pulling the whole house down’.²⁹⁷ In essence, spillover is a kind of safety net available to states who have committed themselves to an integration initiative to the extent that pulling out of the process would inflict greater damage.

It is noteworthy that spillover is not a certain phenomenon. The whole purpose of the neo-functional approach is precisely to relate existing national and emerging regional characteristics in something approximating a probabilistic model of international system transformation.²⁹⁸ Hence, international organizations created for integration purposes do not always evolve along lines set by their founders, and contained in their constitutive instruments. Instead, such institutions may be prodded by a combination of ‘propulsive and directive impulses of trends running through the political context and of purposes injected by participants in their operations’, which is dynamic to each institution.²⁹⁹ The reaction to stimuli by the international organization, in this case, may also be due to a combination of external (international environment outside the region) and internal political or social forces which impact on the initiative after it has commenced and either deflects or strengthens the process even if not envisaged by the initial agreement. The resultant effect of the distraction is the decision to expand the scope of the integrative process to respond to new institutional challenges.

It would be recalled that supranationalism and spillover are neo-functionalist concepts emanating from European integration. The European experience gives validity to these theories. The transition of European Communities (EC) which was collective initiative in coal production to the European Union (EU) which is a political union explains these

²⁹⁵ O.I Nwapi, *The Role of the Pan-African Parliament in African Regionalism (2004-2006) : An Institutional Perspective*, Unpublished Doctoral Thesis (University of Pretoria, 2009), p.162.

²⁹⁶ J.Nye, *Pan-Africanism and East African Integration*, (Cambridge, MA: Harvard University Press, 1965), p.84-85.

²⁹⁷ E.B Haas, *The Uniting of Europe: Political, Social and Economic Forces, 1950 – 1957*, (Stanford: Stanford University press, 1958), p.523 – 524.

²⁹⁸ Schmitter (1969), p.164.

²⁹⁹ I.L Claude, *Swords into plowshares, the problem and progress of international organisation*, (New York: Random House, 1971), p.6.

principles. However, this gradual transition was unintended as decisions were made incrementally by actors. Along this continuum, Sweet and Sandholtz argue that European integration is ‘provoked and sustained by the development of casual connections between three factors: transnational exchange, supranational organization, and European Community (EC) rule making’.³⁰⁰ The transition from economic integration (as agreed by governments) to supranational governance which occur as a result of greater social demands for EC rules and regulations regulated by cross border transactions and communications pressures may spark advanced forms of integration.

These transnational exchanges led to an extension of the principle of democratic governance present in municipal states to the community level, eventually leading to a shift from the otherwise economic nature of integration. Thus, admission into the EU became dependent on the quality of the domestic political landscape and the political orientation of the state. It could be argued thus, that the willingness of states to commit to economic integration and the maximization of spillover became the vehicle for introduction of non-economic issues such as greater democratic governance and human rights into states that would have been reluctant to submit to external scrutiny even where they are signatories to global human rights instruments.³⁰¹

The European experience can hardly be mirrored in African RECs. For instance in ECOWAS, transnational forces within the subregion are so weak as to generate the kind of momentum that will drive economic integration and supranational governance. So a new set of variables ought to be adopted to suit ECOWAS. An adaptation of the theories means that this study privileges the role of global and regional dynamics in propelling supranational evolution of ECOWAS in the political and security policy sectors. These changes as would be demonstrated in subsequent chapters impose on regional institutions and Member States certain agenda that ultimately drive integration and create institutional evolution. However, as a collective, RECs in Africa have made an almost synchronized move towards greater political integration, reflecting the greater continental movement. This transformation may be attributed chiefly to the recognition of the complex economic linkages which make it difficult for RECs to operate effectively without engaging across sectoral divides, and external factors

³⁰⁰ A. S Sweet & W. Sandholtz, ‘European Integration and Supranational Governance’, 4 *Journal of European Public Policy*, (1997), 297,p.297.

³⁰¹ E.B Haas, ‘The study of regional integration’ in L.N Lindberg & S.A Scheingold (eds.), *Regional Integration theory and research*, (Cambridge, MA: Harvard University Press, 1971), p.12.

in the form of the end of the Cold war and greater demand for governmental legitimacy. The transition thus appears to have been the consequence of conscious decision-making.³⁰²

³⁰² Ebobrah (2009), p.73.

2.8 CONCLUSION

The transformation of ECOWAS from the 1975 to the 1993 treaty regime was predicated upon the desire for institutional efficiency, the search for greater political legitimacy by ECOWAS leaders and the continuing post-independence enthusiasm for regional co-operation and regional factors such as the outbreak of conflicts. While these factors have led to an expansion of community institutions they do not give a full picture of the direction of the community towards delivering on its economic integration mandate. However, despite the slow pace of economic integration, the Community has continued to evolve institutionally and play its role as a building block for the continental Leviathan while advancing the interests and objectives of Member States under the new treaty regime.

At the continental level, African leaders realized that there was the need for institutionalized means of cooperation with institutions capable of delivering the goods of integration. In search of a Leviathan organization, capable of transforming the fortunes of the African people, the OAU was transformed into the AU. However, the goal of economic integration has been painfully slow to realise. The prominence of conflicts and civil unrest caused the focus of integration in Africa to change from strictly economic integration to human rights protection. This transition in integration goals has been explained by the neo-functionalists as spillover.

More importantly, the normative content of African integration has been filled by new sets of values over the years. Integration is now built on universal values as human rights and democracy. Pan-Africanism the figurative expression of African integration is the symbolic validation, ritual and pedigree upon which legitimacy of integration can be measured. Human rights have been consistently emphasized in speeches and ceremonies of the AU and African leaders. And since Pan-Africanism binds every level of regional organization in Africa, its normative contents must be equally embraced by sub-regional organizations. However, the emphasis on the historical origins, cultural and anthropological deep-rootedness of African integration in Pan-Africanism is not enough to ensure compliance as would be discovered in subsequent chapters.

CHAPTER 3

THE NEW ECOWAS HUMAN RIGHTS REGIME

3.1 INTRODUCTION

It is trite that an international community that operates without a well-developed legal system in which the authority of law is generally recognized is impoverished.³⁰³ This is the basis for normative legitimacy of international law. Along these lines, it is important to examine the legal framework of ECOWAS particularly as it relates to the newly found mandate of human rights. Upon what norms is the ECOWAS human rights framework founded? What are the elements of the ECOWAS human rights framework? What factors have so far impacted on the development of a specific community legal framework? These are some of the salient questions that not only determine questions of legitimacy of a regime, but also hint at a clearer understanding of the institutional and practical nature of the human rights mandate of RECs.

Since normative legitimacy entails the right to rule, the question that follows is, what is the extent of ECOWAS law in this issue area, and how compatible are these laws with the African and UN systems? It would be recalled that a contextual approach of normative legitimacy demands that the kind of authority an institution is exercising, the issue area or domain, and how much authority an institution is exercising should be taken into cognizance when studying international institutions.³⁰⁴ Consequently, the provisions of ECOWAS instruments are scrutinized to ascertain determine their purpose and application, within the context of legitimacy. Hence, the purpose of this chapter is to articulate an understanding of the ECOWAS human rights framework, its content and scope. This is vital in determining the normative legitimacy of the new ECOWAS regime.

³⁰³ Kumm (2004), p.918.

³⁰⁴ Bodansky (2013), p.332.

3.2 DIMENSIONS TO THE ECOWAS HUMAN RIGHTS REGIME

The outbreak of violent domestic conflicts in the later years of the 1975 regime immensely changed the landscape of integration in the sub-region. The interventions of ECOWAS in troubled member states exposed gaps in the community legal framework that created opportunities for wider overhaul of Community institutions. The creation of more robust institutions in the Community has certain normative implications. The most obvious is the expansion of ECOWAS institutions into areas that were previously considered by many states to be within their sovereign domain. For example, the new ECOWAS legal framework includes a protocol that authorizes the community to monitor elections in Member States to ensure that the process is free, fair, and transparent, and the outcomes, peaceful.³⁰⁵ The ECOWAS protocol on Democracy and Good Governance also lists conditions that constitute the constitutional convergence principle which all Member States are expected to adhere to. Some of these principles include: the separation of powers; zero tolerance for power obtained or maintained through unconstitutional means; popular participation in decision making etc.³⁰⁶

Consequently, the new ECOWAS regime not only seeks to protect individuals by stabilizing the environment under which they conduct their daily activities, but also guarantee their fundamental freedoms as enshrined under the ECOWAS treaty and other legal instruments which Member States are parties to. By adopting protocols in a wide variety of areas such as Democracy and Good governance, the new ECOWAS regime casts a wide net in its new human rights regime. Normatively, this compact approach is a novel one amongst RECs in Africa, although the ECOWAS system is not the most complete in certain aspects, it has proven to be relatively effective, as this chapter reveals.

The dimensions to ECOWAS human rights regime, for the purpose of this study are drawn from the legal instruments currently in operation in the community. The ECOWAS human rights regime covers the following areas:

- I) Peace and Security
- II) Democracy and Good governance
- III) Human Rights and Fundamental freedoms

³⁰⁵ Protocol A/SP1/12/01 on Democracy and Good Governance available at <http://www.comm.ecowas.int/sec/index.php?id=protocole&lang=en> (accessed 15 April 2014).

³⁰⁶ *Ibid.*, Article 1.

While the above criteria do not exhaust the normative values which are protected under ECOWAS laws, they may be understood broadly. They also serve an analytical purpose through which ECOWAS's efforts at legitimation are examined from the normative and institutional perspectives, and also for the purpose of compliance.

The unprecedented military intervention of ECOWAS in Liberia opened up legitimacy questions of the ECOWAS regime, primarily because a sub-regional organization acted without the authorization of the United Nations Security Council (UNSC), the only body formally empowered to authorize such interventions. Thus, the greatest legitimacy question on the ECOWAS regime lies in the peace and security architecture of ECOWAS stemming from the political and legal debates on ECOWAS's role in Liberia and Sierra Leone. However, legitimacy questions also lie in other aspects of ECOWAS's human rights regime. Collectively, these dimensions encase the shared values and principles upon which ECOWAS's legitimacy may be widely examined.

According to Jens Steffek, '... in the creation of international regimes all contracting parties need to agree explicitly to the values, goals, and procedures for the regime. This moment of consensus in the regime...also provides consensual reference points for the regime's discursive justification and thus legitimacy'.³⁰⁷ He further underlines the importance of shared values to the legitimacy question by adding that 'what creates legitimacy is less the fact of having consented, but rather having consented to a certain normative reasoning, linking shared values and principles to practice type norms.'³⁰⁸ It is important that the shared norms and values developed by ECOWAS over the years are examined.

3.3 PEACE AND SECURITY

For the purpose of this study, it is importance to place into perspective the meaning of peace and security as commonly used in international legal studies. The traditional conception of security focused on the protection and safety of the state, and the management of the use of military force. Security in the traditional sense is dominated by the perception of external

³⁰⁷ J.Steffek, 'The Legitimation of International Governance: A Discourse Approach', 9 *European Journal of International Relations*, (2003), p.255.

³⁰⁸ *Ibid.*, 263-264.

threats to external threat to the state. But the concept remains a contested one in terms of definition, interpretation and specification. The layman's understanding of security connotes the 'condition of being or feeling safe from harm of danger'.³⁰⁹ The interpretation and specification of the 'condition' of 'being safe' from who or what, and the nature and type of 'danger' and the normative elements, are part of the problematic nature of the conceptualisation of security.³¹⁰

During the Cold war, the traditional conception of security focusing on national security, interests and power, with the state as the primary referent object of security, the condition of anarchy in the international system, and the military use or threat of force, was criticized by various scholars as not reflecting the nature and complexity of security.³¹¹ The emerging sources of threat to security in the world could no longer fit into the normative framework of the traditional conception of security. An example often cited is the oil price rise in 1973 due to the Arab-Israeli war highlighted the relevance of economic security and the role of strategic resources in national security.³¹²

During the early post-Cold War period the emerging consensus in both developing and some parts of the developed world was that the concept of security needed to be redefined to include non-military security issues – human security. The publication of the United Nations Development Programme's (UNDP) Annual Human Development Report in 1994, which broadened the definition of security, was the turning point in the debate.³¹³ Prior to the publication of the report, efforts were already under way in Africa to shift the focus towards the security of people. The most significant initiative was the 'Kampala Document' which called for the establishment of a Conference on Stability, Development and Cooperation in Africa (CSSDCA) in 1991. The CSSDCA points to the fact that peace, security and stability are the pillars for development and cooperation in Africa.³¹⁴ It emphasises that the :

³⁰⁹ T.Terriff, S. Croft, L. James, and P. Morgan, *Security Studies Today*, (Cambridge: Polity, 1991), p.1.

³¹⁰ D.J Francis, *Uniting Africa: Building Regional Peace and Security Systems* (Farnham, UK: Ashgate, 2006), p.86

³¹¹ Ibid.

³¹² Ibid.

³¹³ See, UNDP, *Human Development Report 1994: New Dimensions of Human Security* (New York: Oxford University Press, 1994).

³¹⁴ A. Aderinwale, 'The Conference on Security, Stability, Development and Cooperation in Africa – Framework and the Role of Regional Institutions', in M. Goucha and J. Cilliers (eds.), *Peace, Human Security and Conflict Prevention in Africa* (Paris/Pretoria: ISS/UNESCO, 2000), p.59-66. Available at <http://www.iss.org.za/uploads/CSSDCA.PDF> (accessed 15 April 2014).

“Security, stability and development of every African country are inseparably linked to that of other African countries. Instability in one country affects the stability of neighbouring countries. Instability in one country affects the stability of neighbouring countries and has serious implications for continental unity, peace and security.”³¹⁵

Richard Ullman, one of the foremost critics of the ‘militarisation of the concept of security’, together, advocated a redefinition of the concept of security and the broadening of the security such as the environment, migration, disease, transnational crime, natural disasters, global wealth and poverty divisions, ethno-religious and nationalist identities and the dangers of cybercrime and terrorism.³¹⁶ The non-military/non-traditional threats to security have led to the broadening of the reference objects of security to include individuals, non-state actors and sub-national groups.³¹⁷ This change in reference, particularly the emphasis on the individual has broadened the scope of security, and other related concepts such as Human rights, and Human development.³¹⁸

In Africa, non-military dimensions to security such as environmental degradation, poverty, resource scarcity, ethno-religious and nationalist identities, crime, drugs, diseases such as HIV/AIDS and malaria, natural catastrophes like drought, famine and flood, and mass migration of people, have continued to threaten individual and societal security and survival, and even national security. These non-traditional sources of threat to security affect every aspect of the life of individuals, societies, and states. More importantly, these non-military security threats emanate from a range of non-state, sub-state actors and factors and are trans-state in character. Also, the dangers and challenges posed by these non-traditional military security threats are not confined to a particular state. Essentially, this is where regional bodies like ECOWAS serve as a platform for organized, unified regional security systems that serve states within the community.

As can be seen from the above analysis, security is best understood as the freedom from elimination of threat not only to the physical existence of the state, but also to its ability for self-protection and development, and the enhancement of the general welfare of all the

³¹⁵ Ibid., p.64.

³¹⁶ See generally, R.Ullman, ‘Redefining Security’, 8 *International Security*, (1983), pp. 129 – 153.

³¹⁷ This new approach has evolved into ‘Critical Security Studies’ as a field of legal studies. See, K. Booth (ed), *New Thinking about Strategy and International Security*, (London: Harper Collins, 1991); C. Snyder, *Contemporary Security and Strategy*, (London: Macmillan Press),

³¹⁸ Francis (2006), p.87.

citizens. The common feature of all definitions of security is the protection of the individual against threats. The individual is at the most secure in a peaceful environment, which ensures the protection and preservation of ‘core values’ and the absence of threats to acquired values’.³¹⁹ Security and peace are interwoven and mutually reinforcing. The absence of peace means the absence of security. Equally, the presence of peace invariably secures the presence of security.

The ECOWAS legal and institutional framework covers various areas of peace and security. However, the most contested aspect of ECOWAS peace and security framework is humanitarian intervention. Humanitarian intervention is the dominant aspect of the concept of security hence complaints about the ‘militarisation of the concept of security’ by scholars like Ullman. Consequently, Humanitarian intervention is hotly contested in international law because it involves the subversion of state sovereignty with military force for the purpose of protecting human rights during periods of conflict. The ECOWAS peace and security framework under the current regime emanated due to unilateral humanitarian intervention carried out in member states in the early 90s. Other aspects of security as understood in contemporary times are equally entrenched in other community legislations, which would be revealed in other parts of this study. The next section examines humanitarian intervention as a sub-concept of peace and security and its relationship with equally important concepts like humanitarian law and human rights.

3.3.1 HUMANITARIAN INTERVENTION, HUMAN RIGHTS, AND HUMANITARIAN LAW AS KEY ASPECTS OF PEACE AND SECURITY.

The Westphalian idea of statehood is primarily premised on sovereignty over every facet of life within the territory. The implication of this ideal is the norm of non-intervention in domestic affairs of the state, be it forcible or non-forcible.³²⁰ Thus, intervention in the affairs of a sovereign state without its consent is fraught with difficulties, particularly on the part of the intervening states. However, in the aftermath of the Cold War, and the advent of

³¹⁹ A. Wolfers, *Discord and Collaboration*, (Baltimore: John Hopkins University Press, 1962), cited in B. Buzan, *People, State and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, (Boulder: Lynne Rienner, 1991), pp. 16-17.

³²⁰ B. George, ‘International Law and forcible intervention: a millennium assessment’ in L. du Plessis and M. Hough, *Managing Conflicts in Africa: The Challenge of Military Intervention* (eds.), (Pretoria: HRSC Publishers, 2000), p.74.

globalization, sovereignty has undergone drastic changes. The global awakening on the sanctity of the human life and the realization that human rights must be protected has further changed the understanding of sovereignty. Where states are unwilling or unable to promote and protect the fundamental human rights of its peoples in conflict situations, the international community is obliged to intervene as part of its *erga omnes* responsibility.³²¹

The obligation of the international community to intervene for the protection of human rights during conflict is conceptualized as Humanitarian Intervention in international law. Humanitarian Intervention is defined more elaborately as ‘coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting top a halt gross and massive violations of human rights or international humanitarian law’.³²²

The importance of Humanitarian Intervention to human rights protection cannot be overstated. An effective humanitarian intervention is one that saves lives by preventing or ending violent attacks on unarmed civilians where gross, massive and systematic violations of human rights takes place. The minimum expectation of a humanitarian intervention is that ‘[...] the intended beneficiaries of the action are better off after the intervention than they would have been had the intervention not taken place’.³²³ In order for a humanitarian intervention exercise to be considered a success, the number of lives saved should be considered. Humanitarian intervention can also produce undesired effects. Seybolt points out that if humanitarian intervention is not carried out properly, it wastes lives and resources and might perpetuate or exacerbate the problems it is intended to address.³²⁴

Humanitarian intervention can be undertaken unilaterally (intervention by a single state) or collectively (intervention by a group of states). This study examines collective humanitarian intervention under a regional entity. So emphasis is placed on application of collective intervention mechanism of ECOWAS. Humanitarian intervention suffers from a

³²¹ This is expounded under Chapter VII powers of the United Nations Security Council. See also, Article 4(h) of the Constitutive Act of the African Union.

³²² Humanitarian Intervention: Legal and Political Aspects (Copenhagen: Danish Institute of International Affairs 1999), p.11.

³²³ T.B Seybolt, *Humanitarian Military Intervention: The conditions for success and failure*, Stockholm International Peace research Institute (Oxford: Oxford University Press, 2008), p.3.

³²⁴ *Ibid.*, p.5.

standardization problem due to the fact that the intervening state/states could potentially abuse the process. For example, ECOWAS was accused of violating the principles of peace-keeping, during its intervention in Liberia in the 90s.³²⁵ Various significant expositions of criteria have since emerged.³²⁶ Udoh proposes certain criteria in order to validate military missions based on humanitarian purposes as follows:³²⁷

- 1) The use of humanitarian intervention must be immediate and only occur during the actual commission of the human rights violation or immediate threat of an offence
- 2) Authorisation for intervention must be by a competent body within the United Nations
- 3) Humanitarian Intervention must be a collective effort executed by more than one nation
- 4) Humanitarian Intervention must be used as a last resort when all other means have failed
- 5) Humanitarian Intervention must only be used for grave and large-scale violations of human rights
- 6) All military forces involve in the intervention must respect the principles and spirit of the Geneva conventions and all other applicable International humanitarian Laws.

It is noteworthy that most of the above standards tally with provisions of the UN Charter, particularly Chapter IV on the pacific settlement of disputes. However, in practice, the likelihood of each criteria being present before a particular humanitarian intervention can be embarked on, is low. The UN collective security mechanism has in the past proven to be ‘notoriously selective’ in response to breaches of peace and other conflict situations, particularly in Africa.³²⁸ The dissonance between the provisions of the UN Charter and the politics of its implementation has led to the increase in regional collective security

³²⁵ Peace-keeping is not governed by any direct provision of the UN Charter. Nevertheless, some principle have evolved through the practice of the UN and states alike and have found general acceptance amongst states and writers as forming the legal basis of peacekeeping. The principles are: (i) peacekeepers must obtain the consent of, or be invited by the host state; (ii) Peacekeepers must be completely impartial and must not use force to determine the outcome of conflict; (iii) peacekeepers must not use force except in self-defence. ECOWAS was believed to have acted contrary to all the norms of peace-keeping in its intervention in Liberia in 1990s. ECOWAS was accused of not asking for consent of one of the main rival factions in the conflict. ECOWAS used force against one of the rebel factions in Liberia under permissible limits of the law of peacekeeping. ECOWAS also failed to seek authorisation of the UNSC as required by Article 53(1) of the UN Charter. See, A. Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter*, (Oxford: Hart Publishing, 2004), pp.162-163.

³²⁶ For instance, United Nations Secretary-General Kofi Annan in his report of 8 September 1999 proffered some major considerations for intervention. See, ‘Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict’, S/1999/957, 8 September, 1999. Available at <http://www.un.org/docs/sc/reports/1999/sgrep99.htm> (accessed 15 April 2014).

³²⁷ A.C Udoh, ‘When is Humanitarian Intervention Legal’, 44 *Los Angeles Lawyer* (2010), p.1.

³²⁸ The Security Council’s inaction in African conflicts particularly, Liberia (1989-97), Sierra Leone (1997-2001), and Rwanda (1994) contrasts with its actions in earlier cases in other parts of the world. For instance, the speed of action of the UNSC in the Yugoslavia conflict and the ground-breaking decision to intervene in Haiti over an overthrow of a democratic government has raised concerns of double standards by the UNSC and hinted at its diminishing legitimacy. See, A. Abass (2004), pp.91-105.

mechanisms around the world. As would be revealed subsequently, in this study, the new ECOWAS security mechanism is a response to the failure and ineffectiveness of collective intervention administered by the UNSC in the past, on the continent.

While human rights lay down guarantees and safeguards of rights in society, humanitarian law creates room for protection of the vulnerable in the outbreak of armed conflict.³²⁹ It logically follows that humanitarian intervention is the practice that ensures the successful operation of humanitarian law during conflict. The effective application of both areas of international law ensures that human rights are guaranteed and protected at all times. Both human rights and humanitarian intervention cannot be separated in a dynamic and rapidly evolving world where there are constant acts of violation of human rights manifested in various forms. However, both branches of international law are considered distinct despite its overlapping and until now, still seek pre-eminence over each other.

3.3.2 ORIGINS AND DEVELOPMENT OF ECOWAS PEACE AND SECURITY ARCHITECTURE

The initial mandate of ECOWAS under the 1975 treaty was regional cooperation and economic integration as ways to lift the sub-region out of the economic stranglehold of the advanced markets and enhance the living standard of its citizens. These lofty objectives could only be achieved in a stable environment. Unfortunately, Member States continued to experience one form of conflict or the other. During the first few years of operation of the 1975 treaty, there had been internal conflicts in Togo, Cote d'Ivoire, Ghana, Senegal, Guinea Bissau, Benin and Burkina Faso.³³⁰ There was also inter-state conflict between Mali and Burkina Faso in 1975 and 1985. Senegal and Mauritania also witnessed conflict between them in the same period.³³¹

³²⁹ See, *International Humanitarian Law and International Human Rights Law: Similarities and Differences*, (2003) International Committee of the Red Cross (ICRC). The two bodies of law are similar in their purpose but differ in various respects. For example, while the two bodies of law aim to protect human life prohibit torture or cruel treatment, discrimination etc. issues such as conduct of hostilities, combatant and prisoner of war status and the protection of the Red Cross and Red Crescent emblems are well outside the purview of International Human Rights Law.

³³⁰ M.Chambas, ;The ECOWAS Agenda: Promoting good Governance, Peace, Stability, and Sustainable Development, Nigerian Institute of International Affairs (NIIA) Lecture Series No. 86 (2005), pp.10-12.

³³¹ Ibid.

Realising the inherent destabilising effect of centrifugal forces in the sub-region, and the need for a collective mechanism for peace and stability in the sub-region, ECOWAS Member States adopted a Protocol Relating to Non-Aggression (PNA) in April 1978.³³² The protocol sought to outlaw aggression by member states, and gave primacy to the peaceful settlement of disputes. The protocol did not establish any institutional apparatus to ensure that decisions of Member States were followed up with concrete action and therefore failed to prevent fears of instability within the region.

To correct this defect, Member States adopted the Protocol Relating to Mutual Assistance on Defence (PMAD) in 1981.³³³ The PMAD committed Member States to a collective self defence treaty by accepting that armed threat or aggression against one constituted a threat or aggression against the entire community and resolved to give mutual aid and assistance.³³⁴ The PMAD outlined conditions for intervention and assistance. Article 17 permitted Community action when there was a conflict between two Member States of the Community. The Community was also empowered to intervene when, as defined under Article 18, there was an internal conflict in Member State of the Community that was actively maintained and sustained from outside. Community forces were restricted to purely internal conflicts.

The NAP and PMAD proved to be insufficient legal frameworks to justify the intervention of ECOWAS in the violent internal conflicts that took place in the West African sub-region in the immediate post-Cold War era. The West African security landscape was severely rocked by violent internal conflicts in Liberia, Sierra-Leone, Guinea-Bissau, and Cote d'Ivoire. The unprecedented ECOWAS military interventions in two of these conflicts not only changed the mandate of ECOWAS as an organization, but also the normative and conceptual understanding of peace and security in international law. The implication of ECOWAS's response to the conflict in Liberia and Sierra Leone raised two challenges to the organization's legitimacy. First, some Member States argued that it exceeded ECOWAS's mandate, and violated regional and global norms of non-intervention. These arguments were

³³² Adopted 22 April, 1978, reprinted in Protocols Annexed to the 1975 Treaty, XIV ILM (1975).

³³³ Adopted 29 May, 1981, reprinted in 3 Official Journal of Economic Community of West African States, (June 1981), pp.9-13.

³³⁴ *Ibid.*, Articles 2 and 3. The PMAD established the ECOWAS Defence Council and the Defence Commission. The Defence Council's role was to supervise with the authority of the State or States involved, all measures taken by the ECOWAS Force commander and ensure that all necessary means for the intervention are made available to him.

predominantly based on whether the ECOWAS Ceasefire and Monitoring Group (ECOMOG) troop-contributing states violated the principle of state sovereignty and non-interference? Intrinsic in this argument is the question why an organization set up for economic integration become involved in political/security issues? In other words, did ECOWAS have the mandate or legitimacy for the regional policing role that it undertook?

3.3.3 ECOWAS IN LIBERIA & SIERRA LEONE: LEGITIMATING INTERVENTION

The Liberian conflict started in 1989 by the rebel group National Patriotic Front of Liberia (NPFL) and the Revolutionary United Front (RUF) started plans to take over the West African sub-region by toppling sitting regimes through armed rebellions. By May 1990, the Liberian crisis had degenerated into a killing spree.³³⁵ The Liberia Council of Churches, Muslim Leaders and other influential Liberians asked the United Nations and the United States to intervene, but nobody was willing to intervene.³³⁶ The Organization of African Unity (OAU) then referred to its non-interference clause in the internal affairs of Member States as reason for non-intervention.³³⁷

It was due to the inaction of the international community that the 13th session of the Authority of Heads of States and Government of ECOWAS convened in Banjul, The Gambia, in 1990 proposed the setting up of the Community Standing Mediation Committee. The Mediation Committee consisting of seven ECOWAS Member States was charged with the mediatory role between all the factions.³³⁸ The Mediation Committee on 27 August 1990 established an ECOWAS Ceasefire Monitoring Group (ECOMOG) in Liberia to halt the indiscriminate killing of innocent civilians and destruction of property. ECOMOG was also mandated to restore law and order to create the necessary conditions for free and fair elections.

All attempts by the Standing Committee to make the warring parties reach an agreement were futile and war continued unabated.³³⁹ By the end of August 1990, it became obvious that

³³⁵ L. I. Okere, 'The Legal Framework of ECOWAS Role in Conflict Prevention, Management, Resolution, Peace-keeping and Security in West Africa, Unpublished doctoral dissertation (Ahmadu Bello University, Zaria, Nigeria, 2012), p.190.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ The seven members of the SMC were: Ghana, Nigeria, The Gambia, Sierra Leone, Guinea, Togo, and Mali.

³³⁹ The Mediation Committee took several steps to return peace to the country but all failed. For instance, the Committee convened a conference of all political parties and other interest groups for the purpose of

more forceful involvement was needed to physically dislodge the warring factions. Accordingly, the Mediation Committee took the decision to dispatch ECOMOG to Liberia to enforce a ceasefire.

Laudable as the intention of ECOMOG to intervene in the Liberian crisis seemed at the time, the intervention generated a reverberation of critical comments emanating from issues of legitimacy and legality. With regards to legality, the 1975 Treaty was devoid of any conflict-related provisions. The NAP prohibits aggression among Member States but did not specifically mention peace-keeping nor provide for the right of unilateral intervention in Member States.³⁴⁰ The PMAD recognizes any aggression against any a member state as aggression against the whole community. However, the protocol only provided for intervention in situations where internal armed conflict in a Member State was actively maintained and sustained from outside,³⁴¹ an armed conflict between two or more member states,³⁴² or an external armed threat or aggression.³⁴³ None of the provisions of the protocols governed internal conflicts emanating from within a Member State. This proved a legal hurdle for the ECOWAS Member States' decision to intervene in subsequent internal conflict in Sierra Leone.

ECOWAS Member States against the intervention, led by Cote D'Ivoire and Burkina Faso, pointed to the fact that military action took place without the authorization of the United Nations Security Council (UNSC), which is the exclusive body charged with the responsibility to maintain international peace and responsibility under the UN Charter.³⁴⁴ Both countries hotly contested the basis for the peace-keeping in Liberia for a couple reasons. Firstly, they argued that Security Council authorization was not sought under Article 53 of the UN Charter. Secondly, both Member States frowned on the operation because there was no collective decision by all Member States. Hence, their position was that the ECOWAS Summit was not competent to intervene in a Member State's internal conflict.³⁴⁵

establishing a broad-based interim government. But Charles Taylor one of the key rebel leaders turned down all the peaceful proposals of the Committee. See, Okere (2012), pp.192-193.

³⁴⁰ Article 1 of the Non Aggression Protocol.

³⁴¹ Article 18 of the PMAD.

³⁴² Ibid., Article 17.

³⁴³ Ibid., Article 16.

³⁴⁴ Article 24 of the UN Charter.

³⁴⁵ See, Okere(2012), p.221.

ECOWAS's invocation of humanitarianism was necessitated by the fact that the peacekeeping forces on ground in Liberia were frustrated by internal squabbles which played into the hands of the different warring factions, strengthening claims for further military action.³⁴⁶ Amidst the outcry and criticisms, ECOWAS mounted an international campaign, which had a receptive audience in the post-Cold War period, especially among some of its members. ECOWAS's humanitarian argument was also aimed at connecting with civil society in the sub-region and other international actors such as the United Nations.³⁴⁷ This appeared a clever move at the time since it broadened ECOWAS's constituency from its members to include civil society, a development that resonated with calls for a people-oriented ECOWAS as advised by the CEP.³⁴⁸ The humanitarian argument strengthened ECOWAS's position against those members that opposed the intervention and most importantly pressured the UNSC to retroactively authorize the intervention.³⁴⁹

ECOWAS legitimized its actions by arguing that it was being 'ones brother's keeper, which was the perhaps the strongest position it had because international law clearly forbade unilateral humanitarian intervention outside the framework of the UN Charter.³⁵⁰ However, this argument was plausible because of the normative shift in the international political environment following the end of the Cold war. It became fashionable to talk of an emerging global community and humanitarian intervention. This kind of intervention did not respect established territorial borders or protocols, such as obtaining the permission of a host state before deployment, especially 'when a state has virtually ceased to exist, [when] there is no effective civil authority, and when the subjects are in a quasi-nature'.³⁵¹

³⁴⁶ A publication by ECOWAS after its summit in Banjul, The Gambia buttressed this fact. Bah (2013), p.93

³⁴⁷ Ibid.

³⁴⁸ CEP Report cited in Kufour (2006), p.134.

³⁴⁹ The UNSC endorsed ECOWAS intervention through two presidential statements in 1991 and 1992, and Resolution 788 of November 1992. See, UN doc. S/22133 of 22 January 1991, UN doc. S/23886 of 7 May 1992, and SC Res, 788 of 19 November, 1992.

³⁵⁰ The combined effect of Articles 2(4) and 24(1) of the UN Charter is the outright prohibition of unilateral humanitarian intervention. Article 2(4) admonishes member states to refrain from the threat or use of force against the territorial integrity of a state on one part. On the other part, Article 24(1) confers on the Security Council the primary responsibility for the maintenance of international peace and security.

³⁵¹ A. Sesay, 'Humanitarian Intervention in Liberia: Implications for State and Sub-Regional Security and International Society', paper prepared for the Workshop on Humanitarian Intervention and International Society, London of School of Economics, 13 May 1995.

In response to criticisms of ECOWAS's deployment of ECOMOG and the violation of the non-interference clauses of the OAU and UN Charter, then OAU Secretary-General described the criticism as rhetorical, stating that:

Before ECOWAS undertook its initiative many, including the African media were condemning the indifference demonstrated by Africa... (therefore) to argue that there is no legal basis is surprising. Should the countries in West Africa just leave Liberia to fight each other? Will that be more legitimate? Will that be more understandable?³⁵²

The OAU, like ECOWAS, placed crucial emphasis on the humanitarian argument. The OAU Secretary-General argued that even if the intervention was construed as of questionable legality, it remained proper. The ECOWAS Chairman was even more categorical when he noted that: 'the wanton killings going on in Liberia has made that country a slaughter-house and the situation could no longer be treated as an internal matter.'

From the outset the international community's response, especially the UNSC's, was one of guarded approval. It can be likened to the way it responded to Tanzania's intervention in Uganda in 1979; it validated the result without formally validating the means.³⁵³ But in its strongest show of support of ECOMOG, a senior US administration official observed that,

In a country where anarchy reigned, ECOMOG provided order and a bastion of security in Monrovia and hundreds of thousands of Liberians flocked to the relative safety of the city... ECOMOG remains virtually the only force in Liberia unblemished by serious human rights abuses and is the only military force not motivated by personal aggrandizement.³⁵⁴

The most important act of validation came from endorsement of the UNSC through Resolution 788. The UNSC in the resolution determined that the situation in Liberia constituted a threat to international peace and security. The body also recognized the need for increased humanitarian assistance in the circumstances and commended ECOWAS for its effort to restore peace, security and stability in the country.³⁵⁵ Perhaps the most convincing

³⁵² *West Africa Magazine*, August 1990, 1085.

³⁵³ Bah (2013), p.94.

³⁵⁴ See, 'US Reaffirms Its Policy Toward Liberia', Statement by Leonard H. Robinson, Jr., Deputy Assistant Secretary for African Affairs the Subcommittee on Africa of the House Foreign Affairs Committee, 19 November 1992. Available at <http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1992/html/Dispatchv3no48.html> (accessed 15 April 2014).

³⁵⁵ Resolution 788 *supra*.

indication of UNSC's approval of ECOMOG was the request that all states respect the measures established by ECOWAS to bring a peaceful resolution to Liberia.³⁵⁶ This was significant at the time because the UNSC while playing a secondary role to a sub-regional organization, helped legitimize the intervention, albeit retroactively.

Following the overthrow of the Tejan-Kabbah government in May 1997, the Nigerian-led ECOMOG force was authorized to restore the deposed civilian government. As in Liberia, the intervention attracted global criticism. As the UN pressed for sanctions to be implemented, ECOWAS led mediation for a peaceful settlement and the restoration of the ousted civilian government. The negotiations culminated in the Conakry Accord in which the military junta agreed to step down in April 1998.³⁵⁷ However, after the two weeks period given to junta to relinquish power to the government elapsed, ECOMOG went on the offensive in February 1998, ousting the military junta, cutting short the April deadline reached in Conakry.³⁵⁸

Following the Nigerian-led intervention, *The Economist* commented:

“Whatever happened to non-interference? Meddling in other countries’ affairs let alone invading them, used to be a taboo, even in the best of causes. But when the Nigerian troops moved against the junta officers in Sierra Leone who had over-thrown the elected government, their intervention was accepted by the world as if Sierra Leone were Nigerian territory and not an independent state nearly 900 miles away.”³⁵⁹

Despite such sentiments, then UN Secretary-General, Kofi Annan, appeared to give backing to the use of force when he told African leaders that ‘Democracy has been usurped. Let us do whatever is in our power to restore its owners, the people. Verbal condemnation... is not sufficient.’³⁶⁰ The US called on ‘those claiming power in Freetown to return power promptly to the country’s elected leadership and parliament.’³⁶¹

³⁵⁶ Ibid.

³⁵⁷ Bah (2013), p.97.

³⁵⁸ Ibid.

³⁵⁹ *The Economist*, June 1997, pp.49-50. The fact that Nigeria’s military dictatorship under General Sani Abacha did glossed over the international acclaim that Nigeria received for its role in restoring the democratically elected government in Sierra Leone. Some sections of the international community viewed the intervention as a means to divert international attention from the regimes poor human rights record. See, B. Akinyemi, ‘End the Military Meddling’, *The Guardian*, Lagos, 5 June 1997.

³⁶⁰ *The Economist* June 1997, p.50.

³⁶¹ See, L.D Kozaryn, ‘US Evacuates Americans from Sierra-Leone’, May 31st 1997, American Forces Press Service, available at <http://www.defense.gov/news/newsarticle.aspx?id=40988> (accessed 15 April 2014)

The OAU was quick to condemn the coup d'état and called for the restoration of democracy. On its part, the UNSC was quick to condemn the coup and passed a resolution³⁶² requesting the military junta to 'relinquish power' and allow the restoration of the democratically elected government, it only did so five months after the coup. The UNSC went ahead to find that the situation was a threat to international peace and security in the region. However, it fell short of authorizing the use of force. It merely authorized ECOWAS to ensure the strict implementation of sanctions.³⁶³

With the junta successfully ousted, the UNSC accepted ECOWAS's actions, turning a blind eye to the legality of the intervention. The UNSC issued a statement commending 'the important role' that ECOWAS played in the peaceful resolution of the crises.³⁶⁴ The international applause showered on ECOWAS did little to dispel fears over the use of force between sovereign states. Fundamental questions continue to hang asked about unilateral intervention and the use of force on sovereign states. Retroactive approval by the UNSC adds further confusion to the debate as it appears that the UNSC may legitimize unilateral intervention where it recognizes that international peace and security is under threat in a State, but the UN charter forbids any of such actions carried out outside the supervision of the UNSC. This leaves states in volatile regions of the world such as West Africa, in a difficult situation. Do they protect individuals during conflicts? Do they wait for UNSC approval which has proven to be a time consuming in the past, at the irretrievable cost of millions of precious human lives and property? ECOWAS Member States' reacted to the legal handicap of the interventions in the Liberia and Sierra Leonean conflicts by introducing a new legal regime for humanitarian intervention, which gives the community mechanism the right to intervene during conflicts. The next section examines the new ECOWAS security architecture and areas of normative incompatibility with the UN Charter.

³⁶² Security Council Resolution 1132 of 8 October 1997.

³⁶³ See, K. Nowrot & E. Schabacker, 'Military Intervention in Sierra Leone', 4 *International Law Review* (1998), p.328.

³⁶⁴ *Ibid.*, p.338.

3.3.4 THE NEW ECOWAS SECURITY ARCHITECTURE

In the Preamble to the 1993 revised treaty, ECOWAS member states agreed that ‘... the integration of the Members into a viable regional community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will...’³⁶⁵ This clause represented a departure from the non-interventionist stand of most African States under the OAU regime. This culture of non-intervention and respect for sovereignty was reflected in the 1975 treaty regime of ECOWAS. However, Africa’s experience as battle ground for proxy wars during the Cold War and the humanitarian catastrophes of the 1990s gave impetus to regional collective security mechanisms and a strong interventionist norm.

The aftermath of the intervention of ECOMOG in Liberia and subsequent military missions that followed increased the salience of security and humanitarian activities in the sub-region. Thus, pursuant to Article 58 of the Revised Treaty,³⁶⁶ ECOWAS member states adopted the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security³⁶⁷ (MCPMRPS).

The MCPMRPS attempts to place humanitarian intervention on a firmer legal footing and strengthen the new ECOWAS security architecture in all ramifications. In a break from previous arrangements, the ECOWAS Conflict Mechanism is not limited to inter-state conflicts; it has the mandate to intervene in internal conflicts that pose a threat to human rights and the general peace and security of the region. The MCPMRPS, amongst other things, aims to³⁶⁸:

- a) Prevent, manage and resolve internal and inter-State conflicts;
- b) Implement the relevant provisions of Article 58 of the Revised Treaty;
- c) Implement the relevant provisions of the Protocols on Non-Aggression, Mutual Assistance in Defence, Free Movement of persons, the Right of Residence and Establishment;

³⁶⁵ Revised Treaty of the Economic Community of West African States, adopted 24 July 1993.

³⁶⁶ Under Article 58 of the treaty, member states undertake to work to safeguard and consolidate relations conducive to the maintenance of peace, stability and security within the region.

³⁶⁷ Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace and Security, adopted 10 December 1999, available at <http://www.comm.ecowas.int/sec/index.php?id=ap101299&lang=en> (accessed 15 April 2014).

³⁶⁸ Article 3 of the MCPMRPS.

- d) Strengthen cooperation in the areas of conflict prevention, early warning, peace-keeping operations, the control of cross-border crime, international terrorism and proliferation of small arms and anti-personnel mines;
- e) Maintain and consolidate peace, security and stability within the Community;
- f) Establish institutions and formulate policies that would allow for the organization and coordination of humanitarian relief missions;
- g) Promote close cooperation between Member States in the areas of preventive diplomacy and peace-keeping;
- h) Constitute and deploy a civilian and military force to maintain or restore peace within the sub-region, whenever the need arises.

By regulating every aspect of peace and security in the community, the MCPMRPS is an attempt at a holistic approach to maintaining peace and security. Objectives of the MCPMRPS also include equitable management of natural resources shared by Member States which may cause inter-state conflicts, protection of the environment, safeguarding the cultural heritage of member states, and implementation of policies on anti-corruption, money-laundering and illegal circulation of small arms.³⁶⁹ It is evident from the objectives of the MCPMRPS that Member States intended to create a mechanism with wide authority and the capacity to regulate any potential causes of conflict between Member States.

To increase the legitimacy of its actions and bolster the emerging norms, ECOWAS Member States established new decision-making mechanisms. Member States realised that the absence of credible decision-making instruments and the resort to ad hoc mechanisms such as the Standing Mediation Council (SMC) established to deal with the conflict in Liberia undermined its initial peace-making efforts.³⁷⁰ Consequently, ECOWAS established several mechanisms as its standing decision-making organs. The key organs of the MCPMRPS are:

- the Authority (or Summit) of Heads of State and Government;³⁷¹
- the Mediation and Security Council(MSC);³⁷²

³⁶⁹ Ibid.

³⁷⁰ Bah (2013), p.101.

³⁷¹ Article 5 of the MCPMRPS.

³⁷² Article 8 of empowers the MSC to make important decisions relating to matters of peace and security and the deployment of peacekeeping troops. The MSC shall comprise of 9 Member States, 7 shall be selected by

- the Early Warning and Response Network (ECOWARN);³⁷³
- the ECOWAS Standby Force;³⁷⁴
- the Defence and Security Commission (DSC);³⁷⁵ and
- the Council of Elders.³⁷⁶

The Authority is the supreme institution of the community with general direction and control of the community, while the MSC acts as the equivalent of the UNSC. The MSC is an innovative regional mechanism, but unlike the UNSC it has no permanent members.³⁷⁷

Although Article 6(1) of the Mechanism designates the Authority as the highest decision making body, it is not so in reality. The Authority as the highest decision body has delegated all its powers to the MSC under Article 7. However, in practical terms, there appears to be little or no significant value in the delegation of power by the Authority to the MSC. The MSC, can on its own, initiate actions under the Mechanism without restraints.³⁷⁸

The MSC is also responsible for deciding and implementing ‘all policies for conflict prevention, management and resolution, peace-keeping and security’.³⁷⁹ These provisions show that the MSC, in fact, has greater powers than the Authority under the Mechanism. While these provisions point at supranationalism, there is a need to balance the powers accruable to the MSC. The relationship between the General Assembly and the UNSC under the UN Charter for example, clearly establishes the relationship between both bodied and makes a distinction between actions which each body may take.

the Authority, and the other two shall be the current and immediate past chairman of the Authority. Membership of the MSC is on a rational basis and members are elected for a two- year period with no permanent seats.

³⁷³ Articles 23 and 24 outline the role and function of ECOWARN. The organ shall undertake risk mapping, observation and analysis of social, economic and political situations in the sub-region which have the potential of degenerating into conflict and present appropriate threat perception analysis.

³⁷⁴ Article 17 established the ECOWAS Cease-fire Monitoring Group (ECOMOG). It was later transformed into a standby force in June 2004. The force is made up of 6500 highly trained soldiers to be drawn from national units. It includes a rapid reaction Task Force of 1500 troops which have the capability to be deployed within 14 days, whilst the entire brigade could be deployed within 90 days.

³⁷⁵ Under Article 19, the DSC is responsible for the examination of all technical and administrative issue and also the assessment of all logistical requirements for peace-keeping operations. Chiefly amongst its responsibilities is the appointment of the Force Commander and determining the composition of Contingents of a peace keeping operation.

³⁷⁶ Article 20 outlines the mandate of the Council of Elders. The Council of Elders comprises of a list of eminent personalities who can use their good offices and experience to play the role of mediators, conciliators and facilitators. The list is to be compiled annually by the President of the Commission.

³⁷⁷ Bah (2013), p.101.

³⁷⁸ Article 26(b) of the Conflict Prevention Mechanism.

³⁷⁹ Ibid., Article 10(b).

The MSC's functions include the authorization of all forms of intervention and deciding particularly on the deployment of political and military solutions,³⁸⁰ approving all mandates and terms of reference periodically, on the basis of evolving solution,³⁸¹ reviewing the mandates and terms of reference periodically, on the basis of evolving situations,³⁸² and also appointing the Special Representative of the executive Secretary and the Force Commander.³⁸³ In light of these provisions, and also current practice, it is unlikely that in a situation warranting the authorization of an action, the Authority will overrule the decision of the MSC.³⁸⁴ The delegation of the Authority's power under Article 7 is effected 'without prejudice to its wide-ranging powers under Article 9 of the Revised Treaty'. However, this proviso serves no purpose, because it fails to subject the delegated power to the controls of the Authority. Although Article 9(4) of the revised treaty to which Article 7 refers, vests the Authority with supreme powers, this is subject to contrary provisions in the Treaty or other Protocols. The delegation of power by the Authority to the MSC is an open one, which would require effective constitutional mechanisms to subject it to scrutiny, without which it can be abused.

3.3.5 HUMANITARIAN INTERVENTION UNDER THE MCPMRPS: ASPECTS OF NORMATIVE INCOMPATIBILITY WITH THE UN CHARTER SYSTEM.

To implement Article 58 of the Revised Treaty, Article 25 of MCPMRPS provides that the Protocol is to be invoked:

- (a) In cases of aggression or conflict in any Member State or threat thereof;
- (b) In case of conflict between two or several Member States;
- (c) In cases of internal conflict;
- (i) that threatens to trigger a humanitarian disaster; or
- (ii) that poses a serious threat to peace and security in the sub-region;
- (d) In event of serious and massive violation of human rights and the rule of law.
- (e) In the event of an overthrow or attempted overthrow of a democratically elected government;

³⁸⁰ Ibid., Article 10(c).

³⁸¹ Article (10)(d).

³⁸² Article (10)(e).

³⁸³ Article 10(f) .

³⁸⁴ See Articles 11-14.

(f) Any other situation as may be decided by the Mediation and Security Council.

By the same token, Article 10 vests the MSC with the powers to:

- (a) Decide on all matters relating to peace and security; (b) decide and implement on all policies for conflict prevention, management and resolution, peace-keeping and security; (c) authorise all forms of intervention and decide particularly on the deployment of political and military missions; (d) approve mandates and terms of reference for such missions; (e) review the mandates and terms of reference periodically, on the basis of evolving situations.³⁸⁵

It is noteworthy that the sub-regional mechanisms like ECOWAS are considered ‘part of the overall security architecture of the [African] Union, which has the primary responsibility for promoting peace, security and stability in Africa’.³⁸⁶ The relationship between sub-regional groups like ECOWAS and the African Union underlined in the AUPSC Protocol reflect a new collective security arrangement under the AU regime which is tightly knit and cohesive at all levels. This represents a change from the OAU regime where conflicts that had long term effects on African states could not be contained because there were no concerted plan of action by African States at all levels.³⁸⁷

In the same breath as the ECOWAS MCPMRPS, in its right of intervention, Article 4 of the AU Constitutive Act provides that:

The Union shall function in accordance with the following principles:

- (h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;
- (j) The right of Member States to request intervention from the Union in order to restore peace and security.

³⁸⁵ See Article 10 of the MCPMRPS Protocol, *Ibid*.

³⁸⁶ See the Protocol Relating to the Establishment of the Peace and Security Council of the African Union signed on July 2002 at Durban South Africa, and came into force on 26 December 2003, Article 4(k) (hereinafter the ‘AUPSC Protocol’).

³⁸⁷ The Liberian civil war demonstrated this problem. The OAU often held a different position from ECOWAS Member States. This was worsened by the lack of a legal framework for humanitarian intervention at the time.

Similarly, the Protocol of the AUPSC provides that in discharging its duties, the AUPSC shall inter alia be guided by ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity in accordance with Article 4(h) of the Constitutive Act’.³⁸⁸

These provisions have serious implications for the UN charter system and state practice in international law. During the drafting of the Charter, the question of primacy of the UN over regional organizations and the UN was hotly debated. While some states favoured the principle of universalism represented by the UN, others like the Latin American states, preferred regionalism.³⁸⁹ The provisions in chapter VIII of the UN Charter reflects the compromises by the groups that anchored the relationship between the UN and regional organizations like ECOWAS on the principle of subsidiarity, but left some issues unresolved.³⁹⁰ Enforcement action by regional organization not in collective self-defence must be authorised by the UNSC, and any provision in regional agreement that permits the organization to take enforcement action against a Member State without UNSC authorisation is inconsistent with Article 53 of the Charter. It has therefore been argued that unilateral humanitarian intervention enshrined in MCPMRPS and the AUPSC is incompatible with the UN Charter and thus invalid.

The first area of normative incompatibility with the UN Charter is the right of the unilateral use of force. Article 2(4) of the UN Charter prohibits the use of force in inter-state relations. It is widely accepted by international law scholarship that this provision constitutes a *jus cogens* under international law from which no derogation is permitted.³⁹¹ Article 25 of the MCPMRPS providing for the right of the ECOWAS to use force within Member States on grounds not provided for in the UN Charter apparently violate Article 2(4) of the UN Charter

³⁸⁸ Article 4(j) of the AUPSC.

³⁸⁹ See, S.N MacFarlane and T.G Weiss, ‘The United Nations, Regional Organisations and Human Security: Building Theory in Central America’, 15(2) *Third World Quarterly* (1994), p.280.

³⁹⁰ See, M.Pugh, ‘The World Order Politics of Regionalization’, in M. Pugh and W.P.S Sidhu (eds), *The United Nations and Regional Security: Europe and Beyond*, (Boulder Colorado: Lynne Rienner, 2003), p. 35. See Articles 52 and 53 of the UN Charter.

³⁹¹ This also applies to the principle of non-interference in matters especially within the domestic jurisdiction of a state contained in Article 2(7) of the UN Charter. See, N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, (Leiden: Martinus Nijhoff, 1985), p.87.

on the unilateral use of force.³⁹² Such forcible actions, whenever they are authorized by regional arrangements without the authorizations of the Council, are often regarded as unilateral.³⁹³

Furthermore, these provisions have codified new grounds for exceptions to the rule on the use of force besides those of self-defence and chapter VII enforcement actions under the UN Charter and pose a ‘fundamental challenge’ to the UN system as they seek to supervene upon the provisions in Article 2(4) and chapter VII of the UN Charter.³⁹⁴ These grounds under the AU act are war crimes, crimes against humanity and genocide, with reference to the proposed amendment of the AU Act, includes a threat to legitimate order.³⁹⁵ Under the MCPMRPS these ground include internal conflict threatening humanitarian disasters or sub-regional peace and security, massive violation of human rights and overthrow or attempted overthrow of democratically elected governments. Article 25 also includes an omnibus clause which is undefined by the protocol. It is expected that the scope is determined through pragmatism and the practice of ECOWAS Member States.³⁹⁶

Expectedly, it is argued, continuously, that a regional organisation would be violating international law if it uses force against any state without UNSC authorisation except in collective self-defence.³⁹⁷ The same rule also applies where a treaty gives a regional organisation a “right” of unilateral intervention in a state without requiring the ‘contemporaneous consent’ of the target state and such treaty is void for violating Articles 2(4) and 103. The codification of the right of humanitarian intervention by ECOWAS and the

³⁹² Article 4(h) of the AU Act and Article 4(j) of the AUPSC Protocol. Although Article 4(f) of the AU Acts prohibits the use of force by Member States against one another, this does not apply to the AU itself.

³⁹³ N, Kirsch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council’, 3 *Max Planck Yearbook of United National Law* (1999), p.59.

³⁹⁴ J. Allain, ‘The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and the Iraq and the Emergence of the African Union’, *Max Planck United Nations Yearbook* (2004), p.238.

³⁹⁵ Protocol on the Amendments to the Constitutive Act of the African Union adopted by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique on 11 July 2003, amending Article 4(h) of the AU Act. See also, The Common African Position on the Proposed Reform of the United Nations: The ‘Ezulwini Consensus’. Executive Council 7th Extraordinary Session, 7-8 March 2005, Addis Ababa, Ethiopia. Ext/EX. CL/2 (VII), available at http://www.responsibilitytoprotect.org/files/AU_Ezulwini%20Consensus.pdf (accessed 15 April 2014). Here the AU maintains that self-defence under the UN charter remains the principal ground of execution to the prohibition of the use of force while maintaining the position of Article 4(h) authorising intervention in grave circumstances.

³⁹⁶ J. Iyi, ‘The AU/ECOWAS Unilateral Humanitarian Intervention Legal Regimes and the UN Charter’, 21 *African Journal of International and Comparative Law* (2013), p.497.

³⁹⁷ D.E. Acevedo, ‘Collective Self-defence and the Use of Regional or Sub-regional Authority as Justification for the Use of force’, 78 *American Society of International Law Proceedings*, (1984), p.73.

AU introduces a new dimension to the debate of the use of force because it seeks to protect individuals from atrocities of a grave kind which are usually the result of conflicts. Irrespective of the purpose of the use of force, even to halt mass atrocities in the territory of a state by a third state or a group of states, some international law scholars still insist on the permanency of the UN charter.³⁹⁸

However, an opposing argument which seeks to justify the normative evolution of a right of regional bodies to intervene in Member States has emanated. It proceeds on the basis that given the changes that have taken place since the end of the Cold War, the efficacy of the UN Charter in particular and international law in general can only be achieved if they are 'interpreted and applied in a manner commensurate with the requirements of an evolving international community'.³⁹⁹ It is argued that the trends in the development of international law norms in relation to the international protection of human rights, including the evolution of the Responsibility to Protect (R2P) norm,⁴⁰⁰ support the view that the use of force by external actors to prevent or halt massive human rights violations does not fall under Article 2(4).⁴⁰¹ Perhaps, the drafters of the UN Charter could not have anticipated the degeneration of global security in the aftermath of the cold war, which was in itself devastating to humanity. The much more realistic option would be that the principle of non-use of force should be

³⁹⁸ In this regard, Heidelberg adds that:

"If the members of a regional arrangement... agree that in a case of internal disturbances or other events within one of the States concerned, the other States can intervene with military forces without the consent of the de jure or de facto government, the compatibility of such a special agreement with the Charter becomes doubtful and must, in principle be denied. Here, the territorial integrity of all States and the prohibition of the use of force is at stake. An agreement permitting forceful intervention would hardly be compatible with the Charter and would fall under Article 103". See, R.B Heidelberg, 'Article 103', in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, (Oxford: Oxford University Press, 2002), pp. 121-122.

³⁹⁹ Acevedo (1984), p.70.

⁴⁰⁰ R2P is an emerging norm in international law which focuses on the responsibility of states to protect the individual from grave crimes including genocide, war crimes and crimes against humanity. See generally, F.M Deng, 'Frontiers of sovereignty', 8 *Leiden Journal of International Law* (1995), 249; J. Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect', 53 *Journal of African Law* (2009), 1; International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography and Background* (International Research Council, (2001); G. Evanns, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, (Washington: Brookings Institution, 2008).

⁴⁰¹ Iyi (2013), p.499. See also, F.R Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edn, Transnational (1007), p.150; F.K Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, (The Hague: Kluwer Law International, 1999), p.43; W.M Reisman, 'Criteria for Lawful Use of Force in International Law', 10 *Yale Journal of International Law* (1984-5), p.281.

juxtaposed with the community needs for collective intervention deployed in defence of human rights to halt mass atrocities⁴⁰².

The second aspect of normative incompatibility between the ECOWAS security regime and the UN Charter system rests on the primacy of the UNSC as the watchdog of international peace and security. Article 10(a) of the MCPMRPS which gives authoritative agency to the MSC, and Article 16(1) of the AUPSC which vests sole authority to the AU clearly clash with Article 24(1) of the UN Charter which confers the primary responsibility for the maintenance of international peace and security on the UNSC. It is not clear which of these organizations have the primary responsibility of maintaining peace and security in Africa in the case of AU and West Africa in the case of ECOWAS.

In effect, the MCPMRPS and the AUPSC protocols seek to dislodge the UNSC as the authoritative agency having primary responsibility for the maintenance of peace and security in Africa.⁴⁰³ The AU on its part recognizes its status as a chapter VIII regional organization under the UN Charter in relation to the maintenance of peace and security.⁴⁰⁴ But that is where the conformity with the Charter stops. Article 17(1) of the AUPSC Protocol recognises the primary responsibility of the UNSC in the maintenance of peace and security but at the same time, Article 16(1) allocates exactly the same role to the AUPSC. The AU has alluded to the primacy of the UN in maintenance of international peace and security, but reserves the right of unilateral action in Africa which only ‘reverts to the UN where necessary’.⁴⁰⁵

The ECOWAS MSCPRMS is mute on this matter. The Protocol is not so candid about its relationship with the UN in this respect, so reaching a conclusion in this regard might be fatal. However, by virtue of the powers vested on the MSC in Article 10, to perform the role reserved for the UNSC under the Charter, it is plausible that the MCPMRPS has the same effect as the continental framework. As earlier demonstrated in this study, ECOWAS had

⁴⁰² D. Kuwali, ‘The End of Humanitarian Intervention: The Evaluation of the African Union’s Right of Intervention’, 9 *African Journal of Conflict Resolution* (2012), p.44.

⁴⁰³ Iyi(2013), p.500. Article 17(1) of the AUPSC Protocol recognises the primary responsibility of the UNSC in the maintenance of peace and security but at the same time, Article 16(1) allocates exactly the same role to the AUPSC.

⁴⁰⁴ Ibid., p.57.

⁴⁰⁵ K. Aning, ‘The UN and the African Union’s Security Architecture: Defining an Emerging Partnership?’, 5 *Critical Currents* (2008), 11-23, p.17.

launched humanitarian interventions without the backing of any legal instrument in its peace and security or human rights corpus, necessitating the adoption of a robust, tightly-knitted security framework. It is understandable if ECOWAS and the AU insist on a right to intervention in African States without UNSC authorisation.

Commenting on the inconsistency of the MCPMRPS with UN obligations, Professor Margaret Vogt then of the UN Secretariat, who worked on the protocol as a resource person observed that the Mechanism ‘failed to recognize or adhere to the underlying principles of Article 53 of the Charter on enforcement action’.⁴⁰⁶ In response, the former Director of Legal Affairs of ECOWAS, Mr. Roger Laloupo, remarked that:

The meeting (of experts) considered these observations made by the Prof. (Mrs.) Vogt and was of the view that whilst the subregion appreciates the importance of its obligation under the United Nations Charter, its recent experience has shown that the cost of waiting for the United Nations authorisation could be very high in terms of life and resources.⁴⁰⁷

Waiting for UN authorization for intervention has in the past proven costly in conflicts in Africa. The Rwandan genocide often springs to mind as evidence that regional security mechanisms suited to the African continent is a necessity. The AU Act and AUPSC Protocol both reveal the determination of African states to take control of the use of force and humanitarian intervention in Africa, and not let history repeat itself. Numerous criticisms which the legal inconsistencies of both frameworks have attracted are justified in scholarly terms. But to dismiss the practical salience of these provisions ignores the circumstances and context in which they were adopted. As one scholar aptly explains ‘it is the peripheral role of Africa in the international system and the reluctance to commit troops and resources to Africa that is leading African leaders down the path of unilateral action, without concern for international endorsement’.⁴⁰⁸

Explaining the thinking of the leadership of African states in this regard, former president Thabo Mbeki of South Africa explains:

⁴⁰⁶ *Meeting of Expert on the Draft Protocol Relating to the Mechanism on Conflict Prevention, Management, Resolution, Peace-Keeping and Security* 17-19 November 1999, Lome Togo cited in Abass (2000), p.212.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Iyi (2013), p.511.

“Our view has been that it’s critically important that the African continent [deals] with these conflict situations on the continent... we have not asked anybody outside of the African continent to deploy troops to Darfur. It’s an African responsibility, and we can do it.”⁴⁰⁹

What is deductible from this view is that the aim of regional organizations in Africa is to retain the right to unilateral intervention in Africa. It appears that the agencies are prepared to obtain UNSC authorisation for the use of force where possible, but in the event of practical impossibility, be able to act without it.⁴¹⁰ It must be emphasized that although the vesting of authority to intervene in the UNSC has created problems in the past, that is not sufficient justification for the ECOWAS/AU right of intervention without UNSC approval or to suggest that such authorisation could be obtained after the fact.⁴¹¹ The UN Charter is silent on whether authorisation should be prior or post. It has been argued that to circumvent UNSC delays and politics of veto, *ex post facto* ratification by the UNSC can legalize regional humanitarian intervention.⁴¹² This view legitimizes ECOWAS’s intervention in Liberia and Sierra Leone.

Abass has argued that an unilateral humanitarian intervention under the ECOWAS/AU frameworks such as that of ECOWAS does not lack the ‘collective character’ of the international community represented by Security Council or General Assembly as enshrined in the UN Charter, just because it does not enjoy the support of Security Council *ab initio*. To clarify the conceptual issue of UN approval, he submits that a ‘distinction needs to be made between an action embarked upon by a collection of states, after the UNSC has determined under Article 39 of the UN Charter without being able to proceed further, and one taken without such determination’.⁴¹³ In all, he advises that the expected impact of the ECOWAS Mechanism on the UN collective security system should be measured by the parameters of its

⁴⁰⁹ See, Bush Discusses Mutual Goals with NATO, South African Leaders’, available at <http://www.eucom.mil/article/21619/Bush-discusses-mutual-goals-Nato-South-African> (accessed 15 April 2014).

⁴¹⁰ Aning (2008), p.17.

⁴¹¹ Iyi (2013), p.511.

⁴¹² J.N Moore, ‘The Role of Regional Arrangements in the Maintenance of World Order’, in C.E black and R.A Falk (eds), *The Future of the International Legal Order*, vol. III, (Princeton NJ, Princeton University Press, 1971), p.159.

⁴¹³ Abass (2000), p.225. He further recommends conditions that must be met by regional organizations to undertake enforcement actions where the Security Council fails to act. Firstly, the concerned regional organization must satisfy itself that the Security Council has failed to make an Article 39 determination purely for political rather than factual reasons. Secondly, that there exists within the affected region an overwhelming need to act forcefully in order to avert further catastrophes. Finally, that the Security Council cannot be expected to rise to the occasion.

compliance, or lack of it, with the suggested conditions and not particularly by the inconsistency of some of its provisions with the UN Charter.⁴¹⁴

However normatively illegitimate the ECOWAS and AU mechanisms might appear under international law, its importance to maintaining human security in a continually volatile continent is clear for even the worst sceptic to see. Questions over the encroachment on sovereignty of African states do not detract from the ‘fact that as legal instruments, they are bold, forward looking and ground-breaking’.⁴¹⁵ Globally, there has been a movement towards regional security arrangements, with regional organisations expected to play a more active role in the maintenance of peace and security within their regions.⁴¹⁶ Hammerstad examines the effect of this global shift towards regional security in Africa arguing that RECs in Africa are increasingly willing to replace “hard sovereignty” in terms of which interference in other Member States’ affairs is expressly forbidden, with regimes that allow for foreign intervention under defined circumstances.⁴¹⁷ Going by Hammerstad’s position, it appears that States are increasingly concerned about security risks generated by their neighbours arising from poor governance which inevitably leads to cross-border instability reflecting a dilution in the collective security approach under the UN Charter.

The unilateral intervention provisions contained in the ECOWAS framework apparently amount to an attempt to modernise the provisions of chapter VIII, in light of the past failings of the UN system, particularly in Africa. Drawing up a framework for unilateral humanitarian intervention which is normatively specific in the current state of global security is nothing short of wishing for a pie in the sky. Expectations of a framework that balances the politics of the UNSC while ensuring timely intervention in the numerous hotspots of conflicts in the world are unrealistic. The resources of the UN are particularly stretched at this point in history due to the fragile state of global financial climate, and the volatility of global security. Stronger regional security mechanisms ought to be supported as they can play a decisive role in their various regions. Strict normativity and codification is a far stretch at this point in

⁴¹⁴ Ibid.

⁴¹⁵ A. Abass, ‘The Future of Human Security in Africa’ in A. Abass (ed), *Protecting Human Security in Africa*, (Oxford: Oxford University Press, 2010), p.361.

⁴¹⁶ See generally M. Pugh & W.P Singh Sidhu (eds.), *The United Nations and Regional Security: Europe and Beyond* (Lynne Rienner Publishers, 2003); see also A. Hammerstad (ed.), *People, States, and Regions: Building a Collaborative Security Regime in Southern Africa*, (Johannesburg: South African Institute of International Affairs, 2005).

⁴¹⁷ Ibid., p.10.

time. Normative ambiguity in unilateral humanitarian intervention, on the other hand, is the practical reality and still ‘presents an array of advantages for all the main actors involved.’⁴¹⁸

3.4 DEMOCRACY AND GOOD GOVERNANCE

The African continent began to experience some key ‘constitutional moments’⁴¹⁹ at the beginning of the 1990s. One of the most significant cases of this constitutional revival occurred in the small West African country of Benin. In February 1990 protracted strikes and popular protests forced Mathieu Kérékou, the long-serving dictator of Benin, to convene a national conference. The conference,⁴²⁰ broadly representative, albeit extra-parliamentary, consisting of influential political, civic, and occupational groups and elites declared itself sovereign and proceeded to enact far-reaching changes to the country’s constitutional order.⁴²¹ The conference stripped Kérékou of all executive power, abolished the one-party system, installed an interim prime minister and legislature, and authorized the drafting of a new constitution that won popular approval as the basis for a democratic reconstitution of civil authority.

Kwesi Prempeh describes the impact of this constitutional moment on the African continent and contrasts it with the past:

“In the years since Benin’s precedent-setting transition, the unique mode of which quickly spawned imitators across francophone Africa, regime change and constitutional reform have been forced upon reluctant but beleaguered autocrats across east, west, central, and southern Africa. Single-party parliaments, military juntas, and presidents-for-life no longer dominate the political map of the continent, as they did at the end of the 1980s. By 1999, most African states permitted multiparty

⁴¹⁸ D. Richemond, ‘Normativity in International Law: The Case of Unilateral Humanitarian Intervention’, 6 *Yale Human Rights and Development Journal*, (2003), 45, p.78.

⁴¹⁹ Bruce Ackerman famously coined the word “constitutional moment” to refer to those groundbreaking events in a country’s constitutional development when previously acceptable practices of the extant constitutional order are repudiated and replaced with new understandings that are widely accepted by the populace as legitimate, even though the change might have occurred without recourse to the formal processes of constitutional change. See generally, B. Ackerman, *We the People: Transformations*, (Cambridge, Massachusetts: Harvard University Press, 1998).

⁴²⁰ The conference was modelled after the *états-généraux* of eighteenth-century revolutionary France. See G. Hyden, *African Politics in Comparative Perspective*, (Cambridge: Cambridge University Press, 2006), pp.107-108. Here the author describes parallels between the Benin National Conference and the French Third Estate of 1789).

⁴²¹ H. K Prempeh, ‘Africa’s “constitutionalism revival”: False start or new dawn’, 5 *International Journal of Constitutional Law*, (2007), p.469.

competition for legislative and presidential offices. The number of multiparty elections held in Africa in the last decade of the twentieth century alone was twice as many as in the entire three decades up to 1990.⁴²²

While these constitutional changes were taking place, some West African states were still faced with the challenges of unconstitutional changes in governments and military dictatorships. In Liberia and Sierra Leone for example, the eruption of decade-long civil wars saw numerous coups and counter-coups. ECOMOG sent troops into Liberia to assist the Interim Government of National Unity in 1990 and into Sierra-Leone in 1998 to assist the government of President Tejan Kabba which had been deposed in a coup. The controversies that trailed the legitimacy of both interventions accelerated the need for a supranational legal framework that guaranteed democratic constitutionalism as a regional norm.

The MCPMRPS put ECOWAS and its military arm (ECOMOG) on a permanent footing but fell short of preventing conflicts that emanate from undemocratic changes in government. In an attempt to deter and prevent military coups and unconstitutional changes in government ECOWAS adopted the Democracy and Good Governance Protocol (Protocol on Democracy) in 2001.⁴²³ Some of the key constitutional convergence principles shared by Member States under the protocol include:

- a) Separation of powers;
- b) Accession to power through free, fair and transparent elections;
- c) Zero tolerance for power obtained or maintained by unconstitutional means;
- d) Popular participation in decision-making, strict adherence to democratic principles and decentralisation of power at levels of governance;
- e) No serving member of the armed forces may seek to run for elective political
- g) The rights set out in the African Charter on Human and People's Rights shall be guaranteed in each Member State.⁴²⁴

⁴²² Ibid., p.471.

⁴²³ Protocol A/SP1/12/01 Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted at Dakar, Senegal on 21 December 2001.

⁴²⁴ Ibid., Article 1. The protocol also guarantees secularism and neutrality of the State in all matters relating to religion, non-discrimination on grounds of ethnicity, racial, religion and regional basis, freedom of political parties to carry out activities within the limits of the law, freedom of association and the freedom of press.

It is noteworthy that this normative shift in constitutionalism has also been manifested at the AU level. Article 30 of the Constitutive Act of the AU declares that “governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”⁴²⁵ Equally important, in this regard is the AU Charter on Democracy, Elections and Governance in Africa (ACDEG)⁴²⁶ which consolidated the principles enunciated in the Declarations and Decision adopted by the OAU on the same subject. Articles 23 to 26 of the ACDEG contain the AU definition of ‘unconstitutional governments’ and the sanction regime to deal with any such situation.⁴²⁷

3.4.1 KEY FEATURES OF THE PROTOCOL ON DEMOCRACY AND GOOD GOVERNANCE

Bearing in mind that ECOWAS Member States have been incompetent in conducting free and fair elections in the past, the Protocol on Democracy introduced new guidelines to ensure successful elections. Article 1(b) of the Protocol on Democracy requires that ‘every accession to power... be made through free, fair and transparent elections’. The modification of a country’s electoral law in the six months prior to an election is prohibited and elections have to be held within constitutionally mandated time periods.⁴²⁸ The independence of election-monitoring bodies is required as is the maintenance of electoral registers allowing people to vote equally, irrespective of race or gender.⁴²⁹ These provisions of the Protocol are unambiguously worded and failure to adhere to these requirements would attract the coercive measures such as the imposition of sanctions from ECOWAS.⁴³⁰

The drafters of the Protocol on Democracy clearly aimed to check various tactics that have been devised by African leaders in the past to hold on to power. This is reflected in the specificity of the provisions of the Protocol on elections. The Protocol also mandates ECOWAS election monitoring missions and mutual cooperation and support in elections. In

⁴²⁵ See also Articles 4(m) and 4(p) of the Constitutive Act.

⁴²⁶ Adopted at the 8th Ordinary Session of the African Union Assembly, Addis Ababa, Ethiopia on 30 January 2007.

⁴²⁷ On the application of the ACDEG and the new sanction regime of the AU, see Abass (2010), pp. 277-282.

⁴²⁸ Article 2 of the Protocol on Democracy.

⁴²⁹ F. Cowell, ‘The Impact of the Economy Protocol on Good Governance and Democracy’, 19 *African Journal of International and Comparative Law* (2011), 331, p.333.

⁴³⁰ Articles 44 and 45 of the Protocol on Democracy.

Enforcement mechanisms of the Protocol allow for exclusion of Member States from meetings, the non-recognition of governments in community of fora and sanctions.

The ‘constitutional convergence’ principles of the protocol are strongly worded, concise and unambiguous. This indicates that Member States agreed in the drafting process that domestic law should aim towards harmonisation on matters of succession.⁴³¹ In this regard, the Protocol clearly states that there shall be ‘zero tolerance for power obtained or maintained by unconstitutional means’.⁴³² The prohibitory nature of the protocol makes it difficult for any recalcitrant state to legally circumnavigate the provisions of the protocol. Even if it could be argued that the protocol is ‘soft law’, its combined reading with the AU law on unconstitutional changes of government reveals that Member States of both organizations intended to be bound by these instruments.⁴³³ These provisions conceptually legitimates ECOWAS’s actions when applying the protocol’s coercive measures as Member States are not only in violation of community law, pre-requisite of ECOWAS membership, but are also failing to adhere to their own domestic law.⁴³⁴

3.4.2 POTENTIAL LEGAL EFFECT OF THE PROTOCOL FOR DEMOCRACY.

One of the most debated aspects of the law of succession is the legitimacy of a government that assumes power through unconstitutional means. Under constitutional law, judges have the responsibility to rule on the status of decrees issued by a ‘coup government’. They are often asked to consider the increasingly political question of the legitimacy of the government in question and the coup that brought it to power.⁴³⁵ The Kelsenian theory of revolutionary law which is often deployed in legal argument in this regard, posits that after a revolution the extant legal order is completely reorganized.⁴³⁶ Kelsenian principles have been applied by the Supreme Court in Nigeria to hold that a coup dispenses with the whole ore-

⁴³¹ Cowell (2011), p.333.

⁴³² Article 1(c) of the Protocol on Democracy.

⁴³³ K.S.A Ebeku, ‘The Succession of Faure Gnassingbe to the Togolese Presidency: An International Law Perspective’, 30 *Current African Issues*, Nordiska Afrikaninstitutet (2005), p.13.

⁴³⁴ Cowell (2011), p.334.

⁴³⁵ *Ibid.*, p.336.

⁴³⁶ See generally, J. Hatchard & T.I Ogowewo, *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth*, Commonwealth Secretariat Publications (2003).

existing legal order.⁴³⁷ On the contrary, the Supreme Court in Ghana, previously rejected Kelsenian arguments, and referred to it as ‘fictitious’.⁴³⁸

The legal status of the Protocol on Democracy in ECOWAS Member States creates a system where the Kelsenian position of the sort described above is not sustainable. The Protocol is of equal legal effect as the ECOWAS treaty to which Member States are bound and successive governments must be bound by.⁴³⁹ Although the treaty is yet to assume direct effect in Member States, Member States are required to interpret domestic law in line with the Treaty.⁴⁴⁰ As the protocol binds Member States into only recognizing democratic succession as legal, a coup government cannot be recognized as legal by a domestic court due to the nature of its succession. At the very least the protocol is subject to a degree of entrenchment, making it difficult to set aside a ‘pre-coup’ constitution.⁴⁴¹ This leaves the judiciary susceptible to personal attack, interference from the executive or to their power being undermined by military government following an unfavourable decision, as has been the case in the past.⁴⁴²

Since ECOWAS is an intergovernmental organization, bilateral recognition is technically affected by the existence of a protocol that binds Member States. Consequently, only the collective political action agreement by Member States can give effect to economic sanctions or military action. Regional precedents have shown that states involved in such collective action may, in the absence of a legal provision, alter their bilateral relations with the erring state. Collective action is, however, determined by political mechanisms and there are no provisions in the protocol to ensure that Member States consider such actions. For example, Senegal disagreed with the AU over its position during the 2008 coup in Mauritania and flayed the AU decision on suspension.⁴⁴³ There is no punitive measures in the protocol on

⁴³⁷ *Attorney General of the Federation vs Guardian Newspapers Limited* [1999] NWLR 187.

⁴³⁸ *Salleh vs Attorney General (unreported) 20 April 1970*; see Hatchard & Ogowewo supra n.433 for full text.

⁴³⁹ See B. Ajulo, ‘Sources of Law of the Economic Community of West African States’, 45 *Journal of African Law* (2001), pp.73-96.

⁴⁴⁰ Under Article 5(2) of the revised treaty Member States undertake to take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the Treaty.

⁴⁴¹ Cowell (2011), p.336.

⁴⁴² See, *Lakanmi vs AG (Western State)* (1972) 1 University of Ife Law Review 201.

⁴⁴³ D. Ba, ‘Senegal Opposes Sanctions on Mauritania over Coup’, Reuters, 22 October 2008, available at <http://in.reuters.com/article/id/INLM22263420081022> (accessed 15 April 2014).

dealing with a state that ‘breaks ranks’ or that continues to bilaterally cooperate with a recalcitrant Member State, contrary to community sanctions.⁴⁴⁴

The protocol by setting up a standard for legitimacy also provides clarification in cases of contested multilateral legitimacy, where two governments both maintain that they are the true government of the sovereign territory.⁴⁴⁵ This had previously arisen when members of the OAU opposed the recognition of the new government of Ghana who had come to power via a coup.⁴⁴⁶ The legal test that emerged to solve such disputes used to be one of empirical control of the territory, rather than legitimacy of succession. The test of empirical control remained the norm when determining representational questions until the early 1990s and prior to then the legitimacy of succession was rarely considered in multilateral fora.⁴⁴⁷

3.4.3 SHORTCOMINGS OF THE PROTOCOL ON DEMOCRACY

The constitutional convergence principles enshrined under the protocol are commendable, but the protocol is incomplete in certain aspects. The later part of the protocol focuses on issues such as poverty reduction and the promotion of social dialogue as well as good governance and democracy. These issues do not fall within the rubric of ‘constitutional convergence’ and are formulated in a non-mandatory, aspirational manner. Even some areas relating to democracy and the conduct of elections are imprecisely formulated. For example, Article 1(k) of the Protocol simply states that ‘the freedom of the press shall be guaranteed’ but this is far from an actionable or a measurable provision, making it difficult for the protocol’s coercive sanctions to be applied for a breach of these obligations.⁴⁴⁸

Another shortcoming of the protocol is the possibility of misinterpreting some of its provisions on elections. This aberration occurred in the 2010 Ivory Coast crisis. When Article 7 and 9 are read conjunctively, a losing candidate that disputes an election result should abide by ‘guidelines...stipulated by law’.⁴⁴⁹ Under the Ivory Coast constitution, the Constitutional

⁴⁴⁴ Cowell (2011), p.337.

⁴⁴⁵ Ibid.

⁴⁴⁶ K.O Kufour, ‘The OAU and the Recognition of Governments in Africa: Analysing its Practices and proposals for the Future’, 17 *American University International Law Review* (2002), pp.372-377.

⁴⁴⁷ B.Roth, *Governmental Illegitimacy in International Law*, cited in Cowell (2011), p.337.

⁴⁴⁸ Cowell (2011), p.334.

⁴⁴⁹ Article 9 of the Protocol on Democracy.

Council is the body tasked with arbitrating election disputes, and in December 2010 it declared President Laurent Gbagbo as the legal winner of the presidential election. Gbagbo applied to the Council through appeal after the UN-backed Independent Electoral Commission (IEC) had previously ruled that Alassane Ouattara was the legitimate winner of the election. It was, however, widely suspected that Gbagbo influenced the Constitutional Council. Yet the Council's decision remained lawful as the constitution provides that the Council is the final source of authority on election disputes. Because there is no mechanism in the protocol to appeal a decision on election disputes to ECOWAS, or which permits investigations into corruption in domestic institutions, Gbagbo technically complied with the protocol by honouring the Constitutional Council's decision.

The ambiguity on the issue of mechanisms for solving election disputes allowed Gbagbo to legitimise his actions during the Ivory Coast electoral crisis of 2010. In order to avert a similar scenario from occurring in another Member State, two solutions have been recommended. First, the protocol could be amended to clarify the status of monitoring mechanisms they set up. Second, the protocol could set up a division in the ECOWAS Community Court of Justice (ECCJ) to entertain appeals to clarify ambiguities or hard cases under the protocol.⁴⁵⁰ This would help further entrench democratic values in Member States and develop the visibility of the Court.⁴⁵¹

As earlier indicated, the protocol is also imprecise with regards to implementation of sanctions. Under Article 45 the only sanctions ECOWAS can directly impose are limited political sanctions relating to individual states' membership of ECOWAS, such as suspension from ECOWAS meetings. Other wider economic sanctions depend on an agreement by Member States at the Heads of government level and on the actions of other multilateral organizations that Member States belong to. The AU has shown in the past that sanctions are not just a procedural issue and that they are vital for the promotion of the democratic norms. The AU wasted little time in publically condemning the political events that occurred in Mauritania in 2008. Following the August 6th coup in Mauritania, the AU made it clear that it would suspend Mauritania's membership in the organisation until constitutional order had been restored. The Peace and Security Council of the AU imposed a travel ban on civilians

⁴⁵⁰ Cowell (2011), p.341.

⁴⁵¹ The role that courts can play in electoral disputes has been considered in J.Widner, 'Courts and Democracy in Post-conflict Transitions: A Social Scientist's Perspective on the African Case', 95 *American Journal of International Law* (2001), 64.

and soldiers in the military government as well as froze off their assets.⁴⁵² Continuous pressure led to the formation of a transitional government, divided between civilian politicians and soldiers that was established to take hold of government until elections could be held in July 2009.⁴⁵³

The constitutional convergence provisions of the protocol reflect current legal thinking at the AU level that coups are unlawful. The African Commission has held that coups violate people's rights to free expression, assembly and participation in their government as enshrined in the African Charter on Human and Peoples' Rights.⁴⁵⁴ However, the Protocol's practical application has focused almost exclusively on the threat of unconstitutional changes of government and not on enforcing norms and promoting good governance.⁴⁵⁵ Despite these gaps, the protocol adopts a holistic approach to democracy by covering a broad spectrum of issues pertaining to the maintenance and furthering of democratic ideals. Therefore, the protocol is an important addition to the ECOWAS human rights framework.

3.5 HUMAN RIGHTS & FUNDAMENTAL FREEDOMS UNDER ECOWAS LEGAL FRAMEWORK.

The traditional philosophy of human rights as rights that accrue to human beings on the basis of a collective humanity is the first possible understanding of human rights within ECOWAS legal framework. The Czech-French Jurist and first Secretary of the International Institute of human rights Karel Vasak classified human rights into three generations.⁴⁵⁶ The first generation refers to civil and political rights prominent in Western liberal democracies; the second generation or group rights refer to economic, social and cultural rights. These rights

⁴⁵² See, African Union: Communiqué of the 164th meeting of the Peace and Security Council – Mauritania, Addis Ababa, 27 December 2008. Here the PSC declared that if constitutional order was not restored in Mauritania by February 5th 2009, the PSC 'will impose measures, including targeted sanctions, in particular visa denials, travel restrictions and freezing of assets, to all individuals, both civilian and military, whose activities are designed to maintain the unconstitutional status quo in Mauritania.'

⁴⁵³ M.Mackay, 'The Return of the Military Coup to West Africa: The Africa Union Response', Master's Thesis, University of Witwatersrand, (15 February 2010), available at <http://wiredspace.wits.ac.za/handle/10539/8321?show=full><http://wiredspace.wits.ac.za/handle/10539/8321?show=full> (accessed 15 April 2014), pp. 38-40.

⁴⁵⁴ Communications 147/95 and 149/95, *Sir Derek K. Jawara v The Gambia*, 13th Annual Activity Report of the African Commission on Human and Peoples' Rights, AHG/222 (XXXVI), Annexes I-V and Addendum 95.

⁴⁵⁵ On the practical shortcomings of the protocol see, Cowell (2011), pp.337-341.

⁴⁵⁶ V. Karel, 'Human rights: A 30 year struggle. The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights'. 30 *UNESCO Courier*, (1977), pp. 29-32.

are rights which require affirmative government action for their realisation. They are often styled as group rights or collective rights in that they pertain to the well-being of whole societies. Third generation rights or solidarity rights are the most recently recognized rights and is the less official of all three rights. This grouping of rights is predicated not only upon both affirmative and negative duties of the state, but also upon the behaviour of each individual.⁴⁵⁷ These include the right to development (RTD), the right to peace, the right to a healthy environment and the right to intergenerational equity. Despite this generally accepted classification, there exists some dichotomy in the recognition of rights in different regional human rights systems.⁴⁵⁸

A 'fourth generation' of rights have recently been suggested by GAL proponents. This generation of rights are drawn from administrative justice and is said to have originated from Europe in the 1990s.⁴⁵⁹ These rights, which take the shape of 'principles of good administration', cover the central ground of modern administrative law. An excerpt of this category can be found in Article 6(1) of the European Convention on Human Rights⁴⁶⁰ (ECHR) which provides for 'a fair and public hearing within a reasonable time by an independent and impartial tribunal' in any case involving a determination of a person's civil rights and obligations'. This clause has so far, proven to be influential in the field of GAL. These due process rights have gained increased popularity since the discipline of GAL surfaced in international law. However, due process rights have since been accepted by common law systems and received recognition in other systems.⁴⁶¹ These rights are yet to gain universal recognition and have remained the preoccupation of European and American administrative scholarship.

⁴⁵⁷ O. C Ruppel, 'Third-generation Human Rights and the Protection of the Environment in Namibia', in N. Horn & A. Bösl (eds.), *Human Rights and the Rule of Law in Namibia* (Windhoek: Macmillan, 2008), p.103.

⁴⁵⁸ The African regional human rights system is generally credited with innovative protection of the three generations of rights in the African Charter on Human and Peoples' Rights while different generation of rights enjoy varying degree of force in the Inter-American and European Systems. This clustering of all the three generation of rights in a single document has also been the source of constant criticism of the African Charter, which has been labelled as being over ambitious. See R. W Eno, 'The African Human Rights System: 30 years after the adoption of the ACHPR' in M. Sseyonjo (eds.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Boston: Martinus Nijhoff, 2012).

⁴⁵⁹ C. Harlow, 'Global Administrative Law: The Quest for Principles and Values', 17 *European Journal of International Law*, (2006), 187, p.206.

⁴⁶⁰ Entered into force 9 March 1954, 213 UNTS 221.

⁴⁶¹ For a global survey, see S. Guinchard et al., *Droit processuel, Droit Commun et droit compare du process (5th Edition*, Dalloz- Sirvey, 2009).

ECOWAS as a sub-regional organization does not possess its own catalogue of human rights. The expectation is that human rights should not be defined differently from the African Charter on Human and Peoples' Rights⁴⁶² (African Charter) which serves as the continental rule book on human rights. From a practical perspective, the understanding of human rights under the ECOWAS legal framework is derived from human rights instruments adopted by reference in the revised treaty and other community instruments, and this may entail a variety of sources. The Preamble of the Revised Treaty explicitly mentions the African Charter and the Declaration of Political Principles of ECOWAS as documents that guide the community.⁴⁶³ This suggests that the Declaration of Political Principles and the African Charter are fundamental in the ECOWAS definition of rights and are significant in their guarantee of human rights.⁴⁶⁴ Consequently, human rights within the rubric of ECOWAS may be understood as consisting of all generation of rights provided in instruments referred to by Community instruments and legislations.

Having ascertained the components of the ECOWAS human rights framework, it is important to consider the substantive provisions of law upon which the community protects and enforces human rights. From a constitutionalist perspective four elements make up the legal order of an international institution.⁴⁶⁵ First, rules for conduct must be present. Secondly, there must be entities to which the rules apply or relate. These are the subjects of the legal system. The legal system confers benefits and imposes burdens on the subjects. Third, there must be authority to identify the rules that form part of the legal system.⁴⁶⁶ The final element is an obligation to obey the norms of the legal system. This obligation is enforceable through both public and private means.⁴⁶⁷ Hence, it is within the provisions of the constitutive treaty

⁴⁶² African Charter on Human and Peoples' Rights (Adopted 27 June 1981, entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM. 58 (1982).

⁴⁶³ Roach argues that contemporary preambles often seek to establish legitimacy by providing a narrative of the origins and purposes of a legislation. He further adds that, while preambles have been excluded from working versions of the law, they are still important to better outline purposes and processes which led to an enactment of a particular statute or legislation. See generally, K. Roach, 'The Uses and Audiences of Preambles in Legislation' 47 *McGill Law Journal* (2001) 129, pp. 129 – 159.

⁴⁶⁴ The ECOWAS Court has repeatedly relied on these instruments to reach key decisions and a handsome number of cases where brought on the basis of these two instruments.

⁴⁶⁵ See generally J. Raz, *The Concept of a Legal System; An Introduction to the theory of the Legal System* (2nd Edition, New York: Oxford University Press, 1980); J.W Harris, *Law and Legal Science: An Inquiry into the concepts of legal rule and Legal System* (Oxford University Press, 1979); D.M McRae, *Sovereignty and the International Legal order*, 10 *Western Ontario Law Review* (1971) pp 55- 67.

⁴⁶⁶ McRae (1971), p.67.

⁴⁶⁷ R.F Oppong, 'Observing the Legal System of the Community: The Relationship between Community and National Legal Systems under the African Economic Community Treaty' 15 *Tulane Journal of International and Comparative Law* (2007), 41, p.50.

and other acts of the community that these rules of conduct (substantive values) can be traced.

Ajulo classifies sources of ECOWAS law into two broad categories of primary and secondary sources. He identifies ECOWAS Treaties (1975 and Revised Treaty), the protocols and conventions, treaties with third countries, legislations of the ECOWAS parliament, and other sources referred to in the treaty, as primary sources of ECOWAS law. He further classified subordinate legislation of other community organs, customary international law, general principles of law, judicial decisions, teachings of highly qualified publicists and ECOWAS 'internal law' as secondary sources of law.⁴⁶⁸ These legal instruments form the sources of community law and within its texts the provisions on human rights protection and enforcement can be found.

3.5.1 PROVISIONS OF THE REVISED TREATY

One of the features of the 1975 Treaty regime was its incomplete legal framework. Therefore, there was no mention of human rights anywhere in the treaty and no provision of the treaty could lead to a deduction of an intention to protect human rights. Conversely, in the preamble to the 1993 Revised Treaty, Member States alluded to the African Charter on Human and People's Rights and the Declaration of Political Principles of ECOWAS as some of the background materials considered in drafting the Revised Treaty. The reference of the preamble to the Revised Treaty to the African charter arguably signalled the intent of member states to uphold human rights as one of the principal values of the community. However, the mere mention of these human rights instruments in the preamble does not make the rights contained therein automatically enforceable by community citizens.

The Revised Treaty sets out four fundamental freedoms guaranteed in the community. These are the free movement of persons, goods, services and capital. The treaty also establishes the right to residence and establishment.⁴⁶⁹ The treaty also does not couch these four freedoms in clear rights language but only guarantees these freedoms as steps towards establishment of a common market. The indispensability of these four freedoms to economic integration was

⁴⁶⁸ S. B Ajulo, 'Sources of the Law of ECOWAS', 45 *Journal of African Law*, (2001), 73, pp. 82-91.

⁴⁶⁹ Article 3(2) (d) (iii) of the Revised Treaty.

further strengthened by Article 59 which enjoins Member States to guarantee the ‘right of entry, residence and establishment’ of citizens of the Community’, and an undertaking by ECOWAS member states to recognize ‘these rights of Community citizens’. Thus, it can be advanced from these provisions that Member States intended to provide and protect rights, under the guise of economic freedoms.

Article 4 of the Revised Treaty also contains significant human rights provisions as fundamental principles of ECOWAS. In Article 4, member states, in pursuit of community objectives, solemnly affirmed and declared their adherence to principles such as the maintenance of regional peace, stability and security;⁴⁷⁰ accountability, economic and social justice and popular participation in development;⁴⁷¹ and promotion and consultation of a democratic system of governance in member states.⁴⁷² These provisions are in tandem with the dimensions earlier discussed in this chapter that constitute the understanding of human rights in the ECOWAS regime. The most directly related provision of the treaty to human rights is Article 4(g) which requires member states to adhere to the ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter. These references to rights in the Revised Treaty certainly do not directly impose obligations on ECOWAS since they are merely fundamental principles, which are intended to guide the operation of the organization’s activities. However, these principles remain significant as they reveal the considerations of the organization towards attaining its purpose.

Attached to the provisions already discussed above, the Revised Treaty also commits 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.⁴⁷³ The declaration of Political Principles is quite detailed in the commitments of Member States towards the realisation of human rights in the community. In contrast, the 1975 treaty does not reveal any commitment by Member States to protect human rights. However, the African Charter was adopted at about the same period as the Declaration of Political Principles, and it was no surprise that member states declared their full adherence to respect human rights and fundamental freedoms in all their plenitude.⁴⁷⁴ Member States also vowed to promote and

⁴⁷⁰ Article 4(e) of the Revised Treaty.

⁴⁷¹ Article 4(h) of the Revised Treaty.

⁴⁷² Article 4(j) of the Revised Treaty.

⁴⁷³ Article 56(2) of the Revised Treaty.

⁴⁷⁴ Preamble of the Declaration par. 8(4).

encourage the full enjoyment by all its peoples of their fundamental human rights, especially their political, economic, social, cultural and other rights inherent in the dignity of the human person and essential to his free and progressive development.⁴⁷⁵

The Revised Treaty may not be considered a human rights instrument in itself, but it contains adequate reference to human rights in the same manner as the introductory texts of other international institutions such as the United Nations (UN Charter), the Charter of the defunct OAU and the Constitutive Act of the AU. Judging the provisions of the revised treaty alone, it may be argued that ECOWAS does possess the ‘right to rule’ in the area of human rights protection. At the least, these provisions form the legal foundations for the allocation of rights and obligations in human rights, which can sufficiently sustain claims for, and institutional competence in human rights. The CEP as part of its recommendations warned:

... as the world shrinks more and more into a global village... peoples’ awareness of events in other parts of the world... have brought into focus the concentration, the natural feelings of sympathy and human solidarity and the urge to protect and enhance certain fundamental values.⁴⁷⁶

This was an early indication of the path the community was willing to thread, and being that the drafters of the revised treaty heeded this warning by including other human rights instruments in the course of treaty amendment suggests that member states recognized that the economic objectives of the community are better achieved in an environment where human rights is the utmost priority.

3.5.2 PROTOCOLS OF THE COMMUNITY

In 2006 the revised treaty was amended by a supplementary protocol⁴⁷⁷ to usher in a new legal regime in the community. Under the new regime community acts are to be known as Supplementary acts, regulations, directives, decisions, recommendations and opinions.⁴⁷⁸. Prior to the introduction of this legislative regime, ECOWAS community law-making was

⁴⁷⁵ Ibid., Par. 8(5).

⁴⁷⁶ CEP report, para.44 cited in Kufour (2006), p.143.

⁴⁷⁷ Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty (Supplementary Protocol A/SP.1/06/06).

⁴⁷⁸ Article 9 of Supplementary Protocol supra.

mostly by way of protocols. Protocols serve as the instruments through which the scope of the main treaty is extended. As a result, some of the most elaborate provisions relating to human rights within the ECOWAS legal framework is contained are contained in protocols. It is important to note that under Article 1 of the revised treaty, protocols of the community have the same force of law as the treaty but are treated differently here for analytical convenience.

Earlier on, it was established after a careful reading of the 1975 Treaty, that it contained no human rights provisions in its body. However, some protocols made pursuant to the treaty contained few provisions on human rights although in the form of economic freedoms. The first of these protocols was the Protocol relating to the Free Movement of Persons, Residence and Establishment.⁴⁷⁹ Subsequently, the protocols became more precise in language, explicitly mentioning human rights, albeit to regulate the enjoyment of economic freedoms under the Trade Liberalisation scheme.⁴⁸⁰ As demonstrated earlier in this chapter, ECOWAS protocols have been under the new treaty regime constantly reflect the human rights aspirations of ECOWAS Member States. This demonstrates a change of attitude by ECOWAS Member States towards the actualisation of human rights in the community.

3.5.3 SECONDARY LAW (SUBORDINATE LEGISLATION & SOFT LAW).

The question on whether ‘soft law’ constitutes law has long been debated by international law scholarship without any acceptable consensus. This has prompted some scholars to suggest that the concept is jettisoned due to its redundancy⁴⁸¹. Klabbers argues that the idea of soft law not only does it rest on shaky presumptions, but also fails to find support in state and

⁴⁷⁹ 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. This was a key feature of the Trade Liberalization scheme which failed in the first regime.

⁴⁸⁰ 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.17/85), for example, refers to human rights at least five times. Article 3 of the protocol safeguards the rights of community citizens facing expulsion for illegal immigration.

⁴⁸¹ J. Klabbers, ‘The Redundancy of Soft Law’, 65 *Nordic Journal of International Law* (1996), p.167.

judicial practice.⁴⁸² He concludes that ‘it is not necessary to resort to the soft law thesis to do justice to political considerations.’⁴⁸³

Klabbers may be right in his submission that soft law defies the normative character of law as creating obligations and at the same time capturing different moods and sentiments including political considerations of states. But international relations scholars still insist on applying the soft law thesis particularly in the context of the legalization process of international institutions.⁴⁸⁴ Abbott and Snidal argue that international actors choose softer forms of legalized governance that offer superior institutional solutions. They specify between hard legalization or hard law (representing treaties and other legal arrangements that aim to guide specific substantive or political problems) and soft law, which they argue represent the weakening of legal arrangements on the basis of obligation, precision, and delegation.⁴⁸⁵

This distinction is important in understanding the nature of subordinate or subsidiary legislation of international organizations such as ECOWAS and the extent to which they are binding. The revised treaty as part of its reforms established additional community organs. In order for these organs to function effectively they must make decisions that have legal force. Additionally, they may also issue directives and regulations that are none binding but only serve to ensure uniform implementation of community policies or for inter-regulation of community institutions.

The supplementary protocol amending the revised treaty provides for various modes of applicability of legislative instruments under the new regime. The Authority shall adopt Supplementary acts which shall be annexed to the Treaty;⁴⁸⁶ The Council shall enact Regulations, issue Directives, take Decisions or formulate Recommendations and Opinions.⁴⁸⁷ Legislative power is also vested on the Commission which may adopt rules

⁴⁸² Ibid., pp. 168 – 169. The presumptions that there are various international legal orders to be utilized at will and the conception that states are at will to conclude whatever they wish to conclude (hard law or soft law).

⁴⁸³ Ibid., p.182.

⁴⁸⁴ Di Robilant ranks softness to be among the defining features of post-modern epistemology, highlighting the use as far as ‘soft logic’ in scientific and mathematical reasoning and soft heuristics that pervade philosophy, aesthetics and art. Lawyers have also caught up in the quest for softness. See, A. Di Robilant, 54 ‘Genealogies of Soft Law’ *American Journal of Comparative Law* (2006) p.499.

⁴⁸⁵ K. Abbott and D. Snidal, ‘Hard Law and Soft Law in International Governance’, 54 *International Organization* (2000), 421, p.422.

⁴⁸⁶ New Article 9 introduced by article 2 of the Supplementary Protocol A/SP.1/06/06.

⁴⁸⁷ Ibid., 2(b).

relating to the execution of Acts enacted by the Council of Ministers.⁴⁸⁸ The Authority is the supreme institution of the community.⁴⁸⁹ Accordingly, supplementary acts adopted by the Authority shall be binding on community institutions and Member States, where they shall be directly applicable.⁴⁹⁰ Directives shall also be binding on member states in terms of objectives to be realized, but member states are free to adopt modalities they deem appropriate for the realization of such objectives.⁴⁹¹

Legislations of other community organs that are none binding may also constitute sources of human rights. Under the new legal regime, the Council of Ministers and the Commission may ‘formulate’ non-binding Recommendations and Opinions respectively.⁴⁹² The Community parliament (through its highest body - the Plenary) may also adopt non-binding ‘Resolutions of Parliament’ in accordance with the Treaty and other legal texts of general application to institutions of the community.⁴⁹³ These resolutions shall be forwarded to other decision-making bodies of the Community.⁴⁹⁴ Resolutions together with Recommendations, Opinions and Declarations make up non-binding sources of ECOWAS law. These non-binding instruments appear to suit Abbott and Snidal’s characterization of delegated legislation as ‘soft law’.

Soft laws may not qualify as law, but they are utilized to station harder legalization. Furthermore, they offer many of the advantages of hard law, avoid some of the costs of hard law, and have certain independent advantages of its own.⁴⁹⁵ Within the legal framework of the ECOWAS community these subsidiary instruments conduct or regulate member state activities but do not impose obligations nor create formal sanctions, in the same way as the treaty or other subsidiary legislation of the community. In the same vein, the provisions of

⁴⁸⁸ Ibid., 2(c).

⁴⁸⁹ Article 7(1) of the Revised Treaty.

⁴⁹⁰ Supplementary Protocol A/SP.1/06/06 supra, Article 3.

⁴⁹¹ Ibid., article 2(5). Directives could be likened to the economic integration Principle of ‘variable geometry’ which gives member states in an RTA particularly the poorest members: (i) policy flexibility and autonomy to pursue slower paces time-table trade commitments and harmonization objectives; (ii) mechanisms to minimize distributional losses and (iii) preferences in industrial allocation among members in RTA and preferences in the allocation of credit and investments from regional banks. Gathi believes variable geometry is a central feature of African RTAs and therefore limits more ambitious trade liberalization goals. See generally J.T Gathi, ‘African Regional Trade Agreements as Flexible Legal Regimes’, *20 Working Paper Series, Albany law School* (2009), p.32.

⁴⁹² Article 2(b), (d) of New Article 9 supra.

⁴⁹³ Article 16(2) of the Protocol of the ECOWAS Parliament introduced under article 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).

⁴⁹⁴ Ibid.

⁴⁹⁵ Abbott and Snidal (2000), p. 423.

these instruments may create voluntary human rights obligations for Member States without attracting the usual sanctions in the event of a breach. One of the independent advantages of soft law appears to be its instrumental value in interpretation of treaty objectives, especially tailored to non-judicial means of dispute settlement. This view is opposed by realists who fear that increasing use of soft law might ‘destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose’.⁴⁹⁶ However, soft laws may serve an instructive purpose, as actors learn about the impacts of agreements over time – transforming to ‘hard law’ in the process. For example, the ECOWAS *Declaration on Political Principle* was initially soft law under the 1975 constitutional epoch but was subsequently integrated into the revised treaty promoting it to the status of hard law.⁴⁹⁷

While instruments like the Declaration on political principle may not be enforceable against Member States, they remain useful for non-judicial demand and implementation of rights. In the absence of a definite catalogue of rights and against the variety of binding documents within the ECOWAS legal framework these instruments represent specific documentation of rights and are arguably more significant for the protection of human rights in the community. The downside of soft law is its potential to be compromised especially as states try to regularize their asymmetric relations.⁴⁹⁸ However, in the context of subsidiary legislation of community organs, they form a crucial part in the negotiation process of eventual hard law. Soft law is flexible and may serve as a tester for eventual hard law because their non-binding nature may reduce the potential for conflict with existing mechanisms. Whether they constitute law in the traditional sense or not, they form an intrinsic part of the practice of international organizations.

⁴⁹⁶ P. Weil, ‘Towards Relative normativity in International law?’ 77 *American Journal of International Law*, (1983), 413, p.423.

⁴⁹⁷ Mansour argues that the single act of integrating the Declaration of Political Principles in the preamble of the Revised Treaty, gives it binding status. 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://www.escr-net.org/.../RelationshipbetweenECOWASCourtandAfricanCourt.doc>. (accessed 15 April 2014).

⁴⁹⁸ Going by Klabbers’s reasoning this defeats the essence of law as creating obligations that are sanctionable. However, weaker States often seem to negotiate on the side of soft law as they seek to re-negotiate the asymmetric relations with stronger States. See generally, A. E Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, 95 *American Journal of International Law* (2001), 757.

3.5.4 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples' Rights (African Charter)⁴⁹⁹ is considered by many to be the central instrument for regional human rights protection in Africa. Frans Viljoen refers to the African Charter and other OAU/AU treaties as encasing the 'shared value' systems of Africans.⁵⁰⁰ The African Charter by way of reference in the instruments of the community first appeared in the 1991 and has been consistently referred to in the major legislative documents of the community since then.⁵⁰¹ However, the most important reference to the African Charter remains the revised treaty.

As highlighted earlier, the preamble of the revised treaty, as well as Article 4 on fundamental principles of the community all refer to the African Charter. Article 56(2) of the revised treaty on political affairs enjoins member states of the community to co-operate towards the realisation of the African charter for the purpose of realising the objectives of the instrument.⁵⁰² The Constitutive Act⁵⁰³ of the African Union which all ECOWAS member states are signatory to, has as part of its objectives, the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.⁵⁰⁴ Therefore the African Charter is indispensable to the realisation of human rights in the continent and forms a normative source of the human rights system of ECOWAS.

3.5.5 SUPPLEMENTARY INSTRUMENTS OF THE OAU/AU

Over the years a number of other important normative human rights documents have been adopted in Africa to supplement the African Charter.⁵⁰⁵ Some of the important instruments

⁴⁹⁹ OAU Doc. CAB/LEG/67/3/ Rev.5 (1981).

⁵⁰⁰ F. Viljoen, 'Human Rights in Africa: Normative, Institutional and Functional complementarity and distinctiveness', 18 *South African Journal of International Affairs* (2011), 191, p.197.

⁵⁰¹ The first time the African Charter appears in any community document is in Declaration of political principles.

⁵⁰² Other community legislations that refer to the African Charter include, article 2 of the Mechanism for conflict prevention, article 4 of the Democracy Protocol.

⁵⁰³ OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001.

⁵⁰⁴ Article 3(h) of the Constitutive Act.

⁵⁰⁵ For a compilation of key African union human rights instruments see generally C. Heyns and M.Kilander (eds), *Compendium of Key Human Rights Documents of the African Union*, 4th Edition (Pretoria: Pretoria University Press, 2010). These instruments can also be accessed on the AU website: <http://www.au.int/en/treaties>.

worthy of mention include the African Charter on the Rights and Welfare of the Child,⁵⁰⁶ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.⁵⁰⁷ Other documents include; Convention Governing the Specific Aspects of Refugee Problems in Africa,⁵⁰⁸ Cultural Charter for Africa,⁵⁰⁹ the African Youth Charter, the African Charter on Democracy, Elections and Governance,⁵¹⁰ as well as the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons (Kampala convention).⁵¹¹ The Kampala convention is the first instrument in human history to state formal guidelines to handle the plight of millions of internally displaced people.

Nowhere in the world is the need for such guideline more urgent than in Africa where there has been a chequered past of internecine wars which has displaced millions of people.⁵¹² ECOWAS is making practical arrangements in this area. Although there is no protocol for internally displaced people, the community places the resettlement and reintegration of displaced community citizens high on its priority development projects.⁵¹³ The community through the ECOWAS Peace Fund, the African Development Bank (AfDB), the UN High Commission for Refugees (UNCHR) and the Liberia Refugee Repatriation and Resettlement Commission (LRRRC) has recently constructed four estates in Liberia's Grand Cape Mount and Bomi counties. These estates offer more than just shelter for refugees, the programmes encompasses other social interventions including market facilities, community halls, water, health and sanitation and education services, as well as income-generating opportunities, such as agricultural activities.

⁵⁰⁶ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999, nearly a decade after its adoption. It is currently ratified by all ECOWAS member states.

⁵⁰⁷ Adopted by the 2nd ordinary Session of the Assembly of the AU, Maputo, 11 July 2003, entered into force 25 November 2005. Available at http://www.achpr.org/english/_info/women_en.html (accessed 15 April 2014). Ratified by all ECOWAS Member State except Sierra-Leone.

⁵⁰⁸ OAU Doc. CAB/LEG/24.3 (1969), 1001 UNTS 45, entered into force 20 June 1974. It is currently ratified by all ECOWAS Member States.

⁵⁰⁹ Adopted on 5 July 1976, available at <http://www.au.int/en/content/cultural-charter-africa> (accessed 15 April 2014). Ratified by 13 ECOWAS Member States (Ivory Coast, Gambia, and Liberia) are yet to ratify the Charter.

⁵¹⁰ Adopted January 2007, available at <http://www.au.int/en/content/african-charter-democracy-elections-and-governance> (15 April 2014). It is currently ratified by 9 ECOWAS Member States with the exception of Cape Verde, Ivory Coast, Gambia, Liberia, Mali, and Senegal.

⁵¹¹ Adopted by the Special Summit of the Union held in Kampala, 22 October 2009, entered into force on 6 November 2012. Available at <http://pa.au.int/en/content/entry-force-african-union-convention-protection-and-assistance-internally-displaced-persons> (accessed 15 April 2014).

⁵¹² As at 2011, of the 26 million people internally displaced worldwide, 10 million are said to be in Africa. See 'Africa leads in championing the rights of internally displaced persons in the world' available at <http://en.radiovaticana.va/en3/Articolo.asp?c=645119> (accessed 15 April 2014).

⁵¹³ See, 'Reintegration of Displaced Community Citizens, An ECOWAS Priority' available at <http://news.ecowas.int/presseshow.php?nb=136&lang=en&anee=2012> (accessed 15 April 2014).

Most of these new human rights instruments created under the AU have their universal equivalents under the UN legal framework. However as Viljoen notes, they were created to suit regional specificities and African cultural conceptions of human rights as the protocol on internal displacement above speaks to. Another example that suffices is the African Women's Protocol. When compared to the UN convention on the Elimination of all Forms of Discrimination against women (CEDAW), the African Women's Protocol speaks in a clearer voice about issues of particular concern to African women. It expands on the scope of rights already protected under CEDAW but with greater specificity. The Women's protocol is the first treaty to provide for the right to circumscribed 'medical abortion',⁵¹⁴ and to provide for the right of a woman to be protected against HIV infection, and also to know the HIV status of her (sexual) partner.⁵¹⁵ The protocol also protects women against domestic violence, criminalizes 'rape in marriage', protects women in armed conflict⁵¹⁶ and accords women refugees' protection under international law.⁵¹⁷ Under the protocol, the girl-child may, in particular not be recruited or take direct part in hostilities.⁵¹⁸ State parties to the protocol must set the minimum age of marriage at 18, and all marriages must be recorded in writing.⁵¹⁹ This protocol takes a holistic approach on the predicaments of women in the region and addresses various traditional practices that disparage women.

Viljoen highlights the importance of norm creation and standardisation at the regional level as evidenced in AU/AEC human right instruments, but also states that there are disadvantages in international law.⁵²⁰ He argues thus:

In as far as normative human rights regime of regional IO deviates from that of the universal IO, a distinction should be drawn between supplements (or 'deviations') that differ from but are still consistent with universal norms, and contradictory norms that are in conflict with universal standards. When a nested institution articulates a position at odds with that of the host institution, it may work to undermine the legitimacy of the 'universal consensus'.⁵²¹

⁵¹⁴ Article 14(2)(c) of the Protocol requires states to authorise abortion in cases of sexual assault, rape, incest, and where a continued pregnancy threatens the health of the mother or the life of the foetus.

⁵¹⁵ Article 14(1)(d) requires States to ensure that women are protected against sexually-transmitted diseases, including HIV/AIDS, and article 14 (1)(e) requires that states ensure that women are informed of the HIV status of their partners 'in accordance with international recognized standards.

⁵¹⁶ *Ibid.*, Article 11.

⁵¹⁷ *Ibid.*, Article 11(3).

⁵¹⁸ *Ibid.*, Article 11(4).

⁵¹⁹ *Ibid.*, Article 6(b), (d).

⁵²⁰ Viljoen (2011), p. 193.

⁵²¹ *Ibid.*

While there is a tendency to deviate from universal standards in the process of creating norms that address regional specificities, there is the overarching need for individual protection and ensuring sociological legitimacy. However it is possible that African institutions may in some cases arrive at interpretations – for example decisions by the African Court on Human and Peoples’ Rights and sub-regional tribunals – contradicting findings of global or other regional institutions. It is in this context that the issue of ‘fragmentation of norms’ may most likely be manifested.⁵²² Viljoen concludes that ‘the problem of fragmentation is overstated at least as far as the tension between global, regional and sub-regional human rights frameworks are concerned’.⁵²³

It is noteworthy, that the above mentioned instruments are not expressly referred to in the revised treaty or other subsidiary legislations of the community but represent a crucial part of the regional and sub-regional human rights systems. They seek to protect the same values that the ECOWAS experiment is built upon – the betterment of the standard of living of the African people. Considering the fact that most of the instruments above are content-specific and are largely absent in the legal framework of the ECOWAS community, it would be sensible for community citizens and practitioners to rely on the rights granted in these instruments before regional courts and municipal courts where the State in question is a ratifying party. However, there may be room for contradiction between the continental human rights instruments and those of the ECOWAS community that govern similar areas. There are no provisions in the AU/AEC human rights system to suggest that sub-regional human rights systems are subservient to the continental system. The AEC treaty is silent on this point and would be determined in greater detail below.

3.5.6 THE UNITED NATIONS CHARTER, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND OTHER INTERNATIONAL INSTRUMENTS

As already discussed above, the UN Charter⁵²⁴ and its accompanying human rights instruments form the universal standard of human rights which generally applies to member

⁵²² For an enunciation of this trend from an international Law perspective see, International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682/Add. 1, 2nd May 2006.

⁵²³ Viljoen (2011), p.197.

⁵²⁴ Entered into force 24 October 1945, 3 Bevans 1153.

states. The UN Charter in itself is not a human rights instrument. However, as some scholars have noted, it contains general provisions which have ‘the force of positive international law and create basic duties’ on human rights protection.⁵²⁵ The UN Charter at the barest minimum obliges ECOWAS and its Member States to cooperate towards ‘solving international problems of an economic, social, cultural and humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.⁵²⁶ The obligation to protect human rights is further deepened by a reminder that Member States shall fulfil in good faith the obligation assumed by them in accordance with the charter.⁵²⁷ The fact that the UN is a parent organization, to which all other international organizations are subsidiary, confers UN instruments with the status of universality. Hence, the UN charter and other human rights instruments affixed to it constitute a source of human rights in ECOWAS law, a global standard which all other human rights instruments are expected to conform to.⁵²⁸

Consequently, the Universal Declaration of Human Rights (UDHR)⁵²⁹ a declaration made under the auspices of the UN is a global standard setting human rights instrument that forms an important source of human rights law in ECOWAS. The declaration although not binding, is the ‘common standard of achievement for all peoples of all nations’.⁵³⁰ Although the UDHR is merely a declaration which creates no immediate duty of implementation on the part of UN Member States, it is nonetheless a blue print upon which various forms of human rights law can be founded upon. National courts have relied on the UDHR as a substantive source of human rights. In *Filartiga v. Pena-Irala*⁵³¹ the US second circuit court, relied heavily on the UDHR to establish that torture constitutes a violation of human rights. The court was also faced with interpreting the status of non-binding treaties in international law –

⁵²⁵ L.B Sohn, ‘The Human Rights Law of the Charter’ 12 *Texas International Law Journal* (1977), 129, p.129.

⁵²⁶ Article 1(3) of the UN Charter.

⁵²⁷ *Ibid.*, Article 2(1).

⁵²⁸ The UN human rights treaties now constitutes nine core treaties namely; Convention on the Elimination of all forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families (CMW), the Convention on the Rights of Persons with Disabilities (CPRD) and the Convention for the Protection of All Persons from Enforced Disappearance (CED).

⁵²⁹ Concluded 10 December 1948, UN Doc A/810 at 71 (1948).

⁵³⁰ Preamble to the UDHR, UN GA res.217A, U.N Doc. A/810.

⁵³¹ 630 F.2d 876, (1980).

as some commentators had claimed the UDHR is evidence of customary international law.⁵³² In relation to this, the court noted that U.N resolutions have been viewed as “formal and solemn instruments, suitable for rare occasions when principles of great and lasting importance are enunciated”.⁵³³ The court stopped short of holding that the UDHR or other relevant U.N resolutions create binding law or generate *jus cogens* laws.

It could also be argued that the UDHR represents the first layer of the international value system in the sense that it is a source of *jus cogens* norms that by definition have *erga omnes* effect. The UDHR as the first layer of the international value system establishes most of the peremptory norms recognized under international law such as prohibition of genocide, torture, slavery, and racial discrimination. The UDHR falls within the normative framework of the UN charter and has also been instrumental in the verticalization of the relations of Member States, creating a hierarchical dimension of the international value system. For that reason, the UDHR is custom and as such falls well within the legal framework of ECOWAS as a source of rights.⁵³⁴

Despite the continued debate over the customary law character of the UDHR, the fact remains that, it could be transformed into binding law by positive enactment and judicial attitude as the ECOWAS legal framework suggests. The UDHR is referred to in protocols enacted under the 1975 regime. The treaty itself does not refer to the UDHR, but certain protocols explicitly refer to and define human rights in terms of the UDHR.⁵³⁵ The Mechanism for Conflict Prevention protocol and the protocol on Democracy and Good governance both refer to the UDHR under the current treaty regime.⁵³⁶

Other international human rights instruments referred to in ECOWAS protocols include ILO Conventions.⁵³⁷ ILO conventions are yet to feature before the ECCJ in claims on violation of human rights. This could be attributed to the fact that the community legal framework is still

⁵³² K. Nayar, ‘Human rights: The United Nations and United States foreign policy, 19 *Harvard International Law Journal*, (1978) p.813.

⁵³³ *Filartia vs Pena-Irala* supra, 883.

⁵³⁴ Ebobrah (2009), p.129.

⁵³⁵ Articles 1 and 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 refers to the UDHR.

⁵³⁶ Article 2 of the Mechanism for conflict prevention and the preamble to the protocol on Democracy and good governance.

⁵³⁷ See for example, Article 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 available at <http://www.comm.ecowas.int/sec/index.php?id=asp010786&lang=en> (accessed 15 April 2014).

largely undeveloped in issues pertaining to worker or employer rights and labour law in general. It is worth reiterating that ECOWAS Member states have overwhelmingly ratified key ILO convention in this respect.⁵³⁸ The fundamental ILO conventions include: Freedom of Association and Protection of the Right to organise convention;⁵³⁹ Right to Organize and Collective Bargaining convention;⁵⁴⁰ Forced Labour convention;⁵⁴¹ Abolition of Forced Labour convention;⁵⁴² Equal Remuneration convention;⁵⁴³ Elimination of discrimination in respect of employment and occupation convention;⁵⁴⁴ Minimum Age convention;⁵⁴⁵ and Worst forms of Child Labour convention.⁵⁴⁶ Despite the overwhelming ratification of these ILO conventions and the possibility for incorporating regional labour standards into the integration framework, legislative activity in this area is largely undeveloped in ECOWAS despite its impact on the Trade Liberalisation Scheme (TLS) of ECOWAS.⁵⁴⁷

Borrowing from Ajulo's bracketing of sources of ECOWAS law, substantive values of human rights within the community are easily identifiable. Most of the human rights instruments identified all have a common feature in that they restate human rights obligations already incumbent on Member States.

3.6 RELATIONAL ISSUES: UNTANGLING A COMPLEX WEB

Amidst fears of fragmented proliferation of international human rights law, the African human rights system is grappling with countless issues of normativity particularly as the AU strives to achieve the African Economic Community. Frimpong refers to this conundrum as a 'complex web' in the relationship between the national, sub-regional and regional systems of

⁵³⁸ See status of ratifications of ILO convention at http://www.ilo.org/dyn/normlex/en/f?p=1000:11001:109842738022709:::P11001_COUNTRY_SORT:2#Africa (accessed 15 April 2014).

⁵³⁹ Convention No. 87 (1948) ratified by 14 ECOWAS Member States with the exception of Guinea-Bissau.

⁵⁴⁰ Convention No. 98 (1949) ratified by all Member States.

⁵⁴¹ Convention No. 29 (1930) ratified by all Member States.

⁵⁴² Convention No. 105 (1957) ratified by all Member States.

⁵⁴³ Convention No. 100 (1951) ratified by 14 States with the exception of Liberia.

⁵⁴⁴ Convention No. 111 (1958) ratified by all Member States.

⁵⁴⁵ Convention No. 138 (1973) ratified by 13 Member States with the exception of Cape Verde and Liberia.

⁵⁴⁶ Convention No. 182 (1999) ratified by 14 Member States with the exception of Sierra- Leone.

⁵⁴⁷ The TLS which seeks to improve community trade by lowering tariff and non-tariff barriers does not create any commitment on the part of the Member States towards protecting workers rights and labour standards.

law.⁵⁴⁸ Numerous questions arise from the inter-relationship between these three levels. Which system should be a subsidiary to the next and how are issues such as forum shopping and non-implementation handled? Are these overlapping networks mutually reinforcing and complementary, or are they in competition with one another and constitute a needless duplication? How would the vertical, horizontal and vertico-horizontal relations between all three spheres be better co-ordinated as part of an African human rights system? This section examines relational issues between the regional and sub-regional systems. This discussion is important bearing in mind that the African Economic Community is the final destination of the African integration experiment.

3.6.1 RELATIONSHIP WITH THE AFRICAN HUMAN RIGHTS SYSTEM

There is an obvious absence of a continental or region-wide human rights system. The word ‘African security architecture’ has been utilized to refer to the region-wide framework for peace and security with relative guidelines and standards in the AU peace and security mechanism. However same term has not been employed to describe the African human rights system. This would be inappropriate given the lack of clarity on the relationship between the AU/AEC human rights institutions and the sub-regional human rights institutions.⁵⁴⁹ Viljoen argues that the African human rights system was designed to fail. His reason is that OAU/AU system contains numerous elements suggesting that the system had been designed to enhance state sovereignty and to weaken effective inspection of human rights record of member states that guarantee human rights per the relevant UN treaties.⁵⁵⁰ Therefore, his position is, that there are no sub-regional human rights systems existing in Africa but that there are simply sub-regional intergovernmental groupings with human rights as a concern within their mandate.⁵⁵¹

⁵⁴⁸ R.F Opong, ‘The African Union, African Economic Community and Africa’s Regional Economic Communities: Untangling a Complex Web’, 18 *African Journal of International and Comparative Law* (2010) pp. 92 – 103.

⁵⁴⁹ ‘System’ here represents a holistic perspective of the regional and sub-regional human rights apparatus including all other norm creating and implementation institutions directly or remotely concerned with the recognition, promotion and protection of human rights.

⁵⁵⁰ Viljoen (2011), p.199.

⁵⁵¹ Viljoen, (2007), p.10.

The 1998 Protocol on Relations between the African Economic Community and the Regional Economic Communities⁵⁵² (Protocol on Relations) is instructive on the relationship between the regional and sub-regional organisations as constituent parts of the proposed AEC. Article 6 of the protocol stipulates that the AEC is responsible for strengthening existing RECs and also establish RECs where none exist towards the actualisation of the proposed African Common market. From the wordings of Article 6 it is clear that RECs cannot be outside of the overall framework and are wrongly examined in isolation of the overarching AU system. The revised treaty which came into existence before the Protocol on Relations outlines the position of ECOWAS as a pillar for the AEC by stipulating that ECOWAS was established ‘for the purpose of economic integration and the realisation of the objectives of the African Economic Community’.⁵⁵³ Article 78 of the revised treaty also provides that the community shall constitute an essential component of the African continent and that member states undertake to facilitate the harmonization of policies with those of the African Economic Community. The Protocol on Relations also envisages coordination to avoid duplication of efforts and action that jeopardize AEC objectives,⁵⁵⁴ exchange of information and cross-participation at meetings.⁵⁵⁵

The AEC treaty itself is naturally silent on the issue of co-ordination in the area of human rights and only outlines the step by step economic objectives targeted for the realisation of the African Common market. This is understandable as the AEC is a destination which is yet to be reached and issues of co-ordination can be addressed through subsequent protocols. In 2007 the AU adopted the Protocol on Relations between the African Union and the Regional Economic Communities⁵⁵⁶ (AU/REC Protocol). The AU/REC protocol aims amongst other things, to ‘formalize, consolidate and promote closer co-operation among the RECs and between them and the Union through the co-ordination and harmonization of their policies, measures, programmes and activities in all fields and sectors’.⁵⁵⁷ The AU/REC protocol does not do much to clarify the loopy interface between the AU/REC and is generally silent on the issue of human rights. This is especially true when it is borne in mind that the RECs are legal systems in their own right with separate legal personality. Accordingly, there is the need to

⁵⁵² Signed in Addis Ababa, 1998 OAU Doc. Annex III-4.

⁵⁵³ Article 2(1) of the revised treaty.

⁵⁵⁴ Article 4 of the Relations Protocol.

⁵⁵⁵ *Ibid.*, Article 17.

⁵⁵⁶ When this protocol enters into force, it will replace the Relations Protocol.

⁵⁵⁷ Article 3 of the Relations Protocol, *supra*.

structure and manage the relations between the AEC and the RECs' legal systems as well as among the RECs.

While ECOWAS documents are silent on how community institutions relate with the AU institutions on the issue of human rights, certain documents of the AU seek to outline crucial aspects of the relations between the both levels. For example, as previously observed, the PSC recognises regional security mechanisms as part of the 'overall security architecture of the Union'.⁵⁵⁸ These provisions are however not enough. Other instruments that hint at co-operation between both levels include the African Charter⁵⁵⁹, the Protocol on the African Court on Human and Peoples' Rights⁵⁶⁰ and the African children Charter⁵⁶¹ 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.

From a judicial perspective the creation of courts around RECs with human rights jurisdiction naturally de-monopolizes the exclusive competence of the African Commission on the one part and the African Court of Justice and Human Rights to interpret and enforce the African Charter.⁵⁶² This is a result of the African Charter coming into existence before the RECs and their supranational courts. The adoption of the Protocol on the Statute of the African Court of Justice⁵⁶³ (Protocol on the African Court of Justice) marked an avenue through which some salient relational issues could have been addressed, particularly the hierarchy of sub-regional courts and AU organs for the enforcement of human rights (African Commission and the African Court of Justice). However, the Protocol limits its provisions to the operation of the new court which when operational would give the African Court of Justice human rights jurisdiction transforming it into the African court of Justice and Human Rights (ACJHR).

⁵⁵⁸ Article of the PSC Protocol.

⁵⁵⁹ Article 45(3) of the African Charter.

⁵⁶⁰ *Protocol on the African Court on Human and Peoples' Rights on the establishment of an African Court of Human and Peoples' Rights* available at <http://www.au.int/en/content/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and-peop> (accessed 4 April 2013), Article 4.

⁵⁶¹ Article 42(c) of the African Children's Charter.

⁵⁶² Of the 14 different sub-regional institutions in Africa only 6 have explored the potential for human rights realisation and only EAC, ECOWAS and SADC courts have entertained human rights cases. See generally, 'S. Ebobrah, 'Human Rights Realisation in the African Sub-Regional Institutions', in M. Sseyonjo (2012), n.259 *supra*.

⁵⁶³ Adopted in Sharm El-Sheikh, Egypt, on 1st July 2008 available at <http://www.au.int/en/content/protocol-statute-african-court-justice-and-human-rights> (accessed 15 April 2014).

Currently, individuals and NGOs do not have direct access to the African Court of Justice. In *Femi Falana v. The African Union*⁵⁶⁴ the Court insisted that it had no jurisdiction *rationae personae* to entertain cases of human rights breaches so long as a Member State does not expressly declare that such a case is heard by the court.⁵⁶⁵ So far, only six States (Burkina Faso, Ghana, Ivory Coast, Malawi, Mali, and Tanzania) have made an express declaration accepting the Court's jurisdiction to hear cases of human rights violations against them. As soon as the Merger protocol⁵⁶⁶ enters into force, all cases being heard by the African Court shall be transferrable to the human rights section of the ACJHR while other cases will remain in the general section of the Court. Scholars have expressed fears that this merger could potentially relegate human rights to the background and member States could shift their attention to other 'high state' issues such as border disputes and other constitutional issues that fall under the general section of the court.

The need for the clarification of hierarchy is even more important in the light of plans by the some sub-regional courts to establish an appellate division.⁵⁶⁷ This changes the dynamics of human rights enforcement in Africa creating even more room for forum shopping. The African Charter provision on the decisions of the African Commission is important in this respect. Article 56(7) of the African Charter provides that the African Commission may not admit for consideration cases which have been settled by the states involved in accordance with the principles of the United Nations, the Charter of the OAU or the African Charter. This provision embodies the principle of *res judicata* to the extent that it excludes a matter which has been 'settled by the states' involved.⁵⁶⁸ It however does not preclude the consideration of matters that are before another judicial or quasi-judicial forum, and hence leaves an opening for judicial forum shopping.⁵⁶⁹ In the absence of a prohibition of concurrent proceedings on the basis of the principle of *lis pendens* in the 'other forum', it is

⁵⁶⁴ Application No. 001/2011 (26 June 2012).

⁵⁶⁵ Ibid., Par. 73. See also *Michelot Yugombaye v. Republic of Senegal*, Application No. 001/2008; *Soufiane Ababou v. People's Democratic Republic of Algeria*, Application No. 002/2011; *Daniel Amare and Malugeta Amare v. Republic of Mozambique & Mozambique Airlines*, Application No. 004/2011.

⁵⁶⁶ *Protocol on the Statute of the African Court of Justice and Human Rights* supra.

⁵⁶⁷ See, 'West Africa: ECOWAS Court Mulls Appellate Chamber' available at <http://allafrica.com/stories/printable/20123120943.html> (accessed 14 April 2014). The proposal is said to have been approved by member states and only logistics is hindering the establishment of the court so far.

⁵⁶⁸ Vijoer (2007), p.336.

⁵⁶⁹ Some scholars argue that concerns over forum shopping in Africa are perceived rather than real and if well regulated can materially benefit international human rights law. For example, forum shopping may encourage jurists to dialogue on norms shared in the cross-cutting treaties thereby leading to development of jurisprudence. See O. Ruppel, 'Regional Economic Communities and Human Rights in East and Southern Africa' in A. Bösl & J. Diescho (eds.), *Human Rights Law in Africa: Legal Perspectives on their Protection and Promotion*, (Windhoek: MacMillan Education, 2009), p. 283.

possible for a litigant to institute concurrent proceedings before a REC court and the African Commission or Court.

The concern that arises here is whether one whose case has been heard and determined by a REC court can approach the African Commission or Court for redress in the same case. This depends on the provisions of the REC regarding the finality of their decisions and the approach of the African Court or Commission to such matters. However, it could be argued that allowing an unsuccessful litigant at the sub-regional level to pursue a remedy at the regional level would be tantamount to establishing the African court as an appellate body, which it is not.⁵⁷⁰

So far the relational issues above are left undefined, the question lingers as to whether there is an African human rights system and precisely what place does sub-regional human rights institutions and norms play. It is widely accepted amongst human rights scholars in Africa, that the African human rights system revolves solely around the African Charter, the African Commission on Human Rights and, the African Court of Justice.⁵⁷¹ On the strength of this scholarship, the emerging ECOWAS human rights system clearly is not a part of the African human rights system as it does not have a direct link with the African Charter. However, sub-regional human rights mechanisms offer some practical benefits to the regional apparatus for human rights enforcement.

As mentioned, earlier sub-regional mechanisms are more likely to address legitimate sociological concerns. The small number of states constituting RECs allows them to address issues with particular detail to peculiar circumstances. For example, the scourge of human trafficking which is most prevalent in West Africa is a crucial issue that constitutes a recent challenge to good governance for the entire sub-region.⁵⁷² Recent data reveal that 100 per cent of the human trafficking cases in parts of West Africa involve children.⁵⁷³ Hence jurisprudence on the issue of enforcement of child rights is necessary at the sub-regional and national levels under the applicable regional instrument. Additionally, judges of an REC

⁵⁷⁰ L.N Murungi & J. Gallinetti, 'The Role of Sub-Regional Courts in the African Human Rights System', 7 *SUR International Journal of Human Rights* (2010), p.127.

⁵⁷¹ See Viljoen (2007) *supra*. For an opposing view on this question, see J.D Boukongu, 'The appeal of the African System for protecting human rights', 6 *African Human Rights Law Review Journal* (2006), 269.

⁵⁷² West African cultural patterns fertilize the expansion of human smuggling contributing inexorably to the growth of transnational trafficking in persons. See W.R Sawadogo, 'The Challenges of Transnational Human Trafficking in West Africa', 13 *African Studies Quarterly*, (2012) 95.

⁵⁷³ 'Global Report on Trafficking in Persons' United Nations Office on Drugs and Crimes (UNODC), 2009, pp. 48 – 49.

court are more likely to have a better appreciation of the issues affecting a sub-region than those at the broader regional level.

Finally, the African Charter is widely recognized as a standard for rights in the RECs which makes it an instrument that serves as the normative source of rights. This is the link between the regional and sub-regional human rights apparatus. Article 60 and 61 of the African Charter provides that the African Commission shall “draw from” other international instruments “adopted by the United Nations and African countries” and take into consideration... legal precedents and doctrine”. This provision of the Charter is in itself an admission that the legal precedents and doctrines established by national courts of African countries or by proxy sub-regional courts form part and parcel of the African human rights system, at least for interpretative reasons.⁵⁷⁴ The attitude of the African Commission in some of its cases has given correctness to this argument. In *Purhoit & Anor. vs Gambia*⁵⁷⁵ the African Commission said that it was:

more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well organized principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that ‘All human rights are universal, indivisible and interdependent, and interrelated’.

The submission of the African Commission above displays openness at the regional level of human rights protection and enforcement. The mere fact that the Commission accepts alternative bodies of human rights instruments, principles and norms in the spirit of universality, is testament to its pragmatic approach in ensuring the enforcement of human rights in the region. The only real limitations that might cause frictions between the regional and sub-regional regional systems have been highlighted. Certainly, ECOWAS and her sister RECs are connected to the regional human rights system and interface on the basis of a uniform catalogue of rights but are independent of each other in practice.

⁵⁷⁴ For a comparative analysis of interpretation of human rights treaties by regional tribunals, see M. Kilander, ‘Interpreting Regional Human Rights Treaties’, 7 *SUR International Journal on Human Rights* (2010), pp.143-169.

⁵⁷⁵ (2003) AHRLR 96.

3.7 CONCLUSION

This Chapter establishes the movement towards human rights under the 1993 constitutional epoch. The essence is to demonstrate the normative legitimacy of the organisation in the area of human security. In the process, human rights activities of the community under the current constitutional epoch are traversed. Human rights' understanding under the current ECOWAS regime is divided into three dimensions. These dimensions are peace and security, democracy and good governance, and human rights and fundamental freedoms.

It is revealed that the ECOWAS peace and security architecture was necessitated by a combination of external and internal factors. The early conflicts that plagued the community under the first regime, led to the adoption of a robust interventionist norm under the second regime. With regards to the normative incompatibility of ECOWAS's MCPMRPS with the UN Charter, it is submitted that the MCPMRPS remains an important development in solving the long term problem of conflicts, which have devastated the sub-region. The ECOWAS peace and security architecture is vital in delivering the economic integration objective of the community.

It is also established that the ECOWAS framework is incomplete in certain areas. The Protocol on Democracy and Good Governance for example provides for sanctions as one of the coercive mechanisms against a Member State which has violated the provisions of the protocol. However, the protocol does not prescribe in concrete terms the steps that constitute a sanction. Even more disappointing is the fact these coercive mechanisms are heavily dependent on political circumstances in a Member State. Nonetheless, the protocol is a welcome addition to ECOWAS law as it reflects current legal thinking on the importance of ensuring a democratic culture as foundation for a stable and conflict-free continent.

Amidst fears of fragmentation of international human rights law, the universal human rights system is contrasted with the regional and sub-regional human rights systems to identify possible areas of convergence and divergence. This fear is given further impetus by the emergence and continued growth of regional systems such as the African and European human rights systems. The European convention of Human Rights and jurisprudence of the ECtHR have led to the perception that the European value system trumps the international value system.

It is submitted that regional and sub-regional norm creation in the area of human rights is justified not because it attempts to deviate from universal standards or the international value system, but because of the need to address regional specificities. However, there remains a cloud of uncertainty hovering over the relationship between sub-regional and regional human rights systems. The issue of hierarchy of norms and institutional competence especially as it affects the proposed African Economic Community which is the final destination of the integration process of all RECs which are pillars for African integration lingers on.

CHAPTER 4

THE ROLE OF THE ECOWAS COMMUNITY COURT IN THE NORMATIVE LEGITIMACY OF ECOWAS

4.1 INTRODUCTION

It has been established that the new human rights regime of ECOWAS falls within the legal boundaries of the organisation. The competence of ECOWAS in this regard as discussed is enmeshed in the community treaty and protocols on the one part and by adoption of regional and universal human rights instruments. While it is worth emphasizing that the new human rights regime gained traction primarily due to the creation of supranational institutions and the revision of the 1975 treaty, the competence of the organisation still rests delicately on the sovereignty of member states. This complementary disposition of ECOWAS and the sovereignty question may create possible areas of friction between community institutions seeking to exercise their mandates and national institutions which are the natural custodians of the nation-state and its subjects. Questions over the descriptive legitimacy of ECOWAS still remain and may be better understood after a careful examination of the organization's human rights activities through its institutions in Member States.

This chapter examines the human rights mandate of the ECOWAS Community Court of Justice (ECCJ) and the implications of its activities in Member States. The need for symmetry in the vertical, horizontal and vertical - horizontal relations between community institutions, their municipal equivalents and the continental system cannot be over emphasized. This is especially true to the extent that the human rights protection under the new regime can only be meaningful in the presence of a harmonious co-existence within all institutions involved at all levels. Central to the actualization of the integration initiative under the new regime is the interface between community institutions independently exercising its human rights mandate and their municipal counterparts. Hence, this chapter examines the inter- and intra-institutional relations between the community court and its municipal counterparts. A thematic approach is utilized in part to better explain the impediments that stand in the way of the court in its quest to enforce human rights in member states.

The Community Court is given priority amongst other community organs because it is the only organ with a clear mandate for human rights protection under an enabling protocol. Another justification for this approach is that the ECCJ is a prototype of emerging International Courts(IC) that has gained increased attention recently. The new generation of ICs are vested with judicial competence in a variety of areas that exercise jurisdiction over subjects as diverse as human rights, criminal law, trade, investment and environmental protection. The expansion of this new breed of ICs, their swelling dockets and the widening political impact of their jurisprudence has created a burgeoning field of scholarship dedicated to the study of international adjudication.⁵⁷⁶ However, the growing political importance of IC rulings continues to generate increased scrutiny over their legitimacy. The implication of this shift in paradigm is an expansion of IC authority and the perceived diminution of national autonomy. Therefore, this chapter would start off with the ECCJ placed top of the institutional hierarchy of ECOWAS in the area of human rights protection and enforcement. The normative legitimacy of ECOWAS as a regime is largely dependent on the ECCJ because ICs have the unique capacity to confer legitimacy on the institutions of a regime.⁵⁷⁷

4.2 THE BIRTH OF A COMMUNITY COURT

As has been pointed out in previous chapters, the transformation of ECOWAS under the constitutional epoch of the revised treaty of 1993 led to an eventual shift in community objectives from economic integration to peace and security and human rights. The protocol of Non-Aggression and the Protocol on Mutual Assistance on Defence provided the legal basis for the task of promoting regional security and eventually spilled over to human rights. The Liberian civil war and subsequent civil wars that followed increased the political salience of

⁵⁷⁶ See generally, Project on International Courts and Tribunals, available at <http://www.pict-pcti.org/>; E. Voeten, International Courts Data, available at <http://www9.georgetown.edu/faculty/ev42/ICdata.htm>. Additionally, reputable research institutes, universities and publishing houses around the world have dedicated journals and symposia analysing the law and politics of international adjudication. See, Oxford University Press, International Courts and Tribunals Series, available at [http://ukcatalogue.oup.com/category/academic/series/law/icts.do#.UArFnk0WSp.](http://ukcatalogue.oup.com/category/academic/series/law/icts.do#.UArFnk0WSp;); Martinus Nijhoff Journal on the Law and Practice of International Courts and Tribunals available at <http://www.brill.com/law-practice-international-courts-and-tribunals>. See also iCourts: The Danish National Research Foundations Centre of Excellence for International Courts, available at <http://jura.dk/icourts/>; ERC Project on Effective International Adjudication, available at <http://www.effective-intl-adjudication.org/> (accessed 15 April 2014).

⁵⁷⁷ One of the generic goals of ICs is to confer legitimacy on the norms and institutions that constitute the regime in which they operate. Also ICs legitimating of authority may also be in a supportive role, attendant to all other ultimate ends advanced by ICs such as norm support, dispute or problem solving and regime support. See, Hany (2013), p.137.

ECOWAS security and human rights activities. The resultant effect was the eventual adoption of the MCPMRPS which underscored the importance of human rights, and put regional intervention on a firmer legal footing.⁵⁷⁸

The re-alignment of community objectives towards human rights protection necessitated the creation of a court or tribunal to oversee the enforcement of rights and basic freedoms under the legal framework of the community. The founders of ECOWAS ‘envisioned a tribunal to ‘ensure the observance of law and justice in the interpretation of the provisions of [the 1975] Treaty’ and to ‘settle such disputes as may be referred to it’ by Member States.⁵⁷⁹ But the tribunal was never created and this is understandable considering the fact that the priority of the community at the time was solely focused on economic integration. Additionally, the legal underpinnings for a community court were lacking. Community protocols did not have direct effect in national law,⁵⁸⁰ and as noted earlier, most were not implemented during that constitutional epoch. In such hostile environment of non-implementation of and non-compliance with community rules, a supranational court would have been ‘largely redundant’⁵⁸¹ and out of place.

The revised treaty in Article 15 introduced a community court of justice as part of the newly created institutions. However, the 1991 protocol on ECCJ,⁵⁸² authorized the court to adjudicate on two types of cases, both relating to “the interpretation and application” of ECOWAS legal instruments: (1) “disputes referred to it...by Member States or the Authority, when such disputes arise between the Member States or proceedings one or more Member States and the Institutions of the Community; “ and (2) proceedings instituted by a member state “on behalf of its nationals... against another Member State or Institution of the Community... after attempts to settle the dispute amicably have failed”.⁵⁸³ The provisions of the protocol appeared to have mirrored the constant power tussle between the Francophone and Anglophone countries on the one hand and the suspicion that surrounded Nigeria’s role

⁵⁷⁸ K.J Alter, L.R Helfer & J.R McAllister, ‘A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice’, 107 *American Journal of International Law* (2013), 737, p.744.

⁵⁷⁹ Articles 11 and 56 of the 1975 Treaty.

⁵⁸⁰ I. Akinrinsola, ‘Legal and Institutional Requirements for West African Economic Integration’, 10 *Law and Business Review of the Americas* (2004), 493, p.503.

⁵⁸¹ *Ibid.*, p.504.

⁵⁸² Protocol A/P.1/7/91 on the Community Court of Justice (1991 Protocol), reprinted in S. Ebobrah & A.Tanoh (eds.) *Compendium of African Sub-Regional Human Rights Documents*, (Pretoria: Pretoria University Law Press, 2010).

⁵⁸³ *Ibid.*, Article 9(2), (3) of the 1991 Protocol. The Protocol also authorized the newly created court to issue advisory opinions concerning the Treaty “at the request of the Authority, Council, one or more Member States, or the Executive Secretary and any other institution of the Community...”

as a hegemon in the sub-region. Member States intended to use the ECCJ to resolve disputes that might arise over the meaning of ECOWAS rules by issuing legally binding judgements.⁵⁸⁴

The Court remained inoperative until December 2000 when Member States appointed seven judges that were eventually sworn into office on January 31, 2001. The jurisdiction of the Court remained the same as defined under Article 76 of the revised treaty. The primary function of the Court under the treaty was the interpretation and application of the ECOWAS Treaty. Individuals could only approach the Court under Article 9(3) of the Protocol which provides that a Member State may, on behalf of its nationals, institute proceedings against another Member State or Institutions of the Community relating to the interpretation and application of the treaty. As it turned out, this provision was insufficient as no Member State brought any action to the Court on this basis.

As soon as the Court commenced preparation for its take off, the vision and mission were set out. These included:

- a) Encouragement of fundamental Human rights observance. To achieve this, the Court will undertake a process of creating awareness among the populace of Member States regarding the existing Treaties among the Member States and the fact that individuals can have access to the Court through their Member States if they feel aggrieved.
- b) Encouragement of the Member States to amicably settle disputes among themselves through alternative dispute resolution processes.
- c) Harmonization of relationships with relevant International Organisations such as the European Community Court of Justice, the International Court of Justice and other International Institutions
- d) Speedy dispensation of justice, dissemination of information, easy access to proceedings and judgements of the Court.⁵⁸⁵

Despite the mission statement of the Court, demonstrating its awareness of its role in human rights protection, the Court's initial task after it was constituted was convincing

⁵⁸⁴ It is on record that officials of the of the ECOWAS Legal Affairs Directorate favoured an ad hoc tribunal, which they argued would be less costly and appropriate for the small number of interstate disputes capable of judicial resolution. It was clear that the friction between member states over various community policies meant that only interstate disputes were envisaged. However, the Authority focused solely on supranational expansion and decreed, 'let's have a court'. Alter et al (2013), p.747.

⁵⁸⁵ Information Manual, Community Court of Justice, July 2001 cited in A. Banjo, 'The ECOWAS Court and the Politics of Access to Justice in West Africa', 1 *Africa Development* (2007), p.75.

Member States about “the need to seek [the Court’s] advice with respect to the different problems they will be facing, arising from interpretation of the Treaty and Protocols.”⁵⁸⁶ This task was imperative for the Court to establish a trusted relationship with Member States and also position itself as a truly supranational court in the sub-region. The Court remained stagnant for three years after opening its doors for business.

4.3 THE AFOLABI CASE: THE TURNING POINT

The ECCJ did not entertain any inter-state cases and since individuals were not granted *locus standi* except through Member States, the Court had no opportunity to test the waters of judicial interpretation of the revised treaty – to expand its powers.⁵⁸⁷ The opportunity finally presented itself in 2004 in the case of *Olajide Afolabi v. Federal Republic of Nigeria*.⁵⁸⁸ Olajide was a Nigerian trader who had entered into a contract to purchase certain goods in neighbouring Benin Republic, with the intention of transporting them to Nigeria. Afolabi was unable to complete the transaction when Nigeria unilaterally closed the border between the two countries. Afolabi argued that Nigeria’s action was a clear violation of the economic freedoms guaranteed under the revised treaty,⁵⁸⁹ the ECOWAS protocol on free movement of persons and goods,⁵⁹⁰ and Article 12 of the African Charter.⁵⁹¹ Afolabi demanded reparation from the Court in form of an order of injunction to Nigeria to refrain from future border closures and compensation for his financial loss and litigation costs.

Nigeria responded on the ground that the Court lacked the jurisdiction or the competence to entertain the suit. The defendant also challenged Afolabi’s standing to bring the suit on the ground that only a Member State may bring an action on behalf of its citizen under the 1991 protocol of the court. Afolabi countered Nigeria’s argument invoking Article 9(3) of the 1991

⁵⁸⁶ Banjo (2007), p.77.

⁵⁸⁷ An inevitable uproar followed the court’s idleness with NGOs canvassing an expansion of its powers to the area of human rights protection. The NGOs exploited Article 39 of the Democracy and Good Governance Protocol, which suggested that the not-yet-operational ECOWAS Court might one day hear “cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed”.

⁵⁸⁸ ECW/CCJ/APP/01/03 – ECW/CCJ/JUD/01/04 (2004-2009) CCJELR.

⁵⁸⁹ Article 3(2) (d) (iii) identifies the “aims and objectives” of ECOWAS as including “the removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment”.

⁵⁹⁰ 1979 Free Movement Protocol, Article 2 (granting Community citizens a “right of entry” to other ECOWAS member states).

⁵⁹¹ Article 12(1) of the African Charter decrees that “Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.”

Protocol that permits Member States to bring actions on behalf of their citizens. Afolabi further argued that the use of “may” permits states to raise such cases but did not preclude the ECCJ from directly receiving applications from individuals.⁵⁹² In addition, Afolabi argued that the ECCJ’s review of complaints from private actors was especially appropriate “where a party is instituting action his Country”. In such cases, Afolabi claimed, “the Member state cannot represent the party because the Member State cannot be both the plaintiff and the [defendant]”.⁵⁹³ Lastly, Afolabi relied on “the principles of equity”⁵⁹⁴ as enshrined in the 1991 protocol to support an expansive interpretation of the Court’s jurisdictional rules on *locus standi* for individuals.

After examining the argument of both parties, decided that the issue before it is that of competence to adjudicate on the proceedings instituted by the applicant against the respondent and not on *locus standi* per se. The ECCJ dismissed the arguments of both sides and dismissed the suit for lack of jurisdiction to hear the case. However, the judges acknowledged that Afolabi’s case “raised a serious claim touching on free movement and free movement of goods and his rights to challenge an infringement upon his person.”⁵⁹⁵ The Court stated that Article 9 of the 1991 protocol is “plain” and “unambiguous” and only states can institute proceedings on behalf of their nationals.⁵⁹⁶ Hence, the provision must be “applied as written,” even if the result- effectively insulating member states against suits by their own nationals alleging violations of ECOWAS rules – seems “repugnant”, “absurd” or “harsh.”⁵⁹⁷

The interpretative authority delegated to ICs is politically important because it introduces an independent outside actor with the legal authority to give meaning to international law.⁵⁹⁸ The

⁵⁹² *Afolabi* supra para 14 – 23.

⁵⁹³ *Ibid.*, para 15.

⁵⁹⁴ Article 9(1) of the Protocol provides that “The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty”.

⁵⁹⁵ *Afolabi* , para 55.

⁵⁹⁶ *Ibid.*, at 59-61.

⁵⁹⁷ *Ibid.*, at 37.

⁵⁹⁸ K. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, (2013) forthcoming, on file with the author. p. 7. It is noteworthy that scholars disagree as to whether ICs should be seen as agents of the states or independent outside actors/trustees of the law they oversee. The first group argue that states act as the unseen hand, shaping IC decision-making through the means of re-legislation, sanction, or noncompliance to decisively influence judicial decision making. Others argue that ICs are trustees with political autonomy and that they operate in a realm of rhetorical politics where state sanctioning tools are of little practical relevance. See, K. Alter, ‘The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review’ in Dunoff & M. Pollack (eds.,) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art.*, (New York: Cambridge University Press, 2013), p.357.

judges of the ECCJ failed to apply teleological or constructive methods of judicial interpretation in their capacity as independent outside actors but chose to tread carefully and apply the law to the letter. The ECCJ 's judicial restraint seemed somewhat contradictory because the Court had actively publicized its existence to potential litigants and encouraged filing of cases only to be faced with complaint from a highly sympathetic plaintiff involving a serious obstacle to intraregional trade and then shying away from a pronouncement that would have set straight community law.

It is worthy to note that the ECCJ is not the only sub-regional court to face the question of determining a human rights case without express judicial powers. In *Mike Campbell & 78 others v Zimbabwe*⁵⁹⁹ the SADC tribunal adopted a teleological approach to the interpretation of its treaty mandate. The Claimant a Zimbabwean registered company instituted a case before the SADC Tribunal to challenge the expropriation of agricultural land in Zimbabwe by the government. At the time of application, the matter was pending in the Supreme Court of Zimbabwe. As a result, an application was brought before the Tribunal for an interim measure prohibiting the government of Zimbabwe from evicting *Mike Campbell (Pvt) Limited* and others from the land in question until the pending case has been determined. The claimant's main argument was that the Zimbabwean government's land acquisition process was racist and illegal on the basis of Article 6 of the SADC Treaty⁶⁰⁰ and the African Charter.⁶⁰¹

The SADC Treaty provides that Member States shall act in accordance with the principles of human rights, democracy and the rule of law as well as equity, balance and mutual benefit and the peaceful settlement of disputes.⁶⁰² However, the SADC Treaty and the Protocol on the Tribunal do not expressly grant the Tribunal any competence over cases of human rights violations. The Tribunal held that the respondent state is in breach of its obligations under articles 4(c) and 6(2) of the SADC Treaty and that the applicants were discriminated against

⁵⁹⁹ SADC (T) Case No. 02/007.

⁶⁰⁰ Article 6(2) of the treaty provides that Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability. See further, Treaty of the Southern African Development Community of 17 August 1992 amended in 2001, available at <http://www.sadc.int/documents-publications/sadc-treaty/> (accessed 15 April 2014).

⁶⁰¹ Article 2 of the African Charter stipulates that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race.

⁶⁰² Article 4 (c) of the SADC Treaty supra.

on the grounds of race and that they were entitled to fair compensation on their land.⁶⁰³ Furthermore, the Tribunal directed the Republic of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants who had not yet been evicted from their lands, and to pay fair compensation to the applicants who had already been evicted from their farm lands.

In the aftermath of the Campbell decision, the SADC Tribunal was faced with opposition by Zimbabwe. Implementation of the decision of the Tribunal was a no-go area by the actions of the Zimbabwean government.⁶⁰⁴ The Tribunal was eventually suspended by the Summit,⁶⁰⁵ even after a review of the Tribunal was carried out where it was concluded that SADC Member States were, by suspending the Tribunal, in violation of their international legal obligations.⁶⁰⁶ The Tribunal is yet to be re-constituted although the SADC Summit after considering the Report of SADC Attorney Generals, have issued a resolution stating that a new Protocol for the Tribunal should be drawn up with the Tribunal's activities to be 'confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States'.⁶⁰⁷

Similarly, the East African Court of Justice (EACJ) in *Katabazi vs. Secretary General of the East African Community* (Katabazi case)⁶⁰⁸ entertained its first human rights case. The applicants were a part of a group of 21 charged with treason and misprision of treason. The application claimed inter alia a breach of articles 6, 7(2) and 8 (1) (c) of the EAC treaty relative to the fundamental principles of the EAC, the operational principles thereof and the general undertaking of the partner states to implement the treaty.⁶⁰⁹ Counsel for the applicants

⁶⁰³ *Campbell case*, par. 87.

⁶⁰⁴ For a wider reading on the remarks and actions of the Zimbabwean government, see, F. Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights jurisdiction' 13 *Human Rights Law Review*, (2013), 153.

⁶⁰⁵ See, Communiqué of the Extraordinary Summit of Heads of State and Government of SADC, Windhoek, Namibia, 20 May 2011, at para 7, available at: <http://www.swradioafrica.com/Documents/SADCSummit240511.pdf> (accessed 15 April 2014).

⁶⁰⁶ L. Bartels, 'Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal' Final Report, 6 March 2011 cited in Cowell supra, p.162.

⁶⁰⁷ Final Communiqué of the 32nd Summit of the Heads of State and Government of SADC, Maputo Mozambique, 18 August, at para 24, available at: <http://www.sadc.int/files/3413/4531/9094/Final.32ndSummmmitCommunique.as.at18.2012.pfd> (accessed 15 April 2014).

⁶⁰⁸ 2007 AHRLR 19.

⁶⁰⁹ Signed 30 November 1999, entered into force on 7 July 2000 (amended in 2006 and 2007), available at <http://www.eac.int/treaty/> (accessed 15 April 2014).

sought the EACJ to regard the matter as an application for determination of whether the conduct of the State of Uganda was in breach of the fundamental principles of the EAC. Counsel for the respondent on the other hand argued that the claims of the applicants related to a question of human rights over which the Court had no jurisdiction under article 27(2) of the EAC treaty. The Court held that

Does this Court have jurisdiction to deal with human rights issues? The quick answer is no it does not... It is very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect.

Both of these steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*... while the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.⁶¹⁰

The SADC Tribunal and the EACJ have bravely adopted a liberal approach to treaty interpretation when faced with the challenge of human rights adjudication, albeit with varying consequences. The SADC Tribunal lost its powers completely while the EACJ did not face crushing political backlash from Member States. The case of the SADC demonstrates the power-oriented nature of the relationship between regional organizations in Africa and Member States. The SADC Tribunal read the political landscape of its region wrongly. The Tribunal should have borne in mind that state practice in Africa tilts towards protection of sovereignty and leaves little room for judicial activism that exceeds express powers stated in constitutive documents.

The SADC tribunal and the EACJ were perhaps encouraged by the example of the European Court of Justice (ECJ). The foundations for the protection of fundamental human rights in the EU have been largely attributed to the decisions of the ECJ.⁶¹¹ In *Van Gend & Loos*⁶¹² the ECJ adopted a purposive interpretation of its founding treaty to grant individuals direct access, further expanding the powers of the court. Here the Court held that:

The Union constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit in limited fields... [Union law] therefore not only imposes

⁶¹⁰ Ibid., par, 33, 34 and 37.

⁶¹¹ F. Jacobs, 'Human Rights in the European Union: The role of the Court of Justice' 26 *European Law Review* (2001), p.337.

⁶¹² *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62 [1963] E.C.R 1,12.

obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage.

This decision gave birth to the principle of direct effect of European community law in Member States and established the primacy of the European legal order over national law in agreed areas. Although it has been claimed by a section of European scholars that the decision of ECJ was not revolutionary, but a continuation of earlier established principles,⁶¹³ the ECJ finally established a constitutional approach to European law through that decision.

The revolutionary effect of the ECJ's decision in *Van Gend en Loos* lies in the fact that the court was able to differentiate European law from international public law by declaring the supremacy of the former, and got national governments to accept a fundamental transformation in the European legal order.⁶¹⁴ The entry of fundamental human rights in the discourse of community law appeared to be necessitated by the need to protect the efficacy of direct effect and primacy of community law as instruments for effective economic integration.⁶¹⁵ This fact was not lost on the ECJ, which realised its importance to the overall progress of the community.

Contrary to other sub-regional courts, the ECCJ strictly interpreted the 1991 Protocol, concluding that ECOWAS political bodies must expressly grant it jurisdiction to hear suits from private actors. Perhaps the court was weary of the political backlash it would have to face from Member States and possible disharmony in the organisational hierarchy of ECOWAS. It is possible that the arduous journey of gaining its own freedom as a community institution played on the mind of the judges. Another possible determinant factor for the Court's attitude is the political leadership of Member States at the time which was

⁶¹³ A former ECJ judge, David Edwards, has emphasized how the ECJ established several of the core doctrines on which the *Van Gend en Loos* judgment rested before 1963. He cites the objective-based interpretation of the treaties, the acknowledgment of direct effect of treaty articles, the use of the principle of *effet utile* to fill in gaps in the treaty, and the primacy of European law *vis-à-vis* national legal orders. See, D. Edwards, 'Judicial Activism—Myth or Reality? *Van Gend en Loos*, *Costa v. ENEL* and the *Van Duyn Family Revisited*', in A. Campbell & M. Voyatzis (eds), *Essays in the Honour of Lord Mackenzie-Stuart* 29 (New Jersey: Trenton Publishing, 1996), pp. 29 – 42.

⁶¹⁴ See generally, M. Rasmussen, 'Revolutionizing European Law: A History of *Van Gend en Loos* judgement', 12 *International Journal of Constitutional Law* (2014), 136. Here Rasmussen takes an alternative view to past judges of the ECJ. Here Rasmussen presents a strong historical analysis which demonstrates that the *Van Gend En Loos* judgement was indeed a turning point in the history of European law.

⁶¹⁵ A. Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights', in A. Arnulf et al (eds), *Continuity and Change in EU Law* (Oxford: Oxford University Press, 2008), p.126.

dominantly ruled by military dictatorships, except a few democratically elected governments that were still autocratic in character.

Bearing the above factors in mind, the Court sought political avenues to expand its powers. The judges launched an advocacy campaign to convince member states in this wise by publishing a booklet that summarized the legal arguments of both parties in the *Afolabi* case. The booklet was distributed widely, both to show that they had finally issued a decision and to highlight the serious flaws in the ECOWAS legal system.⁶¹⁶ This sensitization effort not only cast the court in a transparent light but also helped support the court's campaign to expand its jurisdiction.

Civil society also played a crucial part in the eventual expansion of the court's powers. Around the same period, while the court was vehemently campaigning, civil society groups in the sub-region were beginning to mobilize outside of the security context which they initially exploited, and instead, capitalized on a shift to more democratically-oriented governments and strengthening their ties to transnational NGOs such as Amnesty International. Shortly after the *Afolabi* decision, leaders of the West African Bar Association (WABA) met with ECCJ judges and officials of the ECOWAS Commission to develop a proposal to revise the ECCJ's decision. All stakeholders came together in Dakar, Senegal in October 2004 at a "Consultative Forum on Protecting Rights of ECOWAS citizens through the ECOWAS Court of Justice" organized by the Open Society Initiative for West Africa.⁶¹⁷ The Forum, amongst other resolutions, "proposed a Declaration on the proposed amendments to the ECOWAS Court of Justice Protocol" which urged member states "to ensure access to justice to citizens" of the Community and to bring the Protocol into force urgently.⁶¹⁸

The group extended its campaign to key officials from the Ministries of Justice and Ministries of Integration in several states. They were further supported by ECOWAS officials, particularly the ECOWAS Legal Affairs Directorate, which was preparing a draft of the new protocol. A commentator has observed that the decision to focus the reform campaign on human rights may have been a strategic one. It is perhaps a reflection of the implicit

⁶¹⁶ Alter et al (2013), p.750.

⁶¹⁷ See Consultative Forum on protecting the rights of ECOWAS citizens through the ECOWAS Court of Justice, Dakar, Senegal, Oct-20, 2004, available at http://aros.trustafrica.org/index.php/ECOWAS_Community_Court_of_Justice (accessed 15 April 2014). In attendance at this decisive meeting were ECCJ Judges, members of WABA, human rights lawyers from across West Africa, the London-based NGO Interights group, and ECOWAS Commission staff.

⁶¹⁸ Ibid.

understanding that the political climate in the sub-region would not absorb the power of review of noncompliance with ECOWAS economic rules by the court. This might be responsible for the prioritization of human rights concerns over economic issues.

4.4 THE ECCJ's HUMAN RIGHTS JURISDICTION

Less than nine months after the ECCJ dismissed Afolabi's suit, ECOWAS Member States adopted the 2005 Supplementary Protocol.⁶¹⁹ The Supplementary Court Protocol significantly broadened the ECCJ's authority by conferring jurisdiction to determine cases of human rights violation.⁶²⁰ Concomitantly, the new article 10 of the supplementary protocol created the possibility for individuals to access the ECCJ to seek relief for violations of their human rights. To quote the relevant sections of Article 10 verbatim, access to court is given to:

c) Individuals and corporate bodies in proceedings or the determination of an act or inaction of a community official which violates the rights of the individuals or corporate bodies;

d) Individuals on application for relief for violation of their human rights; the submission of application for which shall

i) Not be anonymous; nor

ii) Be made whilst the same matter has been instituted before another international court for adjudication.

The expansion of the Court's mandate to human rights giving individuals access is rather expansive and affects every aspect of the Court's jurisdiction (material, personal, temporal and territorial). It is noteworthy that the new jurisdiction did not replace its original jurisdiction. Collectively, the jurisdiction of the ECCJ comprises competence to interpret the revised treaty from an economic integration perspective in disputes involving Member States and Community institutions, determination of community obligation of Member States. Essentially, the ECCJ is a prototype of European-style ICs (Hybrid courts) that combine the 'multiple roles' of enforcement, dispute settlement, constitutional and administrative

⁶¹⁹ Supplementary Protocol A/SP1/01/05 Amending the Protocol (a/P.1/7/91) relating to the Community Court of Justice, adopted January 2005 (2005 Protocol), reprinted in *COMPENDIUM*, supra n.643, p.298.

⁶²⁰ Article 3 new Article 9(4) of the Supplementary Protocol.

review.⁶²¹ The human rights jurisdiction of the court is specialised because it is relatively new. Ebobrah notes that the ‘express conferment of competence by the proper authority prevents the employment of judicial activism or general principles of law as a basis for finding human rights jurisdiction’.⁶²² His reason for this emphasis is the aversion of the threat of indeterminacy, as the product of a considered decision of the Authority, legislative conferment he argues, provides the opportunity to ensure proper definition of competence.

The competence of the court is clearly not in doubt. But the court faces some crucial challenges mostly attributable to non-compliance by member states. Some questions also hang over the future of the court due to its hybrid nature. One crucial feature of the Court’s human rights mandate is the lack of a human rights catalogue. This gamut makes the human rights mandate less than certain. The next section examines the practice and jurisprudence of the court to enhance the understanding of the Court as a human rights court and to highlight the critical practical issues facing the court as a supranational entity.

4.4.1 MATERIAL JURISDICTION

Generally, both the 1991 Protocol and 2005 Supplementary Protocol of the ECCJ empower the Court to adjudicate on disputes bordering on the interpretation of the Treaty of ECOWAS, the Protocols and Conventions and all other legal instruments of the organization.⁶²³ In the same vein, the new Article 9 gives the Court jurisdiction on matters relating to the legality of regulations, directives, decisions and other subsidiary legal instruments of the Community,⁶²⁴ the failure of Member States to honour their obligations as contained in the Treaty, Protocols, Conventions and other legal instruments of ECOWAS⁶²⁵ and on cases of human rights violations that occur in Member States.⁶²⁶

From the individual human rights perspective, this wide, boundless mandate of the Court can be problematic. This implies that the jurisdiction of the court extends to all cases of human

⁶²¹ Alter (2013), p.355.

⁶²² Ebobrah (2009), p.173.

⁶²³ See Article 9 of Protocol A/P.1/7/91. See also, amended Article 3, new Article 9(1) of the 2005 Supplementary Protocol. The ECCJ interprets article 89 of the revised treaty to imply that Protocols made pursuant to the Treaty form an integral part of it. See *Ukor vs Laleye (ECW/CCJ/APP/01/04)*, para 21.

⁶²⁴ New Article 9(1) (c) of the Court Protocol.

⁶²⁵ New Article 9(1) (d) of the Protocol.

⁶²⁶ New Article 9(4) of the Protocol. Other areas of competence of the Court include actions against the Community, Community institutions and officials of the Community and its institutions.

rights violations that occur in Member States. The absence of an ECOWAS human rights catalogue further accentuates this problem. Instead, as highlighted in Chapter 3 of this study, references made to human rights promotion and protection under the African Charter and (to a lesser extent) the Universal Declaration of Human Rights (UDHR) suggest a link to these instruments. This indeterminacy in the mandate of the Court leaves open the question whether it is exclusively ECOWAS instruments such as the Treaty, Conventions, Protocols and other subsidiary instruments that are applicable to human rights cases or whether the ECCJ is free to rely on international instruments. Considering that there are numerous rights provided for in community legal instruments, the rights contained in any of those treaties may be the basis for a human rights case before the ECCJ. At least the jurisprudence of the ECCJ in the past few years suggests this. The ECCJ in *Keita v. Mali*⁶²⁷ set the record straight 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.”

As Ebobrah notes, the effect of the ECCJ’s submission is three-fold.⁶²⁸ Firstly, it could mean that only those rights relevant for movement towards economic integration can base complaints of human rights violation. Secondly, the dicta could also mean, as long as a right or group of rights are present in any of these instruments adopted for the functioning towards economic integration, they form part of ECOWAS legislation and can be applied.⁶²⁹

An interpretation of article 9(4) of the 2005 Court Protocol gives a third angle to this conundrum. The provision of this article could imply that all human rights reflected in any instrument referred to in community legislative instruments is sufficient to found an action for human rights before the Court.⁶³⁰ Consequently, any reference to human rights instruments in preambles and statements of fundamental principles of ECOWAS instruments would suffice as a source of rights under ECOWAS law. This approach was confirmed by the Court in the *Ugokwe* case where it 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 2005 Supplementary Protocol. The Court affirmed:

⁶²⁷ ECW/CCJ/JUD/03/07 (2004-2009 CCJELR).

⁶²⁸ Ebobrah (2009), p.175.

⁶²⁹ S.T Ebobrah, ‘Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice’, 54 *Journal of African Law* (2010), 1, p.18.

⁶³⁰ *Ibid.*

“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... 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.”⁶³¹

The Court has so far not given similar justification which it offers for the African Charter for its use of the UDHR. However, a few cases have been brought before the Court based on the UDHR, and the Court it has relied on it to reach its decisions.⁶³² The numerous references to the African Charter and the UDHR arguably indicate that both instruments form a crucial source of human rights before the Court. This view gives credence to the interpretation of article 9(4) of the Supplementary Protocol above. This view inevitably augurs well for litigants who can rely on both rich human rights instruments.

Other human rights instruments worthy of mention that have litigants have founded actions upon include the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶³³ the International Convention on Civil and Political Rights (ICCPR),⁶³⁴ and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),⁶³⁵ The ECCJ hinges the applicability of international covenants on constitutional convergence⁶³⁶ common to Member States. In its recent judgement in *SERAP v. Nigeria* the court remarked thus:

“The rights set up in the African Charter on Human and Peoples’ Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights to ensure, to ensure the protection of his/her rights.

Thus, even though ECOWAS may not have adopted a specific instrument recognizing human rights, the Court’s human rights protection mandate is exercised with regard to all the international

⁶³¹ *Ugokwe v. Nigeria*, ECW/CCJ/JUD/03/05 (2004-2009 CCJELR).

⁶³² See, *Keita supra*, *Essien v. The Gambia* ECW/CCJ/JUD/05/07 (2004-2009) CCJELR and *Koraou*.

⁶³³ *Essien* case *supra*.

⁶³⁴ *SERAP v. Nigeria* (Suit No: ECW/CCJ/APP/08/09).

⁶³⁵ *Koraou supra*.

⁶³⁶ Article 1(h) of the Protocol on Democracy and Good governance.

instruments, including [...] the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. to which Member States of ECOWAS are parties.”⁶³⁷

While the use of the constitutional convergence clause in the Protocol on Democracy and Good governance is arguable, the Court made clear that all international instruments of human rights, especially the African Charter and the international covenants apply to it. However, its assumption that an instrument adopted by Member States in their capacity as States automatically applies to it is questionable because ECOWAS as an organization is a separate entity. The only justification for this approach is the fact that these instruments constitute universal standards on human rights protection and the individuals whom the Court seeks to protect are those of the Member States. To a lesser extent, the ECCJ has rarely relied on national constitutions. There are very few cases before the ECCJ to the knowledge of this author that has relied on the constitutions of Member States.⁶³⁸ It is not clear if national constitutions could constitute a source of community law as the ECCJ clearly confirmed in *SERAP* that ‘the sources of law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States’.⁶³⁹

There are positives to the Court’s liberal interpretation of articles 9 and 10 of the Supplementary protocol. Certainly, this gives all classes of litigants the leverage to approach the court drawing from a wide array of human rights instruments. However, there is a reservation on this approach. It is dependent on the ability of the ECCJ to achieve results while acting within the limits of its competence as required by article 6(2) of the revised treaty. Article 6(2) limits the competence of community institutions and by implication the Court to powers expressly conferred by the community’s treaty and protocols. As a result, the ECCJ is constantly under the microscope with the question currently hanging over it as to whether it acts legitimately due to the indeterminacy of its mandate under the Supplementary Protocol. The downside to this approach is that ‘it puts the Court at risk of developing

⁶³⁷ Ibid., para 27-28.

⁶³⁸ In *Ugokwe* for example, the ECCJ relied on section 36 of the 1999 Nigerian constitution that guarantees the right to fair hearing to establish the rights of the applicant. See par. 31; in the 2012 case of *Sa’adatu Umar v Nigeria* (ECW/CCJ/APP/12/11), the ECCJ relied on a domestic case to reach its judgement.

⁶³⁹ *SERAP* supra, para 35.

jurisprudence that has the potential of being in conflict with the jurisprudence of the supervisory bodies of these treaties just as much as it raises questions of forum shopping'.⁶⁴⁰

On the basis that the African Charter is arguably the most important human rights instrument before the ECCJ,⁶⁴¹ and the Charter makes no distinctions between the different generations of rights, the Court is yet to make such distinctions on its own. Thus from the perspective of civil and cultural rights, the EECJ has received complaints on a variety of rights ranging from personal liberty, life, dignity and fair hearing,⁶⁴² the right to property,⁶⁴³ to freedom from slavery,⁶⁴⁴ fair hearing and political participation.⁶⁴⁵ Economic, social and cultural rights (ECSR) which are more problematic for national courts have not featured much before the ECCJ. A rare case where such rights have been sought before the ECCJ is *SERAP v Nigeria*. The plaintiff brought an action against Nigeria seeking the protection of the economic rights of the oil rich Niger Delta region. The plaintiff alleged that the activities of oil companies in the region have led to massive oil spillage that had polluted the environment and denied the indigenes their means to livelihood which is fishing. The plaintiff relied on rights contained in the ICESR and the ICCPR, which Nigeria denied were justifiable or enforceable under the Nigerian constitution.⁶⁴⁶ The Court argued thus:

“As to the justiciability or enforceability of the economic, social and cultural rights, this Court is of the view that instead of a generalistic approach recognizing or denying their enforceability, the appropriate way to deal with that issue is to analyze each right in concrete terms, try to determine which specific obligation it imposes on the States and Public Authorities, and whether that obligation can be enforced by the Courts.”⁶⁴⁷

The Court cast its mind on the possibility that an international court may not possess the technical competence or legitimacy necessary to interfere with allocation of national resources. In this regard, the court stated:

⁶⁴⁰ Ebobrah (2009), p.178.

⁶⁴¹ In *SERAP*, the Court stated obiter that the number of instruments relied on by an individual does not determine the strength of their case. In the Court's opinion, it suffices to cite the one which affords more effective protection to the right allegedly violated. The Court eventually relied overwhelmingly on the African Charter giving the impression that should the same rights be contained in the African Charter, the Charter takes precedence over any other instrument. See, par 92.

⁶⁴² *Chief Ebrimah Manneh v. Gambia* ECW/CCJ/APP/03/08 (2004 -2009 CCJELR).

⁶⁴³ *Alice Chukwudolue and 7 Others v. Senegal* Suit No: ECW/CCJ/APP/05/07 (2004 – 2009 CCJELR).

⁶⁴⁴ *Koraou* supra.

⁶⁴⁵ *Ugokwe* supra.

⁶⁴⁶ Socio-economic rights fall under the Fundamental Objectives and Directive Principle of State Policy enshrined in Chapter 2 of the Nigerian Constitution. Such rights are aspirational as objectives and directive principles and as such are unenforceable.

⁶⁴⁷ *SERAP* supra, para 31.

“Indeed there are situations in which the enjoyment of the economic, social and cultural rights depends on the availability of State resources. In those situations, it is legitimate to raise the issue of enforceability of the concerned rights. But there are others in which the only obligation required from the State to satisfy rights is the exercise of its authority to enforce the law that recognizes such rights...”⁶⁴⁸

Since the socio-economic rights which Nigeria is alleged to have abused fall well within the provisions of the African Charter, the ICCPR and the ICESR, Nigeria had no defence on the account that they fall within the Directive principles of State policy. The Court relying on its earlier decision in *SERAP v. Nigeria & Universal Basic Education Commission*⁶⁴⁹ held that once the concerned right for which the protection is sought by an individual is enshrined in an international instrument that is binding on a Member State, the domestic legislation or Constitution cannot prevail on an international instrument. Hence, Member States cannot violate their international obligations as contained in international instruments.

In a nutshell, the collective approach which the ECCJ adopts to protect rights is significant because it provides the opportunity for Member States to be held to their international obligations as enshrined in the African Charter and other international instruments. This can only be beneficial to the Community citizen. It is also significant for direct application of the African Charter where domestic constitutional principles require national legislation before the Charter becomes applicable. However, this approach may raise challenges for intra-organizational relations as would be revealed subsequently in this chapter. This unfettered material jurisdiction of the Court arguably reflects its nature as a supranational court but can be cause for clash with national courts and could potentially threaten the future of the court. This is true when it is considered that the membership of the organisation relates to limitation of sovereignty in specific agreed fields.

4.4.2 TERRITORIAL JURISDICTION

Article 9(4) of the Supplementary Protocol provides that the human rights jurisdiction of the Court covers violation of human rights ‘that occur in any member state’ of the Community. The choice of the word ‘member state’ as opposed to ‘state party’ suggests that the

⁶⁴⁸ Ibid., para 32.

⁶⁴⁹ Unreported Suit no: ECW/CCJ/APP/0808

jurisdiction of the Court covers non-state parties to the Court's Protocol.⁶⁵⁰ However, this is insignificant considering that Member States of ECOWAS are also parties to the Court. In the same vein, the human rights complaints mechanism of the ECCJ is applicable to the territories of all fifteen Member States currently parties to the ECOWAS Treaty and the Court Protocol (as amended by the 2005 Supplementary Protocol).⁶⁵¹ As article 9(4) of the Supplementary Protocol currently stands, there is nothing to restrict the jurisdiction of the Court over a Member State of ECOWAS for any rights violation that such State allegedly carries out against any community citizen in the territory of another Member State.

As the ECCJ, national courts (each in their states), the African Court on Human Rights and African Commission all have human rights jurisdiction, the potential for forum shopping is high. Within the African Charter, the only provision that could possibly stem this problem of jurisdictional conflicts are article 56(7) of the African Charter and article 109d(II) of the Supplementary Protocol of the ECCJ. But the possibility of the ECCJ adhering to the former provision is remote as the Court does not consider itself to be bound by secondary rules in the African Charter.⁶⁵²

Another challenge of the ECCJ with respect to its territorial jurisdiction is its location. The Court is located in Abuja, Nigeria.⁶⁵³ It is not hard to imagine that those at the receiving end of human rights violations are citizens at the lower end of the economic spectrum and as a result, would have problems accessing the Court in a timely and affordable manner. The Court has most recently sat in Ibadan, Nigeria in its attempt to spread its tentacles.⁶⁵⁴ In the same year, in *Valentine Ayika v. Liberia*,⁶⁵⁵ the ECCJ sat in Cotonou, Benin Republic. The Court has also held sessions in the premises of the apex courts in Niger,⁶⁵⁶ Benin,⁶⁵⁷ and Burkina Faso and Mali.⁶⁵⁸ This would go a long way in dispelling the perception that the ECCJ is a Court used by only Nigerians. Admittedly, this problem is down to funding by

⁶⁵⁰ Article 1 of Protocol A/P1/7/91 defines Member State to mean a member of ECOWAS.

⁶⁵¹ The term territory here also includes embassy premises of Member States in common state practice.

⁶⁵² See the dictum of the ECCJ in the *Koraou* case supra, para 43.

⁶⁵³ Article 26(2) of the 1991 Protocol provides that, where the circumstances or the facts of the case so demand, the Court may sit in the territory of another Member State.

⁶⁵⁴ *SERAP v. Nigeria* supra.

⁶⁵⁵ Unreported Suit No: ECW/CCJ/APP/07/11.

⁶⁵⁶ *Koraou* case.

⁶⁵⁷ *Ameganvi Isabelle v. Togo* (2011) ECW/CCJ/JUD/09/11.

⁶⁵⁸ See, 'ECOWAS Court of Justice holds historic session in Nigerian city', available at <http://www.panapress.com/ECOWAS-Court-of-Justice-holds-historic-session-in-Nigerian-city---12-855006-100-lang2-index.html> (accessed 15 April 2014).

Member States but can only hamper the court as individuals with strong cases from other Member States might be shut out.⁶⁵⁹

4.4.3 LOCUS STANDI BEFORE THE COURT

Article 10 of the Supplementary Protocol of the Court grants access to the Court to Member States, the Executive Secretary, the President of the ECOWAS Commission, the Council of Ministers, individuals, corporate bodies and staff of any Community institution.⁶⁶⁰ As previously argued, in relation to failure to fulfil a Community obligation, it appears that any Member State or the President of the Commission (as legal representative of ECOWAS) are competent to bring a human rights case against a Member State.⁶⁶¹ Since the objective of the revised Treaty and the relevant protocols is to guarantee promotion and protection of human rights set out in the African Charter in community states, there is no limitation of this obligation to rights of citizens of the violating Member State. Accordingly, access to the ECCJ against any Member State under Article 10 need not be only where the victim of the violation is a citizen of the offending State.⁶⁶² There has been no case between Member States before the ECCJ seeking the protection of citizens against each other.

Regarding access to ‘corporate bodies’ before the ECCJ, the Supplementary protocol omits to describe what organizations qualify as corporate bodies. It is expected that use of the term corporate bodies includes non-governmental organizations (NGOs). However, the wording of the provision of Article 10(c) to the extent that such actions should be in determination of acts or inactions of a Community official which violates the rights of individual or corporate bodies’, creates the impression that any action brought upon the facts that do not show the violation of the rights of the corporate body may not succeed.⁶⁶³

⁶⁵⁹ In this wise, Ebobrah has suggested the provision of pro bono services for indigent litigants. This is an obvious omission in the Rules of Procedure of the Court. See Ebobrah (2010), p. 11.

⁶⁶⁰ See, Article 4 of the Supplementary Protocol.

⁶⁶¹ See, Article 9(3) of Protocol A/P1/7/91 and the new article 10(a) of the Supplementary Protocol. It is noteworthy that by article 10 of the Supplementary Protocol, only provisions of Protocol A/P1/7/91 that are inconsistent with the Supplementary Protocol are null and void to the extent of its inconsistency. However, article 9 of Protocol A/P1/7/91 is defunct as it has been repealed by article 3 of the 2005 Supplementary Protocol.

⁶⁶² In a handful of cases, individuals from other Member States have brought actions against an offending Member State. See, *Djot Bayi & 14 ors. vs Nigeria & 4 ors* (Unreported Suit No: ECW/CCJ/JUD/01/09); *Ocean King Nig. Ltd vs Senegal* (Unreported Suit No: ECW/CCJ/APP/05/08); *Femi Falana & Anor vs Republic of Benin & 2 ors* (Unreported Suit no: ECW/CCJ/APP/10/07); *Ayika* supra.

⁶⁶³ See Articles 3 and 4 of the Supplementary Protocol.

The Supplementary Protocol is also silent on the class of defendants before the Court. However a combined reading of the new Articles 9 and 10 of the Supplementary Protocol suggests that Member States, the Community, Community institutions and Community officials all qualify as defendants before the Court. In relation to paragraph (d), the Protocol does not specify against whom the individual right of access can be exercised. A look through the case law of the Court shows that reasonable numbers of human rights cases have been brought against Community institutions and Community officials.⁶⁶⁴ The most obvious defendants however, remain Member States of ECOWAS in actions for failure to fulfil human obligations enshrined in the ECOWAS Treaty, Protocols, Conventions and other legal instruments that Member States are party to.

Another effect of the imprecise couching of articles 9(4) and 10(d) of the Supplementary Protocol is the possibility to bring human rights action against non-state actors before the ECCJ. By granting jurisdiction to the ECCJ to determine all cases of human rights violations that occur in Member States and grant access to individuals for applications for relief for such violations, the Supplementary Protocol appears to have granted a 'blank cheque'⁶⁶⁵ for human rights protection. In *SERAP v. Nigeria*, the Court was presented with an opportunity to lay a marker on the activities of non-state actors in Member States that violate the human rights of community citizens. But the ECCJ held that it had no jurisdiction over the co-defendants that are multinational corporations, but enforced the violation of the rights against Nigeria as a Member State of ECOWAS. The Court's decision is justifiable, as corporations are not parties to international human rights instruments and as such have no human rights obligation under international law. Current legal scholarship seeks to fill this gap in international human rights protection and hold non-state actors accountable for their activities that lead to human rights violations.⁶⁶⁶

⁶⁶⁴ See, *Edoh Kokou v. ECOWAS Commission* (Unreported Suit No: ECW/CCJ/APP/05/09); *Star Crest Investment Ltd vs President of ECOWAS Commission & 3 Ors* (Unreported Suit No: ECW/CCJ/APP/01/08); *Oluwatosin Rinu Adewale vs Council of Ministers, ECOWAS & Ors* (Unreported Suit No: ECW/CCJ/APP/11/10).

⁶⁶⁵ Ebobrah (2009), p.184. The author also argues that this practice holds a risk for the character of the ECCJ as an international court.

⁶⁶⁶ A burgeoning field of human rights that seek to intellectually establish the human rights obligations of non-state actors particularly corporations has come to the fore in recent years. Most notable of this current crop of scholars is John Ruggie who leads a dedicated website that monitors the activities of the top 5100 corporations in the world that amount to human rights violations. See, <http://www.business-humanrights.org/SpecialRepPortal/Home> (accessed 20 September 2013). For a stimulating read on corporate human rights obligations at the international level see, J. L Cernic, 'Corporate Human Rights Obligations at the International Level', 16 *Williamette Journal of International Law and Dispute Resolution*, (2003) 130. Writing

Third parties who consider that their interest may be affected by ongoing human rights proceedings are allowed to intervene under the Supplementary Protocol.⁶⁶⁷ While this provision was originally designed for States, since the introduction of the Supplementary Protocol individuals have relied on it to join proceedings as co-respondents with a State or an individual.⁶⁶⁸

Clearly, the ECCJ's human rights jurisdiction extends over the territories, citizens and institutions of ECOWAS Member States as well as its own institutions. While it is imperative that its mandate cover the above subjects and entities, it potentially evokes concerns over the effectiveness of its mandate, particularly as it relates to Member States and their institutions on the one hand, and other continental human rights institutions on the other. The organizations may be faced with the task of properly defining its relations with these institutions in future. The positive side to this 'complex web' is the fact that the ECCJ like other RECs with human rights mandate augments the efforts of the over-burdened African Commission, and the newly established African Court on Human and Peoples Rights before which individuals and NGOs still lack *locus standi*.⁶⁶⁹ The emergence of the human rights mandate is therefore, a welcome development for human rights protection in the sub-region and the larger continent. There is no evidence to point to the ECCJ's jurisdiction affecting the submission of cases to the African Commission. However, it must be borne in mind that the risk of jurisdictional conflicts in the horizontal and vertical relations with other institutions remains. These relational issues may be resolved through cooperation and coordination,⁶⁷⁰ or constitutionally as would be revealed below.

from the perspective of developing countries, see O. Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries*, (UK: Routledge Publications, 2011).

⁶⁶⁷ Article 21 of the 1991 Protocol (new article 22 under article 5 of the Supplementary Protocol). Article 89 of the Rules of Procedure deals with the procedure for intervention.

⁶⁶⁸ In *Ugokwe* for example, there were interveners who joined as co-respondents with Nigeria. Also, in *Ukor v. Laleye & Anor*, Suit No: ECW/CCJ/APP/03/05 (2004-2009 CCEJLR), an application to join as an intervener was struck out on the grounds of limitation of time.

⁶⁶⁹ See, *Femi Falana vs African Union* (Unreported Application No: 001/2011).

⁶⁷⁰ As has been proven at the European level, courts with different interests, seeking to protect different judicial spaces can cooperate and co-exist successfully. The ECJ and the ECtHR have interacted well over the years, stemming their differences and producing systemic effects on EU politics in the process. This they achieved by talking to each other through their respective case law, bilateral meetings, conferences and colloquies etc. African Courts have the potential to work in similar manner, for the purpose of effective human rights protection across all levels. See more in, L. Scheek, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks', GARNET Working Paper: No 23/07 (2007), available at http://www.garnet-eu.org/pdf/index_27_type_123.pdf (accessed 15 April 2014).

4.4.4 PROCEDURE BEFORE THE ECCJ

Procedure before the ECCJ is contained in the Rules of Procedure of the Court and the protocols of the Court. The Court adopted its rules of procedure in August 2003 on the basis of the authority granted in article 32 of the 1991 protocol. At the time of adoption of the rules of procedure the Court was yet to obtain its human rights mandate and as such could not entertain cases from individuals. The Supplementary Protocol of 2005 is an improvement on the 1991 protocol and contains most provisions that are contributory to the human rights procedure before the ECCJ. Under article 10(d), the two conditions that must be fulfilled before individual applications are accepted are that the application should not be anonymous and should not have been instituted before another international court for adjudication.

The most conspicuous and perhaps the most controversial omission from the rules of the court is the question of exhaustion of local remedies. The Court has consistently insisted that the requirement to exhaust local remedies does not apply to human rights cases brought under the Supplementary Protocol A/SP.1/01/05.⁶⁷¹ In *Ocean King vs. Senegal*⁶⁷² the Court stated thus:

“ ... The rule on exhaustion of local remedies is derived from customary international law which requires the exhaustion of local remedies before a claim may be brought before an international court. However it is not an inflexible rule.

Under Article 10 of the Supplementary Protocol of 2005, any provision of a prior Protocol which is inconsistent with the provisions of the 2005 Supplementary Protocol is to the extent of the inconsistency null and void. Thus, Article 39 of the Protocol on Democracy and Good Governance, which is clearly in conflict with the provisions of Article 4(d) of the Supplementary Protocol of 2005 with respect to the exhaustion of local remedies as a condition precedent to the institution of an action in human rights, is null and void to that extent.”⁶⁷³

The Court rightfully stated that the rule of exhaustion is a customary international law one but also a flexible one. Being that the Supplementary Protocol does not require the establishment of the rule for institution of an action in human rights, it overrules an earlier community law in the form of Article 39 of the Protocol on Democracy and Good Governance which is still in operation. However correct the dictum of the Court appears to be in this regard, a rejection of the rule to exhaust local remedies has adverse implications not

⁶⁷¹ See, *Koraou supra*, *Moses Essien vs Gambia supra*; *Musa Sadykhan vs Gambia* (Unreported Suit No: ECW/CCJ/APP/05/05).

⁶⁷² Unreported Suit No: ECW/CCJ/APP/05/08.

⁶⁷³ *Ibid.*, para 39 – 40.

only on the procedure of the Court, but also has the potential to sour its relationship with municipal courts and may have consequences for the application of *res judicata* between both levels. The Court could be seen as unduly asserting its authority on municipal courts. What makes the position of the Court more surprising is that the African Charter which the Court has constantly relied on in these cases expressly proclaims the rule.⁶⁷⁴ Given that the Court has jurisdiction to interpret and apply the Treaty and the same treaty in Article 4(g) alludes to the ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights, is the ECCJ bound by this provision to exhaust domestic remedies?

Admittedly, the exhaustion of local remedies is a procedural requirement, one which the Court has held that the Supplementary Protocol does not require and as a secondary rule of another Court would not apply to it. If the jurisprudence of the African Court is of persuasive effect, it would be important to see what it says on this requirement. In *Urban Mkandawire vs Malawi*⁶⁷⁵ the African Court reaffirmed the centrality of the requirement to exhaust local remedies in human rights cases before it. Relying on *Mariblanca Staff Wilson and Oscar E. Ceville v. Panama E. Ceville vs Panama*⁶⁷⁶ before the Inter-American Commission of Human Rights (IACHR), the court held that ‘the requirement of exhaustion of local remedies is fundamental in the inter-action between State parties to both the Protocol and the Charter, and their national courts, on the one hand, and this Court, on the other hand’.⁶⁷⁷

The exhaustion requirement is the ‘procedural pivot of human rights redress procedures’⁶⁷⁸ and the ECCJ seems to under estimate the adverse implications of its position on the rule on its human rights mandate. There is a double barrel effect to the non-applicability of the rule of exhaustion. One effect is that the ECCJ is forced to become a court of first instance which opens the possibility of forum shopping, thereby opening the flood gates for every single case of injustice from the 15 ECOWAS member states. The other effect is that majority of human

⁶⁷⁴ Article 50 of the Charter precludes the Commission from accepting any human rights complaint, unless local remedies have been exhausted, long as they exist. See also, article 56(5) of the African Charter and article 6(2) of the Protocol of the African Court on Human and Peoples’ Rights. The Protocol of the African Court on Human and Peoples’ Rights is available at <http://www.achpr.org/instruments/court-establishment/> (accessed 15 April 2014).

⁶⁷⁵ Application 003/2011, Judgement of 21 June 2013, available at <http://www.african-court.org/en/index.php/2-home/172-application-no-003-2011-urban-mkandawire-v-malawi> (accessed 15 April 2014).

⁶⁷⁶ Case 12.303, Report No. 89/03, Inter-Am C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2.

⁶⁷⁷ Ibid., para 37.

⁶⁷⁸ C. Odinkalu, ‘Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa’, 41 *Journal of African Law* (2003), p.22.

rights cases are treated first at national courts thereby barring those cases afterwards from reaching the ECCJ.

It appears that the reason to leave out the rule of exhaustion was strategic. Alter et al notes that three design features of the supplementary protocol – direct access by individuals, open-ended legal norms, and non-exhaustion of domestic remedies collectively gave the ECCJ much broader authority than other human rights tribunals.⁶⁷⁹ The open ended legal norms are viewed by the judges as an ‘opportunity to define and delimit the scope and legal parameters of its human rights mandate in its own image.’⁶⁸⁰ These features dramatically enhance the legal and political salience of the ECCJ in West Africa. The advantage of this omission is steeped in the fact that litigants can bypass national courts and immediately file suits at the ECCJ, enabling ECCJ judges to adjudicate complaints within months or even weeks after the alleged violations occur. Connected to this reality, is the fact that dispensation justice in most West African countries is slow, particularly Nigeria where the ECCJ is headquartered.⁶⁸¹

The requirement that cases should not be brought twice is a codification of the principle of *lis pendens*. In terms of the horizontal relations with other international mechanisms and Courts exercising competence in the sub-region, this is an important provision. One uncertainty in this regard is whether quasi – judicial bodies such as the African Commission and the African’s Children Committee may qualify as international courts. Other than these specific concerns, the current rules of procedure seem adequate for the purpose of human rights competence of the ECCJ, at least at this stage in the court’s life.

⁶⁷⁹ Alter et al (2013), p.753.

⁶⁸⁰ T. Anene-Maidoh, ‘The Mandate of a Regional Court: Experiences from ECOWAS Court of Justice, paper presented at the Regional Colloquium on the SADC Tribunal, Johannesburg (March 12-13, 2013), statement by ECOWAS Court chief registrar, available <http://tamaidoh.blogspot.co.uk/2013/04/the-mandate-of-regional-court-ecowas.html> (accessed 15 April 2014).

⁶⁸¹ The Nigerian justice system is clogged with a multitude of problems ranging from case overload in courts, trial delays and denial of justice, inadequacy of judicial personnel, archaic system of court adjudication, to corruption, lack of modern management technology and the absence of case management techniques. See, D. Peters, ‘Alternatives to Litigation: The Multi-Door Court House Concept’ in F. Yusuf (ed.), *Issues in Justice Administration in Nigeria*, (VDG International; Lagos, 2008), p.435.

4.5 OTHER CRITICAL ISSUES FACING THE COURT

4.5.1 QUALIFICATION OF JUDGES

Article 3 of the 1991 protocol on the Community Court of Justice stipulates that 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 recognized competence in international law”.⁶⁸² This provision was subsequently amended by the Supplementary Protocol, but the only addition in terms of qualification for the office of a judge of the ECCJ is that “jurisconsults of recognized competence in international law” should be versed “particularly in areas of community law or regional integration”.⁶⁸³ Because factors shaping IC decision-making are more likely to be legal and/or related to the professional background of judges, it is important that community judges are well versed in community law. This way, they possess an international outlook, devoid of the undue influence of member states and are able to better protect their ‘strategic space’⁶⁸⁴ from which they make sound decisions for the furtherance of community objectives.

Experience or qualification in human rights is not a consideration for appointment as a judge of the ECCJ. An argument could be espoused that national judges are not required to possess any special human rights qualification to be appointed, yet they are the first port of call in the event of an alleged human rights violation. However, the ECCJ as a post-national human rights institution requires some ‘specialized –knowledge and expertise’⁶⁸⁵ in the field of human rights. The practicality of this requirement stems from the need for ICs to provide leadership and guidance for national courts in the application of human rights instruments. The leadership of the ECCJ is even more relevant when the normative legitimacy of

⁶⁸² Article 3(1) of the SADC Protocol on Tribunal and Rules of Procedure provides for only one limitation for appointment of a judge. The candidate must qualify for appointment to the highest offices in their respective states or considered jurists of recognized competence.

⁶⁸³ New Article 3 in Article 2 of Supplementary Protocol A/PS.2/06/06 amending art 3 paras 1,2 and 4, Article 4 paras 1,2 and 7, and article 7 para 3 of the Protocol of the Community Court of Justice.

⁶⁸⁴ There is scholarly consensus that most ICs enjoy some degree of autonomy within a defined sphere. Steinberg refers to this defined sphere as a ‘strategic space’. See, R.H Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints’, 98 *American Journal of International Law*, (2004), 249. See also, T. Ginsburg, ‘Bounded Discretion in International Judicial Lawmaking’, 45 *Virginia Journal of International Law* (2005), 631.

⁶⁸⁵ Hurrell writing on the legitimacy of the use of force adopts five dimensions to legitimacy; process and procedure, substantive values, specialised and specialist knowledge, effectiveness, and reasoning/persuasion. Of the third dimension, he argues that ‘institutions and the norms and rules that they embody are legitimate to the degree that those centrally involved possess specialist knowledge or relevant expertise. See, A. Hurrell, ‘Legitimacy and the use of force: can the circle be squared’, 31 *Review of International Studies* (2005), 15, p.22.

ECOWAS is taken into context. Appended to this leadership argument is the gap between international judges and direct domestic mandates. This specialised knowledge it is believed would aid the in-depth analysis needed for supranational courts to decide most human rights cases which often have political implications in member states. In this wise, the original composition of the ECCJ may pose potential challenges for the credible exercise of its human rights mandate in terms of not requiring any specific human rights qualification for appointment of judges.⁶⁸⁶

4.5.2 JUDICIAL INDEPENDENCE OF THE ECCJ: THE UGOKWE CASE

Judicial Independence strikes at the heart of what is different about a world with ICs and also very important in the African regional integration context. There are a multitude of definitions of judicial independence, but most scholars agree on a common element. Most scholars agree that judicial independence allows judges to develop legal opinions unconstrained by the preferences of other actors.⁶⁸⁷ Helfer and Slaughter maintain that independence is the key to the legitimacy and effectiveness of ICs.⁶⁸⁸ As a result it is pertinent to examine the extent to which ECCJ judges who are crucial players in the new found human rights mandate of the court are independent. At the international level, the Bangalore Principles of Judicial Conduct⁶⁸⁹ recognizes judicial independence as a ‘prerequisite to the rule of law and a fundamental guarantee to a fair trial’.⁶⁹⁰ Moreover, the African Charter places a duty on State parties to guarantee the independence of courts.⁶⁹¹ This underlines the

⁶⁸⁶ Ebobrah (2010), p.10.

⁶⁸⁷ E. Voeten, ‘International Judicial Independence’ in J.L. Dunoff & M. Pollack (2013) p. 422. See also, article 1.1 of the Burgh House Principles on the Independence of the International Judiciary (International Law Association 2004): “The court and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity”.

⁶⁸⁸ See generally, L.R Helfer & A. Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’, 93 *California Law Review* (2003), 889.

⁶⁸⁹ The United Nations Centre for International Crime Prevention in conjunction with the 10th United Nations Congress on the Prevention of Crime and Treatment of Offenders set up a Judicial Group on the Strengthening on Judicial Integrity, at a meeting held in Vienna in April 2000. At the second meeting of the Judicial Group in Bangalore, India in February 2001, the principles of judicial conduct emerged from the meeting. The core values recognized in that document are independence, impartiality, integrity, propriety, equality, competence and diligence.

⁶⁹⁰ Value 1 of the Bangalore Principles.

⁶⁹¹ Article 26 of the African charter.

indispensability of an independent court as a determinant variable for normative legitimacy of the Court and the organization.⁶⁹²

As events in the currently suspended SADC tribunal continue to unfold, regional courts in Africa are yet to be totally perceived as independent actors in the integration process.⁶⁹³ Even more disturbing is the culture of disregard for rule of law amongst African heads of state and the intergovernmentalist overweight which characterizes the institutional design in most African RECs'. The ECCJ is certainly not immune to this power tussle between governments and ICs and the *Ugokwe* case provides ample evidence of this. The new human rights mandate of the ECCJ even further distends the possibility of a cat and mouse game between both actors as the SADC tribunal's predicament has recently demonstrated.

The fall out of the *Ugokwe* case raises some salient questions about the independence of ECCJ judges and the lack of human rights qualification of judges. It is important to expatiate the facts of the case in question in order to highlight the issues that formed the basis of the dispute between the ECCJ and Nigeria. The applicant, Mr Ugokwe, lost an election into the Nigerian Federal House of Representatives. He was initially declared the winner by the Independent National Electoral Commission (INEC). His opponent, Christian Okeke, appealed the decision to the Nigerian Elections Tribunal, arguing that Ugokwe was not a legitimate candidate for office. The Elections tribunal annulled Ugokwe's election, and the Federal Court of Appeal- the final arbiter for all election disputes – upheld that decision. The applicant thereafter brought the case before the ECCJ contesting amongst other things an infringement upon his right to fair hearing- a right guaranteed by Article 7 of the African Charter on the one hand, the Universal Declaration of Human Rights, on the other hand; and finally, by Section 36 of the 1999 Constitution of the Federal Republic of Nigeria.

Ugokwe requested the ECCJ to issue a special interim order preventing the Nigerian authorities from invalidating his initial election victory or from seating his opponent. In his plea for a special interim order, he enjoined INEC to refrain from (a) invalidating his election or (b) taking any steps towards his replacement; and (2) the Federal National Assembly from

⁶⁹² The African Commission has upheld this duty through a number of its decisions. See for example, *Civil Liberties Organisation vs Nigeria Case No: 129/94* available at <http://caselaw.ihrrda.org/doc/129.94/view/> (accessed 15 April 2014).

⁶⁹³ Following the landmark decision in *Mike Campbell (PVT) Limited & Anor vs Republic of Zimbabwe*, a political tussle ensued between the SADC tribunal and Zimbabwe resulting in the suspension of the tribunal in May 2011 until at least summer 2012. The review of the respective Treaty protocol is yet to be completed.

relieving him of his seat.⁶⁹⁴ The President of the ECCJ, Justice Donli issued the interim order barring the National Assembly from swearing in Okeke while Ugokwe's complaint was pending.⁶⁹⁵ Nigeria challenged the suit and asked for a dismissal for lack of jurisdiction and because Ugokwe's appeal to the high court was still pending. The government accused the applicant of "forum shopping" with courts.⁶⁹⁶ The ECCJ's response was to renew the interim order before it left for a recess. President Donli justified the court's action as necessary to preserve "the res" until the ECCJ could review Ugokwe's allegations.⁶⁹⁷

Despite the dissent displayed on the part of the government, Nigerian officials complied with the ECCJ's directives. The Attorney general and Minister of Justice informed the Speaker of the Federal House of Representatives of the Court's order "not to swear [Okeke] in until the case is fully settled by the [ECCJ]. A massive uproar trailed the Attorney general's order with Nigerian lawyers, activists, and citizens characterizing the dispute as a matter outside the ECCJ's authority.⁶⁹⁸ They noted that the ECCJ had breached the Nigerian Constitution which clearly states that "decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final."⁶⁹⁹

The ECCJ eventually threw the case out after it reasoned that "no provision whether general or specific, gives the court powers to adjudicate on electoral issues or matters arising thereof."⁷⁰⁰ The court also asserted that it "is not a court of Appeal or cassation" over municipal courts. As a result, the court declared that it lacked authority to intervene against the execution of the judgement already made by the Federal Appeal Court of the Member State of Nigeria. The ECCJ judges failed to explain why the case was entertained in the first place but instead sent clear signals that it would not entertain or intervene in electoral matters in the future. The ECCJ was clearly in the right to entertain the case because the applicant claimed that his right to fair hearing had been breached but the electoral nature of the dispute and the subsequent 'intervention' of the court left a bitter taste in the mouth of the government which felt that the court was over-reaching into the judicial autonomy of domestic courts.

⁶⁹⁴ *Ugokwe supra*, para 14.2 – 14.3.

⁶⁹⁵ L. Okenwa, 'Election Petition: ECOWAS Court Stops Ugokwe's Successor, This Day (Nig.), June 2, 2005, 2005 WLNR 8843638.

⁶⁹⁶ FG Asks ECOWAS Court to Dismiss Ugokwe Suit, Vanguard (Nig.), June 17, 2005, available at <http://allafrica.com/thread/comment/main/main/pkey/aans:post:200506170727.html> (accessed 15 April 2014)

⁶⁹⁷ Okenwa *supra*.

⁶⁹⁸ Alter et al (2013), p.759.

⁶⁹⁹ Article 246(3) of the 1999 Constitution of the Federal Republic of Nigeria.

⁷⁰⁰ *Ugokwe supra*, para 19.

In a move indicative of Nigeria's discontent at the manner the Ugokwe case was handled, member states created a community Judicial Council⁷⁰¹ to ensure that the Court is endowed with the best qualified and competent persons, by virtue of their quality and experience, to the establishment of Community laws capable of consolidating and accelerating the regional integration process.⁷⁰² It came as no surprise that member states took this corrective step as it was obvious that the intervention of the ECCJ somewhat exposed what was arguably a lack of experience on the path of the judges.

The Judicial Council increases the influence of national judges in the selection of ECCJ judges. The Council is made up of chief judges from member states not represented on the seven members ECCJ.⁷⁰³ ECCJ Judges are appointed by the Authority and consist of seven members, no two of whom may be nationals of the same State.⁷⁰⁴ The Authority makes a political determination as to which country is next in line to appoint a judge. The ECOWAS Legal Affairs Directorate then advertises the position and collects applications. Every application that meets specified criteria is forwarded to the Judicial Council, which vets applicants and interviews candidates. The Council then selects three candidates and forwards their names, together with point-based rankings, to the ECOWAS Authority, which decides which candidate to appoint to the Court. As of 2012, only one set of appointment had been made using the new procedures. It is expected that appointments will become more frequent since the reforms that created the Judicial Council also reduced the tenure of ECCJ judges – from five years with the possibility of one reappointment to a single four-year non-renewable term.⁷⁰⁵

In addition to this new selection process, the Judicial Council oversees the procedures under which ECCJ judges can be dismissed for malfeasance.⁷⁰⁶ The procedures of the Council might come across as problematic to an observer, in that they contemplate dismissals for

⁷⁰¹ Decision A/2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006) in ECOWAS Official Journal Vo. 49, June 2006, (on file with the author).

⁷⁰² Ibid. p.36.

⁷⁰³ Rules for Judicial Council Approved, PanaPress (Sept. 15, 2007), available at <http://www.panapress.com/Rules-for-regional-judicial-council-approved--12-507868-100-lang2-index.html> (accessed 15 April 2014).

⁷⁰⁴ Article 3(2) of the Protocol on the Community Court of Justice.

⁷⁰⁵ ECOWAS Newsletter Issue I, October 2006, available at http://www.ecowas.int/.../en/newsletter/ecowas_newsletter_01-eng.pdf (accessed 15 April 2014).

⁷⁰⁶ Article 5 of Decision A/2/06/06 outlines the procedures for the Council to deal with complaints against ECCJ judges.

psychological impairments and public statements.⁷⁰⁷ The Judicial Council might also appear as a ‘control mechanism’ by the member states robbing the court of its independence. As Bradley and Kelley observe:

Independence [...] depends on the control mechanisms that a state has over the decision-making body through its representation on the body, the body’s rules and procedures, other institutional features such as oversight mechanisms, the permanence of the delegation, and authority over finances⁷⁰⁸

In response to this, ECOWAS officials and lawyers explain that detailed dismissal procedures of this kind are standard for government positions and judgeships in West Africa. Seen from this perspective, the fact that a council of chief judges from unrepresented member states oversees the application of judicial disciplinary proceedings nullifies to an extent the possibility to punish ECCJ judges for embarrassing rulings.

It is unlikely that the deadlock in the SADC would manifest in ECOWAS although the situations in both cases are different, hence the difference in outcomes. The *Mike Campbell* case concerns land reforms in Zimbabwe,⁷⁰⁹ a politically sensitive matter, and the decision of the Tribunal was a final judgement against the member state.⁷¹⁰ In *Ugokwe*, the issue in contention was an order of court in an electoral case already determined by national courts and which the Nigerian constitution covers. The fact that the applicant claimed an infringement of his right to fair hearing does not entitle the court to order a halt in swearing in the applicant’s opponent – declared winner by the Appeal court. The Nigerian government perhaps perceived that wresting powers from the ECCJ would adversely affect the legitimacy of ECOWAS and would also lead to distrust on the part of smaller member states.⁷¹¹ Instead, the Judicial Council was created to appoint the best qualified and competent judges to oversee the court and make better legal judgements.

⁷⁰⁷ Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community – Judicial Council (Dec. 14 – 15, 2007 (on file with the author).

⁷⁰⁸ C. A Bradley & J. G Kelley, ‘The Concept of International Delegation’ 71 *Law and Contemporary problems* (2008), 1, p.20.

⁷⁰⁹ Land reform in Southern Africa is a subject of heated debate. Namibia, South Africa and Zimbabwe are some of the countries in the region with racially skewed patterns of land distribution and are all struggling to find ways to address their history of dispossession and the undermining of peasant production. Speaking on this topic, the development and justice implications, see, M. Spierenburg, ‘Land Reform in Southern Africa: Myths, Visions and the Harsh Realities of Development and Justice’, 42 *Development and Change*, (2011) 1473; See also, M. Lipton, *Land Reform in Developing Countries: Property Rights and Property Wrongs*, (New York: Routledge, 2009).

⁷¹¹ Voeten reckons that “delegating authority to an independent court increases the credibility of the commitment by the powerful that they will not exploit their more vulnerable counterparts in a cooperative

The court also faced enormous political backlash from the Gambian government after its decisions in *Chief Ebrimah Manneh v. Republic of Gambia*,⁷¹² and *Musa Saidu Khan v. Republic of Gambia*⁷¹³ respectively. In both cases, the ECCJ ruled in favour of the applicants, exposing in the process, the flagrant violation of human rights occurring in the Gambia particularly directed towards journalists. The Gambian government ignored the ruling of the court on both occasions and carried out a political attack on the ECCJ. In 2009, the Gambia called for a revision of the 2005 Supplementary protocol and a restriction of the Court's authority.⁷¹⁴ The ECOWAS Commission posed the proposal to the ECOWAS Committee of Legal Experts who recommended against revising the Supplementary Protocol. In October 2009, the Council of Justice Ministers endorsed the Committee's recommendations, which had the effect of shelving the proposal. The Gambia's proposal provided a clear opportunity for member states to review the 2005 Supplementary Protocol and revise the ECCJ's jurisdiction. That they turned down this opportunity is striking and arguably hints at a willingness to maintain a supranational court with a human rights mandate. The defeat of Gambia's judicial reform campaign further 'bolstered the Court's legitimacy'.⁷¹⁵

Independence of an IC does not necessarily imply effectiveness. There appear sufficient institutional guarantees for judicial independence of the ECCJ. At least at this stage it appears that the judges of the ECCJ are independent of Member State influence in reaching its judgements. However, the past record of some Member States in terms of obeying the rule of law in their various States and the political backlash it has received in the above instances might play somewhat on the mind of the judges. The judges seem well aware of this risk and have continued to forge strong political relationships with community citizens, civil society and other actors in the integration process. This would certainly legitimize the Court and place it on a strong footing irrespective of the power of politicians over it.

agreement. The more independent a court is, the less likely its decisions cater to the wishes of powerful states". Veoten (2013), p. 428.

⁷¹² ECW/CCJ/APP/04/07 – ECW/CCJ/JUD/03/08 (2004-2009 CCJELR).

⁷¹³ ECW/CCJ/RUL/05/09.

⁷¹⁴ West Africa Country Submits proposals to Amend ECOWAS Protocol, FOROYAA Newspaper (Serrekunda) (September 25, 2009) available at <http://allafrica.com/stories/printable/200909250810.html> (accessed 15 May 2014). The most notable changes sought by the Gambia was a limitation of the ECCJ's human rights jurisdiction to treaties ratified by the respondent and also exhaustion of domestic remedies – two distinctive design elements that civil society groups originally lobbied for its inclusion in the protocol.

⁷¹⁵ Alter et al (2013), p.764.

4.5.3 RELATIONSHIP BETWEEN THE ECOWAS COURT AND MUNICIPAL COURTS

Based on the postulations of Hay⁷¹⁶ and Weiler⁷¹⁷ earlier examined on supranationalism, organization's normative powers only qualify as supranational, where there is a direct binding effect of law emanating from it on natural and legal persons in member states. In the greater context of this study, the normative legitimacy of the ECCJ is directly connected to the effectiveness of its decisions in Member States, represented in this case by enforcement through national institutions, particularly the courts. The ECOWAS treaty already provides that the judgments of the ECCJ are binding on Member States.⁷¹⁸ In addition, the ECCJ procedurally relies on national courts for enforcement.

Any examination of the relationship between a supranational court and its national counterparts would imply investigating the nature of such a relationship. Are there are procedural mechanisms that ensure that both spheres interface? In practice, is such a relationship one that shapes cooperation or collaboration? These are salient questions that define and ascertain the nature of the relationship between the ECCJ and national courts.

The first channel of legal and jurisdictional relationship between both spheres is the preliminary reference procedure.⁷¹⁹ The Supplementary Protocol in Article 10(f) provides that 'where in any action before a court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other protocols or regulations, the national court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation'. While this mechanism should *prima facie* enhance greater ties between the ECCJ and national courts, there are loopholes in the manner in which it is couched and this makes its operation problematic.

Firstly, Article 10(f) refers solely to the interpretation of the ECOWAS treaty and other laws enacted in the framework of the Community – Community law. A literal interpretation of this provision implies that the mechanism does not apply to the interpretation of provisions of the African Charter which forms the normative basis of the ECCJ's human rights jurisprudence.

⁷¹⁶ Hay (1966), p.69.

⁷¹⁷ Weiler (1999), p.271.

⁷¹⁸ See article 15(4) of the revised treaty.

⁷¹⁹ The preliminary reference procedure has been most successful in the EU legal system. As a result of the dialogue between courts, the genetic features of the new European legal order take shape one by one. Such principles as direct effect, primacy, accountability, effectiveness and equivalence are considered by some to be the result of the adoption of the procedure. See generally, R. Virzo, 'The Preliminary Ruling Procedures at International Regional Courts and Tribunals', 10 *The Law and Practice of International Courts and Tribunal* (2011), 285.

This can be problematic as it poses the risk of inconsistent interpretation between the ECCJ and national courts in human rights cases.

Another reason is the fact that the preliminary reference procedure provided under Article 10(f) is only optional.⁷²⁰ Municipal courts may, therefore, choose not to refer interpretation of Community law to the ECCJ. The use of this mechanism to strengthen ties between both spheres appears far-fetched as a result. As one commentator rightly points out, the relationship ‘will eventually depend mainly on the spirit of cooperation of domestic courts.’⁷²¹ As at the time of writing, there is still no request for a preliminary ruling from domestic courts. The lack of preliminary ruling requests before the ECCJ has been attributed to the limited economic interaction among ECOWAS countries, which in explains the poverty of related litigation and by human rights matters overwhelming the ECCJ’s docket since 2005.⁷²²

Irrespective of the above limitations, the preliminary reference procedure could potentially improve the relationship between both levels and enhance the influence of the ECCJ. One benefit of the mechanism, related to the question of competence, is that it creates a clear demarcation on the role of the ECCJ and municipal courts in human rights protection. In other words, the ECCJ as mandated by the treaty will interpret and domestic courts will apply community law. More importantly, despite the impression that the relationship between the ECCJ and national courts is a horizontal one, municipal courts cannot set aside an interpretation of the ECCJ in a preliminary ruling. As the former President of the Court explains:

⁷²⁰ While the preliminary reference procedure is optional in the ECCJ, it is compulsory in the courts of sister RECs such as EAC, COMESA, UEMOA, CEMAC, and SADC. Outside the continent, the Caribbean Community (CARICOM) Court exercises compulsory preliminary reference rulings over national courts. However, as a matter of practice most regional courts in Africa seem not to utilize the procedure even if their respective protocols provide for it. The only preliminary reference in an African regional court known to the author was made within the West African Economic and monetary Union (UEMOA) in *Air France v Syndicat des Agents de Voyage et de Tourisme du Senegal* (Cour de justice de l’UEMOA, Arret No. 02/2005).

⁷²¹ H. S Adjolohoun. ‘The ECOWAS Court as a Human Rights Promoter? Assessing Five years’ impact of the Koraou Slavery Judgement’, 31 *Netherlands Quarterly of Human Rights*, (2013), 342, p.357.

⁷²² *Ibid.*

The ECCJ's role here is to give preliminary ruling as to the interpretation or validity of the Treaty provision or community Act, while the National Courts shall apply the ruling to the facts of the case. In other words, the Court's role is to interpret, while the National Court's role is to apply'.⁷²³

The use of 'shall' indicates that national courts must apply the ruling of the facts of the case as interpreted by the court without challenging it. In this regard, the use of the permissive language 'May' in Article 10(f) may be misleading. However, the same wording 'may' is used in UEMOA and OHADA Court rulings, even though the procedure is compulsory.⁷²⁴ The roles are clearly defined such that, interpretation is left to the supranational court while domestic courts will only apply the ruling from above.

In trying to harmonize the 'integrated community legal order' and balance both systems for efficient enforcement of ECCJ judgements, one system has to make certain concessions. In this case, it is the national system that needs to accept the Community Court's jurisprudence. On the ECCJ's side, to avoid clashes the Court must exercise caution in adjudicating cases that have been examined by national courts before making its way to Abuja. A look through the Court's case law suggests that the ECCJ has made reasonable progress in this regard.⁷²⁵ The difficulty in this legal harmonisation or 'judicial monism'⁷²⁶ which the ECCJ strongly calls for is its ostrich approach towards national courts. Domestic norms and court pronouncements inconsistent with ECCJ case law may subsist because the position of the court is uncertain.

The Court may be excused for threading with caution to avoid adversity from Member States, especially in its reluctance to make findings that might contradict the precedent of national courts. A trend which has currently been discovered in the Court's jurisprudence is that it finds in its arguments that domestic law and practice fall short of international standards

⁷²³ H.N Donli, 'The Law, Practice and Procedure of the Community Court of Justice: Meaning and Implication' Paper presented at the Workshop on Law Practice and Procedure of the Community Court of Justice – ECOWAS, organised by the West African Human Rights Forum (Bamako, Mali, 7-9 December 2006),p.10.

⁷²⁴ Adjolohoun (2013), p.358.

⁷²⁵ Other than the case of *Ugokwe*, the ECCJ has rarely clashed with or ruled against a decision of a domestic court. In this regard, the Court has been warned not to mistake 'pro-cooperation' caution for excessive self-restraint that may also lead to a loss of confidence and authority. See, *Ibid*.

⁷²⁶ In the *Ugokwe* case the Court asserted that "the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law... the kind of relationship existing between the Community Court and these national courts of Member States is not of vertical nature between the Community and Member States, but demands an integrated Community legal order. " See *Ugokwe* case supra, par.32.

while at the same time failing to draw the relevant consequences and making corresponding orders in the operative part of the decisions.⁷²⁷

In the main, the status of the ECCJ's decisions in the domestic order suggests an implied jurisdictional superiority stemming from supranationality and jurisprudential authority. In this regard, the Supplementary Protocol states that "only the Community Court may suspend a writ of execution issued in enforcement of its decisions".⁷²⁸ It is therefore sustainable that the ECCJ due to the binding nature of its decisions on Member States and courts appears to be superior in human rights protection and may potentially exert influence in this respect. It is worthy of mention that the refusal of national courts to recognize that the ECCJ's decisions are enforceable despite contrary national decisions are sanctionable under the revised treaty.⁷²⁹ It is argued that this hierarchical ordering of the ECCJ is essential to ensuring consistent interpretation of African human rights law, and this necessitates the need for constant interaction between the continental human rights bodies, the ECCJ and national courts.⁷³⁰

4.6 THE POSITION OF MEMBER STATE CONSTITUTIONS ON COMMUNITY LAW: A LOOK AT SELECT MEMBER STATES

A corollary to the relationship between the ECCJ and national courts is how to manage the limitation of national judicial sovereignty of Member States to ensure that community law is recognized as superior to national law and is accordingly applied and interpreted by national courts at the instance of community citizens. The revised treaty and Protocols of the Community or general community law certainly qualify as capable of influencing domestic legislation and the decisions of national courts.⁷³¹ However, this does not appear to be the case in practice. A situation where West African national judiciaries regard the Revised

⁷²⁷ Adjolohoun (2013), p.359.

⁷²⁸ Article 24 of the Supplementary Protocol relies on institutions of Community States in line with relevant Civil Procedure Rules for the enforcement of its judgement. In this regard, national courts must be obliged by their municipal law to receive and enforce the judgement of the community court. Article 15 of the revised treaty already provides that the ECCJ's judgements are binding on Member States, which include national courts.

⁷²⁹ Article 77 of the revised treaty provides sanctions on Member States for non-fulfilment of obligations.

⁷³⁰ E. S Nwauche, 'Enforcing ECOWAS Law in West African National Courts' 55 *Journal of African Law* (2011), 181, p.181-182.

⁷³¹ Adjolohoun writes on the impact of the *Koraou* judgement on Nigerian courts. He further demonstrated the spill over of the slavery decision into other West African countries and also beyond ECOWAS. See Adjolohoun (2013), p.361-367.

Treaty to be of persuasive authority in the absence of domestication would open up a crucial angle for the direct enforceability of ECCJ judgements and community law in general.

Having stated the above, the crucial question remains, how receptive are the constitutions of member states to the novelty of the Community Court within the framework of the administration of justice. In another word, how willing are Member States to ‘lift the veil of nationality to enable their citizens explore the window of transnational jurisdiction presented by the Community Court, in practical terms?’⁷³² Regional Integration makes constitutional demands, and member states must be prepared to rethink or amend existing constitutional or legislative provisions to accommodate community law and the community itself within their respective states.

The ECJ in *Costa v ENEL*⁷³³ was of the opinion that EC law would be wholly ineffective if subordinated to the national law of members. Furthermore, the ECJ was of the view that European Community law cannot be overridden by domestic law without the legal basis of the community itself being called in the question. If the ECJ in *Costa* established the direct effect and applicability of EC law in member states, it further went ahead to *Internationale Handelsgesellschaft*⁷³⁴ to declare that the EC law has supremacy over the constitutions of the member states. In line with these submissions, the European legal order was created with the consequence being the super-imposition of community law over national law.

Article 3 of the Constitution of the Republic of Benin, 1990; Article 4 of the Constitution of Gambia, 1997; Article 1 (2) of the Constitution of the Republic of Ghana, 1992; Article 2 of the Constitution of Liberia, 1984; Section 1 (3) of the Constitution Federal Republic of Nigeria, 1999; made their various constitutions supreme and binding on all persons and authorities within their respective spheres of influence. Any law that is inconsistent with the provisions of the respective constitutions is null and void to the extent of its inconsistency. These provisions are an extract of the principle established by the Chief Justice Marshall of the US Supreme Court in *Madbury v. Madison* when he declared:

⁷³² A.O Enabulele, ‘Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States’, 12 *International Community Law Review* (2010), 111, p.121.

⁷³³ See Case 6/64, *Flaminio Costa v. ENEL* (1964) ECR 585.

⁷³⁴ See Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel* (1970) ECR 1125.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.⁷³⁵

The implication of these provisions is that nothing which has been prohibited by the written constitutions can take effect within the municipal sphere.

Rett Ludwikowski observes thus:

The coherent and well-integrated legal system cannot digest the concept of more than one supreme element... In the situation in which the Constitutions of all Member States were either amended or left flexible enough to accommodate the principle of the supremacy of Community law, the argument that they are still the supreme laws of these countries cannot bring us too far.⁷³⁶

While Ludwikowski's remark holds sway and is largely the traditional position of international law, it must be borne in mind that community law may be supreme in agreed areas outlined in the treaty. For cohesion to take place in a well-integrated legal system municipal law must make certain concessions in form of constitutional amendment to give community law supremacy – making national law subsidiary to community law in certain key areas. As Dorwick observes in the context of the EU, one of the salient features of the EU legal order is that 'for the most part it is essentially a co-operative, a consensual system, not a coercive order'.⁷³⁷ Certainly, there must be room for encroachment of the sovereignty of the nation-state in certain areas especially regarding law, for integration to take place. It is not so much of one replacing the other, but a co-operative relationship between the two spheres.

Typically, there is no uniformity in the way that states seek to introduce international law into their municipal systems. In ECOWAS the legal systems lie predominantly along two axis; the monist and dualist systems of law.⁷³⁸ In the monist system, treaties are directly incorporated

⁷³⁵ 1803 5 U.S (1 Cranch) 137, cited from Harold W. Chase, *Constitutional Interpretation: Cases, Essays, Materials*, 2nd ed (St Paul; Minnesota, West Publication Co, 1979) pp. 18-19.

⁷³⁶ R.R Ludwikowski, 'Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy,' 9 *Cardozo Journal of International and Comparative Law*, (2001) 253, p.295.

⁷³⁷ F. E Dorwick, 'A Model of the European Communities' Legal System' Vol. 3, *Yearbook of European Law* (1983) p.180.

⁷³⁸ Greater reading on the monist and dualist systems can be found in, J.G Stark, 'Monism and Dualism in the Theory of International Law', 17 *British Yearbook International Law* (1936); I. Tammelo, 'Relations between the International Legal Order and the Municipal Legal Orders – A "Perspectivists" View', 211 *Australian Yearbook of International Law* (1967), 215 ; C.M Vazquez, 'The Four Doctrines of Self Executing Treaties', 89

into the legal system. Such treaties take precedence over and are superior to municipal law except a contrary intention is provided in the constitution of the country. Monism envisages that national law must be in conformity with international or else it is a nullity. Dualism on the other hand is steeped in legal positivism. It sequesters municipal law and international law into separate realms regulating different subjects. Consequently, international law does not form part of municipal law. Therefore, the rule of one system cannot trump the other; neither can the question of supremacy arise since they are not related.

The dualist approach shifts the power of implementation of community law to national courts that operate on the notion that the national legal order is supreme and that every other legal order, including the international legal order, is subordinate to it, except a municipal legislation provides otherwise. This problem is evident even when both systems are made to operate under a common field and regulate a common subject. In this case, the African Charter, under the same substantive provisions. Under this system judges cannot take cognizance of international law, without an enabling national legislation to that effect.

ECOWAS Member states share in the monist/dualist dichotomy, with some countries (francophone countries) operating a mixed system in practice. Article 147 of the Constitution of the Republic of Benin;⁷³⁹ Article 149 of the Constitution of Burkina Faso 1991 as amended; Article 85 of the Constitution of Cote d'Ivoire; Article 75 of the Constitution of Ghana; Article 77 of the Fundamental Law of Guinea; Article 114 of the Constitution of Mali; Article 130 of the Constitution of the Fifth Republic of Niger 1999; Section 12(1) of the Nigeria Constitution 1999; Article 78 of the Constitution of Mauritania, 1991; Article 96 of the Constitution of the Republic of Senegal 2001;⁷⁴⁰ Article 138 of the Constitution of Togo, 1992 are all dualists in nature; they all require legislative action to pass treaties into law before such treaties can take effect in their respective domestic legal order.

Am. J. Int'l (1995), p.695; Y. Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis', 26 *Virginia Journal of International Law* (1985-86), 627; D.O Connell, 'The Relationship between International Law and Municipal Law', 48 *Georgetown Law Journal* (1960), 431; W. Jones, 'The Pure Theory of International Law' 16 *Brit Y.B Int'l* (1935), 5; J. Paust, 'Self Executing Treaties' 82 *American Journal of International Law* (1988), 760.

⁷³⁹ Article 146 provides a check for the direct applicability of ratified international treaty by stipulating that 'if the Constitutional Court, upon a submission by the president of the republic or by the president of the National Assembly, decides that an international obligation allows a clause contrary to the constitution, the authorization to ratify it may occur only after the revision of the constitution'.

⁷⁴⁰ Article 97 provides that, if the Constitutional Court has declared that an international agreement contains a clause contrary to the constitution, the authorization to ratify it or approve it shall only be given after the constitution has been revised.

The Lusophone countries of Cape Verde and Guinea Bissau generally follow the monist tradition. Article 11(1) of the Constitution of Cape Verde, 1992 as amended in 1999, makes international law an integral part of Cape Verde legal system. Article 11(3) stipulates specifically that ‘The legal acts emanating from the relevant organs of the supranational organisations of which Cape Verde is a member, shall enter directly into force in the domestic legal order...’ Based on this provision, a treaty such as the Revised Treaty is superior to the national laws of Cape Verde. Thus article 11(4) of the constitution further provides that the rules and principles of general or common international law and of conventional international law, validly approved or ratified, shall prevail, after entry into force in the international and domestic legal orders, over all legislative and domestic normative acts of an infra-constitutional value.

The constitutions of Liberia, The Gambia, Republic of Guinea Bissau, make no categorical provisions on this issue. Consequently, resort would be had to the legal culture of these countries i.e whether they are civil law or common law countries. Civil law countries usually adopt the monist approach while common law countries adopt the dualist approach.⁷⁴¹ Liberia is a common law country, the same as the Gambia while Guinea Bissau is a civil law country.

The lack of uniformity in the mode of implementing the community treaty creates a bleak prospect for the application of the revised treaty and more importantly, the Protocol of the ECCJ. It is therefore not difficult to imagine national legislations and other measures that undermine the objectives and the norms which are contained within the treaty.⁷⁴² Furthermore, this makes human rights protection difficult to achieve when decisions of the ECCJ are not enforced in member states. So far the ECCJ’s judgements in *Hadijatou Mani Koraou*⁷⁴³ and *Amengavi Isabelle Manavi v. Togo*⁷⁴⁴ have attracted the quickest compliance

⁷⁴¹ See, D. A McNair, ‘When Do British Treaties Involve Legislation?’ 9 *British Year Book of International Law* 9, (1928), p. 59. See also, discussing the roots of legal pluralism in colonized African, Asia and Pacific societies, S.E Merry, ‘Legal Pluralism’ 22 *Law and Society Review* (1988), 869.

⁷⁴² For example, national laws prevent professionals from ECOWAS countries from practicing outside their countries, in breach of Article 59 of the Revised Treaty and the protocols to free movement. In this regard, section 4(1) of the Nigerian Legal Practitioners Act 2004 provides that a key requirement for being called to the Nigerian Bar is Nigerian citizenship. Thus, a Sierra Leonean legal practitioner cannot practice in Nigeria despite the ECOWAS Free Movement Protocol.

⁷⁴³ The ECCJ held that Niger had caused the plaintiff harm and that it was obliged to indemnify her to the tune of 10,000,000 CFA (approximately 20,000 US \$), which it is on record that the state complied with. See, ‘60% of ECOWAS Court’s judgements not enforced – Chief Registrar’ available at <http://www.nannewsngr.com/section/africa/60-of-ecowas-court%E2%80%99s-judgments-not-enforced-chief-registrar> (accessed 15 April 2014).

⁷⁴⁴ Judgement ECW/CCJ/JUD/09/11.

from Member States.⁷⁴⁵ Member states with high human rights violations record (Nigeria and Gambia), have the most cases before the court and have continually ignored the judgements of the ECCJ.⁷⁴⁶

4.7 EXPLORING THE POTENTIAL OF NATIONAL LEGAL PHILOSOPHY IN ENHANCING GREATER HORIZONTAL ENFORCEMENT OF COMMUNITY LAW

Judicial philosophies that inform the decision of national courts are equally important regarding disputes in which community law is involved. As highlighted above, the constitutions of Member States have the final word on the applicability or not of international law in municipal space. However, courts may be guided by certain philosophies or ways of thinking that might be at odds with the *grund norm*.⁷⁴⁷ Judicial philosophy that is attuned to the goals and demands of economic integration, but is irrespective sensitive to national constitutional limits on the exercise of judicial power, especially on issues of foreign policy, is fundamental to ensuring the effectiveness of community law in Member States. Courts seldom act unrestrained in intervening or judicially reviewing the direction of state relations or policies. In instances where individual rights are involved, judicial intervention, including a criticism of the direction of state relations, may be appropriate. Other than criticizing government policies adverse to economic integration, judicial philosophy which takes cognizance of the goals of economic integration, can be relevant in the approach of national courts to the principle of consistent interpretation, and general reliance on foreign laws.

As mentioned earlier, in dualist States, community laws cannot command the force of law unless and until it is enacted into law through executive or parliamentary act. However, it is legally possible for courts to give domestic effect to a treaty, and by effect community law, even though it is yet to scale the incorporation hurdle. In most African countries, reliance on unincorporated treaties has been very visible, particularly in human rights treaties. Courts have also had recourse to unincorporated treaties in interpreting ambiguous statutes. In

⁷⁴⁵ In the latter Togo paid compensation within 25 days of the judgement.

⁷⁴⁶ 'West Africa: Nigeria Doesn't Respect Our Rulings – ECOWAS Court', Daily Trust (March 13, 2012), available at <http://www.dailytrust.com.ng/index.php/other-sections/law-pages/166086-nigeria-doesnt-respect-our-rulings-ecowas-court> (accessed 15 April 2014).

⁷⁴⁷ Grund norm or ground rule is a creation of the Austrian positivist legal philosopher Hans Kelsen. Grund norm of a positive legal system is simply the basic rule according to which norms of the legal system are created; it is the setting into place of the basic material fact of law creation. Here, the author refers to the constitution as the grund norm from which other municipal laws may flow and must comply with. See further, H. Kelsen, *General Theory of Law and State*, Reprint Edition (Law book Exchange Ltd., 2007).

Registered Trustees of National Association of Community Health Practitioners of Nigeria v. Medical and Health Workers Union of Nigeria,⁷⁴⁸ both the Nigerian Court of Appeal and the Supreme Court held that the International Labour Organisation Convention cannot be applied in Nigeria because it has not been domesticated by the National Assembly.⁷⁴⁹

In *Dow v. Attorney General of Botswana*⁷⁵⁰ the applicant challenged the constitutionality of provisions of Botswana's Citizenship Act as being discriminatory and an infringement on her constitutional rights and freedoms. The High Court relied on the fact that Botswana was a signatory to the OAU Convention on Non-Discrimination, even though Botswana had not ratified it, a fact expressly acknowledged by the judge. On appeal, even though it was held that international human rights instruments do not have automatic application in Botswana, the Court of Appeal affirmed the trial court's use of unincorporated treaties. It further held that, despite the fact that treaties and conventions do not confer enforceable rights on individuals within the state until enacted by parliament, they could still be used as aids to interpretation.

In *New Patriotic Party v. Inspector General of Police*⁷⁵¹ the court held that, the fact that Ghana had not passed specific legislation to give effect to the African Charter on Human and Peoples' rights did not mean that it could not be relied upon in adjudication. In *Abacha v. Fawehinmi*,⁷⁵² the Nigerian court of Appeal had no difficulties enforcing the African Charter on Human and Peoples' Rights in Nigeria since the treaty had been passed into law by the National Assembly. However, *obiter dicta* in this case suggest that the Nigerian Supreme Court accepts that an unincorporated treaty might give rise to a legitimate expectation that the government would observe the terms of treaty.⁷⁵³

⁷⁴⁸ [2008] 2 NWLR (Pt. 1072) 575, 623.

⁷⁴⁹ For a detailed discussion on the Nigerian law on application of treaties, see generally, C. Nwapi, 'International Treaties in Nigerian and Canadian Courts', 19 *African Journal of International and Comparative Law* (2011), 38; A.O Enabulele, 'The Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Law', 17 *African Journal of International and Comparative* (2009), p.326.

⁷⁵⁰ 1991 BLR 223.

⁷⁵¹ [1993-1994] 2 GLR 459 at 466.

⁷⁵² [2006] 6 NWLR 228.

⁷⁵³ Ogundare JSC delivering the lead judgement, and subsequently Achike JSC cited with approval the Privy Council opinion in *Higgs v. Minister of National Security* [2000] 2 WLR 1368 at 1375 to the effect that an unincorporated treaty 'may have an indirect effect upon the construction of statutes... Or may give rise to a legitimate expectation on the part if the citizens that the government, in its acts affecting them, would observe the terms of the treaty', and added that this 'represents the correct position of the law, not only in England but in Nigeria as well'.

One important potential of judicial philosophy is the law-making power that the common law judges possess. As one observer put it, 'it is no longer especially controversial to insist that common law judges make law'.⁷⁵⁴ Majority of the community states operate a dualist system which is typical of common law countries, and pronouncements of apex court judges in member states can go a long way in solving the enforcement problem in member states. The doctrine of precedence⁷⁵⁵ guarantees that pronouncements of these judges may be acted upon by lesser courts and in some instances, political authorities. The problem however, is that judicial law-making is based on creative interpretation of foundational documents, as a result courts may not entirely possess autonomous power to create norms independent of the constitution of various member states.

Despite the possibilities that may lie in the pronouncement of national judges, the fact remains that all components of a legal system must be congruous. This means that the first legal hurdle for the ECOWAS Community Court Protocol is for it to be passed into law by the legislative organs of the dualist Community States, which constitute the majority for it to take effect domestically. It is not inconceivable that a person or an institution against which the judgement or any other process of the court is sought to be enforced in the territory of those Community States, can plead the domestication of the Protocol by the legislature to evade the judgement of the court or any of its process. For instance, the court, as it stands, lacks the legal capacity to compel the appearance of anyone before it and enforce same in municipal courts or law enforcement agencies of dualist member states.⁷⁵⁶

Judicial philosophy of Member State courts provides an outlet through which the treaty and community protocols may be interpreted consistently by national courts. Consistent interpretation enables the ECCJ to escape the strictures of the monism/dualism approaches to the relationship between international and national law. It can be applied by national courts under either tradition. Since the ECCJ has decided to be more cautious in its approach, whether national courts be more proactive in stating a case for the enforcement of human rights decisions handed down by the ECCJ remains to be seen.

⁷⁵⁴ F. Schauer, 'Do Cases make Bad Law?' 73 *University of Chicago Law Review* (2006), 883, p.886.

⁷⁵⁵ Precedence here is used to denote both the common law doctrine of *Stare Decisis* and the French concept of jurisprudence. Both terms are used jointly to connote pronouncements of the courts which may be the foundational basis for norms that follow afterwards. These pronouncements may either seek to persuade or command. For an insight into the concept of jurisprudence, see C. Grzegorzcyk, 'Jurisprudence: phénomène judiciaire, science ou method?' 30 APD (1985),p.35.

⁷⁵⁶ Articles 43 to 49 of the Protocol of the ECCJ gives the court powers to summon and examine witnesses and experts. The court so far is very unlikely to have power to compel witnesses to come before the court as long as its relationship with national courts is not agreement specific.

One of the options open to the ECCJ which the court is yet to exercise to compel member state to comply with its decisions is Article 37 of the revised treaty. The court is empowered to order sanctions, suspend community assistance and disbursement of funds to a non-compliant member state or suspend its participation in the Community until it complies with the pronounced judgement. None of the punishments stipulated in Article 37 has ever been utilized by the ECCJ earning it the title of a ‘toothless court’.⁷⁵⁷

4.8 ECONOMIC COURT OR HUMAN RIGHTS COURT?

The transformation of the ECCJ from an economic integration court into a human rights court reflects the transition of the community from a regional integration project primarily aimed at promoting intraregional trade and economic development into an organization that also encompasses security, good governance, and human rights. The conflation of both jurisdictions into one appears to be a manifestation of the realization that economic freedoms and individual liberties are inseparable. ECCJ judges seem to support this view, and appear to favour private litigant’s access to the Court in both economic and human rights cases. The ECCJ in its plea for ‘access to justice’ for both West African traders and human rights victims commented thus:

“The development of the Community law and the interpretation and application of the ECOWAS Treaty would be a mere illusion if Community citizens, individuals and corporate bodies do not access justice. Without access to the Court there cannot be access to justice. We must therefore recognize that the right of access to the Court is the keystone in the development of the Community law. The promotion and protection of human rights and fundamental freedoms of the Community Citizens cannot be ensured, if right of direct access to the Community Court of Justice is not guaranteed. A cardinal objective of ECOWAS Trade Liberalization Scheme is an important programme for the realization of the common market. It should however be noted that this scheme and the intended benefits cannot be realized, unless individuals, consumers, manufacturers and corporate bodies that are the prime movers in commercial transactions have direct access to the Court of Justice.”⁷⁵⁸

⁷⁵⁷ ‘Case to Abolish Gambian Death Penalty Falls on Toothless Court’, available at http://www.iede.co.uk/news/2012_534/case-abolish-gambian-death-penalty-falls-toothless-court (accessed 15 April 2014).

⁷⁵⁸ ‘The Community Court of Justice, ECOWAS: Court Procedure and the Application of Protocols’ 10- 11 cited in Helfer (2013) p.26.

The ECCJ's statement is illustrative of the broader tendency among ECOWAS officials, advocates and NGOs to conflate human rights and economic freedoms, an argument which has been previously explored in this thesis.⁷⁵⁹ The connection of the concepts of economic freedoms and individual liberties in the minds of key actors found expression in the campaign of human rights NGOs and attorneys during the campaign leading up to the expansion of the Court's mandate. In contrast, trade and business associations did not participate in the court reform negotiations. The non-participation of trade and business groups in court reforms appears to be due to the non-profitability of economic integration as a negotiation tool with domestic and foreign donors.⁷⁶⁰

The effect of this design flaw is the danger of relegating economic integration to the background and focusing solely on human rights protection alone. One may argue that human rights protection can take priority over cases covering other economic freedoms, or that both classes of action fall within the jurisdiction of the court under the revised treaty and the supplementary protocol. However, in practice the over-utilization of the ECCJ on the basis of human rights protection and by virtue the undermining of the original economic integration mandate defies the essence of the court, retaining doubts on the effectiveness of the court and by implication the legitimacy of the current ECOWAS regime.

So what other explanation is there for the decision of member states to oversee the transition of the court into a human rights court at the expense of economic integration related disputes? Were member states willing to give up control in the area of human rights because perhaps they are unwilling to relinquish sovereign powers in economic integration? Rationalist choice theorists hold that states participate in, and support international regimes upon the condition that the regime furthers their narrowly conceived functional objectives.⁷⁶¹ According to this approach, the expectation is that African leaders would jealously guard their sovereignty and tightly retain control of the ECCJ despite pressure from civil society, ECCJ judges and the ECOWAS secretariat in the aftermath of the Afolabi case. This obviously was not the case and does not adequately tell the whole story of the court's transformation.

⁷⁵⁹ Nwogu for example argues that the regional economic integration provisions of the 1993 Treaty also promotes the right to development in the African Charter. See, N. Nwogu, 'Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS', 6 *Journal of Human Rights* (2007), 345, p.345.

⁷⁶⁰ Frimpong explains that minimal participation of interest groups in Africa's economic integration process is partly attributable to that fact that 'the importance of human rights and good governance have been sold to domestic and foreign donors and attract huge funding for interest groups, Africa's economic integration has not been similarly marketed.' See, Oppong (2011), p.148.

⁷⁶¹ Alter et al (2013), p.768.

Historical institutionalists on the other hand operate from a different premise. The theory does not agree with rationalists argument that the primary goal of actors who populate institutions is to meet government demands. Instead, they posit that institutional change occur due to pressure such as economic crises, exogenous shocks, or policy failures. Initial design choices and vested interests interact with shifts in the environment to create path dependent change.⁷⁶² Recent institutional studies focus on incremental shifts that occur through political contestation and realignments of coalitions which lead to institutional adaptation.⁷⁶³ Alter et al identify the incremental shifts that led to the court's transformation into a human rights court as 'layering' of additional rules, goals, or priorities which eventually become the defining features of an institution.⁷⁶⁴ In the case of ECOWAS the outbreak of conflicts in the sub-region and the humanitarian interventions that followed created opportunities for wider overhaul of the Community.⁷⁶⁵

These incremental shifts created the environment for non-state actors to convince states to give the ECCJ human rights jurisdiction. In line with historical institutional studies the Court's 'conversion' or 'redeployment' is indicative of a change that allowed new actors to redirect the institution toward new goals, functions and purposes.⁷⁶⁶ Thelen argues that institutional adaptation and redeployment by non-state actors can produce changes that, over time, are more significant than "big decisions" made by governments in response to exogenous shocks. It therefore appears that the non-state actors in ECOWAS who have played a role in the reform of the court and by implication the community as a whole, may have a more influential role in further changes that might take place in the court in future.⁷⁶⁷

Another curious enquiry in the transformation of the court into a human rights court is the silence or non-participation of private groups in the restructuring of the court. These groups would have equally been decisive in ensuring that the economic integration mandate of the court is not dumped entirely. Groups such as the National Association of Nigerian Traders

⁷⁶² W. Streeck & K. Thelen, 'Introduction: Institutional Change in Advanced Political Economies', in W. Streeck & K. Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies*, (Oxford: Oxford University Press, 2005), p. 1, 7, 11.

⁷⁶³ Alter et al (2013), p.770. See also, K. Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States and Japan* (Cambridge University Press, 2004), p.31-37.

⁷⁶⁴ *Ibid.*, p. 770-771.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ Streeck & Thelen (2005), p.26-29.

⁷⁶⁷ Pierson argues that governments would not be able to block such revisions because initial decisions can produce unintended consequences that constrain future behaviour even of powerful actors as represented by the States. See, P. Pierson, 'The Path to European Integration: A Historical Institutional Analysis', 29 *Comparative Political Studies*, 123, p.147 (1996).

(NANTs)⁷⁶⁸ have always existed and are knowledgeable about the ECOWAS legal system and aware of the obstacles to economic integration in the sub-region. To enhance their ability to challenge these violations of economic rules, NANTs recently asked West African governments to allow private firms direct access to the ECCJ.⁷⁶⁹

However, NANTs, could not partake adequately in the 2005 court reforms chiefly because it was nationally organized, whereas ECOWAS rules only allow for participation by regional groups.⁷⁷⁰ But the question could be asked why ECOWAS officials did not facilitate the mobilization of economic groups at the regional level and why did human rights groups benefit to the exclusion of trade groups? Perhaps the answer is in the fact that West African governments appear to benefit from maintaining barriers to intraregional trade and that, these benefits, at least in the current political, outweigh the advantages of achieving a functional common market.⁷⁷¹ While this position is arguable, the recent impasse between Nigerian Traders in Ghana (represented by NANTs) and the Ghanaian government certainly validates this argument to some extent. The new Ghana Investment Promotion Council (GIPC) Act which bar foreigners from engaging in retail trade in the country's markets,⁷⁷² were challenged by NANTs as a violation of the ECOWAS Protocol on free movement. The ECCJ threw the case out, in the face of arguments by the Ghanaian government that the law only sought to protect the country's domestic interests.⁷⁷³

Key salient questions that persist despite these developments include what role would non-state actors play in further changing the human rights landscape which they have played a key role in establishing? What role can non-state actors, along with ECCJ officials and judges play in reversing the trend of non-implementation of court judgements in member states?

⁷⁶⁸ The organization's website is at <http://www.nants.org/>.

⁷⁶⁹ C. Osagie, 'West Africa: Traders Task ECOWAS on Regional Integration', THIS DAY (August 29, 2011), at <http://allafrica.com/stories/201108300754.html>.

⁷⁷⁰ Alter et al (2013), p.773.

⁷⁷¹ Ibid., p.774. A recent NANT's newsletter confirms this bias, boldly declaring that 'Member States did not desire the Court to be an engine for realizing the economic integration objective'. See, 'Sovereignty, Supranationality and Trade: The Case of ECOWAS Laws', 2 ECOWAS Vanguard, (February 2013) available at http://www.inter-reseaux.org/spip.php?page=imprimir_articulo&id_article=8655&lang=fr (accessed 15 April 2014).

⁷⁷² The new Ghana Investment Act 1994, amongst other changes aimed at giving greater access to national traders, raised the minimum capital for foreigners wishing to do business in the country from the previous US\$300,000 to US\$1 million either in cash or goods. For the terms of the new act and its impact on trade in ECOWAS see, K.O Kufour, 'When Two Leviathans Clash: Free Movement of Persons in ECOWAS and the Ghana Investment Act of 1994', 6 *African Journal of Legal Studies* (2013), 1.

⁷⁷³ See, 'ECOWAS Court dismisses case against Ghana', 20 November 2013, available at <http://www.myjoyonline.com/news/2013/November-20th/ecowas-court-dismisses-case-against-ghana.php> (accessed 15 April 2014).

Transnational legal mobilization may be theoretically relevant in reversing the current trend. Considerable literature exists which examines how social movements use legal mobilization, litigation and rights-claiming strategies to achieve their goals.⁷⁷⁴ Law it is agreed, shapes social movements by facilitating the formation of collective ideas and interests, helps nascent movements anchor grievances in response to specific rights violations and most importantly, provides concrete mechanisms for group members to seek redress for those violations.⁷⁷⁵

Keck and Sikkink explain how domestic advocacy groups pressure states to comply with international law. Where governments respond with repression, local groups can reach out to their international compliance partners or “transnational advocacy networks”⁷⁷⁶ that share their objectives. Linking with these transnational allies enables activists to create “boomerang patterns of influence” that pressure governments from above and below.⁷⁷⁷ Based on this theory, if there are any hopes of the Court being equally redeployed to its original mandate, while not abandoning its human rights mandate, there must be a concerted effort by all non-state actors in the sub-region.

⁷⁷⁴ F. K Zemans, ‘Legal Mobilization: The Neglected Role of the Law in the Political System’, 77 *The American Political Science Review* (1983) 690; P. Burstein, ‘Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity’, 96 *American Journal of Sociology*, (1991), 1201.

⁷⁷⁵ T. Kay, ‘Legal Transnationalism: The Relationship Between Transnational Social Movement Building and International Law’, 36 *Law and Social Inquiry* (2011), 419 , p.421-422 .

⁷⁷⁶ M.E Keck & K. Sikkink, *Activists beyond borders: Advocacy networks in International Politics*, (Cornell University Press, 1998), p.2.

⁷⁷⁷ *Ibid.* p. 12 – 13.

4.9 CONCLUSION.

Despite the extant institutional shortcomings of the Court, it would not be unreasonable to imagine that it could succeed in the long term should crucial aspects of its mandate be addressed. The most important aspect of the court's jurisdiction in need of urgent repair is its relationship with national courts. The ECCJ's search for supranational status is unattainable should it fail to exercise impact on national courts. Key to solving this problem would be making the use of the exhaustion of local remedies agreement-specific. This is important in drawing a line in the jurisdictional margin of both spheres and would create some sort of acceptance of the ECCJ amongst member state municipal courts. If an atmosphere of cooperation is established, national courts are likely to be forthcoming in referring to the court and assisting procedurally in the enforcement of the court's decisions.

The willingness of key actors (NGOs, civil society and ECOWAS Court judges and officials) to ensure that the court's powers are continuously expanded is encouraging. The use of the court by community individuals would keep the option of further transformation of the court alive. The Court serves as one of the key determinants of the descriptive legitimacy of the ECOWAS as an institution, but its under-utilization as an economic integration court robs it of further legitimacy. The Court's recent decision to throw away the case of NANTs may give the indication that the court is acting like a typical agent, which only acts to the extent of the powers delegated to it by the principal (member states). However, the court has always acted cautiously as the *Afolabi* case demonstrates, seeking to explore political channels instead. Whether this means that the Court is weary of the backlash of member states remains to be seen.

However, the ECCJ has continued to deliver some equally ground breaking decisions, in high-profile human rights cases, signs it failed to show when it was newly established. In recent decisions such as *SERAP*, *Koraou* the ECCJ has displayed creativity and boldness in delivering judgements that have touched highly politically controversial issues in the member states. The court has maintained a high profile, through speeches, press releases, and meetings with bar associations, judges, and NGOs across the sub-region.⁷⁷⁸ Most recently,

⁷⁷⁸ The most notable of these events was in 2011 when the court celebrated its 10th anniversary amidst a flurry of activities, including a conference with national Supreme Court judges and government officials. See, 'The Court of Justice of ECOWAS welcomes the Presidents of the Supreme Courts of Member States and other regional courts of Africa', July 6, 2011 available at http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=106:tenyearspressrelease (accessed 15 April 2014).

the Court has agreed to hear a case against the Gambia involving its decision to impose death sentences on two Nigerian inmates.⁷⁷⁹ It would be recalled that the Gambia has in the past been belligerent towards the Court, but this has not in any way inhibited the Court. These events reveal that the court while not a completely legitimate entity continues to play its part in the legitimisation of the community. The court is in itself becoming a layer of legitimacy in the ECOWAS institutional hierarchy.

It could be argued that the court is only bold enough to act in its essence as a human rights court and is not equally comfortable to act as an economic integration court is evidence of its realization that member states are unwilling to promote economic integration in the sub-region. However, a look at earlier experiences of other ICs such as the European Court of Human Rights (ECtHR) and the Interv-American Commission for Human Rights (IACtHR) reveal similar issues of non-compliance from Member States. It took a while for these courts to establish authority in Member States. While the conditions and environment are different in the respective regions, recent studies also suggest that partial non-compliance is the norm for human rights tribunals.⁷⁸⁰ This is also the same for national courts in parts of the world that are not ordinarily synonymous with disobeying community law.⁷⁸¹ Whether the ECCJ would live up to expectations, depends largely on the political will of member states to comply with its decisions. Equally, key jurisdictional issues of the Court need to be urgently addressed, because the Court is central to the legitimacy of ECOWAS.

⁷⁷⁹ See, Brittany West 'ECOWAS Court Agrees to Hear Case Brought by Inmates on Death Row Against the Gambia' (April 15 2013), available at <http://hrbrief.org/2013/04/ecowas-court-agrees-to-hear-case-brought-by-inmates-on-death-row-against-the-gambia/> (accessed 15 April 2014).

⁷⁸⁰ See for example, D. Hawkins & W. Jacoby, 'Partial Compliance: A Comparison of the European and the Inter-American Court of Human Rights', 6 *Journal of International Law and International Relations* (2010), 56.

⁷⁸¹ See, A. Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights', 44 *Cornell International Law Journal* (2011), 493 pp.509-29.

CHAPTER 5

THE ROLE OF OTHER COMMUNITY ORGANS IN LEGITIMATION OF THE CURRENT ECOWAS REGIME

5.1 INTRODUCTION

The objective of this chapter is to examine the role of other community institutions in enhancing the normative legitimacy of ECOWAS. In the preceding chapter, the ECCJ was prioritized because community courts are gaining increasing scholarly attention due to their distinct role in enforcing the law of the community. The community court is backed by an enabling protocol. Hence, it carries the bulk of the mandate in human rights protection. Most international organizations possess a variety of organs set up to perform various distinct functions, and also, possibly keep each other in check. Although various standard functions are assigned to these institutions in the constitutive treaty, they may assume other functions as part of the larger organizational objective.

In the preceding chapters it is established that the addition of broad security goals fundamentally shifted ECOWAS's normative orientation. This greater emphasis on human rights necessitated institutional reforms to enable effectiveness.⁷⁸² These reforms which ECOWAS carried out matched the suggestion of the Committee of Eminent Persons (CEP) that a transition should be made towards a people-oriented organization. An argument has been proposed that the quality of an institution transforming to match new realities without completely winding up or failing may suggest proper institutional design. One of such values of institutional stability or adaptability, Goodin refers to as *robustness*.⁷⁸³ According to him, institutions:

⁷⁸² Apart from the treaty revision in 1993, the community also carried institutional reforms in 2006.

⁷⁸³ Goodin propounds desirable principles of institutional design in the admittance that, "good institutional design is not just a matter of pragmatics. It is not just a matter of aesthetic or functional 'goodness of fit'". He proposes theories of middle range resting on both empirical and normative realms. The first of such desirable principle of institutionalism is *revisability* – the design of an institution to be flexible and evolve over time. The downside to revisability is that successive members of an institution may not be able to resist the temptation to deviate from binding agreements. The other principles are 1) Robustness; 2) Sensitivity to motivational complexity; and 3) Variability. R. E Goodin, 'Institutions and their Design' in Goodin R.E (ed.), *The Theory of Institutional Design*, (Cambridge: Cambridge University Press, 1996), p. 40.

“... should be capable of adapting to new situations: not brittle and easily destroyed by them. But they should adapt to new situations only in ways that are appropriate to the relevant respects in which situations are new – changing fundamentally only where there has been some fundamental change in the factual or evaluative universe, and making only surface accommodations to changed circumstance where there has not.”⁷⁸⁴

Along these lines, it is expected that the adaptation of other key community organs to include human rights could enhance institutional effectiveness in the long term. It is important that the ECJ is not overburdened as the only community organ with human rights competence. While the Court focuses on judicial-protection of human rights, other community institutions can equally play a role, particularly in decision-making and policy-making aspects.

Against this background, this chapter adopts an institutional approach to evaluate the role of other community organs in the normative legitimacy of the community. As norms are not value free, such values as good governance, accountability, public participation are also enmeshed in the discourse on human rights and the rule of law.

5.2 THE PARADOX OF INTERNATIONAL INSTITUTIONAL LAW

With the continued expansion of international organisations into complex institutional entities, international legal scholarship is yet to fully inform certain aspects of the operation of these entities, particularly the policy making aspect. The interaction among various organs of these organizations, state agencies, other actors, norms, ideas, values, policy choices, motivations, and influences on behaviour, is not readily reducible to a simple system of rules and rule-apppliers. In the same vein, the field of international institutional law has begun to confront the demands for deeper conceptual foundations and more expansive theoretical and policy understanding. The difficulty in aligning international institutions into a particular discipline on the one side, and describing its activities through the lenses of a unified system of norms and principles on the other hand is captured aptly by Jan Klabbers. Klabbers speaks of a “paradox” within international institutional law:

“As soon as organizations become more than debating clubs, as soon as they exercise public authority, it becomes possible and plausible to wonder whether they do a good job, or whether someone else would have done better. When organizations start to administer territory, or impose and monitor sanctions regimes, regulate markets, or set standards, discussions will start about how they do so, and

⁷⁸⁴ *Ibid.*, p.41.

whether they do so well enough to merit further support. They operate, so to speak, on the market of legitimacy, and legitimacy, however precisely conceptualized, is a scarce resource. And when this happens, the organization loses its character as organization and become something else – whatever the “something else” may be”.⁷⁸⁵

Klabbers’s sentiments ring true when regional organizations such as ECOWAS are taken into context. Key decision-making organs of the community are difficult to understand because not so much can be made of the process of decision or policy making. A general sense of opaqueness surrounds the process of decision/policy making, and in the context of human rights the need is even more pertinent to adopt a variety of approaches to better understand their activities. Additionally, it appears that majority of scholarly works on regional organizations in Africa have mostly concentrated on the constitutional issues concerning the competences of these organizations and their various organs, leaving out the critical aspect of the relationships between community institutions on the one hand (intra and inter – organizational relations) and between community institutions and Member States on the other.⁷⁸⁶

Klabbers also explains:

“First, to the extent that the law of an international organization covers only the internal legal order and is really residual (each organization is sui generis and has its own legal order), there cannot be said to exist any international institutional law. Second, the more active and successful organizations become, the less their existence will be seen as a specific branch of law; instead they will be subjected to general public international law, even without a plausible theory of obligation”.⁷⁸⁷

The above observation goes to the heart of the institutional complexities of supranational organizations.⁷⁸⁸ Irrespective of the angle an organization such as ECOWAS is viewed from, there is an inherent difficulty in explaining the activities of decision-making organs such as the Assembly and the Council of Ministers, the sub-regional parliament and an administrative

⁷⁸⁵ J. Klabbers, ‘The Paradox of International Institutional Law’, 5 *International Organizations* (2008), 151, p.169.

⁷⁸⁶ A critical aspect of this relationship outside the scope of this thesis is the organizational procedures that hold the community and national institutions together such as the relationship between community departments and their national field offices. For a seminal work in this regard, see, J.C Senghor, ‘Institutional Architecture for Managing Integration in the ECOWAS Region: An Empirical Investigation’, in J. C Senghor and N.K Poku (eds.), *Towards Africa’s Renewal*, (Ashgate Publishing, 2007), pp.108-142.

⁷⁸⁷ Klabbers (2008),p.169.

⁷⁸⁸ The emergence of supranational organisations and the elusive quest for globally acceptable standards of good governance has increased the distrust of international institutions among contemporary scholars. See, D. C Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’, 115 *Yale Law Journal*, (2006), p.1493.

organ such as the ECOWAS commission, all institutional components of the community legal system, under a specific branch of law. Whatever accurate analysis or explanations that may be offered for the effectiveness or lack off, of the institutional hierarchy of ECOWAS in the normative legitimacy of the organization would most likely involve a combination of approaches. Embedding the analysis of law and legal processes in the wider context of global governance while retaining the concept of law and its techniques should be ideal, but might be insufficient in explaining supranational or in this case quasi-supranational institutions.

While some aspects of ECOWAS's normative make-up earlier identified may differ from other international organizations, some other principles are sufficiently common across diverse international organisations to suggest the possibility of discerning a unified field. Values such as transparency in decision-making; due process in decisions that directly affect private parties; review mechanisms to ensure rationality and legality and a variety of other mechanisms to promote accountability are widely applicable across disciplines.⁷⁸⁹ These procedural principles might fall short of being widely applicable to institutions that have little or no governance function, but, in this case the ECOWAS Commission like other unelected organizations the world over have assumed wider decision making powers and have led to increased calls for principles and practices that make them accountable.

As the emerging human rights regime of ECOWAS operates within the territories of member states and within the African human rights system, there is an overarching need for symmetry with both national and continental mechanisms. This need for correspondence necessitates an institutional analysis that reflects on issues of jurisdictional conflicts, inconsistencies and duplication that are sure to arise in international organizations with similar mandate as ECOWAS.

⁷⁸⁹ B. Kingsbury & L. Casini, 'Global Administrative Law Dimensions of International Organization Law', *Institute for International Law and Justice (IILJ) Working Paper*, 2009/9 (Global Administrative Law Series), p. 9.

5.3. THE AUTHORITY OF HEADS OF STATES AND GOVERNMENT: OVER-BEARING INFLUENCE?

International organizations operate through primary and subsidiary organs. Primary organs are created in the founding treaty while subsidiary organs are often creations of a primary organ in exercise of express powers granted in a treaty.⁷⁹⁰ The highest primary organ of international organizations is often the plenary assembly.⁷⁹¹ The plenary assembly most times consists of all member states represented by Heads of State and Government. The Authority of Heads of States and Government (herein ‘the Authority’) is established under Article 7(1) of the revised treaty as the ‘supreme institution of the Community’. The Authority is the highest decision-making body in the ECOWAS Community and is mandated to be ‘responsible for the general direction and control of the community.’⁷⁹² The Authority exercises its powers and functions by concluding treaties, issuing declarations and giving decisions.⁷⁹³ The ECOWAS instruments do not give any express mandate to the Authority in the field of human rights.

The Authority has aided the growth of a human rights culture in the community by overseeing the adoption of documents with clear or implied human rights consequences. By adopting important community documents in human rights, and by implication, expanding the institutional capacity of the community the Authority has demonstrated the will to create supranational institutions to oversee the human rights objective of the regime. Intention is important here because it implies that on the part of the Authority as an organ of the community, it is aware of the implication of the community’s human rights mandate on national sovereignty.⁷⁹⁴ Based on the above, the most important role of the Authority as the intergovernmental organ of the community with respect to the normative legitimacy of ECOWAS rests in the area of law making and overall policy coordination in the

⁷⁹⁰ N.M Blokker & H.G Schermers, *International Institutional Law*, 4th Edition (Leiden: Martinus Nijhoff, 2003), p.153.

⁷⁹¹ C.F Amerasinghe, *Principles of Institutional Law of International Organizations*, 2nd Edition (Cambridge: Cambridge University Press, 2005), p.131

⁷⁹² Article 7(2) of the revised treaty.

⁷⁹³ New Article 9 of the revised treaty.

⁷⁹⁴ Richmond and Heisenberg identify four fundamental factors of supranational institutional design as 1) Intentionality (Did the member states intend to create a supranational institution?); Specificity (how concrete is the mandate of the institution?); Relationship to national institution (How much does the supranational institution depend on its national counterpart?); and Institutional copying (Is the supranational institution explicitly modelled on a specific national institution?). See, A. Richmond & D. Heisenberg, ‘Supranational Institutional building in the European Union: A comparison of the European Court of Justice and the European Central Bank’, 9 *Journal of European Public Policy* (2002), 201.

community.⁷⁹⁵ These functions are however, subject to national constitutional law requirements and the specifics of treaty provisions

In addition to the general obligation of the Authority to oversee general policy direction of the community, other specific, albeit limited obligations and powers of the Authority can be ascertained from other community legislations. The first and most important 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. The duty of the Authority above to ensure compliance with Community obligations is doesn't stop at the door of Member States. This duty also entails ensuring intra-institutional balance by ensuring that ECOWAS institutions act within the limits of their authority.⁷⁹⁶ If the duty that arises from the UN Charter is anything to go by,⁷⁹⁷ the Authority can be considered as having the responsibility to ensure that ECOWAS institutions act with respect for human rights. The duty of implementation of the Authority is two pronged. The first is the power to refer allegations of non-compliance to the ECCJ. The second aspect is the power of the authority to impose sanctions on member states' when they fail to fulfil obligations arising from the ECOWAS Community law.⁷⁹⁸ The Protocol on Democracy and Good Governance also confers the power to impose sanctions on Member States for failure to comply with provisions of the protocol.⁷⁹⁹

Other human rights obligations of the Authority also exist in the form of economic freedoms guaranteed under protocols of the community. For example, the Authority (through its Chairman) has a responsibility to intervene in the event of a 'systematic or serious violations of the Provisions of the Protocol on Free Movement of Persons, the Right of Residence and

⁷⁹⁵ Ebobrah (2009), p.124.

⁷⁹⁶ Under article 7(2) of the revised treaty, the AHSG Article 7(3) (g) enables the Authority to refer where it deems necessary any matter to the Community Court of Justice when it confirms, that a Member state or institution of the Community has failed to honour any of its obligations or an institution of the Community has acted beyond the limits of authority or has abused the powers conferred on it by the provisions of the Treaty.

⁷⁹⁷ Article 103 of the UN Charter gives priority to member states obligations under the charter over any international agreements that are party to. The Authority as representatives of each ECOWAS member state is under the obligation to uphold the values which the UN seeks to protect, which include human rights, peace and security.

⁷⁹⁸ Article 77 of the Revised Treaty lays out the powers of the Authority to sanction erring member states.

⁷⁹⁹ Under article 45(2) of the Democracy Protocol, the community may place sanctions on a Member State where democracy is abruptly brought to an end, or where there is mass violation of human rights. In 2012, the AHSG exercised its power to impose sanctions on two Member States (Mali and Guinea Bissau), where democratically elected governments were deposed by the military.

Establishment'.⁸⁰⁰ These provisions all make for effective implementation of community human rights obligations.

5.3.1. GENERAL POLICY DIRECTIONS OF THE AHSG

The Authority executes its responsibility mainly through Supplementary acts. An act of the authority, depending on the subject matter, may be adopted by unanimity, consensus or two-third majority.⁸⁰¹ Regrettably, the Authority are yet to adopt a protocol stating exactly what specific decisions would be made by unanimity, consensus or two-third majority. At the moment all decisions are reached by consensus. Some scholars have criticized the continued use of consensus and unanimity in decision making in sub-regional organizations, attributing some of the institutional failures during the OAU era to this system.⁸⁰² This is a feature of the intergovernmentalist overweight that characterizes regional organizations in Africa, leading to the conclusion that there are no truly supranational organizations in the continent.⁸⁰³

As indicated earlier, the most significant mandate of the Authority relates to its general policy direction giving function.⁸⁰⁴ Thus the new human rights mandate of the organization is well within the powers of the Authority as the supreme institution of the community. Accordingly, the Authority may limit the powers exercisable by Community institutions in this area. Article 4(g) of the revised treaty lists 'recognition, promotion and protection of human and peoples rights' as 'fundamental principle upon which Member States will act in pursuit of the objectives of the community.'⁸⁰⁵ This provision laid the foundation for the inclusion of human rights consideration in other documents of the community. Under the current regime, the Authority acting in its capacity as a community institution, rather than a collection of

⁸⁰⁰ Amended Article 7 (in Article 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.

⁸⁰¹ Under Article 9 of the revised treaty, the Authority is to act by decisions adopted by unanimity, consensus or two-third majority. Following the adoption of Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty, new Article 9 was introduced. The new Article 9 replaces decisions with supplementary acts as tools of the Authority.

⁸⁰² G. Naldi, *The Organisation of African Unity: An analysis of its role*, (Mansell Publishing, 1999), p.19.

⁸⁰³ Capotorti argues that an international organization may combine both intergovernmental and supranational features and still be regarded as a supranational organization. So long as the organization possesses independent decision-making machinery; relations with nationals of Member States; and a legal system with its own judicial body. See, F. Capotorti, 'Supranational Organization', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 5 (North-Holland: Elsevier, 1983), pp.262-271.

⁸⁰⁴ Rule 5 of the Rules of Procedure of the Authority of Heads of State and State and Government, Decision A/DEC.2/07/10 on the Adoption of the Rules of Procedure of the Authority of Heads of States and Government.

⁸⁰⁵ Article 4(g) of the revised Treaty.

Member States built on the provision of article 4(g), introduced aspects of human rights, democracy and humanitarian law in protocols. African leaders have in the past hampered the effectiveness of human rights and democratic institutions while acting in their capacities as Heads of States but the case of ECOWAS hint at a change of attitude.⁸⁰⁶

A plausible implication of Article 4(g) is that, Member States of ECOWAS acting through the Authority intend to cooperate to ensure respect for human rights, in line with the UN Charter.⁸⁰⁷ As a result, the Authority arguably brings the Community in line with the duty already incumbent on UN Member States under article 103 of the UN charter to avoid the conclusion of other treaties that would negate obligations taken undertaken under the UN charter. Article 4(g) of the revised treaty falls under the “fundamental principles” of the community. Fundamental principles serve an important purpose in treaty interpretation under international law. International law scholars agree that fundamental principles form the “mass of matter or stone” on which the international legal system is built, but there is no theoretical or practical guide on its effect on integration treaties.⁸⁰⁸ In the context of the ECOWAS, fundamental principles may be understood as requiring the Authority to take human rights concerns into account in pursuit of community objectives. A purposive interpretation of Article 7(2) which gives the Authority leverage to ‘take all measures to ensure...progressive development and the realisation of ...objectives’ of the community lends credence to the argument that human rights protection is a central objective of the Authority’s general policy direction mandate. Read together, Articles 4(g) and 7(2) of the revised treaty gives further credence to this argument.

⁸⁰⁶ The contrast in attitude by African heads of States in their collective capacity as members of a regional institution on the one part, and their capacity in their various member states may be attributable to their excess constitutional powers. Prempeh writes of the survival of the imperial president despite what might seem the recent wave of constitutionalism revival in the continent. He argues that failure to rethink the unitary model or redistribute power away from the central state means that power continues to be abused by the executive. In his words “African presidentialism has historically dispensed with meaningful horizontal restraints on executive power... once installed in office and for the duration of his term, the contemporary African president generally retains within the constitutional and political orbit the essential attributes of imperium long associated with presidential power in postcolonial Africa. The imperial presidency in African has been term-limited but not tamed.” See, H.K Prempeh, ‘Africa’s “constitutionalism revival” False start or new dawn?’ 5 *International Journal of Constitutional law*, (2007), 469, p.497.

⁸⁰⁷ Article 1(3) of the UN Charter.

⁸⁰⁸ C.F Voigt, ‘The Role of General Principles of Law in International Law and their Relationship to Treaty Law’, 31 *Retfaerd Argang* (2008) 2/121, p. 12. The author agrees that fundamental principles provide the pre-condition for treaty law and are guarantors for the functioning of treaties and of the international legal system in general.

As part of its attempt to direct general policy of the community in the area of human rights, the Authority has recently responded to local human rights problems of child trafficking, which is prevalent in West Africa.⁸⁰⁹ The Authority has adopted a regional plan of action to address the scourge of trafficking persons in West Africa.⁸¹⁰ By focusing on establishing appropriate criminal justice responses to tackle the scourge while initiating protection and rehabilitation measures for victims of trafficking, the Authority has laid the foundation for Community to address one possible consequence of the free movement aspect of integration – a commitment which the ECOWAS Commission has recently re-emphasized.⁸¹¹ It may be argued that the engagement of the community in this area falls outside its treaty competence. However, the cross-border nature of human trafficking and its socio-economic implications justifies the intervention of the Authority.⁸¹²

5.3.2 CREATION, MODIFICATION AND CONTROL OF OTHER COMMUNITY ORGANS

As part of its mandate to guide the general policy direction of the community, an executive institution as the Authority may establish secondary or subsidiary institutions to oversee the implementation of community policy objectives. Under international law institutional competences are expected to be described in treaties, but it is not unconventional practice for international organizations to create institutions to achieve specific objectives.⁸¹³ There is no general clause in article 7 of the treaty enabling the authority to create institutions/bodies to carry out community objectives. However, specific articles empower the Authority to determine or modify the powers and functions of certain community institutions to the extent that the Authority may legislate on the functions, powers and organization of those institutions.⁸¹⁴

⁸⁰⁹ A significant amount of humans trafficked in Africa are children (two-third), with West Africa and East Africa accounting for a high percentage of the global trafficking flow. See, Global Report on the Trafficking in Persons (2012) United Nations Office on Drugs and Crime (UNODC) available at http://www.unodc.org/documents/data.../Trafficking_in_persons_2012_web.pdf (accessed 15 April 2014).

⁸¹⁰ 2004 Annual Report of the ECOWAS Executive Secretary, p.70.

⁸¹¹ 'ECOWAS Pledges to Address Child Rights Challenges in West Africa', available at <http://news.ecowas.int/presseshow.php?nb=209&lang=en&annee=2011> (accessed 15 April 2014).

⁸¹² Viljoen (2007),p.510.

⁸¹³ This is the reason for the distinction between principal and subsidiary organs. Some international instruments such as the UN Charter (articles 7, 8, 22 and 29); constitution of the International Maritime Organization (IMO) (article 2); and the Organization of American States (OAS) (articles 51, 74, 75, 83 and 91).

⁸¹⁴ For example, articles 13(2) and 15(2) of the revised Treaty on the Authority's power to adopt a protocol on the Community parliament and the ECCJ respectively.

In exercise of its powers under the revised treaty, the Authority has established subsidiary institutions. Some of these institutions have human rights related powers that strengthen institutional cohesiveness in human rights policy-making and implementation. In this wise, the Authority, legislated on the 1991 Protocol on the ECOWAS Community Parliament, listing human rights as one of the issues over which the Parliament may exercise limited legislative competence.⁸¹⁵ It would be recalled that it was through this means that the Authority enacted the supplementary protocol which expanded the mandate of the ECCJ into human rights protection.⁸¹⁶ While the legislative competence of the Authority might be over bearing in certain instances, by empowering other community institutions to act in the field of human rights, the Authority removes the possibility of conflict that might arise if other institutions acted on implied powers. These institutions represent a participatory medium through which community citizens can interact regularly with the community.

The Authority has been criticized for not considering the need to delineate Community competence from national competence on the one hand and the competence of other international organizations on the other hand.⁸¹⁷ This, in addition to the undefined boundaries of the human rights mandate of some community institutions,⁸¹⁸ may create room for tension arising from ‘over-involvement of ECOWAS in fields considered being outside its specific objectives. This may possibly lead to institutional overlap and conflicting jurisdictions in the institutional hierarchy of the community. Such institutional balances can be sorted by the exercise of extra care during the protocol making process through consultations and dialogue with community institutions and individuals.

As part of the general revision of community laws and institutions in 2006, the Authority approved the transformation of the ECOWAS Secretariat into a Commission.⁸¹⁹ The Authority approved the establishment of departments within the Commission with functions within the field of human rights. The Authority has also created subsidiary institutions such as the West Africa Health Organization (WAHO), the Council of Elders under the Conflict Management protocol and adhoc offices of Special Representatives of ECOWAS in certain

⁸¹⁵ Article 6 of the Protocol A/P2/8/94 Relating to the ECOWAS Parliament available at http://www.parl.ecowas.int/doc/protocols_eng.pdf (accessed 15 April 2014).

⁸¹⁶ Articles 3 and 4 of the Supplementary Protocol of the ECCJ.

⁸¹⁷ Ebobrah (2009), p.158.

⁸¹⁸ In chapter 4 the undefined boundary of the ECCJ’s human rights mandate has been highlighted as a cause of friction between the court and municipal courts. The human rights competence of the parliament is also not specifically placed under the Protocol of the parliament. The parliament may only consider issues relating to human rights and freedom of expression and advice community institutions

⁸¹⁹ Decision A/DEC.16/01/06 transforming the Executive Secretariat into a Commission.

member states emerging from conflict. Most recently, the Authority created a tripartite social dialogue forum within ECOWAS.⁸²⁰ The forum would promote social dialogue in the framework of regional integration to resolve the problems of labour and employment. As demonstrated in chapter 3 the community legal framework is largely underdeveloped in the area of labour and employment rights despite its immanent effects on the economic integration objectives of the community. It is expected that the social dialogue forum plays a strategic role in developing the community framework in this area. The tripartite meetings would be convened by the Commission and would bring together representatives of member states, employers' organisations and trade unions as well as representatives of civil society organisations and NGOs.⁸²¹

These subsidiary organs all have a role to play in human rights implementation in member states despite the fact that the revised treaty only allows primary institutions of the community to perform functions and act within the limits of powers defined in the treaty and protocols. Subsidiary organs are more issue-specific and operate only in areas where national mechanisms are non-existent or ineffective hence they may be more functional than community or national institutions in certain respect⁸²²

5.3.3. DUTY TO IMPLEMENT COMMUNITY LAW IN MEMBER STATES

One of the expected advantages of the Authority is that, as heads of the executive of respective member states, they may invoke the mandate of national institutions – such as the police, customs and immigration – to enforce community law, or propose the enactment of laws giving effect to community law.⁸²³ As an institution, treaty power is conferred on the Authority to impose sanctions on member states who fail to fulfil their obligations to the Community.⁸²⁴ This duty is reinforced by the fact that each Member State by ratifying the revised treaty is obliged to abide by the decisions and regulations of the Community.⁸²⁵

⁸²⁰ Supplementary Act A/SA.1/07/10 on the creation of a Tripartite Social Dialogue Forum within ECOWAS.

⁸²¹ Ibid., Article 2.

⁸²² Their relevance is even more important when considered at a regional scale where some of the continental institutions are unable to reach the grassroots. These organs are a necessity because they serve a cohesive purpose in balancing human rights activities at all levels.

⁸²³ Oppong (2011), p.166.

⁸²⁴ Article 77 of the revised treaty grants the power to impose sanctions on the Authority and lays out possible sanctions that may be imposed in the event of such failure to fulfil Community obligations.

⁸²⁵ Article 5(3) of the revised treaty.

In order to impose sanctions on erring member states, the Authority may refer a question to the Court to determine and confirm whether a member state has failed to honour its community obligations.⁸²⁶ At the time of this study, there has been no record of any such referral to the Court to sanction a member state. Perhaps this is attributable to the fact that the Authority combines both legislative and executive powers and may act through other direct means which it considers more effective.⁸²⁷ Another plausible argument is that the Authority is made up of politicians who may seek political compromises rather than strict enforcement of laws.⁸²⁸ Political challenges in member states mean that heads of states and government are unable to forcefully implement community law through sanctions. The Authority has however aggressively exercised its power of implementation to exert pressure on member states in situations of humanitarian concern and in order to restore constitutional government in situations of unconstitutional overthrow of government,⁸²⁹ in line with the ‘trigger mechanism’ contained in the Democracy and Good Governance protocol.⁸³⁰

One aspect where the Authority can be instrumental, which is omitted in community protocols, is the function to implement or enforce decisions of the ECCJ. The protocol of the Court makes no mention of the Authority, in enforcing its decisions in their various member states. The Authority possesses the highest legislative power, but the inclusion of an article in the Court protocol would give legal effect to the Authority in this regard. However, Article 77 of the treaty may suffice, due to its general nature. The *Manneh*⁸³¹ case presented the Authority the best opportunity to exercise this implementation power, an opportunity it failed to seize. In *Manneh*, the Gambian government went as far as proposing a total revision of the

⁸²⁶ Article 7(g) of the revised treaty.

⁸²⁷ Combination of legislative and executive powers is not unusual in international organizations. The AU adopts a similar approach in its Assembly. In the EU, legislative and executive powers are conferred on the Council of Ministers.

⁸²⁸ Oppong (2011), p.167.

⁸²⁹ The Authority successfully prevailed on the Togolese Authorities to conduct democratic elections after the death of former President Gnassingbe Eyadema in 2005. Similarly, Guinea’s membership of ECOWAS was suspended by the Authority in 2009 following a military coup in that country. In 2012, the Authority suspended Mali after a military coup deposed a democratic government.

⁸³⁰ The trigger mechanism automatically suspends states from ECOWAS in the event of an unconstitutional change of government and contains numerous provisions relating to electoral law and constitutional transfers of government. The Protocol is similar in this vein to the AU mechanisms in the African Charter on Democracy, Elections and Governance. See also, Article 30 of the AU Constitutive Act on unconstitutional change of government.

⁸³¹ Chief Ebrimah Manneh v. Republic of Gambia (ECW/CCJ/APP/04/07- ECW/CCJ/JUD/03/08 [2004-2009] CCJLR)

Supplementary protocol and restriction of the Court's authority.⁸³² Most notably, the Gambia sought to limit the ECCJ's human rights jurisdiction to treaties ratified by respondent States. The Gambian proposal provided a clear opportunity for member states through the Authority to make a clear statement on the implementation of ECCJ judgements in member states, especially as it affect human rights but the Authority never availed itself the opportunity to clarify a grey and yet fundamental aspect of ECOWAS Community law. The proposal was eventually defeated by the recommendation of the ECOWAS Committee of Legal Experts and the Council of Justice Ministers.⁸³³

A commentator argues that the silence of the Authority and its general inactivity in this respect appears to have been predicated on a lack of clear guidelines on how individuals may kick start the process of implementation through the Authority.⁸³⁴ It may be beneficial for the Authority to set out the procedure in a protocol by which community citizens may invoke its power of implementation and enforcement. The tripartite social dialogue forum may be enacted as an institution to oversee such applications that may come from community citizens to the ECCJ for cases of the Court that are yet to be implemented by a defendant Member State.

The Authority is the highest body of the community and its role in ensuring the implementation of community objectives cannot be under stated because they represent the ultimate sovereign power of member states. However, it appears that Heads of States, past and present, tend to push a different agenda at the regional level and another at the domestic level. In the past, political pressure from domestic constituencies have caused governments to close national borders or expel foreigners, thus hindering trade and free movement of persons enshrined under various community protocols.⁸³⁵ A constant feature of regional institutions in Africa is the over-centralization of authority in the Assembly. Some scholars have suggested that the time is right for politicians to leave the decision-making process in African regional organizations to technocrats.⁸³⁶ This appears to be an attractive proposition, but any

⁸³² 'West Africa: Country Submits Proposals to Amend ECOWAS Protocol', FOROYAA Newspaper (Serrekunda) (Sept. 25, 2009) available at <http://allafrica.com/stories/200909250810.html> (accessed 15 April 2014).

⁸³³ 'Justice Ministers Endorse Experts' Decisions on ECOWAS Jurisdiction', (14 Oct. 2009), available at http://www.ifex.org/west_africa/2009/10/14/ambian_proposal_defeated/ (accessed 15 April 2014).

⁸³⁴ Eboerah (2009), p. 161.

⁸³⁵ M.L Brown, 'Nigeria and the ECOWAS Protocol on Free Movement and residence', *27 Journal of Modern African Studies*, (1989), 251, p.251.

⁸³⁶ Frimpong sights the collapse of the former East African Community due to personal differences between Heads of States as an example of the need to divest major operational powers from politicians. In the former East African Community the Authority failed to meet for six years leading to the eventual collapse of the

hope of achieving this rests largely on political will of Member States and other socio-economic factors too numerous to address here.

5.4 THE COUNCIL OF MINISTERS: MERELY A PREPARATORY BODY?

The Council of Ministers of ECOWAS (the Council) is established under Article 10 of the revised treaty. The Council is comprised of two Ministers from each member state (including the Minister in charge of ECOWAS Affairs where such exists. Under the revised treaty, the main function of the Council is to bear responsibility for the ‘functioning and development of the Community’.⁸³⁷ To this end, the Council shall ‘make recommendations to the Authority on any action aimed at attaining the objectives of the Community’.⁸³⁸ In essence, the Council may be considered the policy-making hub of the community, feeding the Authority with necessary laws and policy trends for attaining community objectives. Therefore, the human rights role of the Council cannot be understated.

In addition to the Council’s advisory role, the Council exercises other functions enumerated in the treaty which may have consequences on normative legitimacy of the community.⁸³⁹ From a human rights perspective, the Council does not have any clear human rights mandate under community law, but its centrality to the decision-making process of the community necessitates its analysis. One of functions of the Council that may affect human rights, democracy and the rule of law is the responsibility to ‘approve the work programmes and budgets of the Community and its institutions’.⁸⁴⁰ The Council may exert its influence by refusing to grant approval for programmes that weigh too much in favour of human rights realisation. The Council may also reject the budget of Community institutions aimed at expanding the human rights agenda of ECOWAS. In the past, the supervisory authority of the

community. See, Frimpong (2011), p.169; see also, O.E.G Johnson, ‘Economic Integration in Africa: Enhancing Prospects for Success’, 29 *Journal of Modern African Studies* (1991), 1, p.12.

⁸³⁷ Article 10(3) of the revised treaty.

⁸³⁸ Ibid., Article 10(3)(a).

⁸³⁹ The Council may also appoint other statutory appointees in the Community; issue directives on matters concerning co-ordination and harmonisation of economic integration policies; and may request the Community Court of justice, where necessary, to give advisory opinion on any legal questions. See, Articles 10 (3) (b), (c) and (h) respectively.

⁸⁴⁰ 10(3)(g).

council has been challenged and the council accused of over stretching its supervisory powers over other community institutions.⁸⁴¹

Recently, in *Odafe Oserada v. ECOWAS Council of Ministers*⁸⁴² a regulation of the Council allocating the post of Secretary General of the Community Parliament to a citizen of Ivory Coast was challenged at the Community Court by the applicant (a Nigerian) who was equally qualified for the position. The applicant, amongst other things, requested the court to declare the regulation unlawful because it violated provisions of the revised treaty regarding appointment of statutory appointees and rights guaranteed in the African Charter.⁸⁴³ While the applicant's case was thrown out by the court for failure to prove that the regulation affected him directly, the case opens up an important angle in human rights protection within the community, at least regarding community officials. More importantly, it highlights the impact the Council's decisions can have on human rights.

Admittedly, the Council's human rights mandate as contained in community law is relatively imprecise in comparison to other decision-making organs. However, the operation of Article 4(g) of the revised Treaty on the processes and operations of ECOWAS institutions arguably places an obligation on the Council, to take human rights and the rule of law into account in the exercise of its powers. From a good governance perspective, the Council is expected to operate on the basis of procedural legitimacy because it exercises public governance over Member State's ministries.⁸⁴⁴ The *Odafe* case opens up an important aspect of human rights arising from administrative procedures in regional organizations.⁸⁴⁵ Clearly, certain aspects of the Council's operations touch on rights-related values, albeit not in its entirety. The need to keep eye on the activities of the Council is also to ensure institutional balance within the community. The Council further has powers to request for advisory opinion from the ECCJ on any legal question. This avenue has the potential to develop the jurisprudence of the Court

⁸⁴¹ *ECOWAS Parliament vs ECOWAS Council of Ministers & Executive Secretariat of ECOWAS* - Suit No: ECW/CCJ/APP/03/05; Judgement No: ECW/CCJ/JUD/02/05 (2004-2009) CCJELR.

⁸⁴² ECW/CCJ/JUD.01/08

⁸⁴³ Articles 2, 13(1), (2); 22(1), (2) of the African Charter.

⁸⁴⁴ Procedural legitimacy is primarily an administrative law concept which is centred on fairness, ensuring that decision makers follow the right process. It is expected that an international institutions with procedural rigor possess a procedure that forces decision makers to justify their analytical frameworks, assumptions, and policy answers against competing viewpoints, demonstrate that their choices are legal and rational, and subject their results to review and oversight will further enhance the legitimacy of policy outcomes as well as the prospect of social welfare gains. See, Esty (2006), p.1512.

⁸⁴⁵ The scale of these rights violations are smaller in comparison to the larger citizenry of the community, hence would be mostly dealt with by the Court having little heuristic value to human rights discourse. However, it leaves room for debate on the wider issue of procedural legitimacy in the practice of community institutions and also highlights the human rights angle to the decision-making process of the Council.

and essentially improve the human rights regime of the community. This can be set in motion by bringing cases on compliance with Community policies, programmes and budget with the principle of respect, promotion and protection of human rights.⁸⁴⁶

Decision-making organs of African institutions have always been criticized for their lack of function, attributed largely to the over-bearing influence of Assemblies of government. As far back as 1972, Sundström observed that ‘in most African organisations the conference of heads of state dominates to the extent that ministerial committees often may be reduced to acting as preparatory bodies’.⁸⁴⁷ This stifles the possibility of supranational institutions thriving independently as their design and treaty powers suggest. This constant trait in African organizations not only dislodges any hint of institutional balance (legal or political) but also raises eye brows about the democratic legitimacy of African institutions. The resultant effect of this over-bearing power of Assemblies is a lack of transparency, public participation, and possibly, the absence of rule of law in the decision-making process of the community.⁸⁴⁸ This inadvertently has effects on the normative legitimacy of the community as it violates the democratic and participatory nature of policy making with social implications. The first step towards enhancing the overall effectiveness of the institutions of the community would be balancing powers between executive institutions such as the Authority that operate solely on political basis and technocrats that engineer the policies upon which the community runs. This would further enhance institutional effectiveness which is critical to achieving set community objectives built on human rights and good governance.

5.5 THE COMMUNITY PARLIAMENT: MERELY AN ADVISORY BODY?

The introduction of modern parliamentary institutions in international organizations is based on the need to establish some degree of participation, proper representation of peoples of

⁸⁴⁶ Ebobrah (2009), p.126.

⁸⁴⁷ G.O.Z Sundström, ‘The Legal Procedures and Techniques of Economic Co-operation’, 16 *Journal of African Law* (1972), 229. p. 229.

⁸⁴⁸ During a visit by the author to the ECOWAS Commission, one of the senior staffs bemoaned the disconnection between the Council and other community institutions due to the lack of transparency in the decision-making process especially involving the Council. An example is the fact that the Council does not have its own office complex or a building where its operations can be housed on a permanent basis. The Council constantly changes corporate memory making the process of monitoring and implementation of community policies a complicated administrative process.

different groups aiming to achieve a common goal.⁸⁴⁹ This need has led to the institutionalization of traditional forms of parliaments as an organ of government, particularly in regional organizations.⁸⁵⁰ While the need for national parliaments are understood as carrying the supervisory power of the populace in the decision-making process of the nation-state, the central idea of democracy, the same justification was not initially extended to international institutions. It is often thought that parliamentary control of the business of international organizations is unnecessary as no immediate link was seen to exist between the functions of these organizations and the citizens of member states.⁸⁵¹ The logic behind this position is the fact that national parliaments directly impacted on citizens through the constitutionally stipulated processes which often required assent before the ratification of international agreements take effect.⁸⁵²

Current legal scholarship reveals the challenges a lack of independent parliamentary organs in international institutions pose to global governance and the democratic legitimacy in international organizations. These challenges only become apparent from a global governance perspective.⁸⁵³ The most prominent of these challenges in international organizations is what has been termed the “legitimacy chain” of decision-making. The idea of legitimacy chain albeit rooted in European and North American constitutional theory, is relevant to regional organizations such as ECOWAS that operate a tripartite governance structure akin in certain aspects to the nation-state. The legitimacy chain argument is presented thus: All public servants receive their authority through a chain of orders and personal responsibility which can ultimately be traced back to decision of the electorate (i.e general election or popular vote). The electorate can then hold the governmental accountable for the actions of its civil servants. The acts of international organizations are hence

⁸⁴⁹ M.O Gasiokwu, ‘The Nature and Functions of ECOWAS Parliament: 1994 Protocol in Perspective’, 3 *Current Jos Law Journal* (1997), p.1.

⁸⁵⁰ There are no parliamentary assemblies of global international economic institutions such as the WTO, the IMF or World Bank which has led to criticisms over the democratic legitimacy of those institutions. There are however, less formal means of parliamentary participation in the vicinity of global economic institutions. Examples include the Parliamentary Network on the World Bank and the Parliamentary Conference on the WTO.).

⁸⁵¹ H. Schermers & N. Blokker, *International Institutional Law*, 4th Edition (Leiden: Martinus Nijhoff, 2003), p.398.

⁸⁵² *Ibid.*, p.399.

⁸⁵³ Krajewski identifies these challenges to democracy as 1) the prolonged “legitimacy chain” of executive decision-making processes; 2) the problem posed by binding decisions which are taken by majority vote, which creates the dilemma of “rule of the other”; 3) constitutional functions of international trade agreements such as the WTO agreements. See, M. Krajewski, ‘Democratic Governance as an Emerging Principle of International Economic Law’ Society of International Economic Law, Working Paper (June 26, 2008) available at <http://www.ssrn.com/link/SIEL-Inaugural-Conference.html> (accessed 15 April 2014), p.3.

legitimised if decisions in the organization are taken by unanimity and if the authority of the representative can be traced back to the results of a general election at the national level.⁸⁵⁴ Perhaps, it is premature to think of every international organization in these terms, or as having the possibility of any likely resemblance to democracy in the nation-state. However, the increasing sophistication of the processes of international organizations and the greater evolution towards Supranationality which causes the policies and acts of these organizations to by-pass national parliaments yet have direct effect in the national systems necessitates thinking along these lines.

Thomas Franck in his seminal contribution on emerging right to democratic governance argued that in the light of the fundamental changes in the political landscape of the world, democracy was becoming a global entitlement.⁸⁵⁵ He claimed that the democratic entitlement be transformed from a moral prescription to a global entitlement.⁸⁵⁶ In similar vein, the uncertainty over the ability of the nation-state to function as an adequate constitutional legitimacy in the emerging global society means that ‘the development of global power [may]...never be seen as legitimate without some type of public interest oriented scrutiny of such power...’⁸⁵⁷

Overall, international parliamentary bodies still fall short of national parliamentary functions, but an enhancement of their powers could placate some of the concerns over the democratic deficit in the decision-making process of international institutions. This could possibly enhance the democratic legitimacy of international institutions. Krajewski identifies three existing elements of democratic governance in international organizations as transparency and public scrutiny, parliamentary participation, and dialogue with civil society.⁸⁵⁸ While these elements are exercisable by other community institutions, it is the parliamentary body which most embodies these elements of democratic participation.

⁸⁵⁴ Ibid.

⁸⁵⁵ See, T.M Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992), 46.

⁸⁵⁶ Franck’s argument were supported by an exhaustive empirical study of the number of political systems turning towards democracy and the growing practice of the United Nations and other international organizations to monitor elections and to foster democratic governance in various states. He based his approach on the firm normative basis of international human rights law.

⁸⁵⁷ P. Muchlinski, ‘International Business Regulation: An Ethical Discourse in the Making’, in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, (Springer Publishing, 2004), p.99.

⁸⁵⁸ Krajewski (2008), pp. 7-10.

The ECOWAS community parliament (the Parliament), was established for the first time under the revised treaty.⁸⁵⁹ The idea of a functional ECOWAS Parliament was made a reality under the current regime which envisages greater popular participation of community citizens in the integration process. Article 4(h) of the revised treaty underlines the centrality of democracy to the achievement of community objectives by stating that Member States shall adhere to the principles of accountability, economic and social justice and popular participation in development. The democratic intention of the community is given further strengthened by Article 4(g) which also contemplates integration in an environment of recognition, promotion and protection of human rights. The Parliament has no direct human rights responsibility under the treaty, but some of its activities can impact on the rights and freedoms of community citizens enshrined in the treaty. The Parliament is considered a representative assembly of the people of the Community, serving as a forum for dialogue, consultation and consensus, and its powers are essentially of an advisory nature.⁸⁶⁰ Over the course of its existence, the Parliament has through its procedures, statements and actions attempted to reinforce its legitimacy, enhance its powers and also ‘consolidate its position as a specialized Institution amongst the Community Institutions.’⁸⁶¹

5.5.1 CONSULTATIVE AND ADVISORY POWERS OF THE PARLIAMENT

Under Article 6(1) of Protocol A/P2/8/94 the Parliament may consider any matter concerning the Community, in particular issues relating to Human Rights and Fundamental Freedoms and make recommendations to the institutions and organs of the community.⁸⁶² This places some human rights responsibility on the Parliament, although it is restricted to recommendations to other community institutions. Reading Article 6(1) on its own is not very enlightening. But if read jointly with Article 6(2) of the Protocol, the extent of the human rights mandate of the Parliament can be understood clearly. Article 6(2) provides that the opinion of the Parliament may be sought in, amongst other areas, ‘respect for human rights and fundamental freedoms in all their plenitude’.⁸⁶³ Since the Parliament is allowed to ‘consider any matter’, which includes human rights and fundamental freedoms, there is no

⁸⁵⁹ Article 13 of the revised treaty.

⁸⁶⁰ Para 4 of the preamble in Protocol A/P2/8/94 Relating to the Community Parliament.

⁸⁶¹ ‘Strategic Plan of the ECOWAS Parliament: Third Legislature 2011-2015’, (On file with the author).

⁸⁶² New Article 4 of Supplementary Protocol A/SP.3/06/06 Amending Protocol A/P.2/8/94 Relating to the Community Parliament.

⁸⁶³ New Article 4(3) (m) supplementary protocol A/SP.3/06/06.

difference between matters which the Parliament may consider or those which it may be referred to it. However, being that the requirement to consult the Parliament rests on community institutions with decision-making powers, it could be deduced that the allowance to ‘consider’ rests on parliamentary initiative.⁸⁶⁴ Ascertaining whether human rights matters may be considered by the Parliament on its initiative or are presented through consultation from other community institutions does not take away the fact that the Parliament lacks the power to bind other community institutions.

As part of the general revision of the community legal framework in 2006, the Protocol A/P2/8/94 on the Parliament was amended by a Supplementary protocol A/SP.3/06/06. It is expected that the competence of the Parliament would be progressively enhanced from an advisory to co-decision making capacity, and subsequently to a law making role in areas to be defined by Authority.⁸⁶⁵ Till date these areas of law-making are yet to be defined by the Authority. The progression of the Parliament to full legislative function appears hinge on the community’s successful transition from appointment of parliamentarians from national parliaments to election by direct universal suffrage.⁸⁶⁶

The Parliament operates mainly through the Plenary, the Bureau, and the conference of the Bureaux. The Plenary is the highest body within the Parliament and its decisions are binding on other structures of the parliament. Additionally, the plenary adopts all the resolutions of the Parliament which are subsequently forwarded to the decision-making bodies of the community. The Bureau is the governing organ of the Parliament which comprises of the Speaker, the Deputy Speaker, the Second Deputy Speaker, the Third Deputy Speaker and the Fourth Deputy Speaker. The powers of the Speaker under Article 15 of the supplementary protocol are administrative at best and are limited to the internal procedures of the Parliament.⁸⁶⁷

To facilitate its work, the Parliament operates through standing and adhoc committees under the Conference of Committees Bureau. The committees are granted personal responsibilities for the different aspects of the Parliament’s mandate.⁸⁶⁸ The committees most relevant to

⁸⁶⁴ See, J.U Hetmann & F.K Mohammed, ‘Opportunities and Challenges of Parliamentary Oversight of the Security Sector in West Africa: The Regional Level’ (Freidrich Ebert Stiftung, 2005), p. 20.

⁸⁶⁵ New Article 4(2) Supplementary Protocol A/SP.3/06/06.

⁸⁶⁶ Ibid., New Article 4(3).

⁸⁶⁷ Ibid., New Article 16.

⁸⁶⁸ The Parliament currently operates through 12 committees namely: a) Agricultural, Environment, Water Resources and Rural development; b) Education, Science and technology, Youth, Sports and Culture; c)

human rights function of the community include: Education, Science and Technology, Youth, Sports and Culture; Gender, Employment, Labour and Social Welfare; Legal and Judicial Affairs; Health and Social Services; and Human Rights and Child Protection. The recommendations from the Parliamentary Committees are generally advisory but it is expected that human rights would get more detailed attention at the committee level.

As earlier highlighted, the law and practice of international organisations seems to limit the powers of parliamentary organs. In regional organizations in Africa, parliamentary bodies are relegated to merely advisory bodies. At the AU level, the Pan-African Parliament (PAP) lacks full legislative powers despite its envisaged role in providing a common platform for the grassroots in Africa to get involved in discussions and decision-making on problems and challenges facing the continent.⁸⁶⁹ The PAP seeks to, amongst other objectives, promote the principles of human rights and democracy in Africa, encourage good governance, transparency and accountability in member states, promote peace, security and stability, and facilitate co-operation among Regional Communities and their Parliamentary fora.⁸⁷⁰ Like its sub-regional counterparts, the PAP exercises advisory and consultative powers. It is inconceivable that the PAP, as the parent Parliamentary body in Africa, would play any decisive role in achieving the lofty ideal of an African Economic Community.

Essentially, while international parliamentary organs traditionally do not play a decisive role in international organisations, they may offer an opportunity for mutual consultation and cooperation.⁸⁷¹ In this light, the recommendations and other advisory inputs of the Community Parliament though not binding, should have a strong persuasive effect and can be leveraged to the advantage of Community citizens. The persuasive effect of the Parliament can also be exploited to influence national parliaments to put pressure on governments. A

Gender, Employment, Labour and Social Welfare; d) Infrastructure and Industrial Development; e) Political Affairs, Peace and Security; f) Trade, Customs and Free movement of Persons; g) Legal and Judicial Affairs; Communication and Information Technology; h) Economic Policies; i) Administration, Finance and Budget Control; j) Nepad and the African Peer Review Mechanism; k) Health and Social Services; l) Human Rights and Child Protection. See, <http://www.parl.ecowas.int/English/committees.html> (accessed 29 July 2013).

⁸⁶⁹ O.I Nzewi, *The Role of the Pan-African Parliament in African Regionalism (2004-2004): An Institutional Perspective*, Unpublished Doctoral thesis, (University of Pretoria, 2008), p.176.

⁸⁷⁰ Article 3(1-9) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament available at <http://au.int/en/content/protocol-treaty-establishing-african-economic-community-relating-pan-african-parliament> (accessed 29 July 2013). Additionally, under Article 11 the PAP is mandated to, *inter alia*, examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendation it may deem fit relating to matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.

⁸⁷¹ Schermers and Blokker (2003), p.417.

look through the rules of procedure reveals some oversight functions of the Community Parliament which may be decisive in decision-making in the community. The Parliament may submit to the Authority its recommendations on any matter concerning the community for its consideration.⁸⁷² Additionally, the Speaker of the Parliament shall have access to the Chairman of the Authority and shall periodically brief the Chairman on the activities of the Parliament.⁸⁷³ While this provision reflects the superiority of one community institution over the other, this presents a political avenue through which the Speaker of the Parliament can influence community decisions. The Parliament may also on its own initiative, invite the Chairman of the Council of Ministers to address the Plenary on any issues of relevance to the life of the Community.⁸⁷⁴ These provisions serve as probable means through which the institutional imbalance in the community can be relatively assuaged, particularly as it affects the decisive role of the Parliament.

Despite the seeming efficacy of the Parliament's oversight roles above, records of any parliamentary initiative in any matter relating to human rights are scarce. A recent study by the ECOWAS Commission in response to a Parliamentary resolution requesting for greater involvement in the integration process concluded that 'the parliament has never addressed recommendations to the other ECOWAS institutions'.⁸⁷⁵ The role of the Parliament has since improved, albeit not to the desired extent. Recently, the Parliament has shown desire to enhance human rights standards in the Community. In a 2002 resolution, the Parliament requested for an increase in the degree of its involvement in the promotion of human rights, democracy, good governance and peace.⁸⁷⁶ The third legislature⁸⁷⁷ of the Parliament has been more vibrant and determined in its attempt to ensure that the powers of the Parliament are fully enhanced. The Parliament in its most recent strategic plan,⁸⁷⁸ acknowledges that:

Despite limitations in the current Protocol, which confers consultative and advisory status to the Parliament, there is the need for the Institution to exercise its existing mandate to the fullest. In

⁸⁷² Rule 85(4), Rules of Procedure of ECOWAS Parliament (On file with the Author).

⁸⁷³ Ibid., rule 85(5).

⁸⁷⁴ Ibid., rule 86(2). Under rule 86(2), the Parliament shall make recommendations on any issue concerning the Community, to the Council of Ministers for its consideration.

⁸⁷⁵ ECOWAS August 2004: Study on the Enhancement of the Powers of the Community Parliament, ECOWAS Secretariat cited by Ebobrah (2009), p.166.

⁸⁷⁶ Resolution Relating to the Enhancement of the Powers of the Community Parliament, September 2002, the ECOWAS Parliament. (On file with the Author).

⁸⁷⁷ Under article 4 of the Supplementary Protocol, the life of each legislature shall be four years from the date of its inauguration by the Chairman of the Authority. The current legislature which is the third would operate from 2011 to 2015

⁸⁷⁸ 'Strategic Plan of ECOWAS Parliament', supra.

particular, the Parliament needs to devise people oriented programmes and actions that will impact positively and directly to the lives of the people... Specifically, the agenda of the Third Legislature shall focus on ... Democracy, Good governance and Human Rights.⁸⁷⁹

In like manner, the 4th Deputy Speaker of the ECOWAS Parliament, Hon. Simon Osei - Mensah remarked thus “We have an additional one which we may like to take on board like the ombudsman. Like something which require mandatory referral, may be issues concerning human rights in the Community...”⁸⁸⁰ This is a clear indication that given adequate powers, the Parliament would prioritize activity in the area of human rights, democracy and the rule of law. This has not however, prevented the Parliament from availing its consultative and advisory capacity in enhancing the normative legitimacy of the organization, particularly in the area of peace and security.⁸⁸¹

Another important outlet for the Parliament to positively affect human rights in the Community is the fact that parliamentarians also double as national parliamentarians in their various states.⁸⁸² This should allow for greater coordination between national human rights policies and legislations and Community human rights initiatives. This gives a solid, transparent, and democratic base to the formulation of human rights policies at the regional level, in comparison to the continental level.

5.5.2 INDIVIDUAL AND CIVIL SOCIETY STANDING BEFORE THE PARLIAMENT

Despite the obstacles to its exercise of legislative powers, the ECOWAS Parliament has created an avenue for engagement with citizens of the Community by including a ‘right to petition’ clause in its rules of procedure. Under Rule 82:

⁸⁷⁹ Ibid., para 33.

⁸⁸⁰ See. ‘ECOWAS Parliament: A toothless bull dog?’ Available at <http://mydailynewswatchng.com/2013.07/07/ecowas-parliament-a-toothless-bull-dog/> (accessed 15 April 2014).

⁸⁸¹ Most recently, the Parliament Ad-hoc committee on Mali and Guinea Bissau played a decisive role in devising a plan for military intervention in the troubled ECOWAS member States. See ‘ECOWAS Parliament convenes 1st Ordinary Session for 2013 in Abuja with five Liberian Legislators in Attendance’, available at http://liberiaembassyabuja.org/index.php?option=com_content&view=article&id=70:ecowas-parliament-convenes-1st-ordinary-session-for-2013-in-abuja-with-five-liberian-legislators-in-attendance&catid=1:latest-news&Itemid=17 (accessed 15 April 2014).

⁸⁸² Rule 91 of the rules of procedure, outlines the terms of relations with national parliaments. The ECOWAS Parliament may exchange information, contacts and request facilities from national parliaments. Most importantly, under rule 91(3) representatives shall make periodic reports of the activities of the ECOWAS Parliament to their national parliaments.

“any citizen of the Community and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens, a petition to Parliament on a matter which comes within ECOWAS fields of activity and which affects him, her or it directly.”

Once such petition is declared admissible by the Parliament, it may be dealt with by the relevant parliamentary committee and could lead to a resolution or an opinion ultimately forwarded to the ECOWAS Commission for action.⁸⁸³ Although the procedure is potentially restrictive to the extent that it requires a petitioner to be directly affected by the subject-matter of the petition, it provides the possibility of addressing human rights issues without judicial mechanisms. The link with the Commission in this regard, could translate to the use of good offices in the resolution of human rights matters. It is noteworthy that the limitation of the petitions to the Community’s field of activities narrows down the scope for conflict and inconsistency with national mechanisms of Member States and also those of the AU.

Regarding the role of NGOs and Civil Society groups, it will be recalled that the revised treaty includes their participation in the integration process. The centrepiece of the revised treaty as far as social dialogue is concerned can be found in Articles 82 and 83, whereby the community not only commits to cooperating with non-governmental and socio-economic organizations, but also commits to setting up mechanisms for consultation with these organizations. Yet, beyond these commitments, the revised treaty does not specify how community institutions may consult with social bodies. Details about consultation are fleshed out in a separate Community decision⁸⁸⁴ which introduces a regulation granting observer status to NGOs to participate in the Community’s institutions.

Under this decision, organizations are divided into two categories (A or B) depending on their level of interest in ECOWAS activities.⁸⁸⁵ The difference between the two designations is essentially that “A” observers have privileged access to the ECOWAS Council of Ministers whereas “B” observers are only accredited for other community institutions. It is under this

⁸⁸³ Rule, 83(7).

⁸⁸⁴ *Decision A/DEC.9/8/94 Establishing Regulations for the Granting to Non-Governmental Organisations (NGOs) the Status of Observer within the Institutions of the Economic Community of West African States* cited in R.Roberts, ‘The Social Dimension of Regional Integration in ECOWAS’ *International Labour Organization (ILO) Working Paper No. 49 (2004)*, p.25.

⁸⁸⁵ An organization qualifies for an “A” designation if it (1) has a basic interest in ECOWAS activities of the Community; (2) is closely linked with the social and economic life of the area which it represents; and (3) has made sustained contributions towards the attainment of Community aims and objectives. On the other hand, “B” certifications are given to organizations which only have a general interest in the activities of the Community.

category that observers can be accredited as observers of the Parliament which may audit the sessions of the Parliament and contribute to the general process of decision-making in the community. As discussed previously, civil society in the sub-region is at its most vibrant in pushing the Community and Member States to meeting human rights obligations. Including civil society and NGOs in the decision-making process arguably strengthens the democratic legitimacy of the community. However, NGOs and civil society have not been as vibrant in canvassing for the expansion of the Parliament's mandate in the same manner as they have campaigned in the case of the Court.

The Parliament, potentially serves as a more realistic and legitimate channel through which the constitutions of Member States can be amended to give direct effect to Community law. Recently, the Parliament intervened in a dispute between the National Association of Nigerian Traders (NANTS) and Ghana over a new legislation which is unfavourable to Nigerian traders in Ghana and considered to be a breach of ECOWAS trade rules. The Parliament appealed to the Ghanaian government to adhere to the Revised Treaty obligations. In doing so, it dispatched its members to Ghana to bring about a resolution that upholds the terms of the revised treaty.⁸⁸⁶ An expansion of the Parliament's powers would accelerate the process of constitutional amendment, making enforcement of Court decisions easier.

5.5.3 FACT-FINDING AND OTHER MISSIONS

Article 16(8)(b) of the supplementary protocol of the Parliament empowers the Bureau to authorize meetings, hearings, hold fact finding and study tours of committees away from the headquarters. Although this was not originally included in Protocol A/P.2/8/94, the ECOWAS Parliament is recorded to have undertaken various fact-finding missions while the old protocol was in operation. During the tenure of the second parliament, fact finding missions were made to the Mano River Union as well as reconciliatory visits during the Liberian crisis. Such visits turned out to be crucial in preventing the escalation of crisis and were eventually decisive in resolving the conflicts which would have had further devastating human rights consequences in the troubled areas and the entire sub-region.⁸⁸⁷ Recently, members of the ECOWAS Parliament have also been included in ECOWAS observer

⁸⁸⁶ See, 'ECOWAS Parliament Saved us in Ghana', (16 August 2012), available at <http://www.thenationonline.net/2011/index.php/news> (accessed 15 April 2014).

⁸⁸⁷ In the case of Liberia, the outcome of the Parliament's visit was a roadmap eventually transmitted to the Authority and became a useful tool for mediation in the conflict.

missions for the purpose of monitoring and observing elections in ECOWAS member states in accordance with article 12(3) of the Protocol on Democracy and Good Governance.⁸⁸⁸

Such missions of the Parliament can be useful for human rights realisation. The ECOWAS Parliament may not have co-decision making powers with other organs of the Community or budgetary approval powers. However, the current procedures and practices of the Parliament are potentially viable tools for the promotion of community objectives without clashing with national systems. For example, the Parliament's fact-finding mission to Ghana in the NANTS case enabled the Parliament identify specific issues relating to the Protocols on Free Movement and its implications on regional integration. The parliament reinforced the efforts of the ECOWAS authorities in evolving cooperation and integration within the region.⁸⁸⁹ Since the methods of the parliament as shown above are not adversarial, the goodwill of Member states ought to be greater in this regard. Parliamentary actions have so far, shown no potential of disrupting national or continental mechanisms. Instead the means applied by the Parliament could be instrumental in enhancing symmetry with national systems.

5.6 THE ECOWAS COMMISSION: A MODERN ADMINISTRATIVE ORGAN

Traditionally, states reserved the right to exclusive management of international organizations by conferring powers on the plenary organ composed of government representatives who had to approve every important decision unanimously. However, the non-permanence of plenary bodies necessitated the creation of an organ with administrative powers, most often called a Secretariat.⁸⁹⁰ It was envisaged that this administrative entity in executing the will of the organization, which differs from that of member states, had at least the right of requiring from member states submission and exchange of useful information for the functioning of the organization. This incidentally also required the right of monitoring compliance with obligations of the organization.

Although the administrative role of the Secretariat varies according to organization, some of their main functions include general administrative and clerical functions, budget preparations, collection of reports and information, representing their organizations in legal

⁸⁸⁸ See, 'ECOWAS Election Observer Mission Arrives in Sierra Leone', available at <http://news.ecowas.int/presseshow.php?nb=74&lang=en&annee=2007> (accessed 15 April 2014).

⁸⁸⁹ Letter from the Community Parliament to the President of Nigerian Association of National Traders (NANTS) informing the association of the fact-finding mission to Ghana. (on file with the Author).

⁸⁹⁰ Amerasinghe (2005), p.154.

proceedings and rendering technical assistance to member states. With the expansion of international organizations into “multiple issues”⁸⁹¹ entities with supranational powers, it has become practically impossible to restrict the role of the classical Secretariat to purely administrative functions. Secretariats have become more than just administrative organs, but have grown into, arguably, the engine room of most international organizations. Hence, in some organizations, secretariats have engaged in election observation, carrying out executive functions and initiating policies.⁸⁹² The variance in the institutional capacity of Secretariats in international organizations has led to diversity in nomenclature.

Some international organizations have expanded secretariats to become ‘Commissions’,⁸⁹³ while a handful still operate through general Secretariats.⁸⁹⁴ As earlier highlighted, the administrative organ of ECOWAS came into existence as the Executive Secretariat with merely secretarial functions under the 1975 treaty.⁸⁹⁵ The secretariat was largely incapacitated during the first regime, a general feature of community institutions under that regime. However, in 2006 the ECOWAS Secretariat was transformed into a ‘Commission’ (Commission of the Economic Community of West African States)⁸⁹⁶ ‘with a view to adapting it to the international environment and to making it more effective in the accomplishment of its regional integration assignment’.⁸⁹⁷ The new Article 17 of the supplementary protocol of the revised treaty establishes the ECOWAS Commission furnishing it with nine commissioners namely: the President, the Vice President, and seven other commissioners.⁸⁹⁸ The Supplementary protocol A/SP.1/06/06 also expanded the functions of the Commission, significantly transforming it from an administrative vetting

⁸⁹¹ T.A Börzel, ‘Comparative Regionalism: A New Research Agenda’, *KFG Working Paper Series* (2011), p.11.

⁸⁹² Schermers & Blokker (2003), p.325-328.

⁸⁹³ The UN has established commissions in different regions as administrative hubs, primarily for the purpose of economic integration. The European Commission is regarded as the ‘EU’s executive body, representing the interests of Europe as a whole. See more about the Commission at, <http://ec.europa.eu/about/> (accessed 15 April 2014).

⁸⁹⁴ The Organization of American States (OAS), The Andean Community and the Caribbean Community (CARICOM) all operate through general secretariats. In Africa, only the AU and ECOWAS have commissions, the other major RECs operate through secretariats.

⁸⁹⁵ See, Articles 4(1) and 8 of the 1975 treaty, and articles 17, 18 and 19 of the revised treaty.

⁸⁹⁶ See, Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty.

⁸⁹⁷ *Decision A/DEC.1/06/06 Relating to the Commission of the Economic Community of West African States*, (2006) Vol. 49 ECOWAS Official Journal.

⁸⁹⁸ The seven commissioners head the departments of the Commission which include: 1) Administration and finance department; (2) Agricultural, Environment & Water Resources Department, (3) Human Development and Gender department; (4) Infrastructure department; (5) Macro-Economic Policy department; (6) Political Affairs, Peace and Security; and (7) Trade, Customs, industry & Free Movement department. These departments further have directorates that oversee specific aspects of policy-making. See further, <http://www.comm.ecowas.int/> (accessed 15 April 2014).

entity to an organ with some policy-making competence.⁸⁹⁹ The responsibility of the Commission to ‘exercise its powers to ensure the smooth functioning of the Community and protect the overall interest of the Community’⁹⁰⁰ plausibly entails authority to act in human rights, democracy and the rule of law since these have been demonstrated as community objectives.

In practice, the Commission has become deeply involved in the activities for the promotion and protection of human rights due to its duty to comply with instructions from other decision-making organs of the community vested with human rights mandate. However, it is not all of the Commission’s activities are rights-based *stricto sensu*. Some of these activities are incidental, but still institutionally relevant for the protection of rights in the Community. It is impossible to discuss the functions of a pre-dominantly administrative body without reference the procedural aspects of its operation. The Commission’s new authority in this issue area entails responsibility in ensuring legitimate policy-making.⁹⁰¹ It is within these rule-making procedures that underlying issues pertaining to human rights can be resolved with sound policy-making. More so, a procedurally legitimate Commission also enhances careful analysis of such policies and engages interested national departments dialogue on methods/mechanisms of implementation. The following section examines the policy-making process and procedure of the ECOWAS Commission that enhances the legitimacy of the community.

5.6.1 MEETINGS AND CONFERENCES

In its capacity as an administrative body, the Commission has convened or facilitated meetings and conferences that have impacted positively on the human rights and the rule of law in the Community. In most cases, the Commission may draw its powers from the provisions of the revised treaty, in other cases, the Commission acts in accordance with

⁸⁹⁹ New article 19 of the revised treaty gives the Commission competence to formulate proposals and make recommendations to the main decision-making organs of the Community.

⁹⁰⁰ *Ibid.*, 19(4).

⁹⁰¹ Procedural Legitimacy depends on the proposition that good governance procedures are employed in the policy-making process. The assumption is that if decision-makers follow the right process, the decisions that will emerge will enjoy a degree of legitimacy. Proponents of this approach argue that procedural rigor is especially important in the international policy domain, where the lack of democratic underpinnings and political accountability are lacking. See, Esty (2006), pp.1521-1522. Procedural Legitimacy could also imply the classical idea of rule of law. See, E. Colombatto, ‘A Theory of Institutional Legitimacy’, *International Centre for Economic Research*, Working Paper Series no. 5 (2012), p.6.

directives of the Authority or the Council.⁹⁰² The President of the Commission is responsible for the coordination of the activities of the community institutions as the legal representative of the community⁹⁰³, he may on his own volition organize meetings and conference aimed at addressing specific policy objectives of the community which may have human rights implications. Whether the convening of meetings are strictly on the initiative of the Commission or in collaboration with other actors (e.g. national institutions from which it may request information), the actions of the Commission has the potential to improve the rule of law in the Community.

One of such powers conferred on the Commission by a community document is Article 35(2) of the Protocol on Democracy which provides that the Commission (then Executive Secretariat) may provide a framework for independent human rights institutions in the sub-region. The framework would be organized into a regional network in order to enhance national capacities to protect human rights. To carry out this function, the Commission through directorate of Political Affairs facilitated the establishment of the ECOWAS Network on Human Rights, a network of human rights bodies, in 2006.⁹⁰⁴ In 2012, two meetings were held by the Commission adopting the Network's constitution and a three year plan of action that would enhance the performance of national human rights institutions, including those of civil society organizations, in the protection and promotion of human rights in West Africa.⁹⁰⁵ This provides a platform for national institutions to compare notes on human rights situations in various member states, and the inclusion of NGOs and civil society further authenticates the legitimacy of the Commission.

The Commission has made remarkable strides in other aspects of the ECOWAS human rights regime. In the area of peace and security, the Commission has most recently been instrumental in bringing stability to Mali and Guinea Bissau. The Commission organized four extraordinary sessions of the Mediation and Security Council at the ministerial level and five Extra-ordinary summits of Heads of State and Government towards finding a solution to the

⁹⁰² Under new Article 9 of the revised treaty, the Commission may adopt rules relating to the execution of Acts enacted by the Council of Ministers. These rules have the same legal forces as Acts adopted by the Council.

⁹⁰³ New article 19(2) of the revised treaty.

⁹⁰⁴ 'Deepening Regional Integration in Africa in Response to the Global Economic Crises', ECOWAS Annual Report, (2009),p.76.

⁹⁰⁵ Ibid.

crisis in both countries.⁹⁰⁶ To ensure the sustenance of democracy and good governance the Commission regularly facilitates meetings of national Electoral Commissions through its Network of National Electoral Commissions (ECONEC). The ECONEC promotes peer learning among Electoral Management Bodies (EMBs).⁹⁰⁷ The Commission regularly carries out observation missions through this arrangement and has facilitated peaceful elections in Senegal, Guinea-Bissau, Sierra Leone, Ghana,⁹⁰⁸ and most recently Togo.⁹⁰⁹

The Commission has scored reasonably in the area of humanitarian law and Gender. The Commission holds annual workshops on the Implementation of International humanitarian Laws in West Africa and has recently commenced implementation of the International Humanitarian Laws approved by Member States and presented to Ministers of Justice.⁹¹⁰ The policy is expected to be approved by the Heads of States. Regarding Gender and Childs rights, the Commission has approached this aspect of the Community's human rights objectives with careful planning. The Commission realising the importance of women to economic success has held series of meetings on finalising a study on Gender and trade dynamics in the West African sub-region.⁹¹¹

Through a plethora of meetings and conferences the Commission has demonstrated its commitment to the institutionalization of transparency and public participation in the policy-making process. The Commission is arguably the only community institution which ensures an all-inclusive approach to its operations. Through these meetings, workshops and conferences the possibility of upsetting intra-organisational institutions are low. The Commission as part of its drive to be accountable to domestic interests⁹¹² has worked closely

⁹⁰⁶ 'Integration and Political stability in West Africa', ECOWAS Annual Report (2012), p.85. The Commission also built linkages and advocacy with the AU, UN and other partners in support of ECOWAS mediation efforts in both countries.

⁹⁰⁷ ECOWAS Annual Report, 2009, p.76.

⁹⁰⁸ ECOWAS Annual Report, 2012, p.86.

⁹⁰⁹ See, 'ECOWAS Election Observation Mission says Parliamentary Polls Credible, Transparent' available at <http://news.ecowas.int/presseshow.php?nb=226&lang=en&annee=2013> (accessed 15 April 2014).

⁹¹⁰ ECOWAS Annual Report, 2012, p.76. In this vein, the Commission has held meetings on a draft Memorandum of Understanding on establishing an ECOWAS Humanitarian Depot as part of the ECOWAS Emergency Response Unit. The Commission has also adopted a draft policy for protection of, and assistance to victims of trafficking in persons in West Africa which has been validated by experts and adopted by Ministers

⁹¹¹ Ibid. The Commission has also started the process of preparing the Child Labour Plan of Action. In this regard, the Commission in collaboration with international partners have held a Validation workshop on the Draft ECOWAS Monitoring and Evaluation Framework for Child protection System in the sub-region

⁹¹² One of the criticisms of the current system of international governance from a procedural perspective is accessibility. Familiar domestic interest groups that are so important in the representation of aggregate individual interests are generally not abreast with details of international proceedings. See, E. D Kinney, 'The

with the West African Civil Society Forum (WASCOF). The Commission has developed a 3-year Action Plan aimed at enhancing civil society organizations' contribution to the ECOWAS integration process. The Commission has also provided financial support to WASCOF and other regional society organizations 'whose primary foci are in tandem with ECOWAS Vision 2020 and ECOWAs Strategic Action Plan'.⁹¹³

The Commission (then the secretariat) is on record as playing an instrumental role in the expansion of the human rights mandate of the Court. The Commission was always in support of adding a human rights mandate to community legal texts and institutions.⁹¹⁴ The Commission felt the need to give the judges and staff enough work to justify the large expenditure of Community resources.⁹¹⁵ The Commission's backing of civil society and ECCJ judges in the aftermath of the *Afolabi* decision 'greatly increased the likelihood that ECOWAS Member States would approve the protocol advocated by ECOWAS judges and NGOs'.⁹¹⁶

The Commission appears to be the most visible community institution in member states, earning it positive acclaim as embodying "the brand" of ECOWAS.⁹¹⁷ There appears to be little signs of intra-organizational friction with member state institutions despite some gaps that currently exist in the institutional mechanism particularly in implementation of community policies.⁹¹⁸ It could be argued that the efforts of the Commission in these areas undermine that of parallel continental human rights institutions like the African Commission. This is particularly true given the expectation that there should be symmetric alignment of policies towards a continental framework in key areas such as human rights. However, challenges facing the African Commission such as shortage of financial and human resources

Emerging Field of International Administrative Law: Its Content and Potential', 54 *Administrative Law Review* (2002), p.428-429.

⁹¹³ ECOWAS Annual Report 2012, p.79.

⁹¹⁴ N. Nwogu, 'Regional Integration as an Instrument of Human Rights: Reconceptualising ECOWAS', 6 *Journal of Human Rights* (2007), 345, p.352.

⁹¹⁵ 'Interview with ECOWAS Legal Affairs Directorate A', cited in Alter et al (2013), p.754.

⁹¹⁶ Alter et al (2013), p.754.

⁹¹⁷ On a field visit by the author to the ECOWAS Commission, a senior staff referred to the Commission as 'the brand' of the Community.

⁹¹⁸ One of such institutional gaps not fully covered here is the infrastructure in member states. For example, a cursory look at the national unit directory on the ECOWAS website reveals disparities in the national unit structure of member states. Some member states especially francophone countries all have Ministries of African integration with a department dedicated to ECOWAS. The Anglophone countries on the other hand have just ministries of Foreign Affairs with divisions or desks dedicated to ECOWAS. See, ECOWAS National Unit Directory at <http://ecowas.int/> (accessed 15 April 2014). It may be argued that the difference in national resources and institutional capacity calls for different institutional structures in member state ministries and departments.

can arguably be ameliorated by the efforts of sub-regional administrative organs in this area. Cohesive administrative strategies enhance efficient resource management at both levels due to information sharing. This reduces the risk of duplication.

5.6.2 TRAINING PROGRAMMES

The functions of the Commission do not stop at meetings and conferences. The Commission also carries out various training programmes amongst its staffs and also across national institutions. These trainings are carried out either in conjunction with external bodies or as part of its inter-institutional arrangement. The aim of these programmes is often to build capacity of national institutions of member states to enhance and improve Community intervention in given area. From a human rights perspective, the Commissions' training programmes contributes to human rights education in the Community.⁹¹⁹

As part of its efforts to improve humanitarian crisis management in the community, the Commission established the ECOWAS Emergency Response Unit (EERT). The EERT has held simulation workshops for EERT member on civilian protection during crisis situations. Members of the EERT were also trained on the use on of Geographic Positioning System to enhance humanitarian missions in the sub-region.⁹²⁰ EERT specialists have in addition received training on the essential policies and legal documents of the ECOWAS Commission backing response in Member states. The importance of an efficient emergency response unit in the sub-region cannot be understated considering the recent devastating results of natural disasters in some member states where national emergency units have been unable to cope with the high number of casualties.⁹²¹ As an anticipatory institutional strategy for disaster management and humanitarian access, the Commission has also carried out training

⁹¹⁹ The Commissions approach here typifies the Accountability model of the emerging field of Human Rights Education (HRE). The Accountability model of human rights education consists of legal and political approaches that include trainings and networking. This method remains one of the most effective methods of human rights education because learners are directly involved in the protection of individual and group rights. Other models include the; 1) Values and awareness model and 2) Transformation model. See further, F. Tibbits, 'Understanding What We Do: Emerging Models for Human Rights Education', 48 *International Review of Education* (2012), 159.

⁹²⁰ ECOWAS Annual report, 2009, p.79.

⁹²¹ The flood disaster in Nigeria in 2012 was the worst in 40 years and displaced over 2 million people cutting off routes that connect neighbouring countries. See, 'Nigeria: 2012 Flood Disaster, Worst in 40 years', Daily Trust, 6 Aug. 2013, available at <http://allafrica.com/stories/201308060714.html> (accessed 15 April 2014); 'Nigeria Flood displaces 2 Million people, kills 363', BBC News Africa, 6 Nov. 2012, available at <http://www.bbc.co.uk/news/world-africa-20221451> (accessed 15 April 2014).

workshops on International Disaster Response Laws (IDRL) for West African Disaster Managers with the International Federation on Red Cross and Red Crescent Societies (IFRC) in Dakar, Senegal in 2012.⁹²² The training aims to promote measures in ensuring humanitarian access by foreign relief assistance agencies in the sudden onset of emergencies which might exceed the coping capabilities of Member States.

Bearing in mind the importance of a politically stable environment to the actualization of economic integration, the Commission has sought to strengthen the ECOWAS Early Warning System by recently holding a Regional Policy Seminar on the Responsibility to Protect (R2P). The Forum organized in collaboration with the Global centre for R2P, ‘provided an opportunity to share experiences of ECOWAS in implementing its collective security mechanism as a model for implementing the concept, especially, the very controversial third pillar of R2P’.⁹²³ In line with building staff capacity in this regard, the Commission held a training on International Humanitarian Response and Humanitarian response System and Contingency Planning in July 2012 for staff of its Early Warning, Humanitarian and Social Affairs Directorates. As a means of proactively engaging member states in information sharing, the Commission introduced field visits of analysts in the same year.⁹²⁴

In a bid to enhance Good Governance in the sub-region, the Commission has undertaken a string of training workshops that aim, in particular to develop the capacity of national institutions. In this regard, subject to the ECOWAS Protocol on Corruption, the Commission has recently carried out training of Operational Investigators in Anti-Corruption Institutions in Member States, and also plans for staff exchange programme among governance Institutions in West Africa. The Commission also plans to provide more technical and capacity support for the Implementation of the work of Regional Networks on Human Rights, Anti-Corruption, Political Parties and the ECOWAS Network of Electoral Commissions (ECONEC).⁹²⁵

Through these trainings the Commission appears to have made the most impact in effective human rights protection in the Community. This is true to the extent that, through training of community and member state officials, human rights topics are geared toward specialized areas. This enables a more direct approach towards addressing rights-related problems in

⁹²² ECOWAS Annual report, 2012, p.76.

⁹²³ *Ibid.*, p.87.

⁹²⁴ *Ibid.*

⁹²⁵ *Ibid.*,p.85.

member states, even to the grass-root level. Additionally, through training of member state officials international human rights strategies are exchanged with skill-development. Tibbits agrees that, it is within the accountability model of human rights training that ‘social change is necessary and that community-based, national and regional targets for reform can be identified’.⁹²⁶ Hence, human rights education presents an all-inclusive platform for every level in effective human rights protection across the continent – almost in a harmonization style to suit practical reality.

5.6.3 INITIATION OF POLICIES

As already indicated, the Commission aside from its administrative functions bears a sizeable proportion of the policy-making responsibility in the Community. This policy-making function is however, subject to the approval of the Council of Ministers and the Authority. In practice, policy proposals of the Commission are mostly adopted by the decision-making organs without little amendment.⁹²⁷ As would be demonstrated below, the Commission has since its transformation initiated policies that have potential long-term impacts on human rights in the Community.

After years without a framework for Conflict Prevention, the Commission instituted the ECOWAS Conflict Prevention Framework (ECPF) which was adopted in January 2008 by the Mediation and Security Council.⁹²⁸ The Framework eventually attracted funds from major international organizations and European governments.⁹²⁹ The ECPF covers several components of the Community’s operations, including: Democracy and Political Governance; Natural Resource Governance; Women, Peace and Security; Security Governance; Media; and Preventive Diplomacy.⁹³⁰ Despite the success of the ECOMOG experiment in Sierra Leone and Liberia, questions still remain on the legitimacy of that intervention.⁹³¹ Complaints regarding the actions of the soldiers that were tantamount to gross human rights violations led to criticism over the training of the peacekeeping forces. To avoid similar scenario in future

⁹²⁶ Tibbits (2002), p.166.

⁹²⁷ Ebobrah (2009), p.197.

⁹²⁸ ECOWAS Annual report, 2009, p.75.

⁹²⁹ The EU committed the bulk of one hundred and nineteen million euros (€119m) facility towards the implementation of the ECPF under the 10th European Development Fund (10th EDF). The Danish government on the other hand, financing the development of the Plans of action for five components of the ECPF

⁹³⁰ Ibid.

⁹³¹ See, ‘Sierra Leone: Getting Away with Murder, Mutilation, Rape’, Human Rights Watch Report, (1999), available http://www.hrw.org/reports/1999/sierra?SIERLE99-04.htm#P1104_182827 (accessed 15 April 2014).

peace-keeping missions, the Secretariat shortly before its transformation into a Commission undertook the task of formulating a code of conduct to guide armed forces.⁹³²

Another important area where the Commission has initiated policies on its own is Gender and child rights. The Commission has developed a Child labour plan of Action in conjunction with international partners. In the same vein, a validation workshop has been held on the Draft ECOWAS Monitoring and Evaluation Framework for Child Protection system in West Africa.⁹³³ Apart from policies initiated on its own, the Commission can also formulate policies on the direction of the decision-making organs of the community to complement extant community legislation.

The expansion of the ECOWAS secretariat into a Commission has improved the institutional capacity of the Community. The implication is a broader framework for effective policy-making and implementation. This also implies a cautious willingness, at least, from member states to support supranational institutions to implement community policies and deepen integration. A look at some of the regional organizations in Africa that operate through Secretariats may reveal restrained institutional capacity, as the ECOWAS Commission and the African Commission have so far expanded the activities of the AU and ECOWAS, especially in the area of human rights, democracy and good governance. However, this may not directly determine the level of implementation. It is not within the purview of this thesis to establish the ‘implementation management capacity’⁹³⁴ of the ECOWAS Commission, but its activities certainly impact immensely on human rights objectives of the community and also complement that of the African Union Commission at the continental level.

5.7 OTHER SUBSIDIARY/SPECIALIZED ORGANS OF THE COMMUNITY

It is trite that international organizations may establish subsidiary organs for furtherance of set objectives or as a matter of expediency to address a specific institutional issue.⁹³⁵ These subsidiary organs are usually not created at inception and as a result may not necessarily appear in a treaty. However, they may be established by subsequent legislation stating

⁹³² ECOWAS Annual report, 2005, p.93.

⁹³³ ECOWAS Annual report 2012, p.77.

⁹³⁴ Writing on the mechanism of Implementation Management Capacity as a strategy of the European Commission in policy execution, see, M.W Bauer, ‘Co-managing programme implementation: conceptualizing the European Commission’s role in policy execution’, 13 *Journal of European Public Policy* (2006), 717.

⁹³⁵ Amerasinghe (2005), p.139.

specifically its functions and termination, if necessary. These specialized organs may exercise advisory powers or play some more tangible role in the day to day function of an international organization. These organs are often not the primary focus of intellectual inquiry into African regional organizations, perhaps due to their temporary mandates or as a result of their non-decision making powers. The political salience of these specialized organs to the functioning of regional organizations may have just come to the fore in recent years, as the case of ECOWAS would reveal.

One of such specialized organs that have played little role in the community institutional framework but has the potential to enhance the normative legitimacy of ECOWAS is the Economic and Social Council of ECOWAS. Established under section 14 of the revised treaty, the Council has an advisory role and its composition shall include representatives of the various categories of economic and social activity. Article 14(2) provides that the composition, functions of the Council shall be defined in a Protocol relating thereto. Till date, there has been no protocol in this respect. It is not clear if the expansion of the secretariat into a Commission and the subsequent adoption of Committee system are in any way connected to the redundancy of the Council. At the continental level the Economic, Social and Cultural Council (ECOSOCC) of the African Union is much more visible. In essence, specialized organs of this type, though advisory in nature, are arguably ‘the most important... in respect of activities relating, directly or indirectly, to the intended establishment of the AU’.⁹³⁶ The distinctive character of the ECOSOCC is that it provides a platform for African civil society to play an active role in charting the course of the region.⁹³⁷ The ECOSOCC was established under articles 5 and 22 of the AU constitutive act. The statute of the ECOSOCC has been adopted by the Heads of States and Government and it defines it as an advisory organ of the African Union composed of different social and professional groups of Member states.⁹³⁸

It is intended that the ECOSOCC would provide the people-oriented platform for Africans from all works of life and background to express their opinion on issues that border on aspects of their lives and societies. The CSOs that may liaise with the ECOSOCC include: a) Social groups such as those representing women, children, the youth, the elderly and people

⁹³⁶ N.J Udombana, ‘The Institutional Structure of the African Union: A Legal Analysis’, 33 *California West International Law Journal* (2002),69, p.117.

⁹³⁷ Significantly, article 90 of the AEC Treaty provides for the establishment of consultative mechanisms between the AEC, non-governmental organizations and socio-economic organizations and associations, with a view to encouraging the involvement of the African peoples in the process of economic integration and mobilizing their technical, material and financial support.

⁹³⁸ Assembly/AU/DEC.42 (III) adopted July 2004.

with disability and special needs; b) Professional groups such as associations of artists, engineers, health practitioners, social workers, media, teachers, legal professionals, social scientists, academia, business organizations, workers, employers, industry and agriculture as well as other private sector groups; c) NGOs, community-based organizations (CBOs) and voluntary organizations; d) Cultural organizations and e) social and professional groups in the African Diaspora in accordance with the definition approved by the AU Executive Council.⁹³⁹ The benefit of ECOSOCC to effective human rights protection in the continent is immediately apparent when taken into context the democratic nature of an organ of this nature. The advantage of the Council when fully established⁹⁴⁰ would be drawing every stakeholder together to touch on human rights issues that affect the lowest or most vulnerable in every society. As earlier demonstrated, one of such groups that may have a greater role to play in human rights in developing countries is corporate entities. By involving them in the integration process and outlining policy strategies, certain issues that stem from the activities of these entities that touch on the rights of individuals may be better addressed.

As already discussed, the Conflict Prevention Protocol established four main specialized organs to oversee the community mechanism for conflict prevention.⁹⁴¹ The chief organ, the Mediation and Security Council continues to play an all important role in the maintenance of peace and security in the continent. The MSC holds the key to intervention in cases of conflict in member states as it is the primary body responsible for initiating the mechanism.⁹⁴² Thus, its willingness to react to situations where there are threats of humanitarian disasters, threat to general peace and security or where there is the presence of gross violations of human rights in member states, makes it an indispensable body in the community.

The Council of the Wise which was originally called the Council of Elders under the Conflict Prevention Protocol⁹⁴³ also plays a vital role in human rights protection in the Community. From a conflict resolution perspective, the Council of the Wise plays an all-important role in the application of good offices to end conflict. The Council which comprises of eminent

⁹³⁹ 'Economic, Social and Cultural Council (ECOSOCC)' available at <http://pages.au.int/ECOSOCC/about> (accessed 15 April 2014).

⁹⁴⁰ The Council launched its Permanent General Assembly in 2008, but still faces some challenges such as funding. This is expected due to the fact that it is a new institution.

⁹⁴¹ The Mediation and Security Council; the ECOWAS Standby Force; the Defence and Security Commission; and the Council of Elders.

⁹⁴² Article 26 of the Conflict Prevention Protocol. Other bodies empowered to initiate the mechanism include the Authority, a member state, the President of the ECOWAS Commission or a request by the AU or UN.

⁹⁴³ *Ibid.*, Article 17.

politicians, traditional rulers, and religious and women leaders may intervene in conflict situations as mediators, conciliators and facilitators of peace. Additionally, the Council is also central to the maintenance of democracy and good governance in the sub-region. Members of the Council also double as members of election monitoring teams.⁹⁴⁴ The ECOWAS Early Warning and Response Network (ECOWARN) established by Article 23 of the Conflict Prevention Protocol also plays a crucial part in peace and security and humanitarian law aspects of the Community's human rights mandate.⁹⁴⁵ By closely observing and analysing socio-economic and political situations that could potentially develop into conflict, ECOWARN plays the role of a conflict threat-perception censor.⁹⁴⁶ As a monitoring tool, its threat perception analysis is vital to containing and eliminating conflict and humanitarian crises before they escalate.

Another specialized organ whose activities are incidental to humanitarian intervention in the community framework is the Special Representative of the President of the ECOWAS Commission. Established under Article 32 of the MCPMRPS, the Special Representative plays an important role in peace and security. The Special Representative is the coordinator of humanitarian relief and peace-building activities during conflicts. It is expected that the presence of the Special Representative on the ground during conflicts would regulate the conduct of armed forces and officials of the Community.⁹⁴⁷

Other specialized organs that are worthy of mention here due to their relevance to the rights to health and Gender are, the West African Health Organization (WAHO) and the ECOWAS Gender Development Centre (EGDC) respectively.⁹⁴⁸ WAHO was created to ensure a

⁹⁴⁴ Members of the Council have led ECOWAS observation teams in elections in Liberia, Burkina Faso, Benin and Gambia and most recently Togo. See, ECOWAS Election Observation Mission says Parliamentary Polls Credible, Transparent', supra.

⁹⁴⁵ ECOWARN comprises the Observation and Monitoring Centre at the ECOWAS Commission in Abuja (Nigeria) and four Zonal Bureau in Banjul (The Gambia), Cotonou (Benin), Ouagadougou (Burkina Faso), and Monrovia (Liberia).

⁹⁴⁶ The Early warning directorate works in partnership with representatives of ECOWAS Member States, and Civil Society Organizations and research institutes. It also collaborates with other RECs and the AU in the establishment of the Continental Early Warning System (CEWS). See further, ECOWARN profile at <http://ecowarn.org/Login.aspx>.

⁹⁴⁷ Ebobrah (2009), p.200.

⁹⁴⁸ Both rights are discussed jointly here, not only in reference to the two community organs that oversee both functions, but also due to the fact that the UN Committee on Economic, Social and Cultural rights identifies underlying determinants of health" as including safe drinking water and adequate sanitation, safe food' adequate nutrition and housing, healthy working and environmental conditions, health-related education and information and *gender equality*. See, 'The Right to Health', OHCHR and WHO Fact Sheet NO.31, available at <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf> (accessed 15 April 2014). More importantly,

regional approach to some of major health challenges that are prevalent in West Africa. The work of WAHO is central to the implementation of policies that enhance the right to health in Member States. The objective of WAHO is the attainment of the highest standard and protection of health in the sub-region through harmonisation of policies.⁹⁴⁹ In line with this objective, WAHO which started operation in 2000, developed a regional programme on the prevention, treatment and care of people living with HIV and AIDS in 2005. It also developed a sectoral 3-year plan on HIV and AIDS control among the Armed forces of Community Member States and in addition, formulated a regional strategy for the reduction of maternal and pre-natal mortality.⁹⁵⁰ These programmes may not represent a concerted effort at ensuring the enforcement of the right to health in member states, but they are vital in keeping a strategic regional policy to assist national institutions in this respect. Alternatively, this approach potentially qualifies as a regional and international accountability and monitoring mechanism envisaged at the UN level. All these subsidiary organs engage in activities that impact greatly on human rights in the community. As a matter of fact, their activities have the potential for greater impact, since they occur at the field level. Key decisions are made by the main community institutions, but the activities of subsidiary organs are equally as impactful.

the case of *Hadijatou Mani Koraou* and other cases of the ECCJ have opened up for increased debate the human rights to health and the right of women in the community.

⁹⁴⁹ Article 3 (1) of the Protocol of WAHO, 1987.

⁹⁵⁰ ECOWAS Annual Report 2005, p.81.

5.8 CONCLUSION

While the ECCJ is saddled with the responsibility of interpretation of the treaty provisions and also the judicial protector of human rights in the community, it is supported by other community organs. This responsibility of decision-making as entrenched in other community organs makes the actualization of community objectives a practical reality. This Chapter has explored the role of other community organs in the normative legitimacy of the organization. In the course of discerning the performance of each organ, it is established that the plenary Assembly which is the highest authority in the community while representative of the interest of state possesses excessive powers which may inhibit the function of other community organs. While there is little evidence of friction between the Authority and other community institutions, the inter-governmental over-weight in the community hierarchy undermines the role of other equally vital community organs such as the parliament.

It is argued that increased authority of supranational organizations in a wide variety of forms elongates the legitimacy chain of governance. While the governance impact of ECOWAS is not comparable to that of other international organization such as the EU, there is little intellectual inquiry to shine light on the governance role of other community organs. This gap is exacerbated by the fact that global governance lacks any legal patterns of public or democratic participation (democratic deficit in international organizations). It is therefore important that a parliamentary body such as the ECOWAS parliament is granted full legislative powers. The ECOWAS parliament bears some semblance to more traditional forms of parliamentary assemblies at the national level although lacking the feature of direct election which is a key determinant of democratic legitimacy.⁹⁵¹ However, it represents the most viable platform for any form of deliberative attempt at law-making in the community. Admittedly, democracy above the nation state above the nation state is not in sight, although not theoretically unthinkable. In regional integration in Africa, parliamentary bodies may hold the key to ensuring that norms are legitimized through a process of participatory arrangements ensuring the involvement of civil society actors, stakeholders, and the public, in the arguing, bargaining and reasoning process of decision-making. The Parliament has continued to play its role in human rights protection within the Community while

⁹⁵¹ While most international parliaments comprise members of national parliaments there is often no direct election of parliamentarians. However, the Andean Parliament is planning a direct election of parliamentarians. See, Krajewski (2008), p.8.

continuously canvassing for an expansion of its powers from advisory body to one with full legislative powers.

More positively, the Commission has come up leaps and bounds and carries a sizeable portion of the responsibility by initiating sound policies with human rights implications in member states and coordinating the implementation of policies in member states. While the Commission is still a long way from fully implementing key policies of the community, largely due to failure on the part of the Member States, its policies have so far laid the groundwork for the adoption of uniform policies that address human rights challenges that are peculiar to the sub-region. The Commission (then the Secretariat) was equally instrumental in providing a platform for NGOs and judges of the ECCJ to organize and canvass for an expansion of the human rights mandate of the Court. The Commission is the community institution which clearly exercises public governance over member states institutions. It is pertinent that the Commission ensures the adoption of key values such as transparency, accountability and public participation in its policy-making processes as these values ensure that the democratic legitimacy of the Community is further strengthened. As discussed above through workshops, meetings, and programmes the Commission has arguably entrenched some of these norms in the institutional practice of the Community.

It would be recalled that the ECCJ has become under-utilized as an economic integration court causing a lack of focus on the implementation of economic rules in the community. This gap is being filled in the meantime by other community organs such as the Parliament and the Commission. The recent ordeal of NANTs is an example of the vital role which the Parliament has assumed to ensure the implementation of economic rules in member states. While the issue of discriminatory trade laws are far from being a misnomer in ECOWAS states, the verve shown by other community organs, particularly in ensuring fair domestic trade policies which conform to community objectives will only augur well for the organization in the long run. The current president of the Parliament is aware of the vital role of the Parliament and has argued that the best way for ECOWAS to improve trade and investment and compete favourably in the global economy is for the powers of the Parliament

to be expanded.⁹⁵² The Parliament also proposes an electoral college to elect ordinary citizens as representatives of ECOWAS Parliament.⁹⁵³

⁹⁵² 'A Case for the Enhancement of Power of the ECOWAS Parliament' cited in E. U Kizito & U.N Patrick, 'The Role of Parliament in Economic Integration in Africa: Evidence from ECOWAS Parliament', 4 *Journal of Humanities and Social Sciences* (2012),1, p.3.

⁹⁵³ Ibid.

CHAPTER 6

CONCLUSION

6.1 SUMMARY OF FINDINGS

This study set out to ascertain the value of the ECOWAS by examining its current practices along the lines of normative legitimacy. The aim is to show that ECOWAS although not completely capable of delivering on primary economic integration mandate may possess certain attributes that justify its continued existence. Put differently, although ECOWAS is making relative strides in other areas which are equally as important to the realization of her long term mandate of economic integration, protection of individual's rights and guarantee of their economic freedoms equally enhances the long term success of the organization. Consequently, the study examines the legal and institutional practices of ECOWAS in her new found human rights mandate with the aim of ascertaining its effectiveness and relationship with international, continental and national institution.

To achieve its objectives, this thesis has adopted mainly a descriptive analytical approach supported by a multi-disciplinary conceptual framework to explore the theoretical basis for any legitimacy claims that may be made with respect to the current ECOWAS regime, assess institutional practices of legitimation and its link to effectiveness. This analysis approach aided the discovery of challenges that might hamper the practical realization of an effective and legitimate regime. Also, during the course of the analysis, institutional practices in other regional bodies around the world with similar wide mandates are concurrently highlighted in applicable areas. This chapter presents a summary of the findings of this study, outlines key observations and recommends steps towards setting the organization on the path to legitimacy.

Under international law, the expectation is that the literary properties of a treaty induce a sense of obligation in states to which they are addressed. This is the main presumption upon which international law operates. Textual determinacy is a sine qua non for determining the legitimacy of the rule-making process of an international regime.⁹⁵⁴ In fact, the authority of an international organization is usually derived from express or implied powers laid out in the treaty. The Vienna Convention on the Law of Treaties (VCLT) and state practice all

⁹⁵⁴ Franck (1988), pp 713- 725.

demonstrate the constancy of treaty provisions and the obligatory nature of express treaty provisions.⁹⁵⁵ However, international organizations may also introduce new laws and practices through secondary laws and legislations. This means that the source of an organization's power need not stop at treaty level. At the same time, treaty provisions are the clearest indication of the intentions of an organization's members and the direction which they intend to move to, particularly from a normative standpoint.

In the case of ECOWAS, the revised treaty makes reference to the African Charter but does not clearly state that human rights protection is a definite issue area which the organization would pursue. The statement of fundamental objectives suggests that the activities of the community must be carried out with the provisions of the African Charter and other international human rights instruments in mind. However, fundamental objectives do not place any concrete obligations on Member States. The statement of fundamental principle urging member states to pursue integration on the basis of respect for the African Charter is only of aspiratory effect. As the political landscape of the region and the larger continent began to change, that fundamental principle to respect human rights was given concrete legal effect through protocols and other legislations that further outline the specifics and modes of implementation of human rights. By creating a framework for human rights protection and establishing supranational institutions to act in the protection of human rights, it became self-evident that Member States not only sought to legitimise the regime but also apply ECOWAS as the main organization to achieve a stable and successful sub-region.

Consequently, his study attempted to establish a wider link between respect for human rights and legitimacy. It is argued that an organization that respects human rights does not only enhance its normative legitimacy as a matter of the moral right to rule, but also enhances its descriptive legitimacy or the widely held belief in its right to rule. It is also established that there is a clear link between social and economic rights and the obligation to 'raise the living standards of its peoples' which ECOWAS has placed on Member States. Furthermore, economic integration is only achievable in a stable environment. It is no surprise that the organization opted for a more robust approach to human rights protection, encompassing peace and security, democracy and good governance, although this evolution towards a was

⁹⁵⁵ Article 26 of the VCLT provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

propelled by a combination of internal conflicts and a global demand for a stable international community in the aftermath of the Cold War.

The conclusion in this regard is that human rights protection does not go against the economic integration objectives of the community. Rather effective human rights protection in all its ramifications enhances the actualization of economic integration. The reality of practice in ECOWAS is that the move towards human rights realization has somewhat distracted the economic integration objective of the organization. The layering of economic integration with human rights is most evident in the use of the ECCJ. As earlier revealed, the expansion of the court's jurisdiction into human rights although sparked originally by a case touching on economic integration has led to a decline in economic integration disputes. Perhaps, this is a result of the nascent nature of the ECOWAS human rights regime, also evident in the gaps that exist in the African human rights system.

In relation to the gaps that exist in the current ECOWAS human rights regime, crucial aspects of ECCJ's rules of access are still unresolved. In particular, the omission of the established international customary rule to exhaust local remedy is evidence of weak design. This flaw in the access rules of the court has the potential of harming the court's relationship with municipal courts and this does not bode well for the pursuit of effective human rights protection in the community. The ECOWAS human rights regime borrows from the African Charter-based system, which poses seven admissibility requirements including the exhaustion of local remedies. This is one of the few instances where the practice under the sub-regional human rights regime goes against the African human rights architecture, further derailing the constitutional convergence often desired in African integration. Additionally, the constitutions of member states and national judicial philosophies still impede the direct applicability of community law frustrating the legal integration process. Continued uncertainty over these crucial aspects of the integration process will continue to hamper the effective enforcement of community law.

From a policy perspective, the activity of other community organizations in human rights is a positive sign that would further legitimize the current ECOWAS regime. This is a distinct feature of ECOWAS and reveals effectiveness of sub-regional human rights regime more over continental institutions in some areas. Unlike the African Commission and other continental institutions, which bear the bulk of the responsibility for human rights in the continent, ECOWAS by mainstreaming human rights in and around its organisational

structure has the ability to implement human rights programmes at all levels. Additionally, since RECs have the potential to reach the grassroots, NGOs and civil society can play an active part in agenda-setting at the sub-regional level. ECOWAS has so far set the pace in this regard. The role of civil society in the expansion of the ECCJ in the aftermath of the *Afolabi* decision proves this point. As advised by the CEP, the new ECOWAS regime has created a more determinate role for civil society in community organs, particularly the court and the parliament.

The current ECOWAS regime has further legitimized the organization by institutionalizing the role of NGOs. As indicated earlier, NGOs and civil society constitute an important audience for international organizations' legitimation practices, because through their advocacy and lobbying efforts, their ability to mobilize networks of activists, and their promotion of particular norms they can legitimize organizations.⁹⁵⁶ In the case of ECOWAS, civil society in the sub-region leveraged the outbreak of conflict in the sub-region and the global demand for human rights at the time to push an agenda on the organization. Consequently, the human rights movement overtook an agenda for implementation of economic rules. It is crucial to the long term success of the organization that equal emphasis is placed on the economic rules which also create rights in most instances.

On the quest for the attainment of supranationalism, ECOWAS only possesses indicators of supranationalism in some aspects. The dynamics of supranationalism as represented in the EU are not present in ECOWAS. Transnational forces of integration (cross border transactions and communications) which can transform and transfer governance from the state to the supranational level are not present in Africa. This is evident in the low-level of intra-African trade. Furthermore, two aspects of state sovereignty often affected by Supranationalism (the exclusive competence of the state in its territory and the relative independence of law-making institutions from external intervention) are largely absent, particularly with regards to courts. Hence, the variables for supranationalism are re-defined in context. Global dynamics and internal conflicts have propelled supranational evolution of ECOWAS in the political and security policy sectors. These changes have imposed on community organs and member states certain agenda that drive integration in certain aspects.

The expansion of ECOWAS mandate to include the prevention and resolution of intra-state conflict is considered 'a major shift in site of governance from national to supranational

⁹⁵⁶ Zaum (2013), p.18.

level'.⁹⁵⁷ The supranational indicators that are currently present in ECOWAS are determined by a different set of factors. The influence of changing global context, the adaptation of ECOWAS institutions, and the role of civil society organizations and ECOWAS development partners are the determinant factors towards supranationalism in ECOWAS. However, the non-implementation of key community policies in Member States and non-compliance with ECCJ decisions continue to undermine the effectiveness of the current regime crucially shading its legitimacy.

While the ECCJ has recorded compliance with some of its decisions,⁹⁵⁸ the overall attitude of Member States in enforcing the court's judgements is far from impressive. In relation to other community organs the lack of independence in law making is evident in the decision-making process of the community which lies overwhelmingly in favour of the Authority. The fact that the Parliament lacks full legislative powers exacerbates the democratic deficit that is present in African organizations but which is less covered in intellectual discussions on African integration. With regards to the Commission, it has so far played a vital role in sustaining the organization as the case of the ECCJ demonstrates. However, it can do no more than initiate policies. Implementation of these policies is dependent on the effectiveness of national institutions.

The suspension of the SADC Tribunal reveals the reluctance of African governments to move from power-oriented to rule-oriented regimes. This is manifested in the lack of political will to support the evolution of regional institutions towards supranationalism. The ratification of treaties, protocols and other legal instruments which mandate regional organizations to carry out all broad mandates is not paralleled by sufficient desire to match obligations. Non-compliance with obligations is the greatest impediment to regional integration in Africa. While socio-political change has substantially altered the dynamics of integration in Africa knocking the tide towards greater respect for human rights, democracy and the rule of law, the over-all picture still leaves much to be desired.

Compared to Europe, the destructive effect of the Second World War caused the socio-political reawakening of European political elite. This impacted positively on the European arrangement creating a fertile ground for the supranational radicalism of European integration and the establishment of a supreme legal order represented by the European Court of Justice.

⁹⁵⁷ Yaya & Malam (2014), p.113.

⁹⁵⁸ The most notable case of enforcement of an ECCJ judgement is the Niger government's payment of 19,000 dollars to the plaintiff who was a victim of slavery.

The antecedent conditions prior to African integration are quite different. African integration was built on a different set of values. The initial aim was to strengthen the political stronghold of the newly independent states and banish the remaining vestiges of Colonialism. Subsequently, Africa witnessed conflicts, but these were mostly internal conflicts and fratricidal wars. Africa is yet to witness inter-state conflicts of the same magnitude as Europe with defining consequences. Perhaps this is impossible due to the still extant political influence of the European powers and the forces of globalization and liberalization. These forces support sovereignty because they benefit from the state protection. These pro-sovereignty interests have the continued effect of stunting integration. This is manifested by the scramble to control domestic markets by opening them up and practicing rent-seeking behaviour, which in turn weakens regional organizations.

The continued non-implementation of key economic rules and the slow process of integration paint a grim picture. However, supranational institutions, although operating in a quasi-state, are fundamental to the long term success of regional organizations. Kufour argues that supranational institutions and organizations serve little purpose within ECOWAS.⁹⁵⁹ He provides a number of reasons to support his stance. While some of his arguments are considerable, the evolution of some community organs particularly in the Conflict Prevention Mechanism and the recent resurgence of the ECCJ and the Parliament give a different perspective. These institutions are effective to an extent, even though a combination of actions of Member States and an incomplete legal framework may hamper its effectiveness.

Can ECOWAS be considered a legitimate organization? Normatively, ECOWAS is legitimate to a certain degree. Some aspects of its human rights mandate particularly its right of intervention has been welcomed by Member States and has become a trend amongst regional organizations. But, in practice, this new interventionist norm has proven to be incompatible with the UN charter system in some areas. This clash suggests that the ECOWAS regime has fallen short in international legality/formal legitimacy.⁹⁶⁰ On the other hand, the descriptive aspects of its legitimacy depend largely on the perception of the organization by the citizens. The acceptance of the current regime by NGOs and civil society arguably hint at a high level of descriptive legitimacy. However, this is not conclusive evidence of ECOWAS's as NGOs may drive certain agenda that do not necessarily reflect the opinion of the majority.

⁹⁵⁹ Kufour (2006), p.123-127.

⁹⁶⁰ Kumm (2004), p.918.

The acceptance of the current regime by Member States could also suggest a normatively legitimate regime. But the low level of compliance with community law by some of the regional hegemony like Nigeria also mean that the organization may not reach reasonable outcomes on certain issues. This inadvertently costs the EOWAS system its effectiveness. However, the problem of compliance is inherent in the international legal system as there is no sovereign to whip states into obedience. Mechanisms exist to ensure compliance with international norms, but as state practice reveals, compliance with the central rules of international organizations can be problematic.⁹⁶¹ But noncompliance is not a bad thing all together. Henkin argues that, sometimes noncompliance is a medium for change in international law. States seek to change certain unfavourable aspects of international law by not complying with laid down rules. This noncompliance is then widely practiced or accepted. Thus, noncompliance can be a ‘purposeful invitation to others to join to make, unmake or remake a norm.’⁹⁶²

Finally, the legal and institutional shortcomings already discussed leaves question marks on the normative and descriptive legitimacy of the current ECOWAS regime. By prioritising human rights, the organization has attempted to enhance its legitimacy. Whether the organization is subsistent in the long run, would be determined by the willingness of Member States to effectively implement key policies while creating a favourable atmosphere for institutions to operate independently. The attempts at legitimation are laudable and point to a slow transition towards institutionalizing norms that are beneficial to the community citizen. It is imperative that Member States do not take too long in achieving community objectives. A change in attitude or political will is indispensable to the effective functioning of the organization and by implication the economic progress of states and their citizens.

6.2 RECOMMENDATIONS

The previous sections of this chapter, has summarized the research findings and drawn conclusions on the practice of legitimacy of ECOWAS. The main argument is that both objectives of economic integration and human rights should be given equal attention and

⁹⁶¹ One of such international organizations that struggles to enforce certain rules of its regime despite having a robust judicial mechanism is the WTO. There is a general perception that the bigger nations of the WTO regime tend to benefit from, and also flay regime rules when favourable while smaller nations get the short end of the stick. On the problem of compliance in the WTO system, see, Y.N Hodu, *Theories and Practices of Compliance with WTO Law*, (Kluwer International, 2012).

⁹⁶² L. Henkin, *How Nations Behave*, 2nd Edition (New York: Columbia University Press, 1979), p.130.

pursued with concerted vigour at all levels. Additionally, legal and institutional impediments that frustrate the process of integration need to be addressed to give further legitimacy to the ECOWAS regime, although the will to do so is ultimately that of Member States. The following section outlines practicable ways of strengthening the ECOWAS regime. It considers mechanisms and concepts that if implemented, will enhance the human rights mandate of the community and at the same time improve the economic integration in the sub-region.

6.3.1 STRENGTHENING THE AFRICAN HUMAN RIGHTS SYSTEM

An ideal model of sub-regional human rights regimes is not yet in sight. The African human rights architecture is a few practical steps away from attaining the desired level. The first step is establishing a culture of judicial law-making and independence of sub-regional courts. The strangulation of the SADC tribunal and the challenges of the ECOWAS and EAC courts reveal the fear to engage in expansive judicial law-making. The judges of the EAC court have been equally brave in the face of threats to have their powers knocked back. The ECCJ on the other hand opted to exploit diplomatic avenues to enhance its authority. The predicament of regional courts is compounded by the provision of human rights as only an objective of the community in the treaty. Stipulating human rights as fundamental objectives is not conclusive evidence of the right of community organs to act in that area.

Hence, it is desirable that Member States expressly provide for human rights jurisdiction for community courts. This is achievable through further legislative action such as protocols, where member states outline the specific details of the community's human rights mandate. This would prevent African states from challenging the competence of REC to engage in the field of human rights. African states are reputed for jealously guarding their sovereignty, as a result it is incumbent on RECs to make express provisions to determine human rights competency.

With regards to the supremacy of the African Charter, it is imperative that it is incorporated by RECs in clear terms as a common African standard. While international human rights instruments provide common international standards, it is preferable that the African Charter is the minimum common African standard. The African Charter is the most representative and legitimate source of reference to ensure the unity of the African human rights law. To

address regional specificities, RECs may adopt region-specific human rights catalogues on given thematic areas.⁹⁶³ To prevent the risk of fragmentation in practice, these human rights catalogues should be tied to the African Charter by reference to the Charter in the instrument.

Also in relation to fragmentation, it is important to ensure that RECs are complementary to the existing institutions of the African human rights system. This means an adoption of mechanisms that regulate the RECs relationship with national and continental human rights institutions. This is achievable by the introduction of the principles of limited competence and subsidiarity in the areas of norm-creation, in the establishment of institutions with human rights mandates and the implementation of human rights policies.⁹⁶⁴ This approach also helps protect the system against duplication functions as well as jurisdictional conflicts and inconsistencies.

Regarding locus standi before sub-regional courts, it is ideal to expressly permit individual and NGOs access. However, jurisdictional competence in this regard should be subject to international customary law sifting mechanisms such as the requirement to exhaust local mechanisms before admissibility in relation to national courts, and respect for the principles of *res judicata* and *lis pendens* with respect to continental judicial and quasi-judicial bodies. Currently, apart from the African Commission for human rights, the African Court is still not fully functional. Nearly 15 years since the Protocol to the African Charter establishing the African human rights court was adopted in June 1998 (Protocol),⁹⁶⁵ only 27 States have so ratified the Protocol establishing the Court. In addition, only a small number of State Parties to the protocol establishing the Court have made the declaration allowing individuals and NGOs to submit cases directly to the Court. Of the 27 States that have ratified the Protocol establishing the court, only 5 States (namely Burkina Faso, Ghana, Ivory Coast, Malawi, Mali and Tanzania) had made a declaration under Article 34(6) of the Protocol accepting the jurisdiction of the Court to examine applications lodged directly by individuals and NGOs. The Court thus lacks the jurisdiction to receive cases directly from individuals and NGOs from the majority of African States. Pending the universal ratification of the Protocols of the African Court, sub-regional courts can continue to play a complementary role by continuing to address human rights problems.

⁹⁶³ Ebobrah (2009), p.337.

⁹⁶⁴ Ibid.

⁹⁶⁵ See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

To further enhance the ECOWAS human rights regime, it is important that public action provisions are institutionalized. This is a major omission in the protocol of the ECCJ. Considering that most of the victims of human rights abuses are indigent and lack the resources to access the court in timely fashion, it is important that the Protocol of the Court empowers NGOs and civil society to bring actions on behalf of human rights victims. This approach also enhances the wide reach of the Court. Jurisprudence of the ECCJ reveals an inconsistent approach to NGOs standing. The Court granted access to in 2010 (SERAP Education and Environment cases) but subsequently refused access in 2011 (*Mrakpor*,⁹⁶⁶ *Ggagbo v. Cote d'Ivoire*⁹⁶⁷ and *CDD v Niger*⁹⁶⁸) and granted access again in 2012 (*RADDHO v Senegal*).⁹⁶⁹

6.3.2 RATIONALIZATION OF RECs

The first step towards enhancing the economic integration in Africa is to address the crowded integration landscape. As far back as 1976, Ajomo had identified the 'mercurial proliferation and disappearance' of regional economic institutions in Africa as a problem.⁹⁷⁰ As already demonstrated in Chapter 2, the crowded integration landscape is an indicator of the failure of African states to genuinely commit to a single, well-thought-out and implementable programme.⁹⁷¹ This phenomenon is equally prevalent in the West African Sub-region where ECOWAS was anticipated as the 'sole economic community for regional integration in West Africa'⁹⁷², but 13 ECOWAS Member States except Cape Verde and Ghana belong to at least two regional organizations. Multiple memberships of regional integration arrangements have adversely affected the implementation of key integration objectives. For example, ECOWAS has set the adoption of a single currency for the year 2020, although the currency is going to take effect five years earlier in Anglophone Member States.⁹⁷³ It is expected that Francophone countries currently

⁹⁶⁶ *Godwill Mrakpor & 5 Ors v. The Authority of Heads of States of ECOWAS & Anor* (ECW/CCJ/APP/17/10).

⁹⁶⁷ *Simone Michel Ggagbo v. Cote d'Ivoire* (ECW/CCJ/APP/18/11).

⁹⁶⁸ *Centre for Democracy and Development & Anor v. President Mamadou Tandja & Anor* (ECW/CCJ/APP/07/09).

⁹⁶⁹ *Recontre Africaine Pour la Defense de Droits de l'Homme (RADDHO) v. Senegal* [ECW/CCJ/APP/03/12].

⁹⁷⁰ M.A Ajomo, 'Regional Economic Organisations: The African Experience', 25 *International and Comparative Law Quarterly* (1976), 59, p.101.

⁹⁷¹ UNECQ (2006), p.52-54.

⁹⁷² CEP Report cited in Kufour (2006), p.136.

⁹⁷³ See, 'ECOWAS to Introduce Single Currency by 2020', available at <http://www.thisdaylive.com/articles/ecowas-to-introduce-single-currency-by-2020-/109690/> (accessed 15 April 2014).

operating the CFA Francs under UEOMA will eventually adopt the ECO by the year 2020.

This phenomenon is exacerbated by the uncertainty over the relationship between RECs, the AEC and the AU. Unlike other regional trade agreements in other parts of the world, international regime complexity on economic integration in Africa is modestly regulated by the AEC. The Protocol on Relations which was established to harmonise and coordinate the activities of the RECs is mute on the issue. The Protocol expects RECs to ultimately merge or be absorbed to form the AEC.⁹⁷⁴ The simplicity of this provision masks the complexity of the engagement of merging or absorbing international organizations such as RECs. To date the only successful merger of RECs has been the merger of the European Community with the European Free Trade Area to form the European Economic Area.

Any attempt at addressing the problems resulting from multiple memberships and the relational issues between the RECs and the AEC requires legal imagination, economic thought and strong institutional and political will.⁹⁷⁵ While the 2006 AU moratorium on the establishment and recognition of more RECs is an important first step, some more options are open to the AU. The AEC can adopt a protocol founded on the principle of ‘one country, one community’ of the eight AU recognized RECs.⁹⁷⁶ By liaison with national institutions and commissioned experts, countries should be guided to decide which RECs best suits their needs taking into account the fact that the ultimate realisation of the vision of an African Economic Community may help address some of their needs. It is also important that the decision on which REC to join should be made predominantly by economic criteria. It is important that Member States shed the long held suspicions over sovereignty for this approach to succeed. This should be viewed as a measure necessary to pool state sovereignty effectively for the common good.⁹⁷⁷

To give effect to this approach at rationalization, African states ultimately must show commitment to the realisation of the vision of the AEC beyond the usual attitude of platitudes and political rhetoric that suggest support. To compel obedience, non-

⁹⁷⁴ Article 5(1)(d) of the protocol on relations.

⁹⁷⁵ R. F Oppong, ‘Redefining the Relations between the African Union and Regional Economic Communities’, in *Monitoring Regional Integration in South Africa Yearbook*, (Trade Law Centre for Southern Africa, Stellenbosch: South Africa, 2009), p.18.

⁹⁷⁶ Ibid.

⁹⁷⁷ Ibid.

complying states may be expelled from the AEC and all but one of the RECs to which they belong. The expelled states may retain membership of the AU which is a political body. As correctly argued by Frimpong, the AEC is only realisable if founded on a different notion other than Pan-Africanism. There is no reason why the AEC cannot consist of something less than the whole of Africa. An African Economic Community which consists of a few states can extend the benefits of integration to other countries that need not necessarily be members.⁹⁷⁸

If historical lessons in African integration have been learnt, the collapse of OAU would serve as a useful lesson that waiting for every African country to join the boat can be detrimental to the actualisation of key organizational goals. Kufour observes, in relation to the OAU regime, that ‘unrestricted access in the form of virtually no entry requirements led to the tragedy of the regional commons’.⁹⁷⁹ Applying the same logic to the AEC, only States that share the vision of a Leviathan economic community and are willing to commit the necessary resources towards achieving it should contribute. Africa’s economic integration is being devalued, delayed and diluted by the fact that there are no entry requirements for continental programmes, and strict commitment to implementation

6.3.3 HARMONIZATION OF LAWS

In regional organizations faced with the mandate to integrate the markets of Member States, a crucial step towards increasing trade is the reduction of legal uncertainty and generating greater legal predictability and security. Legal harmonization is a mode of legal integration which consists of modifying existing laws in Member States to attain substantial congruence among them.⁹⁸⁰ Legal harmonization is often associated with economic and commercial law due to the fact that regional economic organizations are the main driving forces behind legal harmonization at the regional level. The most well-known example is the EU which, since its establishment as a common market, has branched out to cover different areas including the

⁹⁷⁸ Ibid.

⁹⁷⁹ K.O Kufour, ‘The Collapse of the Organization for African Unity: Lessons from Economics and History’, 49 *Journal of African Law* (2005), 132, p.133.

⁹⁸⁰ Harmonization should be distinguished from unification. Unification in contrast to harmonization which places emphasis on the integration of community law on national law, refers to the adoption of uniform laws by member states in an agreed area. Here, community laws relating to the agreement are substituted for segmental or national laws, albeit applied generally.

judicial field. In Africa, RECS have been slow in implementing serious policies capable of eventually reaching their widely heralded integration goals.⁹⁸¹ Harmonization in the African context is therefore some way from being achieved.

Amongst the eight recognized RECs, references to legal harmonisation in founding treaties are far-fetched. The ECOWAS Treaty only makes reference to the harmonisation of legislation with regard to labour laws and social security, transport and communications.⁹⁸² The EAC treaty provides for harmonised laws with regard to labour legislation, transport, communications, traffic, banking and legislation pertaining to the community.⁹⁸³ The Constitutive Act of the AU establishes that the Union shall coordinate and harmonise the policies of the regional economic communities and gives the AU Assembly the power to determine the common policies of the Union.⁹⁸⁴ However, as earlier mentioned, the problem with legal harmonization is the dichotomy between monist and dualist states. In ECOWAS, most member states require national implementing legislation for international law to take effect in national law. National implementing legislations are rare in Africa impeding community law from taking direct effect or be directly applicable in African states.

In the context of the EU, the purpose of harmonization is to eliminate differences in the laws of Member States so far as they constitute an impediment to the free movement of people, goods and services.⁹⁸⁵ However, the formulations of harmonisation provisions in the various instruments of regional economic organizations add uncertainty on how to achieve harmonization. EU practice shows that the uncertainties related to harmonization can be dealt away with. In this regard, Foster classifies EU practice into total or complete harmonization, minimum harmonization, and optional harmonization.⁹⁸⁶ According to him, total harmonization connotes where a rule is enacted for the whole community and precludes member states from legislating in the same area.⁹⁸⁷ Minimum harmonization refers to the establishment of minimum standards in Community legislation but member states are permitted to apply a higher standard domestically.⁹⁸⁸ Optional harmonization is limited to

⁹⁸¹ M. Kilander, 'Legal Harmonization in Africa: Taking Stock and Moving Forward', 47 *Italian Journal of International Affairs* (2012), 83, p.84.

⁹⁸² Article 3(2) of the Revised Treaty.

⁹⁸³ Article 104(3)e) of the amended EAC Treaty.

⁹⁸⁴ Article 3(l) of the Constitutive Act.

⁹⁸⁵ L. Kähler, 'Conflict and compromise in the harmonization of European Law' in T. Wilhelmson (ed), *Private Law and the many cultures of Europe* (Kluwer law International, 2007), p.126.

⁹⁸⁶ N. Foster, *Foster on EU Law*, 1st Edition (OUP, 2009), p.262-264.

⁹⁸⁷ *Ibid.*, p.262

⁹⁸⁸ *Ibid.*, p.263

member states where they need to apply a harmonized rule for the purpose of cross-border trading.⁹⁸⁹

Some African integration scholars have waded in on the most suitable approach for legal harmonization at the regional level. Thomas maintains that harmonisation is not a form of unification but should, therefore, recognize the diversity within a framework set up by communal principles.⁹⁹⁰ However, a caveat ought to be placed on his definition. Depending on the scope of harmonisation intended by State parties, legal integration may come close to unification in the sense that different legal norms are replaced by a single (supranational) norm. Thomas proposed harmonisation that limits African states to primary fields of the law dealing with economic transactions necessary for creating common markets at the regional level.⁹⁹¹

At sub-regional level, the Organization for the Harmonization of Business Laws in Africa (OHADA)⁹⁹² calls the tune for the harmonization of law from a private international law perspective. OHADA was formed by the adoption of the treaty on October 1993. The organisation is built around the existing economic and political relations among francophone African countries. The treaty which is essentially pro-development and business inclined,⁹⁹³ aims to accelerate economic development and foreign investments in member states through the provision of a secure judicial environment. The Treaty regulates – through the Uniform Acts – the following areas: company law, general commercial law, securities, enforcement measures, insolvency law, arbitration, accounting law and transport.⁹⁹⁴ At present there are seventeen member states spread across west and central Africa.⁹⁹⁵ Since the majority of member states are francophone countries, the OHADA laws are largely based on the French

⁹⁸⁹ Ibid.

⁹⁹⁰ P.J Thomas, 'Harmonizing the law in a multilingual environment with different legal systems: Lessons to be drawn from the legal history of South Africa', 14 *Fundamina* (2008), 133, p.153-154

⁹⁹¹ Ibid.

⁹⁹² Organisation Pour l'Harmonisation en Afrique des Droites des Affaires. See organization website at: <http://www.OHADA.com>

⁹⁹³ See generally, C. Dickerson, 'Harmonising business law in Africa: OHADA calls the tune', 44 *Columbia Journal of Transnational Law*, (2005), 17.

⁹⁹⁴ Article 2 of the OHADA Treaty.

⁹⁹⁵ They include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, DR Congo, Cote d'Ivoire, Gabon, Equatorial Guinea, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. The only non-French speaking countries are Equatorial Guinea (Spanish), Guinea-Bissau (Portuguese) and the English speaking parts of Cameroon.

legal system. The Treaty seeks to promote continental integration by leaving membership open to all member states of the AU.⁹⁹⁶

Currently, there are nine OHADA statutes. Because the treaty limits OHADA's jurisdiction to business matters, these statutes, called Uniform Acts, focus exclusively on business matters. These uniform acts govern the formation, operation and dissolution of business entities and the formation, performance and enforcement of business transactions. An important supranational feature of the OHADA regime is the provision which stipulates that the Uniform Acts are immediately applicable in the domestic laws of each Member State and shall have direct effect.⁹⁹⁷ To further its supranational goals, the OHADA Treaty establishes four principal institutions namely: the Common Court of Justice and Arbitrage (CCJA), the Council of Ministers, the Permanent Secretariat, a regional school devoted to training judges and lawyers.⁹⁹⁸

In the light of Africa's movement towards greater economic integration, there is an overarching need to facilitate internal trade as well as foreign investment by creating a unified system of business laws. The growth of private international law on the continent is slow. But this gap is not a deterrent to doing business in and with Africa. However, the volume of trade lost and lack of confidence engendered in the existing legal frameworks on the continent as a result of this deficiency can only be left to the imagination. The expected consequence of increased economic co-operation on the continent is an increase in business ventures between private parties cutting across national boundaries. Thus, the creation of strong legal framework to facilitate the envisaged growth in commercial activity should be paramount in African regional organizations. The creation of organizations such as OHADA is timely. The Institute for Private International Law in Southern Africa is also doing a lot in the area of harmonization, particularly in the Southern African sub-region.⁹⁹⁹ It was established in 2000 under the auspices of the University of Johannesburg, South Africa. The main aim of the institute is to draft a code of private international law of contract for the

⁹⁹⁶ OHADA Treaty- General Clause Title 1, Article 53. Anglophone countries such as Nigeria, Ghana and Liberia have also considered joining OHADA. See, D. H Rauch, 'Ghana may opt for Harmonized Business Law', *African Business*, February 2003, Issue 284, p.36; J. A Yakubu, 'Harmonising Business Laws in Africa: How Nigeria can benefit', *This Day* (Nigeria), 29 September 2004.

⁹⁹⁷ Articles 9 and 10 of the OHADA Treaty.

⁹⁹⁸ Article 3 of the OHADA Treaty

⁹⁹⁹ See more on institution's website:

<http://www.uj.ac.za/EN/Faculties/law/research/Pages/InstituteForPrivateInternationalLawInAfrica.aspx> (accessed 15 April 2014).

Southern African development Community and/or the AU. This is a laudable effort by academics to develop the subject on the continent.

6.3.4 SECURING COMPLIANCE WITH AFRICAN INTEGRATION COMMITMENTS: EXPLORING NEPAD AND APRM INITIATIVES.

As earlier demonstrated non-compliance with key integration initiative remains one of the illegitimate features of African integration initiatives. To briefly reiterate earlier arguments, non-compliance denies an organization its effectiveness. Non-compliance with treaty obligations would often amount in failure to reach reasonable outcomes. In constitutionalist language, the organization is lacking in ‘outcome legitimacy’.¹⁰⁰⁰ The question remains, what are the available mechanisms, if any, at the continental or sub-regional levels that can potentially improve the level of compliance of African states with integration commitments? The AU has adopted two initiatives, namely, the African Peer Review Mechanism (APRM)¹⁰⁰¹ and the New Partnership for Africa’s Development (NEPAD)¹⁰⁰² to improve the governance performance of African states and to collectively attempt to build institutional, human and infrastructural capacity. The following sections explore the potential of these initiatives to compel obedience with AU integration initiatives.

6.3.4.1 NEPAD

As part of the AU’s goal of improving the quality of life of African peoples, the New Partnership for Africa’s Development (NEPAD) was launched on 23 October 2001. NEPAD is an African economic programme of action under the AU framework. The primary goal of NEPAD is the eradication of poverty by placing Africa on the path of sustainable growth and development in order to participate actively in the world economy.¹⁰⁰³ To achieve its goals, the NEPAD framework sets out a programme of action which identifies key conditions for sustainable development in Africa. These conditions include peace, security, democracy, good governance, human rights and sound economic management. Most importantly, capacity building is the key strategy for combating underdevelopment under the NEPAD

¹⁰⁰⁰ Kumm (2004), p,927.

¹⁰⁰¹ See, website: <http://aprm-au.org/about-aprm>

¹⁰⁰² See, website: <http://www.nepad.org/about>

¹⁰⁰³ The NEPAD Framework Document, October 2001, para 71.

framework. The strategy underlines the incapacity of African states to meet the conditions necessary for sustainable development.

Consequently, the NEPAD document emphasizes capacity building in various sectors of African economies. Priority is given to bridging the existing gaps in infrastructure, education, information technology, agriculture and science and technology.¹⁰⁰⁴ NEPAD also outlines a strategy for enhancing capital flows in African economies. In this regard, NEPAD advocates an increase in domestic resource mobilisation and debt relief, increased flows of Overseas Development Assistance (ODA), and private capital flows.¹⁰⁰⁵ Pertaining to market access, NEPAD advocates the removal of tariff and non-tariff barriers, diversifying production, promoting private sector participation, promoting African exports, and boosting the capacity of states in the services sector.¹⁰⁰⁶

The NEPAD framework recognizes the capacity constraints of most African states. This deficiency is an effect of the non-compliance conundrum in African integration arrangements. In African states, capacity constraints are present in various sectors, and these constrain national institutions leading to failure to effective implementation of integration obligations. An essential component of the NEPAD agenda that can enhance compliance with integration treaties, particularly aspects of intra-regional trade integration, is its emphasis on improving regional infrastructures. Infrastructure affects economic development in terms of both intermediate and final products. With respect to intermediate products or goods, sound infrastructure such as transnational highways, good seaports and efficient railway networks facilitates the mobility of the means of production (labour, goods and finance), thus improving productivity and reducing the cost of production. Infrastructure also increases the flow of information, opening new opportunities and reducing asymmetries and other market imperfections.¹⁰⁰⁷ African countries are particularly lacking infrastructure in transport, communication and energy.

Research shows that, despite a decrease in tariff levels in recent years, transport costs still remain a restrictive trade barrier in Africa.¹⁰⁰⁸ Statistically, poor infrastructure accounts for

¹⁰⁰⁴ Ibid. part V

¹⁰⁰⁵ Ibid., paras 144-152.

¹⁰⁰⁶ Ibid., 153-170.

¹⁰⁰⁷ UNECA (2010), p.295.

¹⁰⁰⁸ V. Anchara, K. Mbekeani and Z. Brixiova, 'Impediments to regional trade integration in Africa' *2 Africa Economic Brief* (2011), p.3.

40 per cent of predicted transport costs for coastal African countries and up to 60 per cent for landlocked countries.¹⁰⁰⁹ Inevitably, this inflates market prices and creates low levels of intra-African trade. The link between transportation costs and the incumbent restrictions on intra-African trade means that even in the event of a reduction of tariffs, compliance with trade rules is insufficient to the actualisation of trade integration in Africa. NEPAD presents a holistic governance framework to bridge this gap.

The capacity-building mechanism of the NEPAD framework makes it an essential tool for securing compliance with integration treaties. One of the notable NEPAD projects in infrastructural development is the north-south corridor project linking Durban in South Africa to Dar-es-salaam in Tanzania. This elephant project has yielded in 157 infrastructural projects including 59 road projects, 38 rail projects and 6 bridge projects.¹⁰¹⁰ As part of the larger Cape-to-Cairo project, a 350 km road between Dar-es-salaam and Cairo is currently undergoing construction to be completed in 2015.¹⁰¹¹ These efforts, while not completely filling the infrastructure deficit on the continent, represent a substantial move in the quest to connect African markets. At sub-regional level, although not connected to the NEPAD initiative, ECOWAS Member States have embarked on several infrastructural projects such as the trans-West African highway¹⁰¹² and the West African Power Pool.¹⁰¹³ Projects of this size are decisive in the move to merge existing RECs into the AEC in the future.

NEPAD has been criticized by African scholars for various reasons.¹⁰¹⁴ Gathii, summarises his critique of NEPAD under three headings: (a) NEPAD's failure to engage with the Bretton

¹⁰⁰⁹ N. Limao and A.J Venables, 'Infrastructure, geographical disadvantage, transport costs, and trade', 15 *World Bank Economic Review* (2001), 451, p.452.

¹⁰¹⁰ Jacob Zuma Address delivered at the 27th Meeting of the NEPAD Heads of State and Government Orientation Committee AU Summit, Addis Ababa, Ethiopia, 14 July 2012, available at <http://www.dfa.gov.za/docs/speeches/2012/jzum0716.html> (accessed 15 April 2014).

¹⁰¹¹ Ibid.

¹⁰¹² The six-lane trans-West African highway project is expected to connect Lagos to Abidjan. The highway will link Ghana, Benin Republic and Togo. See more at, <http://www.thisdaylive.com/articles/ecowas-leaders-approve-50m-for-trans-west-african-highway/170195/> (accessed 15 April 2014).

¹⁰¹³ See, <http://www.ecowas.int/ips/ii/energy/en/page.php?file=what> (accessed 15 April 2014).

¹⁰¹⁴ Udombana questions the legitimacy of the NEPAD document because it was unilaterally decided upon by African leaders without prior consultation with the African people. See, N. Udombana, 'The unfinished business: conflicts, the African Union and the New Partnership for Africa's Development', 35 *George Washington International Law Review* (2003) 55; See also N. Udombana, 'A harmony or a cacophony? The music of integration in the African Union Treaty and the New Partnership for Africa's development' 13 *Indiana International and Comparative Law Review* (2003), p.185-236.

Woods-sponsored market-centred view of development, and thereby treating it as a non-negotiable development framework; (b) using the acquisition of foreign capital and donor aid as a pre-condition for NEPAD's success; and (c) NEPAD's failure to engage with the unfairness and injustice of the international trading rules.¹⁰¹⁵ Gathii's appreciation of the fact that the NEPAD initiative arguably lacks the potential to rescue Africa from its dependence on Western capital is valid. NEPAD's approach rests whole-heartedly on market-oriented economic approach which is dependent on foreign aid and capital and thus will struggle to remedy the failings of the existing structures that sustain 'inequality, poverty, and hierarchy, both within and without the African state'.¹⁰¹⁶ NEPAD's blueprint for Africa's development is faulty in this regard.

Rather than provide a much required internal economic self-sustenance system that seeks to address the current unfavourable position of African economies in the global market, the NEPAD framework relies heavily on Western aid and capital.¹⁰¹⁷ It is not rocket science that lifting Africa out of poverty and underdevelopment, African leaders must in consonance with NGOs and civil society redraw a roadmap for Africa's development. This roadmap should be void of notions of over-reliance on foreign capital, donor funding, foreign aid and the exaggerated benefits of market access liberalisation.¹⁰¹⁸ However, NEPAD's emphasis on cross-border infrastructure as vital to Africa's development is equally valid.

Africa's underdevelopment and exclusion from the globalised economy¹⁰¹⁹ is also ascribable to the inefficient and corrupt leadership that has plagued post-colonial Africa, and is still prevalent on the continent.¹⁰²⁰ As part of NEPAD's strategy to resolve the leadership deficiencies that have contributed, in no small part, to Africa's underdevelopment, under the African leaders have adopted a self-monitoring mechanism to frequently assess their governance performance in key sectors. As a self-monitoring mechanism, the African Peer Review Mechanism (APRM) could be used to address the 'elephant in the room' which is good governance in Africa. This would eventually improve the question of leadership which has frustrated the economic and political performance of African states in recent times.

¹⁰¹⁵ J. Gathii, 'A critical appraisal of the NEPAD agenda in light of Africa's place in the World Trade regime in an era of market-centred development', 13 *Transnational Law and contemporary problems* (2003), 179, pp.181-198.

¹⁰¹⁶ *Ibid.*, 180-181.

¹⁰¹⁷ J. Gathii, *African Trade Agreements as Legal Regimes*, (New York: Cambridge University Press, 2011), p.28.

¹⁰¹⁸ A. Afadameh-Adeyemi, *Securing Compliance with African Economic Integration Treaties*, Unpublished doctoral thesis (University of Cape Town, 2013), p.130.

¹⁰¹⁹ NEPAD document, para 1.

¹⁰²⁰ N. Udombana 'A harmony or cacophony?', p.215.

6.3.4.2 THE APRM

As earlier highlighted, governance issues have come to the fore of African integration due to the unbridled and unchecked use of executive power by heads of states. It is against this background, and to give effect to the principles of NEPAD, that African governments invented the peer review mechanism in 2002. The APRM is modelled on both donor-prescribed criteria and a broad-based methodology. The APRM has been described as ‘the most ambitious piece of innovation to have come out of Africa since decolonization’.¹⁰²¹ The APRM Base Document defines the mechanism as ‘an instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism’.¹⁰²²

The APRM ensures implementation of agreed integration policies by providing an institutionalized platform for reviewing the steps taken by African states. A country that expresses interest in belonging to the peer-review process signs a Memorandum of Understanding (MOU) which stipulates the conditions for review.¹⁰²³ The benefit of the APRM is that it arguably indicates a change of attitude by African leaders, to commit to agreed collective standards. To further concretize their commitment to better governance standards, African Heads of State adopted a Declaration Democracy, Political, Economic and Corporate Governance.¹⁰²⁴ The Declaration outlines four broad themes upon which states are reviewed: democracy and political governance, economic governance and management. These four broad themes constitute the standards upon which States are reviewed under the APRM. These four broad areas broadly cover the areas in which African States have committed to integrate and foster development under the Constitutive Act of the African Union, the Treaty Establishing the African Economic Community, and the constituent treaties establishing the RECs.¹⁰²⁵

¹⁰²¹ M, Hansungule, ‘The role of APRM in strengthening governance in Africa: Opportunities and constraints in implementation’, prepared for the Office of the United Nations Special Adviser on Africa (2007) 2, available at <http://www.un.org/africa/osaa/reports/Overview%20APRM%20paper%20Dec%202007.pdf> (accessed 15 April 2014), p.2.

¹⁰²² R.Herbert & S. Gruzd, *African Peer Review Mechanism: Lessons from the Pioneers*, (Johannesburg: South African Institute of International Affairs, 2008), p.7-8.

¹⁰²³ The Sixth Summit of Heads of State and Government Implementation Committee (HSGIC) of the New Partnership for Africa’s Development (NEPAD), held in March 2003 in Abuja, Nigeria, adopted the Memorandum of Understanding (MOU) on the African Peer Review Mechanism (APRM).

¹⁰²⁴ Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVII) Annex 1, adopted on 8 July 2002 at the Thirty-Eight Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity (African Union).

¹⁰²⁵ Afadameh-Adeyemi (2012), p.132.

At an organisational level, the APRM is made up of the Committee of Participating Heads of State and Government (APR Forum) which constitutes the APRM's highest decision making body. It meets about twice a year, often on the margins of AU Summits, to discuss APRM Country Review Reports of countries that have completed the exercise. The APR Panel of Eminent Persons (APR) Panel consists of seven distinguished Africans, appointed to five year terms.¹⁰²⁶ It exercises oversight over the APRM. Each of the Panel members is responsible for overseeing designated country review process. The APRM Secretariat is the main organ of the APRM process. It is responsible for preparing the background research report on the countries to be reviewed. It is also charged with providing logistic and administrative support for country missions.

The APRM process, although voluntary,¹⁰²⁷ helps to ensure that states implement norms agreed at regional level nationally. This is a realisation that Africa does not necessarily lack ideas, but struggle to implement principles necessary for development.¹⁰²⁸ While NEPAD provides the normative platform for development in Africa, APRM monitors the practical application of these norms. Member States have therefore adopted standards, criteria and indicators for monitoring and assessing individual performance.¹⁰²⁹ Through a five stage review process, these standards and indicators are used as a benchmark for evaluating a state's performance. The peer review process is a broad-based one. It allows performance of Member States to be assessed under the various themes covered by African integration documents, particularly as classified under the Declaration on Democracy.¹⁰³⁰ The APRM

¹⁰²⁶ Current panel members include Barrister Akere Tabeng Muna (Cameroon) - Chair person, Ambassador Fatuma Ndingiza Nyirakobwa (Rwanda) - Vice Chairperson, Professor Amos Sawyer (Liberia), Barrister Julienne Ondzieil-Genelenga (Congo), Ambassador Professor Okon Edet Uya (Nigeria), Ms. Baleka Mbete (South Africa), Ambassador Ashraf Gamal (Egypt), Dr. Mekideche Mustapha (Algeria). Available at <http://www.uneca.org/aprm/pages/panel-eminent-persons> (accessed 15 April 2014).

¹⁰²⁷ AHG/235/XXXVIII, Annex 11, para 1. As at July 2013, the following 33 countries have signed the Memorandum of Understanding acceding to the APRM: Algeria, Angola, Benin, Burkina Faso, Cameroon, Chad, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Republic of Congo, Kenya, Lesotho, Liberia, Mali, Malawi, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Sierra Leone, South Africa, Sudan, Togo, Tanzania, Tunisia, Uganda, and Zambia. Available at <http://www.uneca.org/aprm/pages/status-countries> (accessed 15 April 2014).

¹⁰²⁸ S. Gruzd, *Grappling with Governance: Perspectives on the African Peer Review Mechanism* (Auckland Park, South Africa: Fanele, 2010), p.9.

¹⁰²⁹ Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (The APRM) NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI 9 March 2003.

¹⁰³⁰ NEPAD, Declaration on Democracy, Political, Economic and Corporate Governance, AHG/235 (XXXVIII) Annex 1.

base document stipulates four types of review.¹⁰³¹ Each of the review has five complex and time consuming stages. The five stage process is set out below.

Stage 1: Countries launch the process (with the help of the APR Secretariat and Strategic Partners through the Country Support Mission) and undergo a comprehensive national self-assessment exercise involving all relevant constituencies. The Self-assessment Report and Programme of Action are then sent to the APR Secretariat and the APR Panel.¹⁰³²

Stage 2: The APR Secretariat and the Strategic Partners (Country Review Team) undertake a country review visit for widespread stakeholder consultation.

Stage 3: The Country Review Team prepares a draft report on the basis of the background document and the Issue Paper prepared by the APR Secretariat, which is then reviewed by the panel of Eminent Persons

Stage 4: The Chairperson of the Panel of Eminent Persons communicates recommendations to the head of State and Government of the country under review and subsequently submits the final Country Review report and Programme of Action to the Forum of heads of States of the APRM for the peer review itself.

Stage 5: After 6 months of discussion by the Forum, the report is tabled before the relevant institutions: the PAP, RECs, African Commission on Human and Peoples' Rights, AU, PSC and ECOSOCC.

So far, only seventeen out of the thirty-three which have acceded to the APRM document, have successfully completed the five stages review process : Algeria, Benin, Burkina Faso, Ethiopia, Ghana, Kenya, Lesotho, Mali, Mauritius, Mozambique, Nigeria, Rwanda, South Africa, Sierra Leone, Tanzania, Uganda, Zambia.¹⁰³³ As apparent in the outlined stages, the APRM is designed to be an all-inclusive process. By including the civil society in the process, the APRM

¹⁰³¹ The first review is the base review, which will be carried out within eighteen months of a country becoming a member of the APRM process. The second review is a periodic review which takes place every two to four years. Thirdly, a member country may ask for a review that is not part of the periodically mandated reviews. And lastly, participating Heads of States and Government, on sensing signs of an impending political and economic crisis in a member country, may request a review. AHG/235/XXXVIII, Annex 11, para 14.

¹⁰³² Djibouti, Gabon and Sudan are currently undergoing this stage.

¹⁰³³ <http://www.uneca.org/aprm/pages/status-countries>. Djibouti, Gabon and Sudan are currently undergoing stage 1 of the review process.

presents an alternative and viable platform for discussing national matters, strengthening national institutions and also highlighting the importance of public participation in national matters.¹⁰³⁴

To get the APRM closer to national institutions, participating countries are expected to establish two main institutions: the National Focal point and the National Governing Council. The APR focal point should be at ministerial level or a high-level official reporting directly to the Head of State or Government with the necessary technical committees supporting it.¹⁰³⁵ The National Governing Council (NGC) is responsible for the implementation of the APRM at the national level by overseeing the production of the Country Self-Assessment Report and Programme of action. Unlike the APR focal point, the composition of the NGC is more broad-based. This body must contain upstanding citizens who command the respect of the general public.¹⁰³⁶ The Country Guideline stipulates that the council should include representatives of civil society (women, youth, trade unions, peoples with disability and business organization) and government.¹⁰³⁷

In assessing a country's status under the four thematic areas of the APRM review process, the review team mainly considers the level of ratification of regional instruments by the country under the review. In instances where the regional instruments have been ratified, the team determines whether the norms created under these instruments are being implemented and also checks the availability of domestic institutions vested with the responsibility of ensuring adherence to the norms. The review team also evaluates the effectiveness of these norms on the country in review. In essence, the review goes beyond determining the level of ratification by a state, but also how these various norms influence a state's behaviour.¹⁰³⁸

Under the theme of democracy and political governance, the objective of the team is to assess how a country is performing in the area of democracy, the rule of law, separation of powers, and respect for human rights. In assessing a country under this theme, its performance is benchmarked against the standards created under various international and African regional

¹⁰³⁴ Fagbayibo (2010), p.154.

¹⁰³⁵ See, NEPAD/APRM/Panel3/guidelines/11-2003/Doc8, para 48.

¹⁰³⁶ See, <http://aprm-au.org/management-structure> (accessed 15 April 2014).

¹⁰³⁷ Fagbayibo (2010), p.155.

¹⁰³⁸ For a detailed list of objectives, criteria and indicators in the four thematic areas, see, Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (The APRM) NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI 9 March 2003.

instruments.¹⁰³⁹ Fundamentally, the review process must reveal whether these instruments have been implemented and if citizens benefit from the resulting norms. Ghana was the first country to undergo the peer review process in 2005. In reviewing Ghana's performance, it was discovered that while Ghana had ratified some AU conventions, a significant number of conventions had not been ratified.¹⁰⁴⁰ In order to strengthen its democracy, and the rule of law, the Ghanaian Government was advised to ratify and domesticate these documents in order to make them part of its own enforceable standards.¹⁰⁴¹

Subsequent reviews in other countries revealed a recurring theme. There exists a gap between the signing or ratification of treaties at the international level and their domestication in national legal systems. As highlighted in earlier parts of this study, this is a constant feature in the domestic law of African states that impede regional integration in the continent. Failure to domesticate these treaties means that norms contained in them are unenforceable in national courts. States like Ghana and Nigeria have so far indicated their willingness to ratify and domesticate all outstanding instruments.¹⁰⁴² Reviews in other thematic areas, economic governance management, corporate governance, and socio-economic governance all reveal a general implementation problem, particularly, regional obligations of member states.

The APRM has faced criticisms because it lacks 'legal teeth'¹⁰⁴³ and as such lacks the capacity to compel obedience from African states. While this view is plausible, it can equally be argued that the APRM unlike other legal instruments ratified by African state is more realistic in that it adopts a different approach and serves a different purpose. The APRM enhances compliance with African integration treaties and other agreements and as such need not be in the same form. By providing for methods such as information sharing, performance reporting, policy assessment, persuasion, and data collection, the APRM potentially facilitates compliance with treaty obligations. The APRM adopts the managerial approach to securing compliance, which can be more effective in some instances. It would be recalled that

¹⁰³⁹ Some of these instruments include the Constitutive Act, the Declaration on the Framework for an OAU (AU) Response to Unconstitutional Changes of Government (2000), the African Charter, the Conference of Security, Stability, Development and Corporation (CSSDCA) Solemn Declaration (2000) and the NEPAD Document.

¹⁰⁴⁰ *African Peer Review Mechanism Country Review Report of the Republic of Ghana*, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/00798283-EN-APRM-GHANA-REVIEW-REPORT-JUNE-2005.PDF> (accessed 15 April 2014).

¹⁰⁴¹ *Ibid.*, p.16.

¹⁰⁴² *Ibid.*, p.149; see also, *Country Review Report Federal Republic of Nigeria*, June 2008: National Programme of Action Annexure 1, p.398.

¹⁰⁴³ Hansungule (2007), p.8.

despite the softness (failure to bind) factor in soft law mechanisms, international actors still chose these mechanisms where they offer ‘superior institutional solutions’.¹⁰⁴⁴ Soft law may still offer the advantages of hard law, avoid some of the costs of hard law, and have certain independent advantages of its own.¹⁰⁴⁵

The APRM can serve as a soft law tool for enhancing greater responsible governance in African states and enhancing compliance. This is achievable because the various stages of country review bring about information sharing among states, provide a platform for reporting and data collection, evaluate the implementation and effectiveness of regional norms, involve non-governmental organizations in the assessment process, provide an opportunity for technical assistance to be given to states in areas where needed, encourage peer dialogue and persuasion from other states. Most importantly, these processes scrutinize every aspect of governance in a state, bringing its reputation under increased scrutiny. This in turn motivates compliance by the state.¹⁰⁴⁶

This reputational pull of the APRM process is crucial to securing compliance with treaty obligations. Reputation is an indispensable tool in securing compliance because it increases credibility and makes future cooperation easier.¹⁰⁴⁷ Greater emphasis is now being placed on a state’s reputation and how it affects the decision to comply with treaty obligations. Rationalists argue that states comply with treaty obligations based on the calculation of long and short term interests. Often present in these calculations is the willingness to make future credible commitments with other states.¹⁰⁴⁸ Consequently, reputation is a determining factor for the perception of a state and its legitimacy in the community of states. Therefore a state would be willing to comply with its obligations because it would be perceived as a reliable partner who upholds their end of the bargain. In the case of African States, which are in need of foreign investment, it is pertinent that this is the image they seek to portray. By abiding by the norms under the APRM, African States can potentially enhance their reputation, and also attract greater trade and investments.

¹⁰⁴⁴ Abbott and Snidal, (2000), p.423.

¹⁰⁴⁵ Ibid.

¹⁰⁴⁶ Afadameh-Adeyemi (2013), p.148.

¹⁰⁴⁷ A. Guzman, *How International Law Works: A Rational Choice Theory*, (New York: Oxford University Press, 2008), p.33.

¹⁰⁴⁸ Afadameh-Adeyemi (2013), p.148.

The reputational effect of the APRM is twofold (internal and external). Internally, the APRM is essential because the government wants to build an internal reputation among its citizens in order to entrench its descriptive legitimacy. Thus, the APRM helps the government appear transparent and committed to good governance. Externally, the process of defending Country Review Report at the level, fellow heads of state will highlight the gaps in the country's governance structure, giving suggestions about the steps that could be taken to bridge those gaps.¹⁰⁴⁹ The APRM inevitably identifies the breaching of rules, and this invariably has political and reputational consequences.¹⁰⁵⁰

Overall, the APRM is an innovative way of securing compliance with African integration treaties. However, its concrete effect is yet to materialize as statistics on the development of African states are far from impressive. For example, all the 17 states that has fully undergone the APRM review process since its creation, are still off –track in meeting the MDG goal 1 to eradicate extreme poverty and hunger by 2015.¹⁰⁵¹ However, this does not disparage the potential impact of the process, if African states continue to submit themselves genuinely to the NEPAD framework and the APRM. The APRM may not be the perfect solution to Africa's governance problem, but it is an organic process capable of developing into a viable mechanism for addressing the normative and practical issues plaguing African integration.

6.4 THE WAY FORWARD

The preceding sections have explored possible legal and institutional ideas that would plug some of the gaps earlier identified in the study, plaguing the ECOWAS regime. It is noteworthy that some of these solutions are not limited to ECOWAS but widely apply to sister RECs and by implication continental institutions. The ideas explored above are not exhaustive but have been identified as the minimum standard of changes that must be made to move the community forward. Since international organizations are primarily creations of state, and the decisions are made by states, the effectiveness of these entities is dependent on the political will of Member States. In African regional organizations, there appears a

¹⁰⁴⁹ Ibid.

¹⁰⁵⁰ Herbert & Gruzd (2008), p.102.

¹⁰⁵¹ See, *Assessing Progress in Africa toward the Millennium Development Goals*, MDG Report 2013, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Millennium%20Development%20Goals%20%28MDGs%29%20Report%202013.pdf> (accessed 15 April 2014), .XIV.

reluctance to make the transition from power-based to rule-oriented regimes. In the case of ECOWAS the legal framework is incomplete and coupled with the inaction of states to make the necessary amendments, the organization would continue to suffer. Member states must match political rhetoric often bandied about at community events with urgent action to move the organization a step forward.

ECOWAS is taking steps to ensure that it has a wider reach. This is consistent with the concept of a community which the revised treaty refers to. There are various programmes of ECOWAS organs worthy of mention. One of such programmes is the sensitization programme of the ECCJ. The programme is part of efforts that began in 2004 to sensitize Community citizens across the sub-region about the competence and functions of the Court. During the 2012 sensitization programme in Nigeria the Court held interactive sessions with the Members of the Nigerian Bar Association, the Nigerian law School, the Market Women Association, the police, Customs and Immigration Services among others. By doing this, the Court works for the good of the entire organization, impacting every aspect of the organization's objectives.

Another important step taken by the organization is the introduction of ECOWAS related courses in higher institutions of Member States. For ECOWAS to achieve a rule-based regime, community citizens will generally need a better understanding of the body of law, particularly students of the legal profession. ECOWAS has so far attempted to introduce peace studies in Member States. The Council of Ministers recently adopted a report of the Ministers of Education that will ensure the introduction of peace studies in the school curriculum in the sub-region.¹⁰⁵² The objective of this initiative is to use education to 'promote peace, human rights, citizenship, democracy and regional integration'.¹⁰⁵³ This is an encouraging sign, even though a regulation of this nature is long overdue. In the EU, Member States include EU law in the curriculum of higher institutions and award advanced degrees in the subject area. An introduction of courses such as ECOWAS law and AU law in law schools around the continent would enlighten community citizens and create a sense of belonging which will further deepen African integration.

¹⁰⁵² See, 'In all ECOWAS member states, peace studies will be taught', available at <http://premiumtimesng.com/news/109629-ecowas-countries-to-introduce-peace-studies-in-schools.html> (accessed 15 April 2014).

¹⁰⁵³ Ibid.

There is a feeling that ECOWAS has overachieved in the face of the conflicts that have occurred in the sub-region, and which continue to plague the operationalization of the organization.¹⁰⁵⁴ This optimism seems to find some justification in recent projections that six Member States may meet the MDGs.¹⁰⁵⁵ However, the non-implementation of key objectives that would boost trade among Member States might stultify the realisation of the MDGs in less privileged Member States. Currently, Member States are working towards the finalisation of the details for the adoption of a common external tariff regime. These efforts towards meeting regional integration objectives are laudable, but all actors must act with alacrity and show more verve if development is to be realised in the sub-region and by implication the African continent.

Intellectual inquiry has covered a fair amount of legal and institutional aspects of the current ECOWAS regime. However, there are some areas that are arguably in the shadow of the more established topics. There appears to be a paucity of academic material, at least to the knowledge of this author, on the administrative aspects of ECOWAS as an organization. It is important that scholars continue to probe the effectiveness of community institutions drawing from other disciplines. For example, a public-administration approach to the organizational practices of ECOWAS organs would help elucidate more on the weak spots of these institutions and proffer practicable solutions on how to further strengthen them. Furthermore, inquiry of this nature not only reduces the opaqueness of the decision-making processes in community organs but also sheds more light on the governance practices of these institutions.

¹⁰⁵⁴ During a visit to the ECOWAS Commission by this author, this was the view communicated by a top rank ECOWAS staff.

¹⁰⁵⁵ See, 'Six ECOWAS Countries Projected to Meet the MDGs' available at <http://news.ecowas.int/presseshow.php?nb=180&lang=en&annee=2013> (accessed 15 April 2014).

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