

Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa

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by

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## **ABSTRACT**

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As a case study, the ECOWAS typifies an absence of effective judicial frameworks to strengthen, or, at least, complement, the integration of markets in the schemes of regional integration in Africa. Two decades since its creation, the Community Court of Justice of the ECOWAS has escaped scholarly analysis, creating a gap in the state of knowledge on regional integration in Africa. Accordingly, this thesis directs attention to the need to study the ECOWAS Court as a distinct actor within the contemporary international legal/political system, particularly in its role in the integration of the West African sub-region.

This research work takes a critical look at the role that judicial institutions can play in the furtherance of regional integration in Africa. Adapting social science methodology for analysis of a judicial institution, the thesis undertakes the first comprehensive examination of the law, machinery, practice and procedure of the Court. The court-centred analysis allows for an appraisal of how the Court is shaping the dynamics of integration activities in West Africa. It examines the contribution (both actual and potential) of the Court to moulding the legal and constitutional framework within which the ECOWAS operates. It situates the Court within the organisational context of an emerging regional community and examines how the Court impacts and is impacted upon by the institutions of the ECOWAS. It emphasises the centrality of the Court to the maintenance of the delicate equilibrium necessary for the harmonisation of the competing interests of the Member States and Institutions of the ECOWAS.

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## **ABBREVIATIONS/ACRONYMS**

ACHPR – African Commission on Human and Peoples’ Rights

ACtHPR – African Court on Human and Peoples’ Rights

AEC - African Economic Community

AfDB - African Development Bank

AMU - Arab Maghreb Union

Annual Report (AR) – Annual Report of the Community Court of Justice, ECOWAS

ASEAN – Association of Southeast Asian Nations

AU – African Union

Authority – Authority of Heads of State and Government of the ECOWAS

CAFRAD – African Training and Research Centre in Administration for Development

CARICOM – Caribbean Community and Common Market

CCJE – Community Court of Justice, ECOWAS (ECOWAS Court)

CELS – Centre for European Legal Studies

CEMAC – *Communauté Économique et Monétaire d’Afrique Centrale* (Economic and Monetary Community of Central Africa)

CEN-SAD - Community of Sahel-Saharan States

CEPGL - Economic Community of the Great Lakes Countries

CJEU – Court of Justice of the European Union

COMESA - Common Market for Eastern and Southern Africa

Commission – ECOWAS Commission (formerly Executive Secretariat)

Council – Council of Ministers of the ECOWAS

EAC - East African Community

EC - European Community

ECCAS - Economic Community of Central African States

ECOWAS - Economic Community of West African States

EEA - European Economic Area

EFTA – European Free Trade Area

EPAs – Economic Partnership Agreements

ERDF - ECOWAS Regional Development Fund

ERIB - ECOWAS Regional Investment Bank

EU – European Union

GAFTA - Great Arab Free Trade Area

HRs – Human Rights

ICC – International Criminal Court

ICJ - International Court of Justice

IGAD - Intergovernmental Authority on Development

IGADD - Intergovernmental Authority on Drought and Development

IOC - Indian Ocean Commission

JCC – Judicial Council of the Community

LGA - Liptako-Gourma Authority (LGA)

MERCOSUR - *Mercado Común del Sur* (Common Market of the South)

MLG – Multi-level Governance

MRU - Mano River Union

NEPAD - New Partnership for Africa’s Development

OAU – Organisation of African Union

OHADA - *Organisation pour l’Harmonisation en Afrique du Droit des Affaires*

OJ – Official Journal of the Economic Community of West African States (ECOWAS)

PCA - Permanent Court of Arbitration

PCIJ - Permanent Court of International Justice

PTA - Preferential Trade Area (PTA)

RECs – Regional Economic Communities

Revised Treaty – Revised Treaty of the ECOWAS, signed in Cotonou, Republic of Benin, on 24 July 1993

SACU - Southern African Customs Union

SADC – Southern African Development Community

SADCC - Southern African Development Coordinating Conference

The Rules - The Rules of the Community Court of Justice, ECOWAS

UEMOA (WAEMU) - *Union Économique et Monétaire Ouest-Africaine* (West African Economic and Monetary Union)

UNDESA – United Nations Department of Economic and Social Affairs

UNECA - United Nations Economic Commission for Africa

WTO – World Trade Organisation

## Chapter I

### INTRODUCTION

#### **Organisation of the Thesis**

The thesis is organised into six chapters. Chapter I traces the development of regional integration in Africa, noting the neglect of judicial enforcement mechanisms. It situates the ECOWAS Court within the contexts of the socio-economic, cultural and political dynamics of the environment and locates its position within the organisational architecture of the parent organisation. It highlights the methodological considerations that guided the conduct of the research work as well as limitations arising from the difficulty of access to the Court and non-availability of data, as well as the strategies adopted to surmount the problems.

Chapter II is a review of the current knowledge on the role of international courts in the process of regional integration, with specific reference to the dearth of scholarly work on the ECOWAS Court. Since there is little work on the ECOWAS Court, the literature review focuses on the role of international courts generally in the process of regional integration. It opens with an examination of the emergence and relevance of international courts in general and regional courts in particular in the process of regional integration, noting the basic features of international courts as represented by the International Court of Justice (ICJ). It then discusses the distinctive contributions of the Court of Justice of the EU (CJEU) and the global influence of the model it represents across the world. Further analysis of the literature highlights the emerging trends and patterns of supranational adjudication, with specific focus on the

problems of regional integration courts in Africa. It discusses the legal and judicial frameworks of regional integration in Africa, noting the weaknesses in the existing frameworks. The discussions expose the meagre scholarly attention enjoyed by the ECOWAS Court compared with other courts of comparable status in international law literature, such as the CJEU, thereby seeking to locate the position and potential contributions of this Thesis to the existing literature on supranational adjudication. This Chapter was written before the creation of the iCourts project in Copenhagen, Denmark in March 2012.<sup>1</sup> The author intends, on completion of the Thesis, to contribute to this project by situating the role of regional courts in the international framework.

Chapter III interrogates the scope of the powers of the Court. It examines in detail the various legal instruments that define the extent of the powers of the Court, and how the Court conceives the scope of its powers and jurisdiction. The Chapter underscores the Treaty basis of the power of the Court, and discusses this and other legal instruments that constitute the legal regime for operation of the Court. It undertakes exhaustive review of the powers, jurisdiction and competence of the Court, as well as the judicial approach of the Court in the interpretation of the scope of its own power.

Chapter IV goes deeper into the internal working of the Court. It examines the membership and composition of the Court, including qualifications and tenure of the Judges; appointment, disciplinary and removal procedures, including the central role of the Judicial Council of the Community in the processes; administrative and judicial machinery of the Court; its rules of practice and procedure; and other aspects of the

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<sup>1</sup> <<http://jura.ku.dk/icourts/about/>> accessed 28 December 2012

internal administration of the Court. This was an original research, and the data presented here are not available on the newly created website of the Court.

Chapter V analyses the cases that have been handled by the Court and the approach of the Court to issues of regional integration that arose from the cases on which the Court has given considered judgments. In this regard, it contains a case management analysis of the agenda and workload of the Court, disposal patterns, and variety of cases and issues. It analyses the judgments of the Court in relation to five issue-areas that are relevant to discussions of the regional integration process in West Africa. These issue-areas pertain to human rights violations, control of community acts, the community public service, enforcement of Treaty and other obligations against the Member States, and the nature of the relationship of the Community Court to the national courts of the Member States. Again, this was an original research. Although the new website has a heading for cases at the time of writing (December 2012) there was no easy access to case law and the website has still to be developed.<sup>2</sup>

Chapter VI summarises the main findings and analyses of the research, highlighting the major contributions of the Court and the challenges facing it in the discharge of its mandate. Emphasis is on those issues that could facilitate or retard the progression toward full integration, and the role of the Court in this regard. The prospects of the Court in terms of its ability or otherwise to play its assigned role are also discussed. Appropriate recommendations are made in the light of the state of development of the Court as well as experience from other jurisdictions in Africa and the EU. It also identifies aspects of the work of the Court that may require further

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<sup>2</sup> Although the website was re-launched in July 2011, it was not put into functional use until November 2012 and many problems relating to data updating and retrieval remain as of December 2012. No hyperlinks are provided to many of the cases listed on the website as of the end of December 2012. Certified true copies (CTC) of available judgments were paid for and obtained.



investigation, thereby signposting future research agenda on the role and significance of the judicature in the emerging regional integration mechanisms in the western and other regions of Africa.

## **Introduction**

The pursuit of economic integration as a model of development was one of the earliest responses to the myriads of socio-economic and political problems that confronted post-independence Africa.<sup>3</sup> In West Africa, discussions bordering on multilateral linkages for rapid transformation of the newly independent States began within the first five years of independence, culminating in the formation of the Economic Community of West African States (ECOWAS) in May 1975. The path towards integration of the markets and other aspects of the economies of the Member States of the ECOWAS remained thorny over the years due to a combination of factors, most notably a lack of genuine political will for integration.<sup>4</sup> This manifested mainly in the creation of weak legal and institutional mechanisms for effective implementation of the goals and objectives set out in the original Treaty. In fact, until the Treaty was revised some two decades later (1993), the ECOWAS integrative mechanisms did not make provisions for or institutionalised any regional judicial frameworks to strengthen the regional integration agenda. Even after the creation of the Court in 1991, it suffered stunted growth arising from inadequacies of legal texts and other teething problems that served to obscure the role of the Court in the

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<sup>3</sup> The West African leaders reiterated the emphasis on regional integration as “the best strategy” for economic and political relevance some twenty years later. See Economic Community of West African States, *ECOWAS at Twenty: Regional Integration in West Africa, Proceedings of the Conference and Workshops Commemorating ECOWAS’ 20<sup>th</sup> Anniversary* (Dakar, 29-31 May 1995) 2

<sup>4</sup> Soumana Sako, ‘Challenges Facing Africa’s Regional Economic Communities in Capacity Building’, (2006) *ACBF Occasional Paper No. 5* (Harare: African Capacity Building Foundation, 2006)

bourgeoning integration efforts. For the same or similar reasons, scholarly analysis of the role of the Court in the integration scheme has been lacking, or, at best, scanty.

### **The ECOWAS Court**

The Community Court of Justice of the Economic Community of West African States (CCJE), often referred to as the “ECOWAS Court”, was established in July 1991 as the principal legal/judicial mechanism for enforcement of the provisions of the Treaty and the associated Conventions and Protocols.<sup>5</sup> It is the “fifth Institution”<sup>6</sup> and, in addition to the Community Parliament, Economic and Social Council and ECOWAS Bank for Investment and Development (EBID), among the new Institutions provided for under the revised Treaty of 1993. It has its seat in Abuja, the capital city of Nigeria.

The principal functions of the Court are defined in the Treaty and the Protocol on the Court as: Interpretation of the legal instruments of the Community; settlement of disputes among Member States and Institutions of the Community; enforcement of Treaty obligations against the Member States and officials of the Community; and enforcement of Community laws and other regional and continental instruments for enforcement of the human rights of the Community Citizens.<sup>7</sup> The Court is empowered to hear and determine contentious matters brought before it, give advisory opinions on issues brought by the appropriate Community Institutions, exercise the power of arbitration pending establishment of an Arbitration Tribunal, and give

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<sup>5</sup> Revised Treaty of the ECOWAS (Revised Treaty), – Arts 6(e) and 15

<sup>6</sup> ECOWAS Community Court of Justice, *2002 Annual Report* (2002 Annual Report) 2

<sup>7</sup> Supplementary Protocol AP/SP.1/01/05 (Supplementary Protocol). When this research was initially undertaken, the Court did not have a website. It is now possible to access the relevant documents at: <http://www.courtecowas.org/>, 01 May 2013

preliminary rulings on issues referred to it by domestic courts of the Member States. Access to the Court was widened in January 2005 to allow individuals and corporate bodies to file cases before it while its competence and jurisdiction was increased to include interpretation of the legal texts of the Community, disputes settlement, enforcement of community obligations, and human rights violations.<sup>8</sup>

The ECOWAS Court is composed of seven Judges, appointed from the Members on a pre-approved order of rotation that ensures that no two Judges are nationals of the same Member State. While the pioneer Judges appointed in 2001 got a five-year renewable term each<sup>9</sup>, Judges are since 2006 appointed on a single non-renewable term of four years.<sup>10</sup> All the Judges that have so far served on the Court are selected from among professionally qualified individuals with considerable judicial experience in their respective countries of nationality. A Judge may also be appointed a Judge Rapporteur for any particular case by the President of the Court. The Registry of the Court is headed by a Chief Registrar, but the Court also has a Bureau comprising the President, the Vice President, and the Doyen (the longest serving judge of the Court), which oversees the administrative machinery of the Court.

By the Protocol on the Community Court of Justice,<sup>11</sup> the President and at least two Judges constitutes the quorum for the hearing and determination of any particular matter. The Court is a single Court with original jurisdiction only. It has no appellate jurisdiction although it can review, interpret and revise its own judgments as provided for under the Protocols<sup>12</sup> and the Rules.<sup>13</sup> The practice and procedure of the Court is regulated by the Rules of Procedure of the Court, approved in August 2002 by the

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<sup>8</sup> Supplementary Protocol – Art 9

<sup>9</sup> Protocol A/P.1/7/91 on the Community Court of Justice, ECOWAS (Protocol on CCJ) - Article 4(1)

<sup>10</sup> Supplementary Protocol - new Article 18(3)(f)

<sup>11</sup> Article 14

<sup>12</sup> Protocol on CCJ –Art 23

<sup>13</sup> The Rules of the Community Court of Justice, ECOWAS (The Rules) – Chapters V and VI

Council of Ministers.<sup>14</sup> Its proceedings consist of two parts: Written Procedure and Oral Procedure, with provisions for other preliminary and preparatory measures.

The ECOWAS Court was inaugurated in January 2001 but did not sit until 2004 when it delivered its first ruling. Since then, and with increased access to it and enhanced jurisdiction from January 2005, the Court has delivered about 65 judgments in various aspects of Community law and human rights. The Court has heard and determined cases bordering on violations of human rights and fundamental freedoms; control/legality of the acts of the Community, its Institutions and officials; disputes regarding the Community and its officials; enforcement of Treaty obligations against Member States (“infringement proceedings”); the relationship of the Community Court of Justice to the domestic courts of the Member States.<sup>15</sup>

The Court is confronted with a number of challenges that are related to the contextual environment of its operation, inadequacy of legal texts, the multilingual character of its operations, and some other administrative problems, which are examined in details in various parts of the Thesis.

### **Africa and the Imperative of Regional Integration**

There is a consensus among scholars that the high hopes that preceded independence in the various African countries were unmatched by the realities years after colonial rule has ended.<sup>16</sup> From the 1960s, the new States have faced many

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<sup>14</sup> Regulation C/REG.4/8/02

<sup>15</sup> The relevant cases are referenced and discussed in Chapter V on Cases and Issues in the Community Court

<sup>16</sup> Roland Oliver Roland and Anthony Atmore, *Africa since 1800*, (5<sup>th</sup> ed, Cambridge University Press, 2004)

challenges of nationhood and development. Although some variations exist among States in terms of the nature and dimensions of the problems, the States suffered and continue to suffer varying degrees of “economic adversity, political uncertainty, and social inequities”.<sup>17</sup> Even years after formal independence, Africa continues to lag behind the other continents,<sup>18</sup> including Asia that was ranked almost equally as Africa in the “decade of independence” (1960-1970).

The backward conditions of the African States at independence necessarily challenged scholars and policymakers to continually explore alternative ideas, prescriptions for economic, social, political strategies and paths towards rapid socio-economic and political transformation of the continent. One model of development that gained early attention in post-independence Africa in this regard was that of ‘pooling’ of economic resources together for the furtherance of the necessary socio-economic development after years of colonial rule. The option was largely irresistible, and was a response to pressures arising from several sources, both internal and external, that combined together to present a regional approach to the developmental challenges of the post-colonial States.

Whatever may be the depth of its impact or the logic of its origin, colonialism in Africa was a unique phenomenon that initially constrained the range of choices available to Africa in its search for rapid socio-economic transformation. For one, colonialism integrated the economies of African countries into “the global hierarchies

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<sup>17</sup> Naomi Chazan, Peter Lewis, Robert Mortimer, Donald Rothchild, and Stephen John Stedman, *Politics and Society in Contemporary Africa* (3<sup>rd</sup> ed Boulder: Lynne, Rienner Publishers, 1999)

<sup>18</sup> See the ranking by Global Finance, quoting IMF, World Bank and OECD sources of data and forecasts for 2008, 2009 and 2010, <<http://www.gfmag.com/tools/global-database/economic-data/12147-the-poorest-countries-in-the-world.html#axzz2HK91CpnH>> accessed 07 January 2013. For a review of the causes of this high poverty level, see Giles Bolton *Africa Doesn't Matter: How the West Has Failed the Poorest Continent and What We Can Do About It* (Arcade Publishing, 2008)

of wealth and power”<sup>19</sup> in a relationship characterised by “unequal development”.<sup>20</sup> This unilateral integration dictated the patterns of post-colonial economic and political relations such that African States had to look forward to the metropolitan countries for the needed path towards rapid growth and development. The gains of integrative efforts in Europe, a reaction to the ruins of World War II, were particularly inspiring and attractive. More importantly, perhaps, the economy of large scale production inherent in the idea of a ‘common market’ meant that the largely backward and underdeveloped economies of the ‘dark’ continent could seek to achieve as a bloc what might prove difficult for them to achieve individually. Thus, within the first decade of independence, the idea of ‘regional integration’ as a model of development had gained wide currency across the continent, particularly in West Africa, often along the path dictated by pre-existing colonial ties.<sup>21</sup>

### **Economic Underdevelopment as a Major Catalyst**

Scholars are *ad idem* that the economies of the post-independent African states were grossly disarticulated, dependent and underdeveloped.<sup>22</sup> The causes of such underdevelopment are located in several other problems, including but not limited to

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<sup>19</sup> Fouad Makki, ‘The Empire of Capital and the Remaking of Centre-Periphery Relations’, (2000) 25 Third World Quarterly 149-168

<sup>20</sup> Samir Amin, *Unequal Development: An Essay on the Social Formations of Peripheral Capitalism* (Monthly Review Press, December 1, 1977)

<sup>21</sup> In West African region, the Anglo-French rivalry continues to reflect in attitudes, structures and developments in the post-colonial states. For the origin of this phenomenon, see Roland Oliver and Anthony Atmore, *Africa Since 1800* (Cambridge: Cambridge University Press, 1994) 101-106. For efforts at reversing the trends in recent times, see Tony Chafer and Gordon Cumming, ‘Punching Below Their Weight? Critical Reflections on Anglo-French Cooperation in Africa’, (2010) Report presented at Chatham House on 28 June (British Academy), <<http://www.port.ac.uk/research/ceisr/researchprojects/TowardsanewpolicypartnershipFranceandBritaininAfricasinceSaint-Malo/downloads/filetodownload,116063,en.pdf>> accessed 11 October 2010

<sup>22</sup> Claude Ake, ‘Explanatory Notes on the Political Economy of Africa’, (1976) 14:1 The Journal of Modern African Studies 1-23; Samir Amin, ‘Underdevelopment and Dependence in Black Africa – Origins and Contemporary Forms’, (1972) 10:4 Journal of Modern African Studies 502-524

colonial exploitation and expropriation of the rich national resources of the various African colonies by the colonial powers, leading to structural distortions that ensure the economies were permanently subjugated to the interests of the colonialists.<sup>23</sup> Thus, in the immediate post-independence periods, the economies of most African states were weak, dependent and mono-cultural, while the patterns of trade were tilted towards the West with little inter-state economic interactions among the newly independent states.<sup>24</sup> Because most of the economies were unilaterally integrated into the economies of the former colonial powers, for want of alternative trading partners, the patterns of trade relations also exhibited similar characteristics. Although many of the countries were rich in natural mineral and agricultural resources, the potentials were not fully explored, and Africa served as a veritable and cheap source of raw materials for the burgeoning industrial production in the West while remaining a “dumping ground” for finished and/or obsolete products of the industrialised world.<sup>25</sup> In the circumstances, local manufacturing industries were not developed while the industrial base of the economies of many African states remains significantly weakened.<sup>26</sup>

The patterns of North-South relations that characterised the African economic landscape at independence also reflected in the political sphere. Having adopted the political map forced upon them by the Berlin West African Conference of 1884-5 and lines of divisions drawn along colonially created borders, African states remained

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<sup>23</sup> For the nature and patterns of imperialist exploitation of Africa during the colonial period, see Walter Rodney, *How Europe Underdeveloped Africa* (1990); Frantz Fanon, *The Wretched of the Earth* (trs R Philcox, New York: Grove Press, 2004); James Foreman-Peck, *A History of the World Economy: International Economic Relations Since 1850* (1973)

<sup>24</sup> See, generally, Martin Meredith *The State of Africa: A History of Fifty Years of Independence* (Free Press, 2005)

<sup>25</sup> Michael Crowder, *The Cambridge History of Africa* (Vol 8, Cambridge University Press 1984) 93

<sup>26</sup> For a review of the “the seemingly intractable economic problems of the African continent” and efforts at “revival and renewal”, see Vishnu Padayachee (ed) *The Political Economy of Africa* (Routledge, 2010)

alien to themselves while remaining faithful to the umbilical cord of centre-periphery relationships that linked the former colonies to the metropolitan countries. Thus, notwithstanding shared socio-cultural dynamics dating back several centuries, inter-border relations and movement of goods and persons among African countries were more difficult while the easier collaboration in all sectors of economic and political relations, including immigration and movement of goods, exist between Africa and Europe than within Africa. Although some measure of cooperation in social, economic and other technical areas were put in place in the decade preceding independence,<sup>27</sup> such efforts were grossly limited both in scope and areas of coverage, involving only the operation of some common services such as airlines, banking and currency, mainly among the 'family' of particular colonial masters. Such efforts remained largely haphazard and could not survive the post-independence regional politics characterised by rivalry and border disputes.

### **Regional Integration 'Model' of Development**

The impetus for regional economic cooperation in Africa came from many sources. The common economic backwardness of the newly independent countries propelled them to seek alternative path towards development. The need for more intra-African trade and relations was particularly appealing in view of the distorted patterns of trade relations between each of the countries and their more economically-buoyant advanced trading partners, and the consequential balance of payments difficulties attendant thereto. Accordingly, regional economic groupings mushroomed

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<sup>27</sup> For example, the West African Airways Corporation established in 1948 for the British West African colonies of Gambia, the Gold Coast, Nigeria and Sierra Leone. See also Kjeld Philip, 'Common Services for East Africa: A model for Small Countries' (1968) 58:230 *The Round Table* 151 - 158



early in various parts of the continent, the motivation for which were the need to form bigger markets for competitive advantage within the global trading system.

The early adoption of regionalism as a development model was a strategy anchored on the need to seek common solutions to the common myriads of social-economic cum political problems that plagued and continue to plague the peoples and nations of Africa. Years after independence, the idea has remained popular, and regional integration groups exist in the different sub-regions of the continent- West, East, South, Central and Maghreb. As the regional integration groupings advance in age, following the lead provided by the EU, more proactive efforts were taken to move integration agenda from mere 'economic cooperation' towards integration in other spheres of societal life: social, educational, legal, judicial and, even, political. Efforts from the 1990s were geared towards continental integration, although the idea has remained largely in conception than in implementation.<sup>28</sup> The impact of globalisation, particularly its effects in "diminishing importance of national borders"<sup>29</sup> means that African states could no longer hope to take the colonially defined borders as sacrosanct and inviolable without serious consequences for the continent and its peoples. As state actors within the contemporary international economic relations make a shift from competition to collaboration, largely through the globalising effect of regionalism as "one of the dominant features of the contemporary global economy",<sup>30</sup> African countries, like their counterparts elsewhere, could not but join the waves of regionalism that are re-defining the course and patterns of international

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<sup>28</sup> For a brief review of the political activities of the OAU up to the 'economic cooperation' efforts of the 1980s, see: Peter J. Schraeder, *African Politics and Society: A Mosaic in Transformation*. (Boston: Bedford/St. Martin's, 2000) 299 – 311.

<sup>29</sup> Susan Berresford, 'President's Message', 1997 Ford Foundation Annual Report (NY: Ford Foundation, 1997) 1

<sup>30</sup> Fred Dicken, *Global Shift: Reshaping the Global Economic Map in the 21<sup>st</sup> Century* (4<sup>th</sup> ed, NY: The Guilford Press, 2003) 144

economic relations since the last decades of the Twenty First Century.<sup>31</sup> The influence of the EU is particularly noticeable in this regard. The EU's external relations, which often mirror its internal policies, have invariably raised the spectre of EU concepts and ideas to the global level, and have shaped developments in Africa and other parts of the developing world.<sup>32</sup>

### **Impact of Globalisation**

The end of the cold war was a watershed in the history of the world generally.<sup>33</sup> Its impact, both positive and negative, on the African continent, has been monumental.<sup>34</sup> However, it is in its potential for breaking down barriers of national frontiers and the collapse of the old Communist regimes that globalisation has impacted on the growth and development of regional integration efforts in Africa. Regional integration received a boost with the reduction in tension that hitherto characterised East-West rivalry for pre-eminence and influence across Africa. There were several manifestations of these new developments. The breakdown of barriers (economic, social, cultural) meant that African States could no longer resist the pressure for greater collaboration without serious consequences.

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<sup>31</sup> See E Mansfield and H V Milner, 'The New Wave of Regionalism' (1999) 53 *International Organisation* 589-627

<sup>32</sup> See Enzo Cannizzaro (ed), *International Law as Law of the European Union* (Martinus Nijhoff, 2011)

<sup>33</sup> For a recent recapitulation of the events that preceded the end of the cold war, see James Mann, *The Rebellion of Ronald Regan: A History of the End of the Cold War* (Penguin Books, 2010)

<sup>34</sup> Singumbe Muyeba, *Globalisation and Africa in the Twenty-First Century: A Zambian Perspective* (Milton Keynes: AuthorHouse UK Ltd, 2008). Cf Joseph E. Stiglitz, *Globalisation and its Discontents* (NY: W.W. Norton & Co, 2003)

## **Regional Economic Communities (RECs)**

The formation of regional integration groups in Africa has had a chequered history that dates to the immediate post-independence period of the 1960s. While the idea of continental unity received a deeper reflection at the political level through the various pan-African discourses/gatherings of the colonial period,<sup>35</sup> which immediately crystallised into the formation of the Organisation of African Unity (OAU) in May 1963,<sup>36</sup> the issue of economic cooperation and integration were considered only at the bilateral and at most regional level. Nonetheless, discussions on economic cooperation and agreements had witnessed considerable activities in virtually all parts of the continent, with mixed results of successes and failures, by the turn of the 1970s. The impetus had both internal and external sources. In West Africa, initial steps for formation of an economic community were taken as early as 1964, leading to the signing of an agreement among the four countries of Cote d'Ivoire, Guinea, Liberia and Sierra Leone in February 1965. Subsequent efforts did not however yield meaningful results until 1972 when joint proposals by Nigeria and Togo facilitated a series of meetings that eventually crystallised into adoption of the treaty creating the ECOWAS in May 1975.

A similar move in the East and South African regions was prompted more by external factors, being an outgrowth of a UNECA-sponsored conference of heads of the newly independent states of the eastern and southern Africa sub-region, called in 1965 to consider proposals for formation of a regional integration group. Although the conference recommended the creation of an economic community, subsequent efforts did not yield much positive result until December 21, 1981 when the Treaty

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<sup>35</sup> Guy Arnold *A Guide to African Political and Economic Development* (Fitzroy Dearborn Publishers, London 2001) 1-5

<sup>36</sup> Zdenek Cervenka, *Organisation of African Unity and Its Charter* (Praeger, 1969)

establishing the Preferential Trade Area for Eastern and South African States was signed in Lusaka, Zambia. The Treaty envisioned the transformation of the FTA into a common market and eventually an economic community. Predictably, the FTA got transformed into the Common Market for Eastern and Southern African (COMESA) in December 1994, after the ratification of the 1993 Kampala Treaty that established the organisation, with the declared objective of achieving “economic prosperity through regional integration”. Short of an economic community, COMESA, perhaps, can boast of the largest regional integration group in Africa with 19 member states, a landmass of 12 million square kilometres, a population of over 430 million, an annual import bill of about US\$152 billion, and an export bill of over US\$157 billion.<sup>37</sup>

The East, Central and South African regions do not lack in other efforts at regional economic cooperation in each of the areas,<sup>38</sup> although with different degrees of successes and failures. The delay in the decolonisation process in the Southern part of Africa may be the reason for the slow development of regional integration efforts in that part of the continent. But as soon as many of the countries realised their independence from colonial rule, negotiations began for economic cooperation, particularly to reduce their individual dependence on the apartheid regime of the Republic of South Africa. Thus, by the mid-1970s the “Frontline States” had commenced efforts along this line leading to the Lusaka Declaration and establishment of the Southern African Development Co-ordination Conference (SADCC) in April 1980. Twelve years later, on 17 August 1992, the SADCC got transformed into the Southern African Development Community (SADC) when the

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<sup>37</sup> <http://www.comesa.int/> accessed 07 January 2013

<sup>38</sup> Trends towards merger of the EAC, COMESA and SADC emerged at a Summit of the Heads of States of the three blocs in Kampala, October 2008. See Julien Emile Razafintsalama, ‘Common Market for Eastern and Southern Africa (COMESA)’, in Ufuk Tepebas (ed), *Regional Organisations in Africa: Institutionalisation and Cooperation* (Istanbul: Tasam Yayinlari, 2009) 27

treaty establishing it was signed in Windhoek, Namibia. It now has 15 member states, including the Republic of South Africa.<sup>39</sup>

The formation of the Intergovernmental Authority on Drought and Development (IGADD) by countries of the 'Horn of Africa' in 1986 was a reaction to specific ecological problems that threatened the whole of the region in the 1970s and early 1980s. It was a regional approach to supplement national efforts at moderating the impact of the severe environmental conditions that had engulfed the region for more than a decade. It was revitalised and renamed as the Intergovernmental Authority on Development (IGAD) by a 'Letter of Instrument.../Agreement' signed in Nairobi (Kenya) on 21 March 1996. The moribund East African Community, envisaged by the African Permanent Tripartite Commission for East African Cooperation, which lasted only 10 years before it collapsed (1967-1977), was re-established in November 1999 when the treaty of the East African Community was signed in Arusha. With a full complement of regional institutions, it sets for itself the goal of establishing a customs union, a common market, a monetary union, and eventually "the birth of a political federation of east African states". Regional integration efforts in the region have always been threatened by many political differences among its three member-states of Kenya, Uganda and Tanzania, particularly in relation to the membership of Rwanda and Burundi.<sup>40</sup> The conflicts in the Great Lakes region have also constrained the effectiveness of the Economic Community of Central African States (ECCAS),<sup>41</sup> which was established on 18 October 1983 by leaders of the countries of the

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<sup>39</sup> South Africa acceded to the SADC Treaty on 29 August 1994

<sup>40</sup> Both countries joined the EAC in July 2007. See Beatrice Kiraso, 'East African Community', in Tepebas (n 38) 35

<sup>41</sup> See Morten Boas and Kathleen M Jennings, 'War in the Great Lakes Region and Ugandan Conflict Zones: Micro-regionalisms and Meta-narratives', in Fredrik Soderbaum and Ian Taylor (eds), *Afro-Regions: The Dynamics of Cross-Border Micro-Regionalism in Africa* (Stockholm: Nordiska Afrikainstitutet, 2008) 153-170

Economic Community of the Great Lakes States (CEPL: Burundi, Rwanda and Zaire, now Democratic Republic of the Congo, DRC) and the Central African Customs and Economic Union (UDEAC), and Sao Tome and Principe. Although the ECCAS began functioning since 1985 and has established formal relations with the African Economic Community (AEC) since October 1999, its activities have remained at a low ebb compared with those of other regional economic communities in Africa, with the exception, perhaps, of the Arab Maghreb Union (AMU).

In the North, while the '*Conseil Permanent Consultatif du Maghreb*' had been established as an economic union of Algeria, Libya, Morocco and Tunisia as far back as 1964, integrative efforts in the region were in limbo until 1989 when the Marrakech Treaty established the Arab Maghreb Union (AMU), an organisation that has remained inactive to date.<sup>42</sup> More relevant to regional integration efforts in the region, perhaps, is the Community of Sahel-Saharan States (CEN-SAD), established in February 1998 as a framework for integration and complementarity, with a large membership that extends beyond the North African region to include many countries of West, Central and East Africa.

The development of the regional schemes did not preclude efforts aimed at continental integration, which got a boost by the second half of the 1970s. Previous resolutions and declarations recognising economic development and integration as a major component of Africa's developmental agenda, such as those of Algiers (September 1968), Addis Ababa (August 1970 and May 1973), Kinshasa (1976) and Libreville (July 1977), did not yield any fruitful results. The "Monrovia Declaration

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<sup>42</sup> Gary Clyde Hufbauer and Claire Brunel (eds), *Maghreb Regional and Global Integration: A Dream to be Fulfilled* (Washington, DC: Peter G. Peterson Institute for International Economics, 2008)

of Commitment” adopted by the Heads of African States in Liberia (July 1979) laid the foundation of the Lagos Plan of Action for the Economic Development of Africa 1980-2000, adopted in April 1980 as a collective response to the state of Africa’s economic problems.<sup>43</sup> The end product was the signing of the Abuja Treaty of 1991 establishing the African Economic Community (AEC).<sup>44</sup> The eventual transformation of the OAU into the AU in 2001 further deepened the continent-wide regional integration process. The continental integration was intended to be gradual, spanning “six stages of variable duration over a transitional period not exceeding thirty-four (34) years”,<sup>45</sup> with the existing sub-regional arrangements serving as the building blocks of the AEC.

Many bilateral and multilateral agreements seeking to facilitate cooperation in economic and technical matters exist in Africa. Eight of these have formally crystallised into regional economic communities (RECs), designated by the AU as the “pillars” of the AEC.<sup>46</sup> They include: Economic Community of West African States (ECOWAS) formed in 1975; Southern African Development Community (SADC) originally established as Southern African Development Coordinating Conference (SADCC) in 1980; Common Market for Eastern and Southern Africa (COMESA), which replaced the Preferential Trade Area (PTA) in 1994; Economic Community of Central African States (ECCAS) established in 1983; Community of Sahel-Saharan States (CEN-SAD) established in 1998; East African Community (EAC) re-established in 1999; Arab Maghreb Union (AMU) established in 1989; and

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<sup>43</sup> Organisation of African Unity (OAU), *The Lagos Plan of Action for the Economic Development of Africa 1980-2000* (Addis Ababa: OAU, 1980)

<sup>44</sup> The Treaty entered into force in May 1994 after ratification by the required number of States.

<sup>45</sup> Treaty Establishing the African Economic Community- Article 6(1), available at <[http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC\\_Treaty\\_1991.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf)> accessed 26 April 2012

<sup>46</sup> Not all the eight RECs have, however, signed the Protocols on Relations between the AEC and RECs; COMESA, ECCAS, IGAD, SADC and ECOWAS signed the protocol in February 1998; CEN-SAD was recognized as a REC at the OAU summit in Lomé in July 2000

Intergovernmental Authority on Development (IGAD) created in 1996 as a replacement for the Intergovernmental Authority on Drought and Development (IGADD), which had existed since 1986. The AU seeks to consolidate the existing sub-regional arrangements and align them with the larger regional integration agenda under the AEC.<sup>47</sup>

Apart from the RECs, other multi-lateral frameworks, economic or otherwise, operates on the African continent. They include the African Development Bank (AfDB), Southern African Customs Union (SACU),<sup>48</sup> New Partnership for Africa's Development (NEPAD),<sup>49</sup> the African Union (AU) itself, United Nations Economic Commission for Africa UNECA, UNDESA, CAFRAD,<sup>50</sup> Mano River Union (MRU),<sup>51</sup> OHADA,<sup>52</sup> Great Arab Free Trade Area (GAFTA) which is not mainly African but includes some countries of the Middle East,<sup>53</sup> Economic Community of the Great Lakes Countries (CEPGL), Lake Chad Basin Commission, Liptako-Gourma Authority (LGA), *Communaute Economique et Monetaire de l'Afrique Centrale* (CEMAC - Economic and Monetary Community of Central Africa),<sup>54</sup> Lake Chad Basin Commission,<sup>55</sup> Indian Ocean Commission (COI),<sup>56</sup> and the West African

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<sup>47</sup> For a brief historical and legal-institutional analysis of these efforts and the challenges and prospects of regional economic integration in Africa, see I. Salami, 'Legal and Institutional Challenges of Economic Integration in Africa', 2011 17:5 *European Law Journal* 667-682

<sup>48</sup> For a brief on the SACU, see Dumisani Mahlinza, 'Southern African Customs Union (SACU): History, Achievements and Challenges', in Ufuk Tepebas (ed), *Regional Organisations in Africa: Institutionalization and Cooperation* (Istanbul: Tasam Yayinlari, 2009) 71-76

<sup>49</sup> For a review of NEPAD's role in Africa's developmental initiatives, see Rawia M Tawfik 'NEPAD and African Development: Towards a New Partnership between Development Actors in Africa' (2008) 11:1 *African Journal of International Affairs* 55-70

<sup>50</sup> See also Simon Mamosi Lelo, 'Role and Place of Regional Institutions in Capacity Building and in Overall Development of the Continent: The Case of CAFRAD, in Ufuk Tepebas (n 48) 125-136

<sup>51</sup> P Pennetta, 'Mano River Union' (1996) 8:2 *African Journal of International and Comparative Law*

<sup>52</sup> See Alhousseini Mouloul, *Comprendre L'Organisation pour L'Harmonisation en Afrique du Droit des Affaires (O.H.A.D.A.)* (2<sup>eme</sup> ed, Decembre 2008)

<sup>53</sup> The African member-states of the GAFTA include Egypt, Libya, Morocco, Sudan and Tunisia, some of which are members of the moribund AMU.

<sup>54</sup> <<http://www.cemac.int/>> accessed 06 December 2012

<sup>55</sup> <[www.lakechadbc.org/](http://www.lakechadbc.org/)> accessed 06 December 2012



Economic and Monetary Union (WAEMU) or *Union Économique et Monétaire Ouest-Africaine* (UEMOA),<sup>57</sup> which is the main regional challenge to the ECOWAS.

Although each of these and several other regional cooperation efforts has a different milieu that underlie its emergence and growth, the need to cement historical and cultural ties as well as promote socio-economic development while increasing cooperation in political matters have remained common trends in the move towards regional and continental integration in Africa. A major challenge has been the multiplicity of organisations and the attendant overlapping membership and jurisdictional conflicts.<sup>58</sup>

### **Regionalism *sans* Court**

The absence of regional judicial enforcement mechanisms at the inception of regional integration is not a peculiarity of the ECOWAS alone. In Africa generally, regional integration has remained popular and the various schemes of integration have witnessed varying degrees of successes and challenges. One common observable trend was the absence of effective regional judicial framework to strengthen, or, at least, complement, the integration of markets and other spheres of the economies of the African States. Although some measure of harmonisation of (colonial) laws was attempted before and after independence, it was distinctively characteristic of regional integration schemes in Africa, until recently that the development of legal/judicial institutional mechanisms for furtherance of integration objectives were largely absent

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<sup>56</sup> <<http://politics.ioonline.org/>> accessed 03 January 2013

<sup>57</sup> <<http://www.uemoa.int>> accessed 06 December 2012

<sup>58</sup> Ariane Kösler, 'The Southern African Development Community – a State 20 Years after the Foundation', (2012) 6:1 *Regional Integration Observer* 2

or, at best, marginal. Where such supra-national judicial organs existed at all, their role was consigned to the background. For instance, all the regional integration mechanisms developed in the 1960s and 1970s did not make provisions for Courts of Justice, while a few had arbitration tribunals only. The general preference has been for quasi-judicial tribunals rather than full-fledged courts.<sup>59</sup> This is, perhaps a fall out of the wide consensus and long standing tradition of international commercial agreements being subjected to arbitration rather than litigation as a mechanism of dispute resolution because of the attendant advantages.<sup>60</sup> Thus, the OAU did not have a court but a Commission on Mediation, Conciliation and Arbitration, and a court was only created when the AU came into being. ECOWAS did not have a “court of justice” until its Treaty was revised almost two decades after its establishment. Before then, disputes arising from the activities of the organisation had been referred to an arbitral body established to resolve disputes among members.<sup>61</sup> Even the Banjul Charter did not create a Court but a Commission. The Inter-Governmental Authority on Development (IGAD), established as recently as 1996, did not have a court as part of its four “hierarchical policy making organs”. In fact, neither the 1996 “Letter of Instrument” which amended the original IGADD charter/agreement nor the “Principal Agreement” of 1986 itself made provision for establishment of any mechanism for conflict resolution even though the Member-States of IGAD dedicated themselves to establishing an “effective mechanism of consultation and cooperation for the pacific settlement of differences and disputes” and “deal with disputes between Member States within this sub-regional mechanism before they are referred to other regional or

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<sup>59</sup> Nsongurua J Udombana, ‘An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?’ 2003 28:5 Brooklyn Journal of International Law 818

<sup>60</sup> Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (London: Routledge, Taylor & Francis Group, (2010) 2

<sup>61</sup> The Arbitration Tribunal has not been functioning since 1975 because the Protocol on its Functioning is not yet enacted.

international organisations”. Also, the CEN-SAD has no court among its “organs” although a “Research and Legal Affairs” Directorate/Department exists within its General Secretariat.

The SADC took over from the SADCC in 1992 but had to wait until recently to embark on a number of institutional reforms “necessitated by the number of difficulties and constraints encountered in the process of moving the organisation from a coordinating conference into a community”.<sup>62</sup> These reforms have not, however, accommodated a “Court of Justice”. Rather, the leaders of the Community signed a Protocol in Windhoek (Namibia) in 2000 to establish a “Tribunal” to interpret the provisions of the legal instruments of the Community and settle disputes referred to it, although its jurisdiction is couched in wide terms.<sup>63</sup> The Tribunal became operational only in 2005. Even at that, the Heads of State of the SADC recently suspended the Tribunal, a decision that has been challenged before the African Courts of Human Rights.<sup>64</sup> While the ECCAS has a Court of Justice among its principal organs, no Protocol on the establishment of such a Court is in existence almost three decades since the formation of an organisation that proclaimed a Central African Common Market as its ultimate objective. The same could be said of AMU, which has a Court of Justice, based in Nouakchott (Mauritania) with two Judges from each of the Member States.

Judicial mechanisms for resolution of disputes have been established and are functional in other regional integration communities. They are, however, of comparatively recent origin in relation to other patently political organs of the communities. Then, the court systems were of limited competences and jurisdictions

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<sup>62</sup> <<http://www.sadc.int/index/print/page/54>> accessed on 12/02/2010 at 16.32 GMT

<sup>63</sup> Protocol on the SADC Tribunal – Article 14

<sup>64</sup> <<http://allafrica.com/stories/201105070101.html>> accessed 06 December 2012

even though sustained pressures are being mounted to widen the scope of the powers of the courts in the process of regional integration. The “courts” of justice of the EAC, COMESA, OHADA, UEMOA, CEMAC, EAC and the ECOWAS are noteworthy in this regard and will be discussed shortly.

The lack of recourse to judicial resolution of disputes in the early phases of regional integration politics seems ironical, given the fact that the development of regional integration in Europe, from which other integration efforts across the globe derive inspiration and logic, has been hinged on a strong tradition of judicial enforcement of integration laws backed by the establishment of supranational courts with considerable powers on the interpretation and application of the supranational EEC/EC/EU laws at various stages of the development of the organisation.<sup>65</sup> This is not the case in Africa, at least in the earlier stages of the development of the regional economic communities.

The reasons for such neglect of a judicial framework can be explained. The late arrival of regional integration courts in the continent of Africa is a function of the initial conception of the nature and purpose of regional integration groupings as well as the prevalence of undemocratic governance systems across the continent for some considerable period after independence. In the first instance, as economic groupings, the regional cooperation efforts were originally confined to or conceived of in terms of cooperation in economic, social and technical matters, devoid of high stake interstate politics that could require judicial intervention. Since the impetus for such efforts and the language of the instruments creating them were in the nature of business matters, it was thought, perhaps that the usual arbitral mechanism for

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<sup>65</sup> For a “balance sheet” of the contribution of the CJEU to the process of European integration, see: Renaud Dehousse, *European Court of Justice: The Politics of Judicial Integration* (London: Macmillan, 1998). See also: Anthony Arnall, *The European Court of Justice* (2nd ed., Oxford: OUP, 2006)

resolution of international business agreements and transactions could be adaptable to the complex issues involved in regional economic integration. Thus, arbitral institutions were either specifically created or parties enjoined to have recourse to other existing international arbitration mechanisms. The idea of a “court of justice” did not therefore begin to become relevant until the regional integration mechanisms began to expand in scope to incorporate sectors that are more complex than mere economic agreements and the impact of integration decisions became felt beyond the confines of the governments.

Secondly, and, perhaps, more importantly, is that most of the regional integration efforts germinated at a time when the wave of democracy with the attendant emphasis on the rule of law was yet to sufficiently make an impact in many African countries. Apart from the strict adherence to the arbitrarily drawn colonial boundaries, which became the basis for assertion of sovereignty and state independence across Africa, and the attendant inter and intra- State disputes of the first two decades of post-independence era, post-colonial African States were under one form of authoritarian rule or another, typified by the prevalence of military rule and authoritarian one-party rule across the continent. In the circumstances, resolution of conflict through the framework of the courts was often viewed with suspicion by many political leaders. This had its impact on delayed emergence of judicial framework in bilateral and multilateral agreements.<sup>66</sup> Lastly, the nature of arbitration itself, with its emphasis on mutual settlement rather than the adversarial nature of the court system, had a tendency to receive an easy reception among African leaders and citizens alike. In Africa, the colonial mode of adjudication, which introduced the adversarial system,

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<sup>66</sup> Absence of supranational courts is not peculiarly African. See Rosalyn Higgins, ‘The ICJ, the ECJ, and the Integrity of International Law (2003) 52 International and Comparative Law Quarterly 15

had little appeal to the generality of Africans who were used to the largely reconciliatory methods of adjudication. In traditional African society, and unlike the adversarial system, conflict resolution mechanisms were “geared towards reconciliation of the disputants”<sup>67</sup> which seems to favour a recourse to arbitration rather than contentious litigation as the preferred mode of conflict resolution at the level of state and individual actors. Issues of State sovereignty, immunity, enforcement of decisions and submission to jurisdiction are also critical.

### **Regional Courts in Africa: A New Norm?**

The emergence of the ECOWAS Court was not an isolated development of the 1990s Africa. The global waves of democracy and the rule of law influenced Africa and engineered the creation of regional (integration) courts across the continent. Thus, the last quarter of the Twentieth Century witnessed phenomenal growth in the development of continental and regional judicial mechanisms for interpretation of statutes and enforcement of Treaty obligations. The global expansion of judicial power,<sup>68</sup> a specific phenomenon of the last quarter of the Twentieth Century, has raised the spectre of courts’ intervention in various aspects of public policies across political systems. At the international level, the variety of complex bilateral and multi-lateral legal instruments and the increasing complexity of inter-group interactions has also induced the emergence of courts and tribunals as important actors. Moreover,

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<sup>67</sup> Mojeed Olujinmi A. Alabi, ‘Law Making in Pre-Colonial Yorubaland’ in Toyin Falola and Ann Genova (eds), *The Yoruba in Transition: History, Values and Modernity* (Carolina Academic Press, Durham 2006) 118

<sup>68</sup> C Neal Tate and T Vallinder (eds) *The Global Expansion of Judicial Power* (New York University Press, New York 1995)

globalisation (and, perhaps, its discontents<sup>69</sup>) has brought about new patterns of relationships that make increasing recourse to judicial mechanisms a regular feature of national and international political and economic relations. The expansion in the scope of integration, which is witnessing a shift in emphasis from mere economic cooperation agreements to more integrated markets, customs union, and political integration, with the attendant impact on individual citizens, corporate bodies and government necessarily increase the prospect of differences, disagreements, disputes and conflict that would require more formal resolution through the ordinary mechanism of the courts of law.

Finally, the emergence of the European Court of Justice as a leading actor for shaping the course and patterns of regional integration in Europe provide a ‘model’ of governance and policy-making that could be adapted, or at least explored, as regional integration moves beyond the narrow confines of economic, social and technical cooperation into more complex areas of political union, conflict prevention and resolution, and promotion of the tenets of liberal democracy.

The ECOWAS Court blazed the trail in activating judicial enforcement mechanisms in regional integration in Africa in the 1990s by the creation of its own Court in 1991. Similar steps were taken by the *Union Économique et Monétaire de l’Afrique de l’Ouest* (UEMOA) which created its own court in 1994.<sup>70</sup> The *Communauté Économique et Monétaire d’Afrique Centrale* (CEMAC), founded in 1994 with six members,<sup>71</sup> has a Community Court of Justice.<sup>72</sup> A Court of Justice established under the COMESA Treaty came into operation in Lusaka (Zambia) in

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<sup>69</sup> Joseph Stiglitz *Globalisation and Its Discontents* (Penguin Books, London 2002)

<sup>70</sup> See Article 16 of the UEMOA Treaty, <<http://www.uemoa.int/Documents/TraitReviserUEMOA.pdf>> accessed on 23 December 2012

<sup>71</sup> Cameroun, CAR, Congo Gabon, Equatorial Guinea, and Tchad

<sup>72</sup> <<http://www.cemac.int/institutionsCEMAC.htm#institution4>> accessed 23 December, 2012

1998. The East African Community (EAC) has a Court of Justice as part of its institutional mechanisms when the organisation was revived in 1999.<sup>73</sup> It has become operational in Arusha (Tanzania) since 2002. The members of the SADC, which had hitherto lacked a judicial mechanism, signed the protocol on the tribunal in Windhoek in 2000. This was in line with Article 9 of the Treaty of the Community which created a ‘Tribunal’ *albeit* with limited jurisdiction.<sup>74</sup>

On a continental level, while the African Charter on Human and Peoples’ Rights (the Banjul Charter) had been signed almost two decades earlier, the Protocol on the African Court on Human and Peoples’ Rights was not adopted until 1998, and the process of its ratification has been unexpectedly slow. Also, a Court of Justice was included as part of the transformation of the OAU into the AU. The signing of the Protocol on the establishment of the Court of Justice in Maputo in July 2003 marked, perhaps, the height of the wave of judicialisation that has come to characterise the activities of intergovernmental organisations, including regional economic communities, in Africa. Thus by the turn of the Century, international courts have had increased presence in Africa, as 15 of the over 40 permanent judicial institutions worldwide are noted to be “in Africa or limit their jurisdiction to African countries and territories”.<sup>75</sup>

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<sup>73</sup> East African Community Treaty 1999 - Article 9(1)(e) and 27(2)

<sup>74</sup> The SADC Tribunal was recently suspended by the Member States, <<http://www.internationaldemocracywatch.org/index.php/home/516-sadc-tribunal-mandate-suspended-by-member-states>> accessed 23 December 2012

<sup>75</sup> <<http://www.justiceinitiative.org>> accessed 05 September 2010



## **Neglect of the Court: A Major Defect of the ECOWAS Treaty**

The ECOWAS is a perfect example of neglect of the judicial framework in the conception and implementation of regional integration arrangements in Africa. Although efforts towards regional integration in the West African sub-region date back to the mid-1960s, culminating in the formation of the ECOWAS in 1975, it was not until 1991 that the Protocols establishing the Court of Justice of the Economic Community of West African States (ECOWAS) was signed.

This does not mean that there were no existing bilateral and multi-lateral treaties and other agreements in legal and judicial matters.<sup>76</sup> The regional community also had an arbitration institution that was set up to settle disputes among the member-states. It took a comprehensive revision of the Treaty establishing the community for an enabling legal framework for a community court, with all the constituent powers of a court of justice, to be established. A key provision in this regard is Article 57 of the Revised Treaty,<sup>77</sup> by which the Member States of the ECOWAS agree to cooperate in judicial and legal matters. This provision gives the needed legal framework for ratification of the Protocol on the Court of Justice, which was signed two years earlier.<sup>78</sup> Even then, the Protocol did not really enter into force until November 1996 when the process of its ratification was completed. The Court really came into existence only in 2001, ten years after the Protocol was signed, and did not commence operation until 2002 when its Rules of Procedure<sup>79</sup> were adopted and its first crop of judges appointed.

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<sup>76</sup> See, generally, Ademola Yakubu, *Harmonisation of Laws in Africa* (Ikeja: Malthouse Press, 1999)

<sup>77</sup> Signed on July 24, 1993 in Cotonou, Benin Republic

<sup>78</sup> See: 'Protocol A/P.1 /7/91 on the Community Court of Justice', (1991) 19 *OJ* 4-14

<sup>79</sup> See: 'The Rules of the Community Court of Justice of the Economic Community of West African States' (2002) 41 *OJ* 31

The establishment of the ECOWAS Court was, perhaps, a manifestation of the increasing appreciation, *albeit* delayed, among leaders of the West African sub-region, of the significance of cooperation in legal and judicial matters for the proper functioning of the processes and institutions, and the eventual attainment of the goals, of integration in the Community. In this sense, the creation of the Court as a supranational judicial organ is part of the reform agenda embarked upon by the ECOWAS and aimed at repositioning the Community for a dynamic role in contemporary international relations.

Although the ECOWAS Court is designed to play important role in the legal and political systems of the Member States and the region, its activities are yet to command enough visibility, both in scholarly writings and among the populace. Apart from seminar speeches and addresses of leading members of the court as well as other judges,<sup>80</sup> which have constituted significant sources of information about the origin, structure and working of the court,<sup>81</sup> no major scholarly analysis of the role of this unique court is yet available. While significant authoritative works exist on the ECOWAS,<sup>82</sup> only very few pay considerable attention to the legal aspects of the economic integration experiment in the sub-region.<sup>83</sup> Even then, examination of the

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<sup>80</sup> See, e.g., Justice Hansine Donli 'The Constitutional Powers of ECOWAS Court', *Nigerian Tribune* (Monday, 2 January, 2006) 32

<sup>81</sup> The ECOWAS Court collaborated with the Chief Justices of the Supreme Courts of the Member States to organize a maiden 'Conference of ECOWAS Chief Justices and ECOWAS Court of Justice' in Accra, Ghana, November 23-25, 2005 on the theme 'The Judiciary as a Partner in the Regional Integration Process'.

<sup>82</sup> E.g., Ralph I. Onwuka, *Development and Integration in West Africa: The Case of the Economic Community of West African States* (Ile-Ife, Nigeria: University of Ife Press, 1982); Domenico Mazzeo (ed), *African Regional Organizations* (NY: Cambridge University Press, 1984); Ralph I Onwuka and Amadu Sessay (eds), *The Future of Regionalism in Africa* (NY: St. Martin's Press, 1985)

<sup>83</sup> There are works, not necessarily limited to ECOWAS, on the legal and judicial institutions in Africa including: SA Akintan, *The Law of International Economic Institutions in Africa* (Leyden, the Netherlands: A.W. Sijthoff, 1977); AN Allott (ed), *Judicial and Legal Systems in Africa* (2<sup>nd</sup> ed, London: Butterworths, 1970); Sergio Ricca, *International Migrations in Africa: Legal and Administrative Aspects* (Geneva: ILO Office, 1989); AJGM Sanders, *International Jurisprudence in African Context* (Durban: Butterworths, 1979); Thomas Lee Roberts, *Judicial Organisation and Institutions of Contemporary*

role of the ECOWAS judicature in the integration process has been generally absent or at best, superficial, lacking any depth of scholarly analysis expected of a court of such potentially immense regional/international significance.

### **Justification for Studying the ECOWAS Court**

The role of courts generally, and the ECOWAS Court in particular, in the integration process in West Africa cannot be over-emphasised. As an institutional mechanism for the interpretation of the Treaties, Protocols, and other legal instruments governing the working of the Community, the weight of the interpretative powers of the Community Court is expected to have significant impact on the patterns of development and future of the ECOWAS, its Member States, and individual citizens of the Community. But then, while such contributions have been long understood and studied in other jurisdictions, the judicial mechanisms for furtherance of regional integration in West Africa have enjoyed little or no scholarly visibility.<sup>84</sup> This is particularly true of the ECOWAS Court. In the circumstances, an inquiry into the law, machinery, practice and procedural, as well as the role and contributions of the Community Court cannot but be an important contribution to the state of current knowledge of the ECOWAS and its relevance in the contemporary international system.

The ECOWAS Court is one among the several regional courts that have sprung up across Africa to boost the course of regional integration. It is an important one,

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*West African: A Profile* (NY: Institute of Public Administration, 1966); Austin Amisshah, *The Contributions of the Courts to Government: A West African Review* (NY: Oxford University Press, 1981); Evelyn A Ankumah, *The African Commission on Human and Peoples' Right: Practice and Procedures* (Boston: Martinus Nijhoff Publishers, 1996)

<sup>84</sup> Chapter II (n 176, 178 and 179)

deserving the need for specific focus on its work in this Thesis. The parent organisation, the ECOWAS is one of the oldest “pillars” of the African Economic Community (AEC), so designated by the African Union (AU). The ECOWAS is also one of the largest regional economic blocs in Africa, comprising sixteen sovereign States,<sup>85</sup> covering a landmass of 5,112,903 square kilometres, an estimated combined population of about 252 million, and a combined GDP of over US\$342 million. Although a late addition to the Community Institutions of the ECOWAS, the Court is also one of the oldest among such similar institutions across the continent.<sup>86</sup> It has in recent times given decisions that hit the headlines of major news outlets, thereby directing attention to its work.

The ECOWAS Court represents a major addition to the efforts targeted at facilitating supra-national enforcement of national obligations and commitments have been largely absent on the continent of Africa. While many of the RECs have upgraded their governing structure to accommodate some measure of judicial enforcement mechanism, only two of such courts have really established themselves in a manner reflective of the growing significance of regional framework for the furtherance of rule of law as an important component of regional integration efforts. One of the two is the Court of Justice of the Economic Community of West African States. However, while the judicial mechanism of the COMESA has functioned for a considerably longer period than the ECOWAS Court, it is to the latter court that one

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<sup>85</sup> Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Mauritania is currently not a member

<sup>86</sup> The regional Courts of Justice/Tribunals presently operating in Africa and the dates of their establishment include those of: African Court on Human and Peoples' Rights (2006), the Common Court of Justice and Arbitration (CCJA) of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, OHADA (1993), the Court of Justice of the *Union Economique et Monétaire Ouest Africaine*, UEMOA (1985), the Court of Justice of the Central African Economic and Monetary Community, CEMAC (2008), the Tribunal of the Southern African Development Community, SADC (1992), and the Community Court of Justice of the ECOWAS (1991)

must look in an attempt to examine the extent to which regional courts can contribute to the furtherance of regional integration objectives in the African continent. This is because, the range of issues which the Court has been invited to pronounce on and its decisions on the cases before it, howbeit few, within the first decade of its existence, have exposed the potentials and limitations of judicial mechanisms of regional integration in Africa. A studied examination of the role of such a Court within the institutional architecture of the parent organisation and the ecological factors that shape and are shaped by its decisions could throw up some useful albeit tentative propositions that could contribute to a theory of judicial regime of regional integration in Africa.

### **Historical and Organisational Contexts**

The historical milieu that favoured the emergence of the ECOWAS Court and the organisational contexts of its operation are intimately bound with those of the parent organisation, the ECOWAS.<sup>87</sup> Founded in 1975, the ECOWAS had a grand vision to promote rapid economic transformation of the region through a programme of phased economic integration over a period of fifteen years, leading to a customs union and ultimately a common market. The overall objectives were to maximise the collective resources of the countries of the region, improve the welfare of the populace, and reduce dependence on external countries. To achieve these objectives, the Treaty created four institutions and a number of technical commissions, including an

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<sup>87</sup> For more on the discussions in this section, see the author's paper, 'Historical Contexts and Organisational Architecture of the ECOWAS', <http://hq.ssrn.com/submissions/MyPapers.cfm?partid=1952759> accessed 07 January 2013

Arbitration Tribunal that was expected to ensure the observance of law and justice in the operations of the Community.

Apart from the inadequacies in the legal texts, which did not encourage reference to it as a dispute resolution mechanism, the Tribunal was not actually established. Also, like similar regional organisations in Africa, the objectives of the ECOWAS were not met within the 15 years originally targeted. Apart from this, there were ecological factors that retarded the progress towards integration. This included the absence of a strong solidarity for integration aggravated by the prevalence of authoritarian regimes, insufficiency of funds, economic diversity that was competitive rather than complimentary,<sup>88</sup> existence of “security threats” (coup d’état, armed banditry and civil wars) that challenged the capacity of the Member States to embark on meaningful developmental efforts,<sup>89</sup> and underdevelopment and dependence on the rich countries of the West.<sup>90</sup> With these conditions and inadequacies in the Treaty and other texts, the ECOWAS became a mere debating forum or “a loose confederation plagued with problems”.<sup>91</sup> Many decisions remained unimplemented in the face of divided loyalties between commitments to the ECOWAS and other intergovernmental organisations that existed and still exist within the organisation.<sup>92</sup> These challenges slowed down the integration process.<sup>93</sup> The potential for a monetary union was even

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<sup>88</sup> See John M Kabia, *Humanitarian Intervention and Conflict Resolution in West Africa: From ECOMOG to ECOMIL* (Surrey: Ashgate Publishing Ltd, 2009) 57-58

<sup>89</sup> David J Francis, *Uniting Africa: Building Regional Peace and Security Systems* (Hampshire: Ashgate Publishing Ltd, 2006)

<sup>90</sup> K B Asante, *The Political Economy of Regionalism in Africa: A Decade of the Economic Community of West African States (ECOWAS)* (Praeger, 1986)

<sup>91</sup> Peter M Dennis and M. Leann Brown, ‘The ECOWAS: From Regional Economic Organisation to Regional Peacekeeper’, in Finn Laursen (ed), *Comparative Regional Integration: Theoretical Perspectives* (Hampshire: Ashgate Publishing Ltd, 2003) 230

<sup>92</sup> See Daniel C. Bach, ‘The Politics of West African Economic Co-operation: CEAO and ECOWAS’ (1983)21:04 *Journal of Modern African Studies* 605-623

<sup>93</sup> Margaret P Karns and Karen A Mingst, *International Organisations: The Politics and Processes of Global Governance* (London: Lynne Rienner Publishers, 2004) 204

doubted,<sup>94</sup> The lack of strong political will actually reflected in the creation of weak legal and institutional frameworks for integration.

The developments within the global environment from about the mid-1980s exposed the inadequacies of the Lagos Treaty and compelled the ECOWAS leaders to embark on reform of the institutional and legal frameworks of the Community starting with the creation of the Court in 1991 and revision of the Treaty two years later. The Revised Treaty was concluded in Cotonou, Benin Republic, and was signed on 24 July 1993. The unimpressive economic conditions of the Member States, the need to take the provision of the Treaty of the AEC into account, and the integration of Europe and creation of a Free Trade Area in the Americas were added impetus for reforms.<sup>95</sup>

The historical ecology that propelled the creation of the ECOWAS Court necessarily constrained the role envisioned for it under the Revised Treaty of 1993. The creation of new institutions and restructuring of existing ones was aimed at tackling the challenges of integration in a globalised world.<sup>96</sup> But the shortcomings and inadequacies, capable of retarding integration, have remained, thereby propelling further reforms in 2001,<sup>97</sup> 2006 and 2010. The revisions, which are still on-going, have addressed the several obstacles and weaknesses inherent in the existing institutional mechanisms and legal texts of the ECOWAS, particularly in relation to the Court. As a central institution whose work affects and is affected by the other

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<sup>94</sup> Paul R Masson and Catherine Pattillo, *Monetary Union in West Africa (ECOWAS): Is It Desirable and How Could It Be Achieved?* (IMF, 2001)

<sup>95</sup> The FTA itself was America's reaction to the expansion of European market. For the development of Free Trade Areas, see: Joshua A. Goldstein and Jon C. Pevehouse *International Relations* (8<sup>th</sup> ed, NY: Longman, 2008) 294-296

<sup>96</sup> For a discussion of the origin and development of the 1993 Treaty and development of new institutions, see Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Hampshire: Ashgate Publishing Ltd, 2006)

<sup>97</sup> See [2001] OJ 40 Extract

Community Institutions and Organs, the ECOWAS Court must be dynamic in the face of continuous updating of the legal/institutional mechanisms as dictated by global trends and local realities.

### **Focus of the Thesis**

This research seeks to direct attention to the ECOWAS Court as a distinct actor within the contemporary international legal and political system, particularly in relation to its role in the integration efforts in the West African sub-region. Broadly, it seeks to examine the contribution (both actual and potential) of the Court to the shaping of the legal/constitutional framework within which the ECOWAS as an economic community operates. It seeks to *know* what the Court does and *how* the Court goes about its work. It asks what are the institutional mechanisms and processes provided under the Treaty and other related Community texts for the exercise of the Court's power? The essence is to isolate patterns and trends that could be useful in building a theory of the Court's behaviour.

The central thesis of this research is the extent to which the Court of Justice can nurture the establishment of a supranational legal order in West Africa is a function of its institutional position within the power structure of the ECOWAS and willingness of the Member States to invest the Court with adequate legal powers sufficient for effective discharge of its mandate. In essence, the ability of the Court to serve as an effective regional enforcement mechanism for implementation of Treaty obligations would depend on the extent to which the Member States are prepared to surrender part of their respective sovereignties and pool them together for the overall objective of furthering the integration process in the region. The theme revolves around the



effectiveness of the Courts' decisions in the Member States, with a view to ascertaining whether, and if yes, to what extent, is the Court strategically positioned, within the institutional architecture of ECOWAS to serve as an effective player in the emergence and development of a regional legal order in West Africa. Accordingly, the Thesis focuses on the:

- Origin and evolution of the community judicature of the ECOWAS;
- Institutional position of the Court, in relation to other organs of the ECOWAS;
- Law governing the operation of the Court – its establishment, functions and powers;
- Internal organisational structure, workings and dynamics of the Court and the way these have worked out in practice in facilitating/hindering the effective performance of the work of the Court;
- Decisions of the Court and specific issues of regional integration arising from them, as a way of assessing the progress of the Court towards creating a community legal order;
- Challenges facing the Court and the institutional concerns of its operational dynamics as a judicial body operating within a wider organisational dynamics;
- Prospects of the Court, in the light of the findings of the study and from lessons learnt from similar institutions of African and non-African origin, within the context of the organisational goals and challenges facing the ECOWAS.

### **Research Questions**

The research seeks to answer questions such as: what does the ECOWAS Court do, and how does the Court go about doing its work? What are the available

legal and institutional mechanisms put in place to assist the Court in the performance of its duties? How does the work of the Court affect the work of the other Institutions and how do these other Institutions relate to the Court? What are the various challenges that have or are confronting the Court in the performance of its duties? In what ways can the institutional processes and workings of the Court enhance or retard the progress towards economic integration in West Africa? What are the prospects in this regard?

Generally, this research takes a critical look at the role that the ECOWAS Court has or is capable of playing in the furtherance of regional integration in West Africa. The issue-areas germane to the analysis will include the relationships between the Court and other Institutions, legal and institutional framework for the operation of the Court, the actual scope of authority of the Court, and enforcement problems and other challenges of growth and development. In examining these issue-areas, the research seeks to highlight the challenges and prospects of using a 'judicial organ' such as the ECOWAS Court as an effective vehicle of strengthening the uniting ties of regional integration not only in West Africa but also in Africa as a whole.

In directing attention to the issue-areas highlighted above, the study seeks to prepare a 'balance sheet' of the contribution of the Court to the integrative process of the ECOWAS. The scope and limits of the jurisdiction and competence of the court as well as the issues of inadequacy of Community texts and absence of effective enforcement mechanisms are put in proper perspective. Overall, the Thesis analyses the institutional strengths and weaknesses of the Court, paying particular attention to the historical, organisational, legal, institutional, and other contextual characteristics that define the limits of possibilities as far as the role that the Court can play in an emerging regional integration scheme is concerned.

## **Objectives of the Study**

The broad objective of this research is to analyse the contribution of the ECOWAS Court to the regional integration process in West Africa. More specifically, it seeks to:

1. Trace the origin and evolution of the community judicature of the Economic Community of West African States (ECOWAS), and account for the delay in the creation of judicial enforcement mechanism of a Community Court of Justice;
2. Examine, critically, the law (including the sources) governing the operation of the Court and determining the extent of its powers: establishment, functions and powers
3. Situate the Court within the overall organisational architecture of the ECOWAS, with a view to determining the institutional position of the Court, in relation to other organs and Institutions of the Community;
4. Re-examine the internal workings and dynamics of the Court and the way these have worked out in practice in facilitating or hindering the effective performance of the work of the ECOWAS Court;
5. Analyse some decisions of the Court that have a bearing to the integration process. In this sense, the research work reviews specific problems, questions and issues that arise from the rulings of the Court in cases that have come

before it, which are shaping the constitutional foundations of integrative efforts in the sub-continent. These issues and questions are examined within the context of the organisational goals of the Community, as a way of assessing the progress of the Court towards creating a Community legal order in West Africa;

6. Highlight the challenges facing the Court and the institutional concerns of its operational dynamics as a judicial body in a complex web of institutional politics; and,
7. Make appropriate suggestions and recommendations, based on the findings of the study and experiences of other similar institutions, for improved performance of the Court, within the context of the organisational goals and aspirations of the ECOWAS.

### **Methodology and Limitations**

This research adapts the methodology of the Social Sciences to the study of a judicial institution. It is an institutional analysis that seeks to use primary data on the ECOWAS Court and its work to ascertain the real and potential contributions of the Court to the development of the regional integration agenda of the parent organisation, the ECOWAS. From an institutional-analytical perspective, the research sets out to combine extensive library research with field statistics from the Registry of the Court, interactions with critical policymaking elites of the Court, and direct observation and knowledge of the researcher as a Lawyer licensed to practice before the Court.

While the Fieldwork provided the raw data, the subsequent analysis takes cognisance of the historical, social, economic, political and cultural milieu that define the origin, growth, institutional strengths and weaknesses of the Court. In this sense, the research undertakes a single-case analysis, without any attempt at comparing the ECOWAS Court with any other regional or international court. But the approach does not preclude references to the CJEU or other courts such as those created under the Andean Sub-regional Integration Agreement (the "Cartagena Agreement"),<sup>98</sup> the Treaty of Chaguaramas establishing the Caribbean Community and Common Market (CARICOM),<sup>99</sup> or other regional courts in Africa, for illustrative purposes. Analysis of the formal structures and processes of the Court is contextualised for full understanding of the patterns of relations and dynamics that shape decision-making and processes within the system. The ECOWAS Court is examined as an institutional mechanism of the ECOWAS for enforcement of its laws and other Treaty obligations that are central to the regional integration process in West Africa.

### Field Work

The nature of this study necessarily constraints the research to a heavy and in-depth use of library and archival materials, including statistical data and information kept in the Court's Registry and Library/Documentation offices of both the Court and the ECOWAS Commission. Frequent visits to the Court over a period of two years and a six-month internship exposed the researcher to many primary data that not readily available for public information or on the internet. During the period of the research, which started in 2009, the website of the Court collapsed. While a new website was launched in June 2011, it did not become operational until November

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<sup>98</sup> The Cartagena Agreement was signed in 1969 but the Treaty creating the Court of Justice entered into effect in 1983

<sup>99</sup> <[http://www.caricom.org/jsp/community/revised\\_treaty-text.pdf](http://www.caricom.org/jsp/community/revised_treaty-text.pdf)> accessed 06 December 2012

2012 and still has little raw data on the workings of the Court by the end of the year. Unfortunately, the request for direct interviews of the Judges of the Court did not materialise despite initial approval and several and repeated demands and enquiries.<sup>100</sup> However, this was compensated by the several visits to the Court between May and December 2012 during which the researcher shadowed the actual internal workings and other operational dynamics of the Court. This period enabled the researcher to have access to relevant primary sources, including court records, library and archival materials specific to the Court.

The objectives of the field work was to access the primary data related to the work of the Court and observe its proceedings and internal processes with a view to better understanding the actual workings of the Court and validating data obtained from secondary sources. Although the disclosure rules would not permit release of data without the approval of the President of the Court, the physical presence facilitated access to basic data that enhance the quality of the Thesis. Solely the researcher conducted the fieldwork, but French-speaking assistants in view of the multi-language character of the Court accompanied him on two occasions. The Assistants helped in negotiating access only where the relevant officials did not speak English.

### Limitations

The ECOWAS Court has only operated effectively for eight years, and this necessarily limits the scope of available data on its work. Notwithstanding expanded jurisdiction and widened access brought about by the Supplementary Protocol on the

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<sup>100</sup> Although the President of the Court gave a formal approval for an interactive session with the Judges, to ascertaining the nature of the proposed interview, the meeting could not hold due largely to the inability of the Secretary to the President to secure a convenient date to have all the Judges seated for such an interactive session

Court in 2005, the machinery of the Court is still not fully functional, with several problems constraining data availability. Apart from the issue of the website already mentioned, the decisions of the Court are not readily available for purchase. The Court had no authoritative law-reporting outfit until March 2011 when it published the *Community Court of Justice, ECOWAS, Law Report*, which contained 19 judgments delivered by the Court over a period of five years (2004-2009). The unofficial *Community Court of Justice Law Reports*, published by a private law firm, is not regarded as authoritative by officials of the Court although it contained four judgments not officially reported. Only 19 of the 65 decisions of the Court as of December 2012 are officially reported, while certified true copies (CTC) of many are not available because of reported problems of translation. The Court therefore has very few decisions that can be relied upon in our analysis of its operation.

The *Official Journal* of the ECOWAS, published by the ECOWAS Commission, contained all the legal texts and documents relating to the work of the Court, and this has eased access to some primary data. Even then, the last edition of the Journal was published in 2010. The raw statistical data on the work of the Court, obtained from the Registry during the six-month internship, provided the researcher with additional opportunities that eased access to some primary data. But the inability to have viva voce interviews with the Judges on the subject-matter of the research work, as originally envisioned, constitute a major void that could, perhaps, have significantly enriched the contents of this Thesis. The range of issues and questions to which this study is capable of beaming its searchlight are wide, and might not have been fully addressed within the limited time, space and other constraints to the research work. While attempts are made as far as possible to provide answers to many of the issues raised, the stage of development of the Court and paucity of relevant data

may make some of the prognosis and conclusions tentative. Where issues raised are incapable of definitive submissions, it is believed that discussions of such issues would provide intellectually stimulating illuminations and generate valid but tentative topical issues for further research as the Court grows and relevant data become more readily available.



## Chapter II

### **THE ROLE OF COURTS IN REGIONAL INTEGRATION IN AFRICA**

#### **Introduction**

This Chapter surveys the literature on international courts and tribunals, and regional courts in particular, in the process of economic integration, with emphasis on the traditions and dynamics of the emergence and relevance of such institutions within the specific African conditions. It opens with an examination of the emergence and relevance of courts within the international system, noting the theoretical and intellectual traditions that have come to define their significance and role within the international community. The Chapter recognises that international institutions in general and international courts in particular are products of treaties freely entered into by sovereign States, and have remained, at least up to the end of World War II in 1945, limited instruments of judicial enforcement of States' international (treaty) obligations.

Because treaties provide the legal foundation for the existence and operation of international courts and tribunals, the State Parties to such treaties have significant influence in determining the limits of the jurisdiction and scope of operation of international courts. Ultimately, international courts function within the limits permitted by the sovereign existence of the signatory parties to the treaties and other associated instruments creating them. To that extent, any writing on international judicial institutions necessarily brings to the fore theoretical discussions on the nature and patterns of relationships that exist or ought to exist between international courts and the domestic courts of the sovereign States that created them. A complex

dimension to the discourse on the international-domestic interface in legal relations, hitherto discussed within the framework of such universal institutions as PCIJ and the ICJ, was introduced with the emergence of the Court of Justice of the European Communities (now the Court of Justice of the European Union, CJEU) with its own brand of legal traditions and culture. This EU model, which is *sui generis* but fast transplanted globally, is re-defining the role of international (and regional) courts. Rather than remain instruments of policy in the hands of sovereign actors, international courts, particularly regional integration courts of the kind distinctively pioneered by the CJEU, are fast becoming instruments by which state and non-state actors could be held accountable for their self-created international (treaty) obligations. In the field of international economic relations particularly, international (mainly regional) courts have effectively emerged and remained key subjects rather than mere objects of international law.

The EU regional integration scheme may be fraught with problems,<sup>1</sup> but it is widely accepted as a ‘model’: the conformity to, or departure from, this model provides the framework for discussions of regional integration in other, particularly the developing, parts of the world. While the EU development is gaining increasing attention and acceptability worldwide, the results and impact have been far from uniform or even significant in comparative perspective. For contextual and other reasons, wholesale transplant of the EU model has been impossible, and significantly wide variations exist between what the CJEU represents and what the courts of the other regional communities that seek to replicate EU institution do in practice. The Chapter reflects on these differences and seeks to explain them. In the African

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<sup>1</sup> See, eg, Gerda Falkner (ed), *The EU’s Decision Traps: Comparing Policies* (NY: Oxford University Press, 2011); Antje Wiener and Thomas Diez (eds), *European Integration Theory* (2<sup>nd</sup> ed, NY: Oxford University Press, 2009)

context, available scholarly work points to a combination of factors, mostly environmental, accounting for the delayed emergence of regional courts notwithstanding aggressive pursuits of integration efforts in many parts of the continent. Scholars have also noted a lack of political will for effective integration, inadequacy of legal texts and institutional weaknesses as major obstacles to emergence of effective regional adjudicative systems in Africa, thereby giving the African courts far lesser a prominent role than the CJEU in the politics of regional integration in the continent. In the circumstances, exploration of the legal dimensions of regional economic integration in Africa has attracted the attention of few scholars, while scholarly analysis of the specific role of the courts in the process of regional integration is virtually non-existent until lately. The ECOWAS Court is not an exception in this regard. A new institution that became operational about ten years ago, it has had to cross many landmines in its march to relevance within the organisational architecture of a regional Community that is yet to fully appreciate the full import of a court of justice in the process of regional integration. The inadequate scholarly work on the ECOWAS Court, compared to other organs and institutions of the Community, in the process of regional integration in West Africa can be explained within this matrix.

### **Courts within the International System**

The place of adjudicative institutions in the working of the international legal system is normally discussed as a component of the Law of International Institutions and Organisations. This is because most international courts and tribunals operate within the framework of international organisations. While the subject-matter of

international law had commanded jurisprudential discourses of Hugo Grotius and other early thinkers,<sup>2</sup> the study of international judicial institutions did not command the attention of scholars until international organisations emerged as major actors within the international system. The latter development itself was an outgrowth of the philosophical discourses on the search for peace, which found expression in the intellectual justification of a “United States of Europe” in the writings of Abbé de Saint-Pierre (1713), Jean-Jacques Rousseau (1761), Immanuel Kant (1795), Saint-Simon (1814), and other subsequent writers.<sup>3</sup> The emergence of international courts and tribunals was therefore closely linked with the same concern for dispute resolution mechanism that originally constrained state actors to conclude agreements and treaties for avoidance of war and conflicts. As the influence of non-state actors in global affairs increased, with international institutions taking frontline positions on leading issues in global affairs,<sup>4</sup> and increased interdependence in an era of globalisation,<sup>5</sup> international adjudicative frameworks blossomed with “multiplication of international legal institutions”.<sup>6</sup> The logical course of action in the academia is to direct scholarly attention to these international courts and institutions with a view to understanding the contexts of their origin and development, their workings and their role within the international system generally and in the process of regional integration in particular.

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<sup>2</sup> See Stephen C. Neff (ed), *Hugo Grotius On the Law of War and Peace* (Cambridge: Cambridge University Press, 2012). For a study of the origins of international law, see David J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2007)

<sup>3</sup> For a summary of these and other contributions that provided the needed platform for European integration, see Pierre F Walter, *The Restriction of National Sovereignty: From the Early Peace Plans to a World Government*, (Newark: Sirius-C Media Galaxy LLC, 2010) 61-86

<sup>4</sup> Hartley, Trevor C, *European Union Law in Global Context: Text, Cases and Materials* (Cambridge University Press, 2004) 1

<sup>5</sup> For the meaning of globalisation within the context of global interdependence, see Richard J. Payne and Jamal R. Nassar, *Politics and Culture in the Developing World: The Impact of Globalisation* (2<sup>nd</sup> ed, NY: Pearson Longman, 2006) 2, 99-116

<sup>6</sup> Rosalyn Higgins, ‘The ICJ, the ECJ, and the Integrity of International Law’, (2003) 52:1 International and Comparative Law Quarterly 12

## **Emergence, Significance and Growth**

Recognition of the important role of judicial institutions in international law dates back to the 19<sup>th</sup> Century. Early treaties of friendly relations among States had always contained arbitral clauses with the attendant emergence of arbitral tribunals and other bodies, often on *ad hoc basis*. The emergence of permanent international judicial bodies as major actors within the international system was a specific phenomenon of the 20<sup>th</sup> Century. From individual arbitration, through arbitral commissions, to permanent arbitral bodies and later courts of justice, international institutions performing quasi-judicial and adjudicative functions have since grown in number, size, variety and scope of operation. While recorded history tends to trace their origin to the Hague Conferences of 1897 and 1907, evidence exists that a proposal for the establishment of an international criminal court had been submitted by the Swiss Gustave Moynier as far back as 1872. However, the International Criminal Court (ICC) did not come into existence until 1998 when the Treaty of Rome came into force. The Permanent Court of Arbitration (PCA) had been established in 1899 while the Permanent Court of International Justice (PCIJ), set up in 1921, had functioned between 1922 and 1946 before the International Court of Justice (ICJ) succeeded it. The unique position the ICJ occupies within the UN system and the increasing expression of preference for peaceful resolution of disputes were the immediate impetus for the growth and proliferation of arbitral and judicial institutions.

One question that should be raised in any discerning mind is why would the international system require a separate set of international courts and tribunals when

national frameworks exist for the settlement of disputes and resolution of conflicts? For Helfer, such a development is not in accord with orthodox conception of States as independent actors seeking to protect their independence and territorial integrity within the international system. Notwithstanding the seeming irrationality in such a course of action, the author believes it is in the overall interest of State actors to accept such “constrained independence” because of the impact it has in enhancing the credibility of international law.<sup>7</sup> Moreover, in an international system comprising multiple actors, disputes are unavoidable. In a situation of conflicting interests among nations, the need to create a legal order could not be overemphasised. Also, some form of law and order is required in the functioning of the international system. Indeed, as in the domestic sphere, the existence of a body of laws within the international system necessarily presupposes that machinery be put in place for codification as well as interpretation and application of such laws.<sup>8</sup> In a system of inter-state relations dominated by recourse to military brinkmanship and armed combat, therefore, pacific resolution of disputes and disagreements, before they snowball into major conflicts, cannot but command the attention of scholars and policy makers alike. In this regard, the existence of international courts in general and regional integration courts in particular have remained a unique development that move inter-state intercourse from the vagaries of power politics to the sphere of cooperation in all aspects of life – socio-economic, cultural, scientific and technical as well as legal and judicial. Finally, recourse to international courts and tribunals is gaining popularity as existing frameworks for enforcement of fundamental rights and

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<sup>7</sup> Laurence R Helfer, ‘Why States Create International Tribunals: A Theory of Constrained Independence’, in Stefan Voigt, Max Albert, and Dieter Schmidtchen (eds), *International Conflict Resolution: Conferences on New Political Economy* 23 (Tubingen: Mohr Siebeck, 2006) 253-276

<sup>8</sup> Luard Evan, *The United Nations: How It Works and What It Does* 2<sup>nd</sup> ed (Macmillan, 1994) 89

freedoms, where they exist at all, becomes increasingly threatened at the domestic level.<sup>9</sup> Accordingly, the last decade of the Twentieth Century has witnessed an increase in the number of international courts and tribunals; there has been increase in the range of issues over which they have competence. There is also an extension of individual access to international courts and tribunals, and a tendency towards formalised court-like procedures.<sup>10</sup>

Whether the proliferation of international judicial institutions is supportive or destructive of the growth of an international legal system is debatable.<sup>11</sup> But the phenomenal increase in the number and variety of these courts and tribunals do raise some concerns about the working of the international system. Scholars have indeed raised concern over such issues as overlapping of jurisdiction among multiple courts and tribunals,<sup>12</sup> composition and appointment processes in these adjudicative fora,<sup>13</sup> hierarchy of authority among the courts and tribunals,<sup>14</sup> and effects of the multiplicity on the work of the International Court of Justice (ICJ).<sup>15</sup> Other areas of concern border on the functioning of the international system in an area of multiplicity and

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<sup>9</sup> Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge: Cambridge University Press, 2011) 13

<sup>10</sup> Voigt, Stefan 'Introduction', in S Voigt, M Albert and D Schmidtchen (eds), *International Conflict Resolution: Conferences on New Political Economy* (Tubingen: Mohr Siebeck, 2006) 1-2

<sup>11</sup> Kingsbury, Benedict, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31:4 *Journal of International Law and Politics* 679-696

<sup>12</sup> Shany, Yuval, *The Competing Jurisdictions of International Courts and Tribunals* (NY: Oxford University Press, 2004)

<sup>13</sup> See Erik Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61:4 *International Organisation* 669-701; Erik Voeten, 'The Politics of International Judicial Appointments' (2008) 9 *Chicago Journal of International Law* 387; Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics* (NY: Oxford University Press, 2010)

<sup>14</sup> Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503. For discussions of the conflicts of international legal norms, see Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012)

<sup>15</sup> Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2003) 25 *Michigan Journal of International Law* 849-863; Jonathan I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1998) 31 *New York University Journal of International Law and Politics* 697

duplication of international judicial enforcement mechanisms. The extent to which the increasing number and variety of courts and tribunals could threaten the traditional means of settling international disputes, including the “contrarious character” of the multiplicity has also been raised.<sup>16</sup> The potential “fragmentation” of the system that may result from inconsistent and at times contradictory decisions occasioned by the proliferation have been noted to pose some risks to orderly development of the international legal system.<sup>17</sup> Suggestions for eliminating or at least moderating the risks have included recourse to appellate review, preliminary reference system, consolidation of proceedings, and effective system of precedent.<sup>18</sup> Whatever be the methods that are adopted, the difficulty of establishing a hierarchy among these international institutions remains a major source of concern even if one has to concede, following Charney, that there are indeed some inherent strengths in the multiplicity of international courts and tribunals.<sup>19</sup> Even then, one cannot but concede to Higgins who, in her Keynote Address, views the unavoidable multiplicity as an opportunity to create some form of unity among institutions, applicable norms and judicial officers.<sup>20</sup>

One other issue of greater concern in any discussion of international adjudication is the extent to which the independence of such courts could be

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<sup>16</sup> JG Merrills, ‘The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory’ (2007) 54:2 *Netherlands International Law Review* 361-393

<sup>17</sup> The risks are discussed in August Reinisch, ‘The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration’, in Isabelle Buffard, James Crawford, Alain Pellet, and Stephan Wittich (eds), *International Law between Universalism and Fragmentation* (Martinus Nijhoff Publishers, 2008) 107 – 125

<sup>18</sup> *Ibid* 119-124

<sup>19</sup> Jonathan I Charney, ‘The Impact on the International Legal System of the Growth of International Courts and Tribunals’ (1999) 31:4 *Journal of International Law and Politics* 697-708

<sup>20</sup> Rosalyn Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) 55:4 *International and Comparative Law Quarterly* 791-804



guaranteed, especially when vested interests of powerful state parties are involved.<sup>21</sup> While efforts are often made to secure the independence and integrity of the judges and other tribunal members, through appointment processes designed to ensure emergence of the best candidates for the jobs, the influence of outsiders, notably state party, may not be totally eradicated. Unlike the apex of national judiciary authority that is assured of finality of its judgments, decisions, rulings and opinions, the “final” decision of an international court or tribunal may be subjected to some other forms of review, revision or interpretation not necessarily by the appellate chambers of the court, if any, but rather by external non-judicial authority. Implementation of the judgments of the ICJ, for instance, is sometimes subject of continuous negotiations years after the decisions are supposedly made. Doubts, thus, exist on the status of these decisions as “sources” of international law.

There are limitations on the scope of the judicial authority of international courts and tribunals, particularly in relation to their relative power vis-à-vis those of the more ‘political’ organs in which the state parties have greater influence on decision-making. Indeed, there is controversy over the extent to which such courts should control the acts of the other organs. The United Nations Charter, for example, places the International Court of Justice in a subordinate position *vis-à-vis* the Security Council. Notwithstanding its description as the ‘principal judicial organ’ under Article 92 of the Charter, the International Court of Justice has “no express power of judicial review”<sup>22</sup> over the UN organs and activities, although its decisions on the legal status

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<sup>21</sup> Ruth Mackenzie and Philippe Sands, ‘International Courts and Tribunals and the Independence of the International Judge’ (2003) 44:1 Harvard International Law Journal 271

<sup>22</sup> Malcolm N Shaw, *International Law* (4<sup>th</sup> ed, Cambridge: Cambridge University Press, 1997) 775; TO Elias, *New Horizons in International Law* (2<sup>nd</sup> rev ed, Dordrecht: Martinus Nijhoff Publishers, 1992) 269-270

of UN resolutions have carried some weight of authority.<sup>23</sup> Also, international courts hardly possess unfettered power over other organs and institutions of their parent bodies. Rather, they are, like any court or judicial body, domestic or international, subject to some limitations, legal or otherwise, which define the scope of their operation and relevance within the international system. Elias categorises these limitations as:

- (a) Restrictions contained in the constitutive instrument(s) precluding the judicial organ from reviewing the acts of the other organs or limiting the extent of any such review;
- (b) An intrinsic limitation by which the court is not expressly forbidden from reviewing but it is of the nature of the sovereign powers that the Court cannot sit in judgment over them or modify or abrogate them; and,
- (c) Self-imposed limitations.<sup>24</sup>

This is a major point of departure for the CJEU and other related courts of regional communities exercising or seeking supranational legal authority.

### **Variety and Classification**

Scholars have identified a variety of international judicial institutions of different types, functions, and jurisdictional competences within the contemporary international system. Far from the situation between the end of the World War I and the 1960s

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<sup>23</sup> Elias (n 22) 86-88

<sup>24</sup> Ibid 271

when the PCIJ and the ICJ “stood above as the forum for the resolution of international disputes”, Higgins notes that the international system now comprises a “plethora of well-developed judicial or quasi-judicial institutions operating under the great human rights treaties of the UN, as well as under the regional treaties”.<sup>25</sup> The author notes the existence of the European Court of Human Rights, the Committee on Human Rights under the International Convention for Civil and Political Rights (1966), the United Nations Committee on Torture, the Inter-American Court and Commission on Human Rights, the African Court on Human and Peoples’ Rights, the Hamburg Law of the Sea Tribunal, among others. The range of international courts and tribunals has since grown beyond the courts exercising general jurisdictions to include many multi-lateral, tri-lateral and bilateral judicial and quasi-judicial bodies. A more recent, comprehensive and systematic classification of international judicial institutions in terms of their jurisdictions and geographical areas of operation is provided in a synoptic chart of “international judicial bodies” developed by Romano.<sup>26</sup> An updated version of the chart lists forty-three different institutions (existing, extinct, nascent or proposed), of which sixteen are currently functioning, grouped by subject- matter jurisdiction in seven clusters.<sup>27</sup> These institutions and mechanisms have very few legal/functional links among one another. The essence of looking at the chart is to appreciate the variety of international judicial institutions operating on the international scene and locate the place of the ECOWAS Court within this matrix.

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<sup>25</sup> Higgins (n 6) 12.

<sup>26</sup> Cesare P R Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31:4 *Journal of International Law and Politics* 709

<sup>27</sup> <<http://www.pict-pcti.org>> accessed 5 October 2009

The judicial bodies listed on the chart include international courts exercising general jurisdiction such as the International Court of Justice (ICJ) and the Permanent Court of International Justice (PCIJ); those exercising international criminal/humanitarian jurisdiction such as the International Criminal Courts for the former Yugoslavia (1993-), for Rwanda (1995-), as well as the International Criminal Court which came into being in 2004. Also listed in this category are such extinct international criminal bodies as the African Slave Trade Mixed Tribunals (1819-1866c), International Military Tribunal at Nuremberg (1945-1946), International Military Tribunal for the Far East (1946-1948), and the aborted International Prize Court (1907). Existing 'international human rights courts' are listed to include the European Court of Human Rights (1959-1998/1998-), and the Inter-American Court of Human Rights (1979-); the African Court of Human and Peoples' Rights (1998-) remains nascent, while the proposed International Human Rights Court is yet to materialise. There are other specialised international tribunals such as the International Tribunal for the Law of the Sea (1996-), the World Trade Organisation (WTO) Dispute Settlement Understanding (1995-), as well as the proposed International Court for the Environment and the International Loans Tribunal.

Apart from these general international courts, Romano also lists other courts and tribunals based on regional economic and political integration agreements. These include, for Europe, the Court of Justice of the European Communities<sup>28</sup> (1952-), the Benelux Economic Union Court of Justice (1974-), the Court of First Instance of the European Communities<sup>29</sup> (1988-), and the European Free trade Area (EFTA) Court (1994-), with a note that the European Court of Auditors (1977-) is not quite an

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<sup>28</sup> Renamed the Court of Justice of the European Union (CJEU) by the Treaty of Lisbon 2007

<sup>29</sup> Renamed the General Court by the Treaty of Lisbon 2007

international judicial body. Other (dormant) European judicial bodies are the European Nuclear Energy Tribunal (OECD, 1957), the Western European Union Tribunal (1957), and the European Tribunal on State Immunity (Council of Europe, 1972). The list also includes the Economic Court of the Commonwealth of Independent States (1993-).

Romano identifies many regional courts outside of the geographical boundaries of Europe. They include, in the Latin American/Caribbean region, such existing courts as the Court of Justice of the Andean Community (1984-) and the *Corte Centroamericana de Justicia* (1994-), the nascent Caribbean Court of Justice (2001), the extinct *Corte de Justicia Centroamericana* (1908-1918), the aborted Central American Tribunal (1923), as well as the proposed MERCOSUR Court of Justice and Inter-American Court of International Justice. Regional Courts operating on the African continent and the Middle East include seven existing, five nascent/dormant, three extinct, and two proposed institutions. The two proposed courts that are yet to be established are the International Islamic Court of Justice and the Arab Court of Justice. The extinct ones include the East African Community Court of Appeal (1967-1977), the East African Community Common Market Tribunal (1967-1977), and the Economic Community of West African States Tribunal (1975-1991). The dormant/nascent judicial institutions include the Judicial Board of the Organisation of Arab Petroleum Exporting Countries (1980), Court of Justice of the Economic Community of Central African States (1983), Court of Justice of the Arab Maghreb Union (1989), Court of justice of the African Economic Community (1991), and Southern Africa Development Community Tribunal (2000).

Ramano lists existing regional integration tribunals operating on the African continent to include the Common Court of Justice and Arbitration of the Organisation

for the Harmonisation of Business Law in Africa (1997-), Court of Justice of the Common Market for Eastern and Southern Africa (1998), East African Court of Justice (2001-), Court of Justice of the West African Economic and Monetary Union (1996-), Court of Auditors of the West African Economic and Monetary Union (2000-), and Court of Justice of the Economic Community of West African States (ECOWAS).

The list of judicial bodies on the synoptic chart prepared by Romano is not intended to be exhaustive. It is not. Apart from the international judicial courts and tribunals so listed on the chart, the author recognises about eighty-two other quasi-judicial implementation and other dispute settlement bodies. These include human rights and humanitarian law bodies (e.g., the African Commission on Human and Peoples' Rights, 1987-), international administrative tribunals (e.g., the World Bank Administrative Tribunal, 1980), non-compliance/implementation monitoring bodies (e.g., the Kyoto Protocol Compliance System, 1997), inspection panel (e.g., World Bank Inspection Panel, 1994-), international claims and compensation bodies, both bilateral and multilateral (e.g. the Eritrea-Ethiopia Claims Court, 2000-), permanent arbitral tribunals/conciliation commissions (e.g., the North American Free Trade Area- NAFTA -Dispute Settlement Panels, 1994-), and internationalised criminal courts and tribunals (e.g., the Special Court for Sierra-Leone, 2003). Other regional courts not listed by Romano, but which are included among the fourteen sub-regional integration arrangements existing in Africa identified in the work of Salami, include the Community of Sahel- Saharan States (CEN-SAD), Economic and Monetary Community of Central Africa (CEMAC), Economic Community of Great Lake Countries (CEPGL), Inter-Governmental Authority for Development (IGAD), Indian

Ocean Commission, Manor River Union, Southern African Customs Union. The list has expanded considerably since the turn of the Twenty-First Century.<sup>30</sup>

The variety of international judicial institutions is so wide that it may be impossible to definitively catalogue them. It suffices to say that they are of nomenclature, kinds/types, operating within different geographical landscape (global, continental, regional or sub-regional), performing different functions, exercising different powers and jurisdictional competences, and adopting different rules of practice and procedure. There are, nonetheless, some general features and operational modalities that have been identified as characteristic of such institutions. Romano identifies such “common characteristics” that are unique to “international judicial bodies” to include: (a) Permanent institutions; (b) composed of independent judges; (c) adjudicating disputes between two or more entities one of which is either a state or an international organisation; (d) working on the basis of predetermined rules of procedure; and (e) rendering binding decisions. In this sense, the International Court of Justice has been discussed as the main archetypal of the international courts and tribunals. Before one goes into the discussions of the main features of the “international judiciary” of the type represented by the ICJ, it is necessary to examine howbeit briefly some other issues that are germane to any proper understanding of the role of courts and tribunals in international adjudication.

### **Non-Judicial Settlement Mechanisms**

The use of the framework of the judicial process, or the court-like machinery of adjudication, is not the only mechanism available for settlement of disputes or pacific

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<sup>30</sup> I Salami, “Legal and Institutional Challenges of Economic Integration in Africa” 2011 *European Law Journal* 17(5): 667-682

resolution of conflicts within the international system. International adjudication is indeed the latest among the various dispute settlement mechanisms that have been used among actors operating across national frontiers and borders. Notwithstanding the increasing recourse to international courts and tribunals in recent times, it has remained only an option, often of last resort, when other non-litigation procedures have been tried and they failed, in the settlement of disputes at the international level.

Scholarly works on international law have discussed the non-litigation mechanisms for settlement of disputes in two broad categories – diplomatic and non-diplomatic means. The diplomatic means include negotiation, good offices, mediation, consultations, inquiry, third party intervention, and conciliation. The second broad category includes mainly the quasi-judicial method of international arbitration and lately adjudication.<sup>31</sup> For William Zartman, these “array of methods and techniques” of conflict resolution are sometimes supplemented by the use of positive and negative inducements, or a combination of them, to ensure peace.<sup>32</sup> Thus, such mechanisms as sanctions and blockades, or in extreme situations, the use of force, are part and parcel of the process of building global peace. The challenges of building international peace in the new millennium have also led scholars and practitioners to begin to discuss non-conventional means of dispute resolution by exploring the role of education,<sup>33</sup> informal assistance provided by workshops, and even such hitherto neglected option as religion,<sup>34</sup> in the search for enduring peace within the contemporary international system. Nonetheless, international arbitration,

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<sup>31</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7<sup>th</sup> ed, London: Routledge, 1997) 273-300

<sup>32</sup> For a review of some of these methods, see I William Zartman (ed), *Peacemaking in International Conflict: Methods and Techniques* (Washington: United States Institute of Peace, 2007)

<sup>33</sup> Pamela R Aall, Jeffrey W Helsing, and Alan C Tidwell, 'Addressing Conflict Through Education', in I William Zartman (n 31) 327-354

<sup>34</sup> Cynthia Sampson, 'Religion and Peacebuilding', in I William Zartman (n 31) 273-326



much more commonly used in the commercial field,<sup>35</sup> remains an important option in moderating the behaviour of States within the international system, through international organisations.

### **Treaty Basis of International Judicial Institutions**

A limiting factor on the operational dynamism of international courts and tribunals is the fact that, unlike domestic courts of nation states, they are products of intergovernmental agreements - treaties, conventions, protocols, and other instruments that are covered by the provisions of the Vienna Convention.<sup>36</sup> Treaties, according to Singh, are “not only the origin but also the basis of all international institutions and organisations.”<sup>37</sup> As the *traité cadre* they define the extent of the powers of any international organisation, and the scope and limits of what is permissible. Thus, while international courts are no less relevant than domestic courts in the interpretation of such statutes, the extent of their powers are limited by the nature of the constitutive instruments establishing them. This is because most treaty provisions are subjected to ratification by the appropriate constitutional organs of the Member States of the organisation in order to preserve their sovereignty. Accordingly, the sovereignty of signatory States, not often fully surrendered, is a serious qualification to the extent to which community law can override national laws. Generally, treaties

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<sup>35</sup> See Emilia Onyema, 'The Use of Med-Arb in International Commercial Dispute Resolution' (2001) 12:3-4 American Review of International Arbitration 411; Amazu A Asouzu, *International Commercial Arbitration and African States: Practice Participation and Institutional Development* (CUP, Cambridge 2001); Emilia Onyema, 'Arbitration under the Ohada Regime' (2008) 11:6 International Arbitration Law Review 205

<sup>36</sup> <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)> accessed 29 April 2012

<sup>37</sup> Nagendra Singh, *Termination of Membership of International Organisations* (London: Stevens and Sons Ltd, 1957) 3

creating international institutions do preserve the sovereignty of the signatory states, thereby subjecting the decisions of the various organs and institutions created under the treaties to the overriding control of the states who remain the ultimate loci of power within the organisational setting. By preserving the sovereignty of the member-states of such organisations, treaties serve as limiting elements of these organisations and institutions created under them, including courts and tribunals.

Treaties also provide the foundational basis of regional organisations, including economic communities.<sup>38</sup> Theoretical discussions often view treaties of regional economic communities as operating on a continuum of cooperation. While some treaties are mere instruments of intergovernmental cooperation, others represent some form of federal or confederal arrangement with varying degrees of allocation of powers among the constituent units. Yet, others seek “a more perfect union” through economic and political integration.<sup>39</sup> Whichever way it is viewed, any movement towards some form of cooperation among States, at whatever level, is bound to have some effect on State sovereignty.<sup>40</sup> What makes a difference among such communities or organisations is the extent to which the component or signatory States may withdraw from the union.<sup>41</sup> The differences are particularly marked between a federation and an international organisation. Generally, supremacy clauses exist in national constitutions that make threats of withdrawal virtually impossible.<sup>42</sup> Such clauses are often lacking in treaties creating international organisations. In an

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<sup>38</sup> See Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge: Cambridge University Press, 2010) 10-15

<sup>39</sup> For a review of the theoretical discourses that define the course and patterns of EU integration, see Antje Wiener and Thomas Diez, *European Integration Theory* (Oxford: Oxford University Press, 2009)

<sup>40</sup> Azopardi, Keith, *Sovereignty and the Stateless Nation* (Portland, OR: Hart Publishing, 2009) 96

<sup>41</sup> See Ian Hurd, *International Organisations: Politics, Law, Practice* (Cambridge: Cambridge University Press, 2010)

<sup>42</sup> Using Ethiopia for illustrative references, Birhanu argues that contrary to traditional conceptions, “federal structures have not entirely succeeded in eliminating secessionist impulses”. See Ayenew Birhanu, *Federalism and Secession: A Viable Alliance?* (VDM Verlag, 2010)

international organisation, each state still retains a significant portion of its sovereignty, and reserves the right to sever its relationship with such an organisation.<sup>43</sup> It is more difficult in a federation, unlike in a confederation, to justify any “right of unilateral withdrawal”.<sup>44</sup> This is true even of such “organisations” such as the EU, which remains the best of such a move towards a union.<sup>45</sup>

The undying jurisprudential tension on the respective scope of national laws and EU law, particularly under the British constitutional law, aptly illustrates this contention.<sup>46</sup> Regional integration involves a “pooling of sovereignty”,<sup>47</sup> and acceptance of supranational courts has had serious implications for sovereign independence of states and their domestic courts. Even in Britain where the notion of parliamentary sovereignty has been used to express some doubt about the superiority of the European legal order over the common law,<sup>48</sup> the issue of sovereignty under the community legal order has been interpreted in a way as to “unbound”<sup>49</sup> the legislative supremacy of Parliament, while a case is made for some “higher-order law”.<sup>50</sup> Thus, like all international courts generally, regional courts, including those of particular relevance to integrative activities, are limited in their scope of operation by the desire of the cooperating states to preserve their sovereignty. This is particularly the situation in the developing world where a combination of inter-state disputes and

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<sup>43</sup> For an analysis of the right of withdrawal from international organisations, particularly the UN, see Mojeed Olujinmi A Alabi, ‘UN Reforms: Withdrawal of Membership as an Option?’ (2008) 13:1-2 *African Journal of International Affairs and Development* 66-93

<sup>44</sup> Singh (n 36) 10

<sup>45</sup> GF Mancini, *Democracy and Constitutionalism in the European Union: Collected Essay* (Oxford: Hart Publishing, 2000) 4

<sup>46</sup> Michael Kirby, ‘The Common Law and International Law – A Dynamic and Contemporary Dialogue’ (2010) 30:1 *Legal Studies* 30-60

<sup>47</sup> Geoffrey Garrett, ‘The Politics of Legal Integration in the European Union’, in Mette Eilstrup-Sangiovanni, *Debates on European Integration: A Reader* (Palgrave Macmillan, 2006) 253

<sup>48</sup> See Dawn Oliver, *Constitutional Reform in the United Kingdom* (Oxford: OUP, 2003) 81-83

<sup>49</sup> For Jacobs, the idea of sovereignty is outmoded and should be replaced by some sort of multi-level sharing of powers. See Francis G Jacobs, *The Sovereignty of Law: The European Way* (Cambridge: Cambridge University Press, 2007) 137-139

<sup>50</sup> J Laws, ‘Law and Democracy’ (1995) 79 *Public Law* 84

economic backwardness has tended to retard rather than promote the progress towards integration.

### **International-Domestic Interface**

A major concern in any discussion of international law is the scope of application of such law within the domestic sphere of individual state actors. Generally, international treaties are compact among states and bind the state parties only, with no direct effect application to individual and corporate bodies. This means treaties cannot ordinarily confer enforceable rights and obligations on individual citizens except positive actions have been taken by the state Parties to domesticate such laws. The methods of making international treaties binding on citizens have taken a variety of forms, but the idea of treaty incorporation has been discussed within two main contending paradigms, each of which has been used by scholars to explain the nature of the relationship that exists or ought to exist between international law and domestic law. They revolve around the vexed issue of the extent to which international law can moderate or limit the sovereign power of States, and vice versa. Such paradigms also explain the nature and patterns of relationships that ought to exist between international courts (including regional courts) and domestic courts of Member States of economic communities. This is important because the powers and functions of the two sets of judicial institutions are mutually reinforcing. Domestic courts do interpret some international instruments in the same manner that national laws are considered by international courts and tribunals in their decisions. In as much as international courts do exercise jurisdictions over States so also do domestic courts

have a role to play in enforcing Treaty obligations and decisions of international courts. Domestic courts do have important role to play in proper functioning of the international system. The justification for this role are three, according to Sloss: domestic courts enforce internationally agreed norms contained in international legal instruments; many international agreements rely on the mechanisms of domestic courts and tribunals for their enforcement; and creation of private rights in international agreements without private access to international courts necessarily makes recourse to domestic courts inevitable.<sup>51</sup> Additional justifications, suggested by Alstine, include: judicial recognition of the international law foundations of treaty law; interpretation of treaty provisions by domestic courts to conform to international law, and the use of treaty for enforcement of national constitutional provisions.<sup>52</sup>

Theoretical discourses on the nature of the relationship between international courts and domestic courts often begin with the restatement of the monist-dualist debate.<sup>53</sup> The latter theory, also known as pluralism, derives from the positivist conception of international law as founded upon the consent of States. For the pluralists, municipal law and international law are separate and distinct systems, and none can override the other;<sup>54</sup> both legal orders have different sources, subjects and objects, and operate at different spheres. Accordingly, the norms of each of the two legal orders would not operate outside its domain without specific acts of transformation to such effects.<sup>55</sup> Each State therefore “retains the sovereign power to

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<sup>51</sup> David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009) 5-6

<sup>52</sup> Michael P. Van Alstine, ‘The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions’ in David Sloss (n 50) 585-597

<sup>53</sup> Ian Brownlie, *Principles of Public International Law* (7<sup>th</sup> ed, Oxford: OUP, 2008) 31-35

<sup>54</sup> Shaw (n 22) 100; GD Triggs, *International Law: Contemporary Principles and Practices* (2006) 135; RMM Wallace, *International Law* (5<sup>th</sup> ed, London: Sweet and Maxwell, 2005) 40

<sup>55</sup> See L Oppenheim, *International Law Vol I* (8<sup>th</sup> ed, 1955) 37

integrate, or isolate, the norms of International Law”.<sup>56</sup> The implication of this theory for the relationship between international law and domestic law is that for international law to confer specific rights and duties on citizens (and not States only), it must have been accepted for domestication in its laws by the state concerned.

The pluralist thesis is rejected by the monists. For Kelsen, the leading light of the theory, the law is a united, integrated whole.<sup>57</sup> Accordingly, both international law and domestic law constitute an integrated, universal and inseparable whole. The emphasis here, in the words of Shaw, is “the unity of the entire legal order upon the basis of the predominance of international law”.<sup>58</sup> On this logic rests the idea of primacy of international law and, by extension, direct application of international law at the domestic sphere without the need for any formal act of transformation. This is the model of “automatic treaty incorporation” largely favoured by the CJEU.<sup>59</sup>

While legal analyses of the incorporation and transformation theories continue to be useful,<sup>60</sup> attempts are made to reconcile the two theoretical perspectives, or at least provide a modification of the theoretical constructs in line with contemporary realities.<sup>61</sup> Although Shaw identifies a “third approach”, in the sense of a re-statement of the dualist position, he admits that this problem-solving and practical approach “does not delve deeply into theoretical considerations”.<sup>62</sup> Other scholars have sought

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<sup>56</sup> William R Slomanson, *Fundamental Perspectives on International Law* (3<sup>rd</sup> ed, Belmont, CA: Wadsworth, 2000) 42

<sup>57</sup> Hans Kelsen, *The General Theory of Law and State* (Cambridge, Mass.: Harvard University Press, 1945) 346

<sup>58</sup> Shaw (n 22) 101

<sup>59</sup> Mario Mendez, ‘The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques’ (2010) 21:1 *The European Journal of International Law* 83-104

<sup>60</sup> See the Hon Michael Kirby’s analysis of the theories in relation to the experiences of the UK, New Zealand, South Africa and India in his paper, ‘The Common Law and International Law’ (n 45) 30-60

<sup>61</sup> For a brief review of the two perspectives and the new developments that constrain their continued relevance as analytic constructs, see Janne Nijman and Andre Nollkaemper, ‘Beyond the Divide’, in Andre Nollkaemper and Janne Nijman (eds), *New Perspectives on the Divide Between National and International Law* (Oxford: OUP, 2007) 341-360. See also Brownlie (n 52) 31-35

<sup>62</sup> Shaw (n 22) 102

to avoid any reference to the distinction, which seems “more apparent than real”.<sup>63</sup> One cannot agree less that in this era of globalisation, the traditional separation of ‘international’ or ‘community’ from ‘domestic’ legal orders cannot but become irrelevant.<sup>64</sup>

As the monist-dualist debate recedes to the background,<sup>65</sup> new concepts and ideas have emerged in attempts to explain the nature and patterns of the relationships between international and domestic law.<sup>66</sup> One of such, which demystify the monist-dualist divide, pertains to conceptualisation of the patterns of community-domestic law interface within the EU system as a multi-level and mutually reinforcing system of laws with emphasis on cooperation rather than contestation. From this perspective, Jacobs (without expressly using the term “multi-level governance”) opines that the notion of ‘sovereignty’ is increasingly being replaced by “an allocation of powers, which are divided, in different realms, among different levels of government: local, national, regional, global”.<sup>67</sup> Multi-level governance is, perhaps, a variant of the new governance approaches, with emphasis on “accommodation and promotion of diversity” and “co-ordination or exchange as between constituent parts”;<sup>68</sup> new

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<sup>63</sup> *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529 at 569 (Stephenson LJ)

<sup>64</sup> See Janne Nijman and Andre Nollkaemper, “Introduction”, in Andre Nollkaemper and Janne Nijman (n 60) 1-14

<sup>65</sup> The dualist thesis seems to have guided a 2010 decision of the CJEU that annulled the European Community’s implementation of certain resolutions of the UN Security Council on the ground that they violated the EU legal order. For a review of the case, see Gráinne de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’ (2010) 51:1 *Harvard International Law Journal* <<http://www.harvardilj.org/articles/1-50.pdf>> accessed 10 October 2010

<sup>66</sup> The CJEU characterises EEA Agreement as an international law agreement creating “rights and obligations between the Contracting Parties” but diff from Community law “the subjects of which comprise not only Member States but also their nationals” – Opinion 1/91 [1991] ECR I-6079 paras 21-21

<sup>67</sup> Jacobs (n 48)

<sup>68</sup> See Gráinne de Búrca and Joanne Scott, ‘New Governance, Law and Constitutionalism’ <http://www.ucl.ac.uk/laws/clge/docs/govlawconst.pdf> accessed 07 October 2010

governance avoids traditional democratic structures.<sup>69</sup> It is also related to the idea of ‘soft law’, which consists of non-legally binding albeit effective rules,<sup>70</sup> often based on consensus in areas that States seek common agreements without necessarily getting their hand tied by law especially in relation to economic and environmental issues.<sup>71</sup> The issue of whether soft law provides a satisfactory alternative to legislation has been interrogated by Senden who examines the varieties, characteristics and legal effects of such law within the EU context and the implications of its use for the development of EU Law.<sup>72</sup> As the European model shows, modern systems of transnational relations are anchored on continuous negotiation among various levels of government,<sup>73</sup> rather than a neat separation between what is domestic and what is international. Whichever way the argument goes, it seems clear now than ever before that domestic law cannot be a defence to a breach of international legal obligations.<sup>74</sup> As Orakhelashvili insists, even the EU institutions “are bound by general international law as any other actor is”.<sup>75</sup>

The monist-dualist debate and its implications for international legal relations have witnessed a restatement in the light of modern development occasioned by the specific contributions of the CJEU. While the primacy of community law over

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<sup>69</sup> Erika Szyszczak, ‘Soft Law and Safe Havens’, in Ulla Neergaard and others (eds), *Social Services in the EU* (The Hague: TMC Asser Press/Springer, 2012)

<sup>70</sup> KC Wellens and GM Borchart, ‘Soft Law in EC Law’ (1989) 14 *European Law Review* 267-321. For a review of the pro and cons of the idea, see David M. Trubek, Patrick Cottrell, and Mark Nance, ‘“Soft Law”, “Hard Law” and European Integration: Toward a Theory of Hybridity’ <<http://www.law.wisc.edu/facstaff/trubek/HybridityPaperApril2005.pdf>> accessed 7 October 2010

<sup>71</sup> Malanczuk (n 30) 54

<sup>72</sup> Linda Senden, *Soft Law in European Community Law* (Hart Publishing, 2004)

<sup>73</sup> See G Marks, ‘Structural Policy and Multilevel Governance in the European Community’, in A Cafruny and G Rosenthal (eds), *The State of the European Community* (NY: Lynne Rienner, 1993)

<sup>74</sup> Slomanson (n 55) 43

<sup>75</sup> Alexander Orakhelashvili, ‘The Idea of European International Law’ (2006) 17:2 *The European Journal of International Law* 346



domestic law seems settled in EU law,<sup>76</sup> notwithstanding some disquiet in the British constitutional context,<sup>77</sup> the CJEU presents a clear departure from the general norm of international adjudication, which the ICJ represents, and the CJEU's approach is sometimes viewed as a direct challenge to international law<sup>78</sup>

## **ICJ and Basic Norms of International Adjudication**

Any discussion of international courts generally should start with the International Court of Justice (ICJ) in the Peace Palace at The Hague. As the main judicial institution of global legal relations, which predates nearly all international institutions presently exercising judicial/quasi-judicial powers, it has remained the reference point, from which basic norms of international adjudication and departures from them are analysed.<sup>79</sup> Generally, many such courts have followed the principles and practice established by the court at The Hague, with little modifications based on their constitutive instruments. Indeed, majority of what is described in many works, including this thesis, as the general characteristics of international courts are derived from the law, machinery, practice and procedure of this 'World Court'. It is important to highlight the basic norms of international adjudication typical of the ICJ, and then examine the departures from the basic norms as represented by the CJEU and other courts of regional integration.

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<sup>76</sup> See *Van Gend En Loos*, Case 26/92 (1963) ECR 3; *Costa V ENEL*, Case 6/64 (1964) ECR 585; *Yvonne Van Duyn V Home Office*, Case 41/74 (1974) ECR 1337

<sup>77</sup> Jacobs (n 4)

<sup>78</sup> Gráinne de Búrca (n 64)1

<sup>79</sup> See Terry D. Gill, Shabtai Rosenne, Erik Jaap Molenaar, and Alex G. Oude Elferink, *The World Court: What It Is and How It Works* (6<sup>th</sup> ed, Leiden: Brill Academic Publishers, 2003)

The International Court of Justice possesses non-compulsory jurisdiction on cases brought before it. This is notwithstanding the fact that all Member-States of the United Nations are parties to the Statute of the Court.<sup>80</sup> Thus, only States who have submitted to its compulsory jurisdiction can be parties before it.<sup>81</sup> A non-member of the United Nations may also be a party to the Statute once it accepts the compulsory jurisdiction of the International Court of Justice under Article 36(2) of the Statute (the optional clause declaration). Moreover, only States can be parties before the court, although a state can take up the case of its nationals. Neither the United Nations itself nor any of its specialised agencies can be a party in contentious proceedings before the court,<sup>82</sup> except only when they seek advisory opinions.<sup>83</sup> One unique feature of the court is that its jurisdiction is concurrent in the sense that a matter may be before the International Court of Justice and still be subject of consideration before the other political organs of the United Nations or other international organisations, or even subject of bilateral negotiations and agreements. Yet, perhaps because of the infrequent use of the machinery of the court, its decisions have not enjoyed the status of primary sources of international law.<sup>84</sup> Nonetheless, the court is staffed by judges of the highest distinction who are “elected regardless of their nationality”. In practice, no two successful applicants have come from the same nationality. Indeed, the procedure for appointment of judges of the court combines both legal and political

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<sup>80</sup> For comprehensive commentaries on the Statute, see Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: OUP, 2006)

<sup>81</sup> Shaw (n 22) 754

<sup>82</sup> DA Ijalaye, *The Extension of Corporate Personality in International Law* (NY: Oceana Publications, 1978) 1

<sup>83</sup> A case is being made that the Secretary General of the UN should be allowed to seek an Advisory Opinion before the ICJ. See Shaw (n 22) 774

<sup>84</sup> There's rebuttable presumption in favour of the validity of UN resolutions. See Elias (n 22) 270

elements, while seeking to limit the influence of nation-states over judicial appointments to the court.<sup>85</sup>

Generally, international courts settle disputes between state actors within the international system, and are not open to individuals, corporate bodies and non-governmental organisations, even as *amici curiae*.<sup>86</sup> Following the lead provided by the International Court of Justice,<sup>87</sup> the practice has been widely adopted by many international judicial bodies. There are, however, a few exceptions to these general norms of international adjudication as defined by the UN framework. Significantly noteworthy in this regard are certain kind of specialised courts, particularly those courts whose jurisdictions are mainly in the area of human rights and humanitarian law, that have opened their doors, in carefully defined areas, to individuals, corporate bodies, non-governmental organisations, and international organisations.<sup>88</sup> International courts do not have compulsory jurisdictions over sovereign states in the same manner that domestic courts have over individuals and corporate bodies;<sup>89</sup> it is only by acceding to the treaty of the parent organisations and/or the statutes creating the courts that their jurisdiction can be invoked.<sup>90</sup> In addition to their lack of compulsory jurisdiction, disputes must be specifically referred to them before their

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<sup>85</sup> Davis R Robinson, 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice' (Annual Meeting, American Society of International Law, April 2-5, 2003) 277-282

<sup>86</sup> Higgins (n 6) 12

<sup>87</sup> Statute of the ICJ – Article 36

<sup>88</sup> See, e.g., the UN Convention on the Law of the Sea, 1982, Part XI; AA Mohamed, 'Individual and NGO Participation in Human Rights Litigation before the African Court on Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights' (1999) 43 *Journal of African Law* 201-213

<sup>89</sup> Karen Alter notes that most international courts now have provisions on compulsory jurisdiction and litigation by non-state actors. See 'Private Litigants and the New International Courts' (2006) 39:1 *Comparative Political Studies* 22-49

<sup>90</sup> See Slomanson (n 55) 379. Karen A. Mingst, *Essentials of International Relations* (3<sup>rd</sup> ed, NY: W. W. Norton & Co., 2004) 169

machinery could be activated.<sup>91</sup> The machinery of the courts, like those of all judicial institutions, both domestic and international, are not self-activating. The use of their machinery requires positive action by others to get their processes started.

The scope of operation and the range of choice available for the use of the framework of international courts are regulated by the treaties and associated protocols/conventions that create them, regulate their operation, and determine the status of their decisions. As institutions of parent organisations created by states, the general rule of *pacta sunt servanda* in construction of statutes operates. By this fundamental principle of treaty law, “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.<sup>92</sup> Thus, unless provisions exist to the contrary, outsiders, i.e., non-members of the parent organisation and non-signatories to the statute creating the court, do not have standing before an international court. In the interpretation of the treaties and associated instruments, however, the courts administer international law, as defined by Article 38(1) of the ICJ Statute.<sup>93</sup> They may also decide cases *ex acquo et bono*, that is, without strict regard for existing rules of international law but rather in the light of the justice of the case as agreed to by the contesting parties.<sup>94</sup> In doing so, they are expected to act judicially without infringing the basic recognised principles of justice. In the exercise of these interpretative powers, the courts abide by the literal rule which requires that words be given their ordinary meaning once they are unambiguous. In fact, in the construction of Treaties, as in those of ordinary national enactments, the literal rule of

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<sup>91</sup> See, e.g., Article 38(1) of the Statute of the International Court of Justice, <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>> accessed 24 May 2010

<sup>92</sup> Elias (n 22) 55

<sup>93</sup> Statute of the International Court of Justice, <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>> accessed on 6 September 2010

<sup>94</sup> Article 38 (2) of the Statute of the ICJ,:

<<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>> accessed on 6 September 2010

interpretation prevails. Departure from the literal interpretation is permitted only where giving words their ordinary unambiguous meaning would lead to ambiguity, obscurity or absurdity.<sup>95</sup> Further, the Vienna Convention on the Law of Treaties permits that treaties be interpreted “in good faith”, which requires that the ordinary meaning of words of treaties be interpreted “in their context and in the light of its object and purpose”.<sup>96</sup>

### **CJEU and the Advent of Supranational Legal Order**

Alter declares the CJEU as “an unusual international court”,<sup>97</sup> by which she meant that it represents a major departure from the basic norms of international adjudication as discernible from the work of the ICJ and many other similar courts and tribunals. The CJEU is an outgrowth of the European integration process, the first and undoubtedly the most successful regional integration effort in recorded history.

Some controversies have surrounded the nature of the European integration. They revolve around whether the process is a story of continuity in intergovernmental relations or distinct historical development that departs from the norm of orthodox international relations. For one, the European community institutions were creations of inter-governmental treaties among member states, and necessarily take the shape of similar international instruments with emphasis on the sovereign independence of the signatory parties. Accordingly, it is possible to treat the EU as an international organisation with no distinct characteristics from other international organisations.

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<sup>95</sup> See, generally, Richard Gardiner, *Treaty Interpretation* (NY: Oxford University Press, 2010)

<sup>96</sup> For exhaustive discussions of the three-part test, see Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht, the Netherlands: Springer, 2010)

<sup>97</sup> Karen J Alter, *The European Court's Political Power: Selected Essays* (Oxford: Oxford University Press, 2009) 5

Conversely, it has been submitted that the EC Treaty (and now the post-Lisbon TEU and TFEU) is set apart from other international treaties of its kind “not only because it creates supranational institutions but, more importantly, because, unlike a typical treaty, its execution has been taken out of the hands of the parties”.<sup>98</sup> Indeed, the implementation of the treaties has given rise to such a unique experience that seems to provide the justification for treating the European integration experience as *sui generis*. As Milward notes,<sup>99</sup> the EU experience is not replicated anywhere and cannot be the basis of comparing the EU with any other international or regional organisation. Whichever way it is conceived, the CJEU has been central in bringing about the current state of the EU integration process resulting in the burgeoning literature on EU law in particular and international law in general.<sup>100</sup>

Scholars have approached the study of the role of the CJEU in the EU integration process from different perspectives. Institutional analyses of the working of the Court have brought to light the nature of the law, machinery and practice that distinctively represents its architecture. From this perspective, Arnall situates the Court within the institutional architecture of the EU, highlighting its organisation and working method, the way the Court has dealt with specific problems in a range of contexts (both constitutional and substantive), and some general questions relating to the Court’s overall approach.<sup>101</sup> The focus of this approach, which appeals to this study, is in the examination of the contribution of the European Court to shaping the legal framework within which the EU has operated. Such an institutional approach

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<sup>98</sup> KPE Lasok and D Lasok, *Laws and Institutions of the European Union* (7<sup>th</sup> ed, London: Reed Elsevier (UK) Ltd, 2001) 123-124

<sup>99</sup> Alan Milward, *The European Rescue of the Nation State* (2<sup>nd</sup> ed, Oxon: Routledge, 2000)

<sup>100</sup> See Francis Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Oxford: Hart Publishing, 2000); David Phinnemore and Alex Warleigh-Lack (eds), *Reflections on European Integration: 50 Years of the Treaty of Rome* (Hampshire: Palgrave Macmillan, 2009)

<sup>101</sup> Anthony Arnall, *The European Court of Justice* (2<sup>nd</sup> ed, NY: Oxford University Press, 2006)

also reflects in the work of Schiemann, the then UK Judge at the CJEU, who examines the workings and challenges facing the CJEU in the aftermath of the expansion in both the membership as well as legislative and administrative competences of the EU. In this regard, the author highlights the serious challenges relating to language, selection of Judges and Advocates General, as well as internal working and the procedural rules of the court.<sup>102</sup> Gormley examines the implications of the Nice Treaty 2000 on the workings of the ECJ, concluding that the amendments were more of attempts at reducing the workload of the Court rather than addressing the inherent weaknesses of the EU dispute resolution mechanisms.<sup>103</sup> Apart from the work of such scholars as Kennedy which compares the machineries of the ICJ, the ECJ, the ECHR Court, the Supreme Court of the United States and the WTO,<sup>104</sup> this institutional, single-case approach has dominated the work of other legal scholars on the CJEU.<sup>105</sup>

Of particular significance is the process analysis of the working of the CJEU by Dehousse, originally published in French in 1994. In this comprehensive work of immense significance, Dehousse attempts “a balance sheet” of the contribution of the CJEU to the process of European integration.<sup>106</sup> The author assesses the contribution of the Court to the integration process, and examines the challenges confronting the European Union, and why the Court has exercised strong influence on policy

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<sup>102</sup> K Schiemann, ‘The Functioning of the Court of Justice in an Enlarged Union and the Future of the Court’, in A Arnall, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: OUP, 2008) 1-19

<sup>103</sup> Laurence W Gormley, ‘The Judicial Architecture of the European Union After Nice’, in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford: OUP, 2002) 133-145

<sup>104</sup> Tom Kennedy, ‘Thirteen Russians! The Composition of the European Court of Justice’ in IL Campbell and M Voyatzis (eds), *Legal Reasoning and Judicial Interpretation of European Law* (Trenton Publishing, 1996) 69-91

<sup>105</sup> Arnall (n 101)

<sup>106</sup> Renaud Dehousse, *European Court of Justice: The Politics of Judicial Integration* (London: Macmillan, 1998) xi

decisions with little opposition. The work is useful in understanding the political potential of the judiciary in the politics of regional integration. Of equal significance as a focus of analysis is the role of the CJEU in the “constitutionalisation” of the regional integration process in Europe.<sup>107</sup> The Court is, for Burley and Mattli, the “unsung hero” of the transformation of the EU into a supranational entity.<sup>108</sup> The influence is not achieved at a specific date, but rather has vacillated over time. In fact, the political significance of the decisions of the CJEU did not command the attention of early legal scholars.<sup>109</sup> By the 1980s, however, the interaction between the Court and the political process of regional integration began to command some attention in scholarly writings. Analysing the factors that have shaped the political role of the CJEU in spatial and temporal European politics, Alter notes that the contributions of the CJEU was dictated by “a distinct set of social forces” and political developments including the contextual characteristics of the environment.<sup>110</sup> Such ecological features, perhaps explain why, granted that the CJEU was not originally created as an enforcement mechanism, as observed by an analyst,<sup>111</sup> the political leadership of the Member States could not take appropriate political action to stop the Court from foisting a supra-national legal order on Europe.<sup>112</sup> They also help to explain why, despite being modelled along the EU and CJEU patterns, regional integration and

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<sup>107</sup> Joseph Weiler, *The Transformation of Europe* (1991)

<sup>108</sup> Anne-Marie Burley and Walter Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’ in Mette Eilstrup-Sangiovanni (ed), *Debates on European Integration: A Reader* (NY: Palgrave Macmillan, 2006) 226

<sup>109</sup> Ibid 227

<sup>110</sup> Alter (n 96)

<sup>111</sup> Richmond, Amy and Dorothee Heisenberg, ‘Supranational Institution Building in the European Union: A comparison of the European Court of Justice and the European Central Bank’ (Paper presented at the European Community Studies Association’s Sixth Biennial International Conference, Pittsburgh, PA, June 2-5, 1999) <[http://aei.pitt.edu/2372/01/002574\\_1.pdf](http://aei.pitt.edu/2372/01/002574_1.pdf)> accessed 12 December 2009

<sup>112</sup> Stuart Scheingold, identifies a number of political tools employed to moderate the role of the Court during the early years of the European integration. See his *The Rule of Law in European Integration* (New Haven: Yale University Press, 1965) 34



integration courts elsewhere, have not operated in manner similar to or achieve the level of integration currently being witnessed in the EU.<sup>113</sup>

### **Supranational Legal Order**

The avowed uniqueness of the CJEU derives from its efforts in pioneering a new international legal order, which brought adjudicative institutions to a prominent position in directing the state of global affairs than hitherto. The treaties subscribed to by the Member States of the EU define the powers and functions of the CJEU. Its foundational basis is not different from that of any other international court or tribunal. However, it has certain characteristic features, operational modalities, jurisdictional competence, opportunities and challenges that make it a unique institution in a class of its own.

The contributions of the CJEU to the development of EU law and international law in the way we now understand the concepts pertains to bringing about some form of supranational legal order in inter-state relations. Before the advent of the EU, international institutions exercising arbitral/adjudicative powers had operated within the limits defined or permitted by state laws. Thus, the ICJ's jurisdiction was subjected to a state's willingness to submit to its compulsory jurisdiction. However, the ECJ has in a line of cases dating back to 1963 laid some principles of European integration law that have crystallized into some defining characteristics of what constitutes a supranational legal order. The pronouncements of

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<sup>113</sup> Karen Alter, 'The European Court's Political Power Across Time and Space', (2009) 59 *Revue Française de Science Politique* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1334328](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334328)> accessed 8 April 2010. The paper is a shorter version of Alter's book on the development of the ECJ's power within the EU. See Alter (n 96)

the CJEU have also helped in re-conceptualising some of the leading theories of regional integration,<sup>114</sup> particularly in relation to the nature of the relationship between community law and the domestic laws of the Member States. For Szyszczak and Cygan, the distinctive contributions have been in the areas of using teleological reasoning, through its judgments and preliminary rulings, to constitutionalise the EU Treaties, entrench the supremacy of EU law, and ultimately guarantee integration in all aspects of EU law.

Within the context of the EU, Alter identifies key factors for development of supranational legal order as: Availability of a point of European law to draw on; use of litigation as a means of achieving objectives; willingness of the CJEU and national courts to issue favourable rulings in favour of the objectives; and sustained political mobilisation in favour of courts decisions.<sup>115</sup> Other supportive factors include, in addition to the litigious character of Western society,<sup>116</sup> availability of a great number of secondary legislation on the wide range of issues litigated upon before the Court and an initial strong political support that viewed integration as the path towards a peaceful and united Europe.<sup>117</sup> Judicial cooperation between the ECJ and the national courts of the member states also favours the activist posture of the ECJ.<sup>118</sup> In this regard, the important contribution of the Court has been in the areas of clarifying the nature of the relationships among the various stakeholders of the EU - the organs of

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<sup>114</sup> See Lasok and Lasok (n 97) 174-177

<sup>115</sup> Alter (n 111)

<sup>116</sup> See Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilisation and Governance* (Cambridge: Cambridge University Press, 2007)

<sup>117</sup> Some doubts exist on the point since political support and legislations were absent at the time the CJEU made its first set of decisions that laid the main principles of EU law. See Gregory A Caldeira and James L Gibson, 'The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support' (1995) 89:2 *The American Political Science Review* 356-376

<sup>118</sup> Hans-W Micklitz, 'Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law', in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds), *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives* (Copenhagen: DJØF Publishing, 2010)

the EU, the Member States, and the individual citizens. An examination of the role of the Court by Maduro also highlights the critical issue of constitutional dilemma facing the EU since the adoption of the Treaty of Amsterdam (1997), which relates to:

the balance of powers to be defined between Member States and the Union, between public power and the market, and between the legitimacy of community law vis-à-vis that of national law.<sup>119</sup>

In this respect, between 1963 and 1992, the Court gave a number of decisions that moved the frontiers of European integration from that of intergovernmental cooperation to that of supranational legal system in which the EU and not the State Parties to the EU Treaties becomes the locus of socio-economic, political and legal authority. Its teleological approach to interpretation of the legal texts, deepened the EU integration process. Even though the issue of the primacy of EU law was not formally expressed until the conclusion of the negotiations of the Treaty of Lisbon 2007,<sup>120</sup> from its earliest decision in *Van Gend en Loos v Nederlandse Administratie der Belastingen*,<sup>121</sup> *Flaminio Costa v ENEL*,<sup>122</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*,<sup>123</sup> the ECJ has developed a number of foundational principles of European integration such as those of Community autonomy, supremacy of community law, direct applicability/direct

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<sup>119</sup> Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998)

<sup>120</sup> See Treaty of Lisbon Declaration 17 Concerning Primacy

<sup>121</sup> Case 26/62 [1963] ECR 1

<sup>122</sup> Case 6/64 [1964] ECR 585

<sup>123</sup> Case 11/70 [1970] ECR 1125

effect of community law, and solidarity based on “sincere cooperation”<sup>124</sup> upon which the authority of the EU is anchored.

Supremacy of EU law presupposes that national laws are subsidiary,<sup>125</sup> and that the Treaty and other legal provisions of the EU are directly applicable in the Member States without requiring any formal act of incorporation as would ordinarily be required in an international legal order principally based on the dualist/pluralist thesis. Such provisions create rights in favour of individuals, which can be enforced in the domestic courts of the Member States. The principle of direct effect serves to make EU citizens stakeholders in the integration process on the logic that it would be unreasonable for the Treaty to impose obligations on individual nationals of the Member States without affording them the opportunity to enforce their rights. By this, the Court effectively articulates a social contract for the EU, which imposes “new duties of citizenship” to the EU and citizens’ entitlements to “corresponding rights”.<sup>126</sup> For the CJEU, the EU “constitutes a new legal order”<sup>127</sup> for which the Member States have “limited their sovereign rights”.<sup>128</sup> Accordingly, the Court has moved beyond its primary duty of ensuring the observance of EU law to become an institution for putting the Community institutions in check.<sup>129</sup>

Although the CJEU has come of age and its decisions widely acknowledged by national authorities<sup>130</sup> and EU officials in Brussels,<sup>131</sup> it has become, in the words of

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<sup>124</sup> Art 4(3) TEU (Art 10 EC)

<sup>125</sup> Ralph H Folsom, Ralph B Lake and Ved P Nanda (eds), *European Union Law after Maastricht: A Practical Guide for Lawyers Outside the Common Market* (The Hague: Kluwer Law International, 1996) 4

<sup>126</sup> Burley and Mattli (n 106) 238

<sup>127</sup> *Van Gend En Loos v Nederlandse Case* 26/62 [1963] 1, 12

<sup>128</sup> *Ibid* at 593

<sup>129</sup> Trevor C Hartley, *Constitutional Problems of the European Union* (Oxford: Hart Publishing, 1999) 12

<sup>130</sup> Alec Stone Sweet, ‘The European Court of Justice and the Judicialisation of EU Governance’ (Faculty Scholarship Series, Yale Law School, 2010)

Arnulf, “a controversial institution”,<sup>132</sup> while some of its key decisions are described as judicial activism “running wild”.<sup>133</sup> Notwithstanding the “constitutionalisation” of the EU legal order, the Court lacks enforcement powers of its own. Its decisions depend on active collaboration of the other institutions and agencies, and the effectiveness of such decisions necessarily depends on the extent of support given to such decisions by these significant others.<sup>134</sup> As Arnulf notes, the practical application of the doctrines and principles of the EU legal order depends largely on “the goodwill of the national courts”.<sup>135</sup> It has even been suggested that a pronouncement of the CJEU is “primarily a statement of legal ideology” the factual dimension of which is provided by the national legal systems.<sup>136</sup> Also, as Mendez points out, while the CJEU seems attached to a maximalist approach to enforcing EU law against Member States, it is prepared to relax the rule in relation to treaty enforcement where Community actions are challenged.<sup>137</sup> It continues to receive support from a large segment of the EU citizenry, Institutions and the Member States as “the ultimate arbiter of Community legality”,<sup>138</sup> due to a combination of factors. These include “the compelling legal and functional logic of its decisions, its strategic accommodation of

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<[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1069&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1069&context=fss_papers)>  
accessed 19 September 2012

<sup>131</sup> See Treaty of Lisbon Declaration 17 Concerning Primacy

<sup>132</sup> Arnulf (n 100) 1

<sup>133</sup> H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Boston: Martinus Nijhoff, 1986)

<sup>134</sup> Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca: Cornell University Press, 2002) xiii

<sup>135</sup> Arnulf (n 100) 100

<sup>136</sup> Ruth Nielsen, ‘Scandinavian Legal Realism and EU Law’ in U Neergaard, R Nielsen and L Roseburry (n 116) 229-264

<sup>137</sup> Mario Mendez, ‘The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques’ 2010 21:1 *European Journal of Internal Law* 83-104

<sup>138</sup> Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (London: Stevens & Sons, 1977) 5

national interests, and the support of national courts”,<sup>139</sup> as well as general unwillingness to “tie the hands of the EU’s political institutions”.<sup>140</sup>

### **Emerging Trends and Patterns**

The “bourgeoning supranationalism”<sup>141</sup> propelled by the CJEU has enhanced scholarly interest in the role of courts in regional integration. Questions have been raised about the necessity or otherwise for such specialised (economic) courts,<sup>142</sup> their role and functions, their working machineries and process, and the opportunities and challenges attendant to their existence. In terms of origin, the growth of regional courts is traceable to two interrelated factors, both occurring in Europe, where the development has spanned over sixty years. The first is the nature of the EU Treaty itself, which confers on the CJEU “a central role in its functioning”.<sup>143</sup> The second is the tradition of legal control over administration,<sup>144</sup> a tradition that has developed in the European countries at the domestic level.<sup>145</sup> These two factors combined to entrench the CJEU as an active participant in “the development of European integration”<sup>146</sup> but also confer on the Court such an enviable status that makes it a model to other regional integration arrangements outside the frontiers of the EU. Whether, and the extent to which, the pace of adoption of the EU model can produce

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<sup>139</sup> Conant, op.cit p. 2

<sup>140</sup> Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: OUP, 2004) 309

<sup>141</sup> Garrett (n 46)

<sup>142</sup> Stuart (n 136) 6

<sup>143</sup> Arnall (n 100) ix

<sup>144</sup> Stuart (n 136) 8-14

<sup>145</sup> Jean-Marie Woehrling, ‘Judicial Control of the Administration in Europe: Progressive Construction of a Common Model’ <<http://www.oecd.org/turkey/35676763.pdf>> accessed 19 September 2012

<sup>146</sup> Dehousse (n 104) 177

the kind of results already evident in the EU elsewhere will depend on whether such other regional courts can create “those opportunities” that enhance not only its own power but also the “professional interests of all parties participating directly or indirectly in its business.”<sup>147</sup> This is because, for any international court, the significance of the judgements and rulings “lies less in their legal pronouncements than in their wider political implications”.<sup>148</sup>

There is wide consensus in scholarship that the EU integration experience is a departure from the norms of contemporary international relations. Yet, the EU has become, in the words of the European Commission, “an unavoidable ‘reference model’”.<sup>149</sup> The desire to get reciprocal advantage from a relationship of close affinity with EU Institutions may sometimes compel a wholesale adoption of the EU methods and processes especially where such affinity are already backed by agreement. As Fredriksen finds in respect of the European Community’s Agreement on the European Economic Area (EEA), EFTA Court’s integrationist interpretation of the EC-EEA Agreement may be the Court’s own way of convincing an originally sceptical CJEU of its own ability to serve a “guarantor of the EFTA States’ fulfilment of their obligations under the EEA Agreement” in return for the CJEU, on the basis of reciprocity, granting the same rights in the common markets to residents of EFTA States as those within the EU.<sup>150</sup> Similar developments, even though for variety of

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<sup>147</sup> Burley and Mattli (n 106) 237

<sup>148</sup> See, e.g., Antje Pedain, “‘With or Without Me’: The ECJ Adopts a Pose of Studied Neutrality Towards EU Enlargement’ (2002) 51: 4 International and Comparative Law Quarterly 981

<sup>149</sup> European Commission (1995), *European Community Support for Regional Economic Integration Efforts among Developing Countries*  
[http://ec.europa.eu/development/icenter/repository/consultation4-001212\\_1\\_en.pdf](http://ec.europa.eu/development/icenter/repository/consultation4-001212_1_en.pdf) accessed 08 January 2013

<sup>150</sup> Halvard Haukeland Fredriksen, ‘The EFTA Court 15 Years On’ (2010) 59:3 International and Comparative Law Quarterly 731-760

reasons, have been noted by Saunders, a Judge of the Caribbean Court of Justice, on the CARICOM jurisprudence,<sup>151</sup> and in other regional economic groupings.<sup>152</sup>

The adoption of the EU model has not been successfully replicated.<sup>153</sup> The forces that shape the development of the European integration model are not necessarily universal. As Alter notes, the success of the European integration experience and the CJEU's pervasive influence on the process are functions of "some exceptional elements that set the ECJ apart from other ICs".<sup>154</sup> Yet, studies on the "new regionalisms" do make references to the EU, to highlight "their limitations and narrow approaches" or "stress their (over) ambitious objectives and grand-vision of integration".<sup>155</sup> In his review of EU's economic partnership agreements (EPAs) with regional groupings in Africa, Asia, the Caribbean, the Mediterranean and Latin America, Bilal finds that while there are desires to emulate the EU "model" across regions, prompted by EU's interest in promoting regional integration beyond the shores of continental Europe,<sup>156</sup> there are significant differences in levels of

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<sup>151</sup> Adrian D Saunders, "A Commentary on the Early Decisions of the Caribbean Court of Justice in Its Original Jurisdiction" (2010) 59 International and Comparative Law Quarterly 776

<sup>152</sup> Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing Ltd, 2011)

<sup>153</sup> Recent comparative works on integration in Europe and other parts of the world include: Finn Laursen *Comparative Regional Integration: Europe and Beyond* (Ashgate, 2010); Roy H Ginsberg *Demystifying the European Union: The Enduring Logic of Regional Integration* (2<sup>nd</sup> ed, Rowman & Littlefield Publishers, Inc, 2010); Bertrand Fort and Douglas Webber *Regional Integration in East Asia and Europe: Convergence or Divergence?* (Routledge, 2009); Woosik Moon, Bernadette Andreosso-O'Callaghan, and U-Sik Mun *Regional Integration: Europe and Asia Compared* (Ashgate Publishing, 2005); Pierre L. Van Der Haegen and Jose Vinals *Regional Integration in Europe and Latin America: Monetary and Financial Aspects* (Ashgate Publishing, 2004)

<sup>154</sup> Alter (n 111)

<sup>155</sup> Sanoussi Bilal, 'Can the EU Be a Model of Regional Integration? Risks and Challenges for Developing Countries', (2005) Paper to be presented at the CODESRIA - Globalisation Studies Network (GSN) Second International Conference on Globalisation: Overcoming Exclusion, Strengthening Inclusion, Dakar, Senegal, 29 August to 31 August <[http://www.ecdpm.org/Web\\_ECDPM/Web/Content/Download.nsf/0/52D667FD6C95057DC125719D004B65F6/\\$FILE/Bilal%20-%20Can%20EU%20be%20a%20model%20of%20RI%20Draft%20for%20comments.pdf](http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/52D667FD6C95057DC125719D004B65F6/$FILE/Bilal%20-%20Can%20EU%20be%20a%20model%20of%20RI%20Draft%20for%20comments.pdf)> accessed 9 October 2010

<sup>156</sup> The EU itself has denied any deliberate attempt to export its model to other parts of the world. See the European Commission (1995), *European Community Support for Regional Economic Integration*



development and institutional history that make wholesale transplant of the EU integration model into these other regions less than successful. The story is not different in Africa, where the influence of the EU on the African regional economic communities has been strong.<sup>157</sup> The natural and inextricable socio-economic, cultural and political links between Europe and Africa,<sup>158</sup> naturally made the European model of economic cooperation among countries particularly receptive and adaptable/attractive to the African continent. Similar findings were made in a study of regional integration in East Asia.<sup>159</sup> Even then, Kirkham and Cardwell are right in their conclusion that while no two models are exactly the same, several features of regional integration experiments conform to the lead provided by “the most constitutionally advanced” model of the EU.<sup>160</sup> In this regard, the issues of compulsory jurisdiction and granting of access to non-state actors<sup>161</sup> have been frequently cited as two unique features of contemporary international courts that are derived from the CJEU experience.

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*efforts among Developing Countries*, <<http://aei.pitt.edu/4328/>> accessed on 21/09/2012. It is prepared, nonetheless, to “share European experience with interested parties”. See Communication from the Commission to the European Parliament and the Council on the Commission's objectives, in the framework of the relations between the European Union and Latin America, in view of the 3rd Summit of Heads of State and Government of the European Union and Latin America and the Caribbean to be held in Guadalajara (Mexico) on 28 May 2004. /\* COM/2004/0220 final \*/ <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0220:EN:HTML>> accessed on 20/09/2012. But the EU have used human rights conditionality clauses in trade treaties with the ACP states. See <http://www.parliament.uk/documents/commons/lib/research/rp2004/rp04-033.pdf> accessed 8 January 2013

<sup>157</sup> Ludger Kühnhardt and others, ‘African Regional Integration and the Role of the European Union’, 2010 25:1 *Development* 1-62

<sup>158</sup> Guy Martin, ‘Africa and the Ideology of Eurafica: Neo-Colonialism or Pan-Africanism?’, 1982 20:2 *Journal of Modern African Studies* 222

<sup>159</sup> See “EU’s Lessons for East Asian Integration” <<http://opinionasia.com/node/7>> accessed 10 October 2010

<sup>160</sup> Richard Kirkham and Paul James Cardwell, ‘The European Union: A Role Model for Regional Governance’ 2006 12:3 *European Public Law* 403-431

<sup>161</sup> Karen Alter, ‘Private Litigants and the New International Courts’, 2006 39:1 *Comparative Political Studies* 22-49

## **Legal/Judicial Frameworks of Regional Integration in Africa**

The uniqueness of the EU experience and impossibility of a transplant of the EU model to other parts of the developing world have not precluded, but have indeed promoted, reference to the CJEU in scholarly study of regional integration courts in other parts of the world.<sup>162</sup> Indeed, a number of studies have sought to observe, explain and account for the wide gulf of difference between the CJEU and similar courts in other parts of the world, with little or no reference to Africa. This pattern of scholarly neglect survives into the Twenty-First Century despite decades of integration efforts in the continent. A recent collection of essays on regional integration efforts in “all major parts of the world” focuses on North America, South America and East Asia, while references are made to Africa only in relation to the Economic Partnership Agreements (EPAs) and MERCOSUR within the context of Euro-American integration agenda.<sup>163</sup> Even more neglected is the role of courts in the integration process. Perhaps, because of the long tradition of autocratic rule, scholarly works on African courts have focused more on human rights courts to the neglect of courts devoted to interpretation of economic laws.<sup>164</sup>

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<sup>162</sup> See Osvaldo Saldias, ‘Supranational Courts as Engines of Disintegration: The Case of the Andean Community’ (2007) Berlin Working Paper on European Integration No. 5 <[http://www.polsoz.fu-berlin.de/polwiss/forschung/international/europa/arbeitspapiere/2007-5\\_Saldias.pdf](http://www.polsoz.fu-berlin.de/polwiss/forschung/international/europa/arbeitspapiere/2007-5_Saldias.pdf)> accessed 9 October 2010

<sup>163</sup> Laursen (n 151)

<sup>164</sup> See: Yemi Akinseye-George, ‘Africa at the Crossroads: Current Themes in African Law: VI. Conflict Resolution in Africa: New Trends in African Human Rights Law: Prospects of an African Court of Human Rights’ (2001/2002) 10 University of Miami International and Comparative Law Review 159-175; Arthur E Anthony, ‘Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa’ (1997) 32 Texas International Law Journal 511-524; IA Badawi, ‘The Future Relationship between the African Court and the African Commission’, (2002) 2 African Human Rights Law Journal 252-260; IA Badawi, ‘Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights: Introductory Note’ (1997) 9 African Journal of International and Comparative Law 943-961; RW Eno, ‘The Jurisdiction of the African Court on Human and Peoples’ Rights’ (2002) 2 African Human Rights Law Journal 223-233; K Hopkins, ‘The Effect of an African Court on the Domestic Legal Orders of African States’ (2002) 2 African Human Rights Law Journal 234-251; M Mutua, ‘The African Human Rights Court: A Two-Legged Stool?’ (1999) 21 Human Rights Quarterly 342-363; R Murray, ‘A Comparison between the African and European Courts of

The fact that the study of courts generally and regional integration courts in particular have not enjoyed much scholarly visibility in Africa comparable to the European experience could be linked to the specific historical experience of the development of judicial institutions in Africa. In the first instance, the long years of authoritarian rule have almost obliterated the relevance of courts within the national legal systems.<sup>165</sup> More importantly, recourse to adjudicatory frameworks for resolution of inter-State conflicts arising from Treaty and other legal obligations did not originally appear an attractive option in the schemes of inter-State cooperation and unity in Africa. As Naldi notes,<sup>166</sup> there is general hesitation, in the African context, for use of judicial framework for settlement of disputes that could be resolved by other (mainly diplomatic) means. While efforts targeted at continental unity and regional integration could be dated to the pre-1960s era, pacific resolution of conflicts had, until lately, been limited to diplomatic channels. Measures of legal/judicial cooperation have occurred at the technical, often private, levels for harmonisation of laws relating to business transactions. Apart from providing for arbitration, such measures made use of existing judicial frameworks provided by national laws. The emergence of courts with transnational jurisdiction and scope of operation was a specific development of the last decade of the Twentieth Century.

This is not to say that there were no judicial institutions or a lack of appreciation of their relevance to societal development in Africa. In fact, prior to the advent of

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Human Rights' (2002) 2 *African Human Rights Law Journal* 195-222; NJ Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication" (2003) 28 *Brooklyn Journal of International Law* 811-866

<sup>165</sup> For African governance systems in the post-independence era, see Naomi Chazan, Peter Lewis, Robert A. Mortimer, David Rothchild, and Stephen John Stedman, *Politics and Society in Contemporary Africa*, 3<sup>rd</sup> ed (Lynne Rienner Pub, 1999)

<sup>166</sup> Naldi, Gino J, "Aspects of the African Court of Justice and Human Rights", in Duncan French, Matthew Saul, and Nigel D. White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Oxford: Hart Publishing, 2010) 321 // 321-344

European colonisation, the several empires and kingdoms of Africa had their own system of governance, some of which included advanced system of legal and judicial administration.<sup>167</sup> Unlike the modern adjudicatory systems that are largely adversarial in nature, the largely unwritten pre-colonial African systems of law and justice were reconciliatory in nature. The society was and still is non-litigious, and the African culture, which survives to the modern age, seeks the promotion of communal spirit with greater emphasis on the promotion of peaceful co-existence rather than assertion of individual rights. While colonialism and globalisation have tended to whittle down this age-long tradition of civility, it continues to reflect one way or another in the African approach to inter-personal and inter-State relations. The preference for diplomatic channels of disputes resolution, over and above creation of judicial frameworks, in the various schemes of regional integration in Africa is one manifestation of this peculiarly African tradition. *A fortiori*, in the absence of much emphasis on legal and judicial frameworks in the schemes of regional integration in Africa, scholarly discourses on the course and patterns of regional integration in Africa has paid little attention to the legal and judicial aspects of regional integration efforts. While significant documentary analyses exist to account for the development of regional integration in Africa, there is a dearth of scholarly work on the role of courts in the process. Although the literature on regional integration in Africa is rich and burgeoning,<sup>168</sup> none has sought to systematically study the judicial institutions of the regional community on a comparative or single-case basis.

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<sup>167</sup> See, generally, Jeanmarie Fenrich, Paolo Galizzi, and Tracy E. Higgins (eds), *The Future of African Customary Law*, (Cambridge: Cambridge University Press, 2011)

<sup>168</sup> See, eg, United Nations, *Assessing Regional Integration in Africa: Rationalising Regional Economic Communities*, (United Nations Publications, 2006); Kato Kimbugwe, Nicholas Perdakis, May Yeung, and William Kerr (eds), *Economic Development Through Regional Trade: A Role for the New East African Community?*, (NY: Palgrave Macmillan, 2012); Gary Clyde Hufbauer and Claire Brunel, *Maghreb Regional and Global Integration: A Dream to Be Fulfilled*, (Washington, DC: Peter G. Peterson Institute

An early attempt to bridge the gap in scholarship in this regard was made by Akintan who examines the origin, powers, organisation and legal status of the various continent-wide and regional economic cooperation agreements existing in Africa. Given that most of the institutions discussed in the book, except perhaps the Economic Commission for Africa (UNECA), were in their state of infancy, the contents of the books are limited to highlights of the governing instruments, functions and powers, organisation structure, and challenges facing each of the institutions discussed. The ECOWAS, which was in existence for only two years at the time of publishing the book, gets a deserved mention in the book, with a submission on lack of clarity about the status of the arbitration tribunal.<sup>169</sup> Since many community courts in the African continent have had delayed establishment and are non-functional, they hardly received enough attention. Some recent works have sought to bridge the gap.

Using the African Peer Review Mechanisms (APRM) as a case study in relation to the Copenhagen requirements for EU membership,<sup>170</sup> Fagbayibo identifies the absence of an effective legal/regulatory regime as a major obstacle towards achieving the supranational vision of an African Union. He therefore proposes a politico-legal framework that could transform the APRM into a legally binding instrument for ensuring uniform application of the fundamental norms of democracy and good governance inherent in the APRM in all the Member States of the African Union. As

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for Economics, 2008); Henry Kyambalesa and Mathurin C. Hounnikpo, *Economic Integration and Development In Africa*, (Hampshire: Ashgate Publishing Ltd, 2006); Said Adejumobi and Adebayo Olukoshi (eds), *The African Union and New Strategies for Development in Africa*, (Cambria Press, 2008); Maduabuchi Ogidi, *Regional Integration and Development in Africa: Example from the African Union*, (LAP LAMBERT Academic Publishing, 2012); Akwen Gabriel and Ortindi Boniface, *The African Union and the Challenges of Regional Integration in Africa: What Hope for Africa's Development*, (LAP LAMBERT Academic Publishing, 2011)

<sup>169</sup> Akintan, S. A., *The Law of International Economic Institutions in Africa* (Leyden: A.W. Sijthoff International Publishing Company B.V., 1977): 178-193

<sup>170</sup> Fagbayibo, Babatunde Olaitan, "A Politico-Legal Framework for Integration in Africa: Exploring the Attainability a Supranational African Union", Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Doctor of Law (LLD) at the University of Pretoria, April 2010

the study takes a broad, continental perspective of the issue of regional integration in Africa, the data provided and analysis of the data are restrictive in scope and dimension, leaving out a pool of issues that are of specific relevance to the regional economic communities, including the ECOWAS.

Another recent attempt at exploring the legal aspects of regional integration in Africa is Salami's review of the continent-wide agenda of the AU in establishing the AEC and seeking to consolidate and incorporate the existing economic integration arrangements into eight regional pillars of the AEC. The author examines the legal and institutional weaknesses inherent in such an arrangement. She presents a historical analysis of the development of regional economic integration in Africa, and critically assesses the treaties of the regional economic communities (RECs) in the light of the legal and institutional challenges facing them and the implications of these for attainment of the goal of continental integration. She examines the legal framework of the RECs, and identifies weaknesses in these legal frameworks as sources of challenges towards attainment of the individual objectives of the RECs and the collective objectives of the AEC.<sup>171</sup> Generally, the key lacunae in the legal instruments of African regional organisations identified by the author pertain to failure to provide for the legal status of the Community texts, particularly the subsidiary instruments, in the laws of the Member States, and lack of effective enforcement mechanisms. While the work recognises the enforcement mechanism of the CJEU as a key success factor in the EU,<sup>172</sup> the paper fails to take into cognisance recent developments in the laws of the communities, particularly of the ECOWAS, that have taken care of many of the criticisms anchored on inadequacies of legislative

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<sup>171</sup> Salami, I, "Legal and Institutional Challenges of Economic Integration in Africa" 2011 *European Law Journal* 17(5): 667-682

<sup>172</sup> Salami, *ibid*

provisions raised in the paper. Nonetheless, other gaps exist, and the author's reform proposals for tackling them are unique: clear provisions of the Treaties on the legal effects of Community texts in the Member States; strengthening the Community law enforcement mechanisms; effective national legal and judicial systems; inclusion of integration law in the curriculum of legal education; according supreme status to Community laws in the Member States; and recognition of superior status of Community law by all the organs and levels of governments of the Member States. It is no doubt a good survey of the laws of regional integration in Africa. But, with regard to the ECOWAS, the author fails to take cognisance of the legal and institutional reforms of the last five years, particularly those of 2006 and 2010.

Some of the legal issues arising from integration processes in Africa that are not captured in the work of Salami can be found in the recent book of Oppong.<sup>173</sup> Key issues of concern to the author bother on the relationship between community law and laws of the Member States, jurisdictional conflict between the Community and the Member States, allocation of competence between the Community and the Member States, individual access, and enforcement of Community acts. Proceeding from a rejection of the contextual characteristics of the socio-economic and political environment as the sole threats to the success of regional integration experiments in Africa, Oppong insists that faulty conceptions and inadequate legal framework are equally important critical factors. The author proposes radical reform of the laws at both the national and the regional levels as the needed panacea for successful regional integration in Africa. He examines the legal framework for managing relational issues in five RECs, including the ECOWAS, seeking to highlight the challenges of

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<sup>173</sup> Oppong, Richard Frimpong, *Legal Aspects of Economic Integration in Africa* (Cambridge: Cambridge University Press, 2011)

harmonising the integration processes of the AEC with those of the RECs. Significant section of the book is devoted to the work of the community courts – their structure, organisation, jurisdiction, and emerging jurisprudence from some decisions of the courts. He also examine issues relating to national implementation of community law, and the implications of all these for integration/international economic law. Like Salami's paper, the contributions of Oppong seeks to situate the legal contexts of the RECs within the wider continental agenda of the AEC, and to that extent, does not go deeper enough to fully explore developments in the ECOWAS region in greater details.

Some concerns have been expressed in respect of the overlapping jurisdiction among the rapidly developing African international courts. In his article, Udombana reviews the development of judicial institutions, interrogating the utility or otherwise of having two continental courts – the Court of Justice of the AU and the ACHPR, operating simultaneously. While he lauds the increasing appreciation of the need for judicial frameworks, he criticised the duplication in view of the realities of the African condition.<sup>174</sup> Other works have focussed on specific regional integration schemes for detailed analysis.<sup>175</sup> While occasional references are made to the ECOWAS as a regional economic community, and to the judicial organs of the existing regional integration schemes in the West African sub-region – ECOWAS, OHADA, WAMU, none has focussed specifically on the details of the specific contributions of the Community Court of Justice, ECOWAS, to the cause of regional integration in the region.

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<sup>174</sup> Udombana (n 162)

<sup>175</sup> Eg, Kato Kimbugwe, Nicholas Perdakis, May Yeung, and William Kerr (eds), *Economic Development Through Regional Trade: A Role for the New East African Community?* (NY: Palgrave Macmillan, 2012); Gary Clyde Hufbauer and Claire Brunel, *Maghreb Regional and Global Integration: A Dream to Be Fulfilled* (Washington, DC: Peter G. Peterson Institute for Economics, 2008)



## The Case of the ECOWAS Court

As in other parts of the continent, West Africa lacked a tradition of sustained commitment to democracy and the rule of law, with military rule and autocratic one-party systems dominating the political landscape for the greater part of the post-independence era.<sup>176</sup> Moreover, the traditional African dispute resolution mechanisms, which are non-adversary with emphasis on reconciliation rather than assertion of rights,<sup>177</sup> did not provide the kind of litigious environment that could compel the creation of courts. Within this context, the original 1975 Treaty of the ECOWAS did not create a court, on the logic that the main goal of regional integration was largely economic, requiring little disputes that could be easily resolved by recourse to arbitration. When the Court was eventually created, it suffered stunted growth occasioned by inadequacy of legal texts. Expectedly, the work of the Court has escaped major scholarly analysis. While some authoritative works on the ECOWAS are available,<sup>178</sup> only very few pay significant attention to the legal aspects of the economic integration experiment in the sub-region.<sup>179</sup> Even then,<sup>180</sup>

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<sup>176</sup> For an examination of continuity and change in the post-Cold War developments in Africa, see Peter J Schraeder, *African Politics and Society: A Mosaic in Transformation* (Bedford/St Martin's, 2000) 244-290

<sup>177</sup> Mojeed Olujinmi A Alabi, "Law Making in Pre-Colonial Yorubaland", in Toyin Falola and Ann Genova (eds) *The Yoruba in Transition: History, Values, and Modernity* (Durham: Carolina Academic Press, 2006) 111-124

<sup>178</sup> e.g., Ralph I Onwuka *Development and Integration in West Africa: The Case of the Economic Community of West African States* (Ile-Ife: University of Ife Press, 1982); Domenico Mazzeo (ed) *African Regional Organisations* (NY: Cambridge University Press, 1984); Ralph I. Onwuka and Amadu Sessay (eds), *The Future of Regionalism in Africa* (NY: St. Martin's Press, 1985)

<sup>179</sup> There are works, not necessarily limited to ECOWAS, on the legal and judicial institutions in Africa including: SA Akintan *The Law of International Economic Institutions in Africa* (Leyden: A.W. Sijthoff, 1977); AN Allott (ed), *Judicial and Legal Systems in Africa* (2<sup>nd</sup> ed, London: Butterworths, 1970); Sergio Ricca, *International Migrations in Africa: Legal and Administrative Aspects* (Geneva: ILO Office, 1989); AJGM Sanders *International Jurisprudence in African Context* (Durban: Butterworths, 1979); Thomas Lee Roberts, *Judicial Organisation and Institutions of Contemporary West African: A Profile* (NY: Institute of Public Administration, 1966); Austin Amissah, *The Contributions of the Courts to Government: A West African Review* (NY: Oxford University Press, 1981); Evelyn A Ankumah *The*

examination of the role of the ECOWAS judicature in the integration process has been generally lacking or at best, scanty, without any depth of scholarly analysis expected of a court of such potentially immense international significance. The reasons are not far-fetched. Many of the scholarly works that seek to discuss the legal aspects of the regional integration process in West Africa predated the establishment of the Community Court of Justice. For this and other reasons, initial focus of analysis has been on the process of legal integration and harmonisation of the laws of the countries comprising the ECOWAS. For instance, Adegbite's<sup>181</sup> treatise was an advocate's attempt at highlighting the benefits derivable from harmonisation of the laws of the countries of West Africa. The issue of harmonisation featured prominently in the work of Ovwah,<sup>182</sup> while Robert seeks to underscore the importance of gender, poverty and labour issues in the legal frameworks of the ECOWAS.<sup>183</sup> A wider continental articulation of the *raison d'être* for harmonisation of laws of African countries is provided by Chomba.<sup>184</sup> All these are advocacy writings and do not provide any broad framework for scholarly analysis of the prospects and challenges of regional integration through law in the African context. Also, Thompson made a half-hearted attempt at highlighting some of the legal problems

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*African Commission on Human and Peoples' Right: Practice and Procedures* (Boston: Martinus Nijhoff Publishers, 1996); A Arthur Schiller, *Bibliography of African Law* (NY: Association of American Law schools, 1965)

<sup>180</sup> Early works on the legal aspects of the ECOWAS, but which exclude a study of the ECOWAS Court, include: Akin Oyebo *International Law and Politics: An African Perspective* (Ikeja: Bolabay Publications, 2003) 185-194; MOU Gasiokwu, *ECOWAS: Problems of Citizenship and Free Movement (With Basic Documents)* (Enugu: Chenglo Ltd, 1998)

<sup>181</sup> L Adegbite, 'The Need for Integration of Legal Systems among ECOWAS States' in A Bolaji Akinyemi, Haroun Adamu and Walter Ofonagoro (eds), *Readings on Nigerian Federalism* (Lagos: Nigerian Institute of International Affairs, 1983) 479-482

<sup>182</sup> AO Ovwah, 'Harmonisation of Laws within the ECOWAS' (1994) 6 *African Journal of International and Comparative Law* 76-92

<sup>183</sup> René Robert, *The Social Dimension of Regional Integration in ECOWAS*, (Geneva: International Labour Office, 2004)

<sup>184</sup> FM Chomba, 'Integration of Africa Through Treaties' in *Integration of African Continent through Law Vol 7* (Lagos: Law Review Series, Federal Ministry of Justice, 1990) 1-10

associated with regional integration.<sup>185</sup> A notable and more recent exception in this regard is Yakubu.<sup>186</sup> None of these works is devoted distinctively to analysis of the judicial architecture of the Economic Community of West African States (ECOWAS).

Initial attempts at beaming scholarly attention on the ECOWAS Court consist of examination of the key provisions of the ECOWAS Treaty and the Protocol on the Community Court of Justice. They consist of highlights of functions, powers and challenges that could confront the new Court.<sup>187</sup> Dinakin examines the legal texts relating to the Court and appraises its prospects within the legal framework of the ECOWAS. The paper does not go into detailed analysis of the law, machinery, practice and procedure of the Court. Also, no attempt is made to link the emergence of the new Court to the pre-existing institutional framework provided under the old (1975) Treaty. Gambari, on the other hand analyses the progress and challenges facing the Court in the light of similar experiences elsewhere.<sup>188</sup> A related attempt at highlighting the obstacles to effective regional integration in West Africa is evident in the leading major work of Asante to assess the progress of ECOWAS within the first decade of its establishment.<sup>189</sup> Kufuor directs attention to the key challenge of enforcing the decisions of the Court,<sup>190</sup> while Ajulo's treatise interrogates the basis for excluding African customary law from the sources of the law of ECOWAS, which

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<sup>185</sup> Bankole Thompson, 'Legal Problems of Economic Integration in the West African Sub-region' (1990) 2 *African Journal of International and Comparative Law* 85-102

<sup>186</sup> Ademola Yakubu, *Harmonisation of Laws in Africa* (Ikeja: Malthouse Press, 1999)

<sup>187</sup> Yomi Dinakin, 'The ECOWAS Community Court of Justice: An Appraisal of Its Function and Powers', in IA Ayua and others (eds), *Nigerian Current Law Review, 1996* (Lagos: Nigerian Institute of Advanced Legal Studies, 1996) 127-140

<sup>188</sup> Ibrahim Gambari, *Political and Comparative Dimensions of Regional Integration* (Humanities Press International, New Jersey, 1991)

<sup>189</sup> SKB Asante, *The Political Economy of Regionalism in West Africa: A Decade of the Economic Community of West African States* (NY: Praeger, 1986); Uka Ezenwe, *ECOWAS and the Economic Integration of West Africa* (London: C. Hurst, 1983)

<sup>190</sup> Kofi Oteng Kufuor, 'Securing Compliance with the Judgments of the ECOWAS Court of Justice' (1996) 8 *African Journal of International and Comparative Law* 1-11

is anchored on foreign legal instruments.<sup>191</sup> A more structured focus on the ECOWAS Court could be found in the work of Ebobrah who examine the human rights regime of the Court.<sup>192</sup> In doing this, the author examines the structure, composition and procedure of the Court in the light of the legal texts and relates them to the challenges facing the Court and the potentials it holds for the future of human rights litigation in West Africa. The work analyses the instruments without assessing the actual working of the Court. Also, the work does not take into consideration the extensive reform of the Court in 2006 and 2010 and neglects the emerging jurisprudence brought about by the cases determined in the light of the new reforms. It is nonetheless a major addition to the emerging literature on the judicial aspect of regional integration in West Africa.

## **Conclusion**

It appears that while regional integration efforts on the continent of Africa have spanned more than half a century, attempts at beaming scholarly attention on the legal aspects of the developments have been scanty and only of recent. In this regard, the Community Court of Justice of the ECOWAS suffers more neglect, perhaps, than the others. The dearth of scholarly work on the judicial institution of the ECOWAS is not a peculiarity of this new institution. Perhaps, with the singular exception of the CJEU at Luxembourg, the judicial aspects of integration processes, particularly in Africa, has not been a subject of scholarly studies. The late development of regional integration efforts, the non-litigious character of the cultural environment, and

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<sup>191</sup> Sunday Babalola Ajulo, 'Sources of the Law of the Economic Community of West African States (ECOWAS)', 2001 45:1 Journal of African Law 73-96

<sup>192</sup> Ebobrah, Solomon T, *A Critical Analysis of the Human Rights Mandate of the ECOWAS Community Court of Justice* (Copenhagen: Danish Institute for Human Rights, 2008)

absence of genuine political will for entrenchment of the rule of law have combined to give the Courts a less than prominent role in the regional integration processes in Africa until lately. As evidence from the literature suggests, the rise of African regional courts was compelled by the global waves and did not arise out of a genuine desire for the use of judicial frameworks for settlement of disputes that are preferred to be moderated through other pacific means of settlement other than litigation. In the circumstances, legal instrument for regional integration schemes are haphazardly drawn and remain inadequate in giving regional institutions and processes that could readily position them to play leading role, in contradistinction to State power, in defining the course and pattern of regional integration schemes. In the circumstances, the judicial frameworks of regional integration process remain largely unutilised, a fallout of their inadequacy to meet the challenges of unyielding State power in favour of supranational authority.

## Chapter III

### LEGAL REGIME, COMPETENCE, AND JURISDICTION

#### Introduction

This Chapter examines the scope of the powers of the ECOWAS Court by looking at the instruments that define access to and jurisdiction of the Court. It pays attention to the dynamics of changing jurisdiction and access to the Court and the impact of this on its work. The analysis situates the issues of competence and jurisdiction within the context of the legal regime of the Community by examining the various sources of the law of the ECOWAS. The Community law not only defines the power of the Court, it is the primary object of the Court's existence, upon which it has the mandate to adjudicate. Discussions of the jurisdiction of the Court, within the ambit of the current legal texts, necessarily takes cognisance of attitudes of the Court itself towards the scope of its expanding jurisdictional competence.

The twin-issue of competence and jurisdiction is of the essence in any court of law. It goes to the root of the judicial process. Without it, the totality of the proceedings of a court of law are a nullity and “the fabric of a whole process of a case” destroyed.<sup>1</sup> The issue of jurisdiction is more important for an international court that is expected to function only on the basis of agreement among state parties to a treaty to surrender part of their sovereignty.<sup>2</sup> This is because international courts

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<sup>1</sup> *Femi Falana & another v Benin & ors* [2010] 3 CCJLR 114 at 131

<sup>2</sup> Despite current challenges to traditional principles, international adjudication remains grounded on the twin principles of sovereignty and territoriality. See Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: OUP, 2008)

exercise jurisdiction only on the basis of “specific powers and prerogatives”,<sup>3</sup> and it would clearly lack the needed competence where the domestic legal order is unwilling to submit to its supranational, or even transnational, scope of operation. The scope of competence and jurisdiction of an international judicial body therefore requires clear definition for effective implementation of its order at the domestic level. The competence and jurisdiction are products of Treaties and Protocols that define the scope and extent of the powers of the Court, and these and other subsidiary instruments of the parent organisations constitute the legal foundations for the exercise of the judicial powers of the courts. The same applies to the ECOWAS Court.

### **Treaty Basis of Legal Regime**

It is trite and no longer in serious intellectual contention that treaties provide the legal foundations for all international institutions, including regional integration courts such as the Court of Justice of the ECOWAS. They constitute the primary source of the law of international institutions.<sup>4</sup> Following the European Union, such primary source comprises the main legal texts establishing the institutions and defining their objectives, institutional mechanisms, functions and powers. Often, these comprise of founding treaties, treaties and protocols amending the founding/amending treaties, and other associated legal texts that are annexed to the founding treaties and declared to be part of them. They may also include Treaties of accession of new members to an organisation. Generally, this class of instruments, in the case of the

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<sup>3</sup> *Jerry Ugokwe v Nigeria & another* [2004-2009] CCJELR 37 at 46

<sup>4</sup> Jose E Alvarez, *International Organisations as Law-Makers* (Oxford: OUP, 2005); Alina Kaczorowska, *European Union Law* (Taylor and Francis, 2008) 206-207

European Union, are at the apex of the hierarchy of legal norms and determine allocation of powers and competences between the organisations and their Member States on the one hand and among the institutions and agencies of the organisations on the other hand.<sup>5</sup> They constitute the legal framework within which the parent organisation as well as the institutions operates.

Treaties are, however, by no means the only source of the laws governing the operation of international organisations, global, continental or regional. Other secondary instruments constitute significant sources of the powers of international institutions. They comprise “law-making acts of the institutions”,<sup>6</sup> being legal instruments that are derived but different from the Treaties,<sup>7</sup> and often include agreements, protocols and conventions that govern the behaviour of Member States of the organisations. Such instruments may comprise agreements among member states and/or institutions of the organisations, with or without outside countries or organisations. and may include what in EU terminology are called “unilateral secondary law”, being those listed in Article 288 of the Treaty on the Functioning of the EU, that is, regulations, directives, decisions, opinions and recommendations as well as those “atypical” instruments not so listed as communications and recommendations, and white and green papers.<sup>8</sup> Other sources of law not provided for in the Treaties are described as “Supplementary”, comprising case law, international law, and general principles of law.<sup>9</sup>

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<sup>5</sup> Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2<sup>nd</sup> ed, Cambridge: CUP, 2010) 94, 100

<sup>6</sup> John Tillotson, *European Community Law: Text, Case, and Material* (2<sup>nd</sup> ed, London: Cavendish, 1996) 63

<sup>7</sup> Rudolf Bernhardt, *Encyclopedia of Public International Law* Vol 2 (North-Holland, 1992) 261

<sup>8</sup> Available at:

<[http://europa.eu/legislation\\_summaries/institutional\\_affairs/decisionmaking\\_process/l14534\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm)> accessed 19 March 2012

<sup>9</sup> Available at:



Decisions of courts and tribunals provide some legal foundations for international institutions. In the exercise of their judicial power, international judicial bodies are enjoined to ensure the observance of law. They are also subject to the general international law, which, following Article 38(1) of the Statute of the ICJ, include: (a) International conventions, rules recognised by contesting states; (b) international customs, general practice accepted as law; (c) general principles of law recognised by civilised nations; and, (d) judicial decisions and opinion of jurists.<sup>10</sup> These principles are taken into consideration by the courts in the exercise of their interpretative powers and they assist to fill the gaps in law created by the inadequacies of Treaties and other secondary sources of the law of international institutions.

### **The Legal Regime of the ECOWAS**

The principal legal instruments of the ECOWAS are the Treaties, Conventions and Protocols entered into among the state parties to the Revised Treaty of 1993. This Treaty, which is the main source of the law of the ECOWAS and the principal source from which the Community Court of Justice derive its powers, is defined to include the “protocols and conventions annexed thereto”. As instruments that derive the force of their authority from the main Treaty, however, the Conventions and Protocols cannot rank equally as the Treaty within the norms of the ECOWAS legal order. These Conventions and Protocols therefore constitute separate sources of the powers of the Court and other Community institutions and therefore deserved of being

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<[http://europa.eu/legislation\\_summaries/institutional\\_affairs/decisionmaking\\_process/l14534\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm)> accessed 19 March 2012

<sup>10</sup> Statute of the International Court of Justice, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>, accessed 26 March 2012

separately examined for clearer understanding of the legal architectural norms of the ECOWAS.

Treaties, Conventions and Protocols are not the only instruments constituting the legal order of the ECOWAS as a regional community. Other subsidiary instruments, both those that derive directly as secondary sources from the principal instruments and those that are not so specifically listed in the principal instruments, are other sources of the law of the ECOWAS. The Supplementary Act A/SA.3/01/10 of 16 February 2010, which amended the Revised Treaty, created a new legal regime for Community Acts. By the new Article 9(1) of the Treaty,<sup>11</sup> the “Acts of the Community” comprises “Supplementary Acts, Regulations, Directives, Decisions, Declarations, Enabling Rules, Recommendations and Opinions”. The descriptions of these various instruments under the new legal regime are not quite different from the way they had been used in the previous legal texts of the Community. The instruments are required under the Revised Treaty to be adopted by unanimity or consensus, or where such agreements could not be reached, by two-thirds majority votes of the Member States.<sup>12</sup> Apart from Supplementary Acts which are required to be authenticated by the signature of all the Heads of State and Government,<sup>13</sup> all the other instruments are authenticated by the signature of the Chairman of the Institution making them. Also, all the instruments are required to be published in the Official Journal of the ECOWAS and the national gazette of the Member states within specified period.

Apart from those instruments designated as acts of the Community institutions by virtue of the Supplementary Protocol A/SP.1/06/06 as amended by the

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<sup>11</sup>As amended by the Supplementary Act A/SA.3/01/10

<sup>12</sup> Revised Treaty as amended – Art 9(8)

<sup>13</sup> Rules of Procedure of the Authority of Heads of State and Government – Rule 9(3)

Supplementary Act A/SA.3/01/10, there are other instruments that have been used in the documents and other texts of the ECOWAS that should not escape our analysis in this work. Since Article 6 of the Supplementary Protocol preserves pre-existing legal instruments to the extent of their compatibility with the aforementioned Supplementary Protocol, we need to take cognisance of such other terminologies that have been used to describe instruments prior to and since the modification of the legal regime by the Supplementary Act, most of which remain valid to date. Thus, such terminologies as Declarations, Resolutions, Rules and Final Communiqué, in so far as they are used to describe acts of Community Institutions, are included in the subsequent discussions on the legal regime, notwithstanding the fact that some of these instruments do not create obligatory legal relationships. Moreover, the Rules of the Community Court of Justice, though not listed as part of the “Acts of the Community”, is an important legal instrument that deserves a mention in our discussion of the legal regime of the ECOWAS. The Community legal texts and other instruments/acts are discussed, as far as possible, in the order of their positions within the hierarchy of norms of the ECOWAS. This hierarchy is not expressly stated in the Treaty or any other legal instruments, but can be ascertained from the provisions of the instruments themselves, the order of listing them in the Official Journal of the ECOWAS, established practices within the community, and rulings of the Community Court of Justice. Where necessary, however, some instruments are discussed together for purpose of clarity in line with the use to which such instruments have been put in legal texts of the Community.

### (a) Treaties

At the apex of the hierarchy of norms within the legal regime of the ECOWAS is the Revised Treaty signed in Cotonou, Republic of Benin on 24 July 1993. It is, to use the words of the ECOWAS Court, “the supreme law of ECOWAS, and it may be called its Constitution”.<sup>14</sup> It is the *grundnorm* of the Community. It revises the original Treaty establishing the Community that was signed on the 28 May 1975 in Lagos. The original Treaty is incorporated by reference into the Revised Treaty, which expressly affirms the existence of the old Treaty. By Article 92(2), the entry into force of the Revised Treaty, after its ratification by the required number of Member States, effectively terminated the provisions of the 1975 Treaty although all Conventions, Protocols, Decisions, and Regulations/Resolutions made under the 1975 Treaty are valid save to the extent of incompatibility or inconsistency with the provisions of the Revised Treaty. In case of conflict between the provisions of the two treaties, the revised Treaty takes precedence. The superiority of the Cotonou Treaty over the Lagos treaty is in line with the general rule of statutory interpretation enshrined in Article 59 (1) of the Vienna Convention on the Law of Treaties,<sup>15</sup> the convention itself being applicable in the determination of the rights and obligations of the Member States of the ECOWAS under the 1975 and 1993 Treaties.<sup>16</sup>

Treaties of the ECOWAS require the signatures of the Heads of State/Government of Member States to be valid, although an accredited representative of a Head of State or Government may sign for and on behalf of the government and people of the signatory State. Like all international treaties, Treaties of the ECOWAS

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<sup>14</sup> *Frank Ukor v Rachad A Laleye and another* [2004-2009] CCJELR 19 at 27

<sup>15</sup> [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf), accessed 26 March 2012

<sup>16</sup> See the Revised Treaty: Art 92(1)

do not become effective until they enter into force after ratification by the required number of States. For the original 1975 Treaty, ratification was a condition precedent to a country becoming a Member State of the ECOWAS.<sup>17</sup> Under the Revised Treaty, a Treaty or Protocol enters into force automatically upon ratification by the minimum number of Member States (which has reduced from nine<sup>18</sup> to eight<sup>19</sup>), the instruments of ratification required to be deposited with the ECOWAS Commission and registered with the African Union, the United Nations and any other organisation that the Council of Ministers may determine.<sup>20</sup> The procedure for ratification by each state is the constitutional procedure of the domestic legal order of the state concerned. The provisions of the Treaty can be amended by a Supplementary Act or Supplementary Protocol.<sup>21</sup>

With specific reference to the ECOWAS Court, the 1975 Treaty had no provision for the Community Court of Justice. It only made provision for an Arbitration Tribunal, now re-established under Article 16 of the Revised Treaty. On the other hand, Articles 6 and 15 of the Revised Treaty provide for establishment of the Court of Justice as an institution of the ECOWAS, although the detail of its status, power, procedures and other issues are left to be set out in a separate Protocol on the Community Court.

**(b) Conventions and Protocols**

The principal legal instruments of the ECOWAS include Conventions and Protocols. By article 89 of the Treaty, Protocols made pursuant to the provisions of

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<sup>17</sup> Treaty of the Economic Community of West African States (ECOWAS), 1975 – Art 2

<sup>18</sup> Revised Treaty: Art 89

<sup>19</sup> Supplementary Act A/SA.5/01/08 – Art 2. The reduction was necessitated by the withdrawal of the Islamic Republic of Mauritania from the ECOWAS in December 1999 thereby reducing the Members States of the organization to 15 from the original 16. See [2007-2008] *OJ*, 52/19

<sup>20</sup> Revised Treaty: Art 93

<sup>21</sup> Supplementary Protocol A/SP.1/06/06; Supplementary Act A/SA.3/01/10

the Treaty are annexed to the Treaty and form part of the Treaty, both instruments requiring the same number of States to ratify them before they can enter into force. Moreover, Article 9 of Supplementary Protocol A/SP.1/01/05 which define the scope of the jurisdiction of the Community Court of Justice set “Treaty, Conventions and Protocols” (paragraph a) apart from “regulations, directives, decisions and other *subsidiary legal instruments*” (paragraph b).<sup>22</sup> These provisions appear to place the Treaty, Protocols and Conventions of the ECOWAS on the same pedestal on the hierarchy of norms within the legal regime of the organisation. Nonetheless, to the extent that Conventions and Protocols derive their validity from the Treaty which declares their status within the legal order of the ECOWAS, they could be regarded as secondary instruments of the highest decision-making organ of the ECOWAS, the Authority of Heads of State and Government. They are, however, not subsidiary instruments but rather part of the principal legal instruments of the ECOWAS. In fact, the ECOWAS Treaty in the texts and documents of the Community is defined to include associated Protocols and Supplementary Protocols amending the Revised Treaty of 1993.<sup>23</sup> Generally, Conventions and Protocols cover matters of details for which the Treaty itself merely give the legal force. As stated in Article 1 of the Revised Treaty, they constitute instruments of implementation of the Treaty and have “the same legal force as the latter”. Such instruments declared to be an integral part of the Treaty also require ratification in the same manner as Treaties, and the procedure for amending a Protocol is quite similar to the procedure for amending the Treaty itself.<sup>24</sup>

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<sup>22</sup> Emphasis mine

<sup>23</sup> See [2010] *OJ*, 57/82, 100, 110

<sup>24</sup> See Protocol A/P.1/7/91 – Art 33; cf Revised Treaty: Art 90

Although Protocols are often used as instruments of implementing the provisions of the Treaty, some Protocols seem to have greater force of law as instruments for amending the Treaty. For instance Protocol A/SP.1/06/06 of 14 June 2006 amended the Revised Treaty of the ECOWAS. With respect to the Community Court of Justice, the relevant protocol is Protocol A/P.1/7/91 signed at Abuja on 6 July, 1991, later clothed with legality pursuant to the provision of Articles 6 (e), 7 and 15 of the revised Treaty.<sup>25</sup> It was approved in April, 2004. The Protocol defines the composition, competence, status and other matters relating to the Community Court of Justice. It has, in addition to the Preamble, 34 Articles covering various aspects of the Court and its working - its establishment, composition, appointment of judges, privileges and immunities, competence, sittings, proceedings, etc. Like the Treaty, the Protocol is signed by all the Member States. However, the Protocol excludes matters of practice and procedure which are, by Article 32 of the Protocol, left for the Court to make, subject to the approval of the Council of Ministers.

One criticism of the 1991 Protocol on the Community Court of Justice was the limitation of parties to contentious proceedings before the Court to Member States and institutions of the Community only. In order to correct this deficiency, which did not enhance the work of the Court, the Supplementary Protocol A/SP.1/01/05 giving direct access to ECOWAS citizens was enacted at the 28<sup>th</sup> Session of the Authority of Heads of State and Government in Accra, Ghana, in January 2005.

Although in the same class as instruments of implementation of the provisions of the Treaty, Conventions do not relate to the Treaty in the same way that Protocols and Supplementary Acts do as instruments for defining the powers, functions and operations of other institutions or for making important appointment. Rather,

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<sup>25</sup> See: "Protocol A/P. 1/7/91 on the Community Court of Justice" [1991] *OJ*, 19/4-11

Conventions stand alone, and bind only State parties who are signatories to the Convention or who have acceded to it. Like Protocols, however, a Convention requires signature and ratification for its entry into force. It is open for signature of the Member States, and requires the same number of Member States as the Treaty and a Protocol to ratify it before it can enter into force. Unlike a Protocol, a Convention may enter into force on different dates in different States depending on the date of deposit of the instrument of ratification. Also, a State that has not signed a Convention may accede to the Convention. Where a State accedes to a Convention in this manner, the Convention enters into force for the signatory State on the date of deposit of the instrument of accession.<sup>26</sup>

### **(c) Supplementary Acts**

Supplementary Acts are the highest law-making acts of the ECOWAS, being the principal means by which the Authority of Heads of State and Government, the highest decision-making organ of the ECOWAS, accomplishes its mission. As “Acts of the Authority”, the Rules of Procedure of the Authority of Heads of State and Government list rank “Supplementary Acts” high on the order of norms within the legal regime of the Community. Like the Treaties, Conventions and Protocols, they have the same enacting formula of “The High Contracting Parties ...” and are signed by the Heads of State/Government. Also, they are binding on the Member States and institutions of the Community and are directly applicable in the Member State subject to the interpretative powers of the Community Court.<sup>27</sup> Supplementary Acts are declared annexed to the Treaty<sup>28</sup> “of which it is an integral part”.<sup>29</sup> This may suggest

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<sup>26</sup> See [2006] *OJ*, 49/18

<sup>27</sup> Revised Treaty as amended – Art 9(3)

<sup>28</sup> Revised Treaty as amended – Art 9(2)(a)

<sup>29</sup> [2007-2008] *OJ*, 52/5-6, 19-20



that they rank equally as the Treaty, or even higher than Conventions and Protocols of the ECOWAS. However, since Supplementary Acts derive the force of their authority from the Treaty, it is safer to regard them as complementary rather than equal in rank to the Treaty. This reasoning is anchored on the fact that Supplementary Acts are annexure to the main Treaty and are integral part of it.<sup>30</sup> They are also used to amend provisions of the Treaty.<sup>31</sup> Their superiority over the other instruments is affirmed by the requirements that they “shall be authenticated by the signature of all the Heads of State and Government” unlike Directives, Decisions, Declarations and Recommendations that are authenticated by the signature of the Chairman of the enacting body.<sup>32</sup> Supplementary Acts are also adopted by the Authority to create new institutions,<sup>33</sup> make key (statutory) appointments,<sup>34</sup> adopt policies,<sup>35</sup> or take other key decisions for which the signatures of all the Member States are required.<sup>36</sup>

#### **(d) Regulations**

“Regulations” rank the highest among the four key instruments – Regulations, Directives, Decisions, Recommendations and Opinions – by which the Council of ministers of the ECOWAS may accomplish its missions. The Council of Ministers “enacts” Regulations to give effect to its decisions or those of the Authority. Regulations are signed by the Chairman on behalf of the Council. They have general application in all the Member States. Such regulations are binding in all respects on both Member States and Community Institutions, and are “directly applicable” in each

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<sup>30</sup> Rules of Procedure of the Authority of Heads of State and Government - Rule 8(2)

<sup>31</sup> Supplementary Act A/SA.3/01/10, [2009-2010] *OJ*, 56/31

<sup>32</sup> Rules of Procedure of the Authority of Heads of State and Government -Rule 8(3) and (4)

<sup>33</sup> See Supplementary Act A/SA.1/07/10 on the creation of a tripartite social dialogue forum within ECOWAS, [2010] *OJ*, 57/5

<sup>34</sup> Eg, Supplementary Act A/SP.8/12/08 relating to the appointment of Judges of the Community Court of Justice, [2008] *OJ*, 54/58

<sup>35</sup> See Supplementary Act A/SA.2/7/10 adopting the West African Common Industrial Policy (WACIP) and its plan of action, [2010] *OJ*, 57/8. See also [2008] *OJ* 54

<sup>36</sup> See [2007-2008] *OJ*, 52/5-28

Member State “with no requirement for the state to do anything to implement it, and may create rights and obligations directly enforceable in national courts”<sup>37</sup> Member States are obliged to “take all appropriate steps to implement Council Regulations”.<sup>38</sup> One of such regulations, relevant to this research work, is Regulation C/REG.4/8/02 enacted at the 6<sup>th</sup> Extra-Ordinary Session of the Council of Ministers, Abuja, 27-28 August 2002, approving the Rules of Procedure of the Community Court of Justice. Other relevant ones are Regulation C/REG.23/12/07 adopting the Rules of the Community Judicial Council<sup>39</sup> and Regulation C/REG.15/11/08 adopting the Terms of Reference of the specialised Technical Committees of the ECOWAS.<sup>40</sup> Council regulations are also used to approve the annual work programmes of Community institutions.<sup>41</sup> Other institutions of the ECOWAS are also permitted to make Regulations in their areas of operation.<sup>42</sup>

**(e) Directives, Decisions, and Enabling Rules**

Regulations, directives and decisions are, by the provisions of Article 9(1)(b) of the Supplementary Protocol A/SP.1/01/05 amending the Protocol A/P.1/7/91, part of the “subsidiary legal instruments” of the ECOWAS. They are terminologies used to describe the law-making acts of the Community through its various institutional organs. The hierarchy of norms among such subsidiary instruments depends on the status of the institution that makes each of the instruments. Thus, a Decision of the Authority of Heads of State and Government necessarily rank higher on the order of norms above that of the Council of Ministers.

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<sup>37</sup> Hansine Donli, ‘The Constitutional Powers of ECOWAS Court’ *Nigerian Tribune* (Monday, 2 January 2006) 32

<sup>38</sup> Rules of Procedure of the Council of Ministers – Rule 9(2)

<sup>39</sup> [2007-2008] *OJ*, 52/54

<sup>40</sup> [2008] *OJ*, 54/88

<sup>41</sup> [2008] *OJ*, 54/79-87

<sup>42</sup> See Regulation MSC/REG.1/01/08 on the adoption of the ECOWAS conflict prevention framework enacted by the Mediation and Security Council on 16 January 2008, [2007-2008] *OJ*, 52/102

Within the context of the legal instruments of the ECOWAS, “Directives” are issued by the Authority or the Council, addressed to all the Member States of the Community, to set broad objectives to be attained while “leaving each and every one of them the liberty to decide” on the modalities for attaining the said objectives.<sup>43</sup> Directives are binding on the Member States in terms of the objectives to be realised. When directives are issued, Member States are permitted to choose whatever method of implementation within a time frame. In this sense, each national authority is at liberty to determine the form and means by which Directives are implemented. As Donli submits, “a directive is primarily intended to create legal obligations on the member state, and not intended to create directly enforceable rights for individuals”.<sup>44</sup> Where a national law is inconsistent with a directive, the national law may be interpreted by the Court in such a way as to give effect to the directive under the principle of “indirect effect”.

“Decisions” are, however, different. They are “acts of individual application to the recipients they designate”.<sup>45</sup> Decisions are made by the Authority or adopted by the Council. When made by the Authority, they are signed on behalf of the Member States by the Chairman of the Authority.<sup>46</sup> Also, the Chairman of the Council of Ministers sign Decisions adopted by the Council. Decisions are also used to monitor the functioning of Community Institutions or for monitoring the realisation of the objectives of the Community. Whenever it is used, a decision is binding on those to whom it is addressed. “Its most striking effect”, according to Donli, “is that it is

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<sup>43</sup> Rules of Procedure of the Authority of Heads of State and Government - Rule 8(3)

<sup>44</sup> *ibid*

<sup>45</sup> Rules of Procedure of the Authority of Heads of State and Government - Rule 8(4)

<sup>46</sup> See, e.g., Decision A/DEC.3/7/91 relating to the selection and the evaluation of the performance of statutory appointees of the Community, [1991] *OJ*, 19/14. See also Decision A/DEC.2/07/10 on the adoption of the Rules of Procedure of the Authority of Heads of state and Government, [2010] *OJ*, 57/80

immediately and totally binding on the addressee (Member States, corporate bodies or individuals), and as a result may create rights for third parties”.<sup>47</sup> The ECOWAS Commission may adopt “Enabling Rules” to give effect to Acts of the Authority and the Council, and they have “the same legal force” as the Acts for the implementation of which they are adopted.<sup>48</sup>

**(f) Declarations, Recommendations, and Opinions**

Other classes of instruments do not have binding force. “Declarations” are statements of commitments to a cause or to take a position on a matter, adopted by the Authority, which Member States are expected to pursue without any binding obligation on any one of them. They may be followed by “actions to be mandatorily undertaken by Member States”.<sup>49</sup> Examples of such are the Political Declaration on the Prevention of Drug Abuse, Illicit Drug Trafficking and Organised Crimes in West Africa adopted by the Heads of State and Government at the 35<sup>th</sup> Ordinary session of the Authority in Abuja in December 2008,<sup>50</sup> and the Declaration on a Sub-Regional Approach to Peace and Security adopted at the Extraordinary session of the Authority of Heads of State and Government held in Abuja on the occasion of the 28<sup>th</sup> anniversary of the Community.<sup>51</sup> Declarations are signed by all the Heads of State and Government, and may also be used as statements of commendation and support,<sup>52</sup> or, like Resolutions,<sup>53</sup> of condemnation and warning.

Proposals by an institution for consideration of another institution, often a higher authority on the organisational structure of the ECOWAS, go by way of

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<sup>47</sup> n 37

<sup>48</sup> Supplementary Act A/SA.3/01/10 – Art 9(7)

<sup>49</sup> Rules of Procedure of the Authority of Heads of State and Government - Rule 8(5)

<sup>50</sup> [2008] *OJ*, 54/72

<sup>51</sup> [2003] *OJ*, 43/9

<sup>52</sup> Eg, Declaration A/DECL.2/12/08 on tribute to His Excellency John Agyekum Kufuor, President of the Republic of Ghana, [2008] *OJ*, 54/70

<sup>53</sup> Resolution A/RES.6/7/94 on Liberia, [1992-1997] *OJ*, 22/44-45

“Recommendations” or “Opinions”. Recommendations and Opinions are not enforceable under the provisions of the Revised Treaty as amended.<sup>54</sup> Recommendations are guides to action and may assist in harmonising the viewpoints of those to whom they are addressed.<sup>55</sup> Most recommendations are formulated by the Council to the Authority, and if by the ECOWAS Commission or any other institution or *ad hoc* body, through the Council to the Authority.<sup>56</sup> The Authority may also make Recommendations by way of proposals “made to the recipients to adopt a particular position or take an action”.<sup>57</sup>

#### **(g) Other Subsidiary Instruments**

There are other terminologies that are frequently used in ECOWAS documents but which are not classified as legal instruments of the ECOWAS. They include “Resolutions”, sometimes made by the Authority or the Council of ECOWAS.<sup>58</sup> Resolutions are signed by the Chairmen of the respective institutions making them on behalf of the institutions, and may not create legal rights and obligations. They are often used as instruments of commendation or condemnation. “Final Communiqué” are not legal instruments but are rather statement of the conclusions reached at sessions of the Authority of Heads of State and Government, most of which are already given effect through appropriate legal instruments. They are released for information, publicity and public relations only.

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<sup>54</sup> Revised Treaty as amended – Art 9(7)

<sup>55</sup> Rules of Procedure of the Council of Ministers – Rule 9(5)

<sup>56</sup> Eg, Recommendation C/REC.1/12/07 relating to the allocation of three posts of Judge of the Community Court of Justice to Member States. See [2008] *OJ* 52/138

<sup>57</sup> Rules of Procedure of the Authority of Heads of State and Government - Rule 8(6)

<sup>58</sup> See [1990] *OJ*, 17/3; [1991] *OJ*, 19/2-3

#### **(h) Rules of Procedure**

Except the ECOWAS Commission that may adopt Rules relating to execution of Acts enacted by the Council of Ministers of the ECOWAS,<sup>59</sup> the Rules of the other Community Institutions are not listed as “community acts” under the new legal regime of the Community. Yet, each Community Institution has its own Rules of Procedure that regulate the performance of its functions and conduct of its sessions/proceedings. These Rules are derived from the provisions of the Revised Treaty and Protocols which permit the Institutions to have such Rules. For instance, the Authority of Heads of State and Government is empowered by Article 7(3)(c) of the Revised Treaty to prepare and adopt its own Rules. The Council of ministers is similarly empowered under Article 10(3)(e) of the Revised Treaty, while the specialised Technical Committees prepare their respective rules under Article 24 of the same Treaty. For the others, such as the Community Parliament and the Community Court of Justice, the power to make the Rules is derived from the Protocols on the respective institutions.<sup>60</sup> Apart from the Authority which adopted its own rules,<sup>61</sup> the Council of Ministers adopted its own rules<sup>62</sup> and those of other Community Institutions, including the ECOWAS Commission<sup>63</sup> and the Administration and Finance Committee in 2010.<sup>64</sup> The Rules normally cover matters that are not ordinarily covered in the Treaty, Protocols and other legal texts guiding the operation of the Community Institution. For the Community Court of Justice especially, the Rules of Procedure cover procedural matters while the Protocol and

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<sup>59</sup> Revised Treaty as amended – Art 9(2)(c)

<sup>60</sup> See Protocol A/P.2/8/94 relating to the Community Parliament – Art 19; Protocol A/P.1/7/91 on the Community Court of Justice – Art 32

<sup>61</sup> Decision A/DEC.2/07/10 of 2 July 2010

<sup>62</sup> Regulation C/REG.12/06/10 of 2 June 2010

<sup>63</sup> Regulation C/REG.13/06/10 of 2 June 2010

<sup>64</sup> Regulation C/REG.14/06/10 of 2 June 2010

Supplementary Protocols on the Court cover such substantive matters as establishment, powers and competence of the Court.<sup>65</sup>

The ECOWAS Court is empowered by Article 32 of the Protocol A/P.1/7/91 on the Community Court of Justice to establish its own rules of procedure subject to the approval of the Council of Ministers. Deliberations on the Rules were concluded during the second meeting of the Court held in Lagos. The President presented the Rules in accordance with Article 32 of the Protocol to the Council of Ministers for approval during the 48<sup>th</sup> Session of the Council in December 2001. By Regulation C/REG.4/8/02, the Rules of Procedure of the Court was approved in Abuja during the Sixth Extra-Ordinary Session of the Council of Ministers on the 28 August, 2002, and has since come into force having been published in the Official Journal of the Community. The Rules constitute a subsidiary instrument for exercise of the judicial powers of the Community Court of Justice. A revised version of the Rules is undergoing the process of approval by the relevant organ.<sup>66</sup>

**(i) Judicial Decisions**

The judgments of the ECOWAS Court are, by Article 15(4) of the Revised Treaty, binding on the Member States, the Institutions of the Community, and individuals and corporate bodies. A judgment of the Court binds only the parties and in respect of the particular case on which the judgement is given.<sup>67</sup> This does not mean that decisions of the Court cannot create precedents. Following the experience

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<sup>65</sup> See the case of *Chief Frank Ukor v Rachad Awodioke Laleye and Chief J. I. Alinnor* (2004-2009) CCJELR 19 at 27

<sup>66</sup> For a detailed consideration of the Rules, see Mojeed Olujinmi A. Alabi, 'Practice and Procedure of the ECOWAS Court of Justice', (2006) 2 The University of Ilorin Law Journal 261-294

<sup>67</sup> Protocol A/P.1/7/91 - Article 25 (5)

of the CJEU,<sup>68</sup> while decisions of international courts may not constitute *stare decisis*,<sup>69</sup> the courts are not precluded from making references to previous decisions in the determination of cases before them. Like the ICJ that often relies on its previous decisions,<sup>70</sup> the ECOWAS Court is not only prepared to refer to its own past judgments, it may also “refer to past judicial decisions and act on precedents from other Regional Courts particularly of courts of similar jurisdictions”.<sup>71</sup> The Court, like other international courts, applies the rules of international law as stated in Article 38 of the Statute of the ICJ.<sup>72</sup> It may also base its judgment on equitable considerations, by mutual agreement of the disputing parties, as the ICJ itself did in *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*.<sup>73</sup>

### **Initial Jurisdiction and Competence**

The powers and jurisdictional competence of the ECOWAS Court are governed by the provisions of the Revised Treaty,<sup>74</sup> the Protocol A/P.1/7/91 on the Community Court of Justice, and the Supplementary Protocol A/SP.1/01/05, which amended the Protocol. The Treaty merely created the Court, while the details of its powers and machinery are set out in the Protocol. Article 9 of the Protocol enjoins the Court to observe law and equity in the interpretation and application of the provisions of the

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<sup>68</sup> John J Barcelo, ‘Precedent in European Community Law’, in D. Neil MacCormick and Robert S Summers, *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate/Dartmouth, 1997) 407-436

<sup>69</sup> For a recent revisit of the historical and philosophical analysis of this doctrine, see Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008)

<sup>70</sup> Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 2007)

<sup>71</sup> Community Court of Justice, ECOWAS, *2004 Annual Report* 32

<sup>72</sup> Protocol A/P.1/7/91 – Art 19(1)

<sup>73</sup> Judgment, ICJ Reports, 1984, 246

<sup>74</sup> The Treaty basis of the jurisdiction of the Court was emphasized in the case of *Peter David v Ralph Uwechue* [2010] 3 CCJLR 135 at 155



Treaty. The Court has the competence to handle disputes referred to it by Institutions and Member States of the Community.<sup>75</sup> Individuals could only have access to the Court through the Member States. The Court may only entertain cases relating to the interpretation and application of the provisions of the Treaty and only “after attempts to settle the disputes amicably have failed”. The Court may also give advisory opinions on legal issues referred to it by any Institution or Member State.

The scope of the jurisdiction and competence of the ECOWAS Court under the 1991 Protocol was grossly limited. Clearly, the Court has the competence to settle disputes arising between the Member States and Institution on the interpretation or application of the provisions of the Treaty and other legal texts. It can review the legality of Community acts where an Institution of the Community has acted *ultra vires* or abuse its powers, and hold Members and Community Institutions accountable for their Treaty obligations.<sup>76</sup> In doing so, it was invested with powers normally vested in international courts of similar status and jurisdiction, that is, interpret Community texts and documents in line with the principles of international law. But the competence of the Court is not automatic; a dispute must be referred to it to be cognisable before it. Such a reference could only come from the Authority or a Member State, none of which is obliged to do so. Only Member States or Community Institutions and no one else could be parties before it, and the disputes must relate to the interpretation or application of the provisions of the Community legal texts.

The exclusivity of the competence of the Court is even doubted. Of course, Article 22 of the Protocol seeks to create exclusive competence for the Community Court of Justice when it provides that no dispute relating to the interpretation or

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<sup>75</sup> Cf Article 76 of the Revised Treaty

<sup>76</sup> Revised Treaty – Art 7(3)(g)

application of the provisions of the Treaty may be referred to any other form of settlement. The same Article 22 of the Protocol also provides that when a dispute is brought before the Court, Member State or institutions of the Community shall refrain from any action likely to aggravate the dispute or militate against its settlement. But those provisions come in handy only if and when the matter is ever referred to the Court. In fact, by the provisions of the Treaty and the Protocol, recourse to the Community Court of Justice for resolution of disputes is secondary. The primary mechanism of dispute resolution provided for under the Revised Treaty is by amicable settlement “through direct agreement”, and it is only when such pacific means of settlement fail that the jurisdiction of the Community Court of Justice can be invoked. In fact, the ECOWAS Court has declared recourse to amicable settlement a condition precedent to exercise of jurisdiction by it, and declined jurisdiction to entertain a suit instituted by the ECOWAS Parliament against the Council of Ministers of the ECOWAS simply because the former did not explore the option of amicable settlement before approaching the Court.<sup>77</sup>

Also, Article 9(3) of the Protocol encourages peaceful settlement of disputes by means other than litigation. The position of the Court of Justice was further threatened by the provision for simultaneous existence of the Arbitration Tribunal, a principal organ for conflict resolution under the original Treaty of 1975, which is retained under the Revised Treaty as an Arbitration Tribunal of the Community.<sup>78</sup> In fact, the jurisdiction of the Court may not necessarily be exclusive on all matters since there are provisions for reference of disputes to a court other than the Community Court of

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<sup>77</sup> *Parliament ECOWAS v Council of Ministers ECOWAS* [2004-2009] CCJELR 29

<sup>78</sup> Revised Treaty – Art 15

Justice under some legal texts of the Community.<sup>79</sup> Once a matter becomes cognisable by the Court, Member States and institutions are to refrain from action likely to prejudice the decision of the Court,<sup>80</sup> or confront it with a *fait accompli*.

### **A Deliberate Act of Omission?**

The restrictive jurisdiction of the ECOWAS Court and the limited access that individuals and corporate bodies had to its framework were major inadequacies of the 1991 Protocol. These inherent defects were deliberately contrived and could not be regarded as mere omissions or oversight. In the first instance, the enactment of the Protocol on the Community Court of Justice predated the comprehensive review of the ECOWAS Treaty resulting in the Revised Treaty by two years. It could be logical to submit that the global developments and internal dynamics that compelled revisions of the Treaty were still in their embryonic stage as of the time the Protocol was being drafted and the magnitude of the globalisation effects and their impact on Africa and African countries not fully manifested or appreciated. While the global waves of democracy was already sweeping across Eastern Europe at the end of the Cold War with the collapse of global Communism,<sup>81</sup> the vast proportion of Africa, nay West Africa, was still under the full grip of cabals of military rulers and authoritarian one-party dictators that little appreciate or fear entronement of the rule of law. As the ECOWAS leaders were literally constrained, in the midst of pressures

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<sup>79</sup> For instance, disputes/claims arising from the interpretation of the texts governing the execution of Community contracts may be settled amicably, by arbitration, or by referral to “a court of competent jurisdiction” pursuant to Articles 86-89 of the Tender Code of the ECOWAS Commission. See [1999] *OJ*, 37/109

<sup>80</sup> Article 22(2) of the Protocol

<sup>81</sup> Jan Zielonka and Alex Pravda (eds), *Democratic Consolidation in Eastern Europe: Volume 2: International and Transnational Factors* (Oxford: OUP, 2001)

from within and without, to agree to a Court of Justice, rather than an Arbitration Tribunal, for enforcement of their Treaty obligations, they had to be necessarily (and understandingly) cautious. Not only was emphasis laid on peaceful settlement of disputes as the primary mechanism of dispute resolution, an Arbitration Tribunal was retained as an alternative to the Court of Justice. The insistence on excluding individuals' direct access to the Court was a reaction to the increasing pro-democracy and human rights activism that was gradually but deeply penetrating the nooks and crannies of the African continent by the early 1990s. No wonder then that the Protocol signed in July 1991 did not get the required number of ratifications for its entry into force until 2001.

### **Attitudes of the Court**

Having recognised the limited nature of its jurisdiction as a “major problem at inception”,<sup>82</sup> the reactions of the ECOWAS Court were two-pronged: administrative and judicial. At the administrative level, the Court embarked on sensitisation missions, as early as it was inaugurated in 2001 to draw attention to its existence and enlighten prospective litigants about its jurisdiction and competence.<sup>83</sup> The efforts did not yield enough results because of the inherent defects in the Protocol, which restricted access to the Court. Indeed, in the four-year period of the existence of the Court before the Protocol was amended to expand the Court's jurisdiction and widen access to it, no Member State instituted any action either on its own volition or on behalf of its citizen(s) against any other Member State or Community Institution.

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<sup>82</sup> [2004-2009] CCJELR vii

<sup>83</sup> *The Community Court of Justice, ECOWAS at Ten (10) Years 2001-2011* (Abuja: Harlem Publishers, 2011) 04-05

While the Court took practical steps to submit proposals for expansion of its competence and jurisdiction,<sup>84</sup> it had to await the needed consideration and approval of the relevant Institutions. In the meantime, neither the Member States nor the Community Institutions filed cases before the Court.

The Court's attitudes at the judicial level did little to enhance its status and powers. While the President and Judges of the Court used opportunities of their off-the-bench speeches and remarks to lament the negative impact of the restrictive provisions of the Protocol on the Community Court, the Court adopted a cautious approach and gave strict interpretation to the provisions defining its competence. The position of the Court was reflected in the only ruling made by the Court before the Protocol was amended. In the case of *Afolabi Olajide v Federal Republic of Nigeria*,<sup>85</sup> a Community citizen of Nigerian nationality claimed that the unilateral closure of Nigeria/Benin Republic border sometimes in 2003 was unlawful and a breach of the provisions of the Revised Treaty on free movement of persons and goods within the Community. He cited the provisions of the Revised Treaty, the Protocol on Free Movement of Persons and Goods, and Article 12 of the African Charter on Human and Peoples' Rights to back his claims. He claimed compensatory reliefs and mandatory order of injunction to restrain the Government of Nigeria from further closing the borders. The Defendant raised preliminary objection on the ground that the Community Court "lacks jurisdiction or competence to entertain the suit" because Plaintiff "has no direct access to the court". The ECOWAS Court rejected the argument of the Plaintiff it could assume jurisdiction by invoking the authority of the CJEU to fill the gaps in the ECOWAS law or invoke equity. It construed the Protocol

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<sup>84</sup> Ibid 23

<sup>85</sup> 2004/ECW/CCJ/04; [2004-2009] CCJELR 1

literally and upheld the preliminary objection, stating that Article 9(3) of Protocol A/P.1/07/91 under which the Plaintiff/Respondent instituted his action did not grant direct access to individuals for breach of their fundamental human rights.

The decision of the ECOWAS Court in *Olajide* was a blow to the advocates of enhanced jurisdiction. It seemed the clear letters of the law tied the hands of the Judges even when it appeared from their off-the-bench speeches that current state of the law was unfriendly. But it appeared the Judges were determined to take a strict constructionist approach on the issue. The Court maintained this approach even after the enactment of the Supplementary Protocol A/SP.1/01/05, unprepared to give retroactive effect to the new provisions on its expanded jurisdiction. This was the import of the Court's decision in the subsequent case of *Chief Frank Ukor v Rachad Awodioke Laleye and Chief J. I. Alinnor*,<sup>86</sup> which was filed in the Registry of the Court exactly a year before the Supplementary Protocol was enacted. The case arose out of disputes on the ownership of some goods that were detained at a border post between Nigeria and the Republic of Benin on the order of a Beninoise court. The Applicant, the Respondent and the Intervener were all citizens of the Community. The case was heard in default of appearance of the Respondent. The Applicant's Counsel sought to invoke the jurisdiction of the Community Court of Justice on the basis of the provisions of the Supplementary Protocol which came into force while the matter was pending in the Court. The Counsel argued that the presumption against retrospectivity of statute provisions did not apply to matters of procedure, citing the case of *R v Chandra Dharma*.<sup>87</sup> Rejecting this contention, the Community Court of Justice made a distinction between "the Protocol that establishes the Court and defines

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<sup>86</sup> [2004-2009] CCJELR 19

<sup>87</sup> [1905] 2 KB 335

its competence which is substantive and the Rules of Procedure which is procedural”,<sup>88</sup> and ruled that that Supplementary Protocol did not touch any procedural rule of the Court. It therefore declined jurisdiction on the matter.

The strict approach taken by the Court in the two cases above is in line with the position of the CJEU in its interpretation of Article 263 TFEU<sup>89</sup> which gave the Court the jurisdiction to review the legality of the European Community acts, including actions for annulment. For a private party to bring an action for annulment of Community acts under the EU law, the party must satisfy the conditions regarding standing laid down in Article 263. In interpreting article 230 of the EC Treaty which is *in pari materia* with this provision, the CJEU took a strict approach,<sup>90</sup> although it has been less than strict in recent times in allowing annulment proceedings to be brought by private applicants.<sup>91</sup> In the case of the ECOWAS Court, however, there was little the Court could do in view of the mandatory provisions of Article 9 of the Protocol, which made the Court competent to entertain suits by private individuals only if such are brought on their behalf by the Member State of which they were nationals. In the circumstances, only a legislative intervention by way of an amendment to the Protocol could widen the scope of the jurisdiction of the Court.

### **The Struggle for Enhanced Competence**

The criticisms levelled against the Court therefore appeared unfair. In fact, the Court itself had taken proactive steps to challenge the provisions of its constitutive

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<sup>88</sup> [2004-2009] CCJELR 19 at 27

<sup>89</sup> Formerly Art 230 EC ( 173 EEC)

<sup>90</sup> See: Anthony Arnall, *The European Union and its Court of Justice*. (Oxford University Press, 1999) 41-44

<sup>91</sup> See PSRF Mathijssen, *A Guide to European Union Law* 10<sup>th</sup> ed (London: Sweet and Maxwell, 2010) 132-141

instruments that granted limited access to its framework. The Court has as soon as it was inaugurated taken steps to reverse the situation. The issue of jurisdiction was a major highlight of the 2003 Annual Report of the Court. According to the President of the Court,

The scope of the jurisdiction of the Court as provided for under Article 76.2 of the Revised Treaty and Articles 9 and 10 of the Protocol of the Court is unduly narrow and restrictive, as they do not give nationals of the member states direct access to the Court. Only member states and institutions of ECOWAS have access to the Court. In our view, lack of direct access to the Court by individuals, is a major impediment that is capable of incapacitating or crippling the Court.<sup>92</sup>

The limited competence of the Court, in terms of its jurisdiction and access, was considered “a hindrance” to effective growth of the Court, which took it upon itself, in collaboration with civil society and other international organisations such as the European Union, to embark on sensitisation programmes and workshops for expansion in the jurisdiction of the Court.<sup>93</sup> In addition, the Court submitted a Memorandum to and participated in the proceedings of the ad hoc Ministerial Committee on harmonisation of the Community texts, which met in Ghana in June 2003.<sup>94</sup> The very positive recommendations of the Committee for expanded jurisdiction, increased access to and effective implementation of the judgments of the Court were in the process of being considered by the appropriate organs of the

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<sup>92</sup> Community Court of Justice, ECOWAS, *2003 Annual Report*, 8

<sup>93</sup> *2004 Annual Report* (n 71) 9-10, 12-14, 15-16

<sup>94</sup> *2003 Annual Report* (n 92) 7-8



Community when the *Olajide* case was instituted and the Court had to take its decision on the state of the law as of the time its jurisdiction was invoked.

The ECOWAS Court was not alone in the campaigns for expanded jurisdictional competence for the Court. Civil society organisations, including the West African Bar Association (WABA), criticised the decision of the Community Court in the *Olajide* case. For them, such a restrictive interpretation of the provisions of the Protocol on the competence of the Court was capable of obscuring the role of the Court in the integration process since inter-state disputes were often resolved at the diplomatic level rather than being submitted for judicial determination by the Court. For a new Court whose existence and process were yet to be publicly noticed and acknowledged, tying access to state intervention as required by Article 9(3) of the Protocol has a tendency to block the flow of litigation into the court system. Indeed, no such intervention was recorded in the very short history of the Court before the Protocol was amended. The human rights and democracy advocacy groups were particularly vociferous in their campaigns for a widening of the scope of jurisdiction of the Court. While the recommendations of the Council of Ministers for amendment of the Protocol was awaiting consideration by the Authority of Heads of State and Government, the Court collaborated with civil society organisations to mobilise support for the initiative. It organised, in collaboration with the West African Human Rights Forum and the Open Society Initiative for West Africa (OSIWA), a Consultative Forum in Dakar, Senegal, on protecting the rights of ECOWAS citizens through the ECOWAS Court. At the end of the meeting, a declaration was drafted to further support the proposed amendments to the Protocol and call for its urgent

ratification once enacted.<sup>95</sup> The non-governmental organisations also worked hard to sensitise the Member States on the need for speedy ratification of the Supplementary Protocol, training of lawyers on how to access the Court, and citizen's protection of their rights through the Court.<sup>96</sup>

Proposals for expanded jurisdiction and access had easy passage through the Council of Ministers and the Authority notwithstanding some fears about the challenges which an expanded jurisdiction may pose to the new Court in terms of influx of cases. The Court had sought to allay such fears by indicating its preparedness to constitute more panels as may be required from time to time. The proposals were approved by the Council of Ministers in Abuja in July 2004.<sup>97</sup> The approval was anchored on the need to assist the Community in the attainment of its objectives and thus accelerate the regional integration process as well as the need to endow the Court with sufficient power to hold Member States of the Community to their commitments under the Treaty and associated Conventions and Protocols. The draft of the Supplementary Protocol was adopted by the Authority of Heads of State and Government at its 28<sup>th</sup> Session held in Accra on the 19 January 2005.

### **Expanded Access and Jurisdiction**

The Supplementary Protocol AP/SP.1/01/05 deletes Article 9 of the Protocol A/P.1/7/91 and replaces it with a new article 9 ("Jurisdiction of the Court") and inserts a new Article 10 ("Access to the Court"). The new Articles 9 and 10 now

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<sup>95</sup> Declaration on Proposed Amendment to ECOWAS Court of Justice Protocol, <[www.interights.org/news/ECOWAS%20DECLARATION.doc](http://www.interights.org/news/ECOWAS%20DECLARATION.doc)> accessed 25 December 2009

<sup>96</sup> (2004) 15:1 *Interights Bulletin*

<sup>97</sup> 2004 Annual Report (n 71) 7

define the scope of the jurisdictional competence of the Court. In this regard, the powers of the Court are enhanced in two main ways as follows:

#### Increased Jurisdiction

In addition to its interpretative powers over Community texts, the new Article 9 states clearly the powers of the Court to adjudicate on disputes relating to legality of regulations, directives, decisions and other subsidiary legal instruments of the ECOWAS, failure by Member States to honour their Treaty obligations, disputes between the Community and its officials, and action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions. The jurisdiction is extensive enough to include the power to award damages or make reparations for wrongs committed by the Community through its officials and Institutions. In this regard, it has jurisdiction to determine non-contractual liabilities of the Community provided actions against Community Institutions/officials are brought within three years of the accrual of the right of action.<sup>98</sup>

The jurisdiction of the Community Court of Justice now extends beyond matters bordering on the interpretation and application of Community texts *simpliciter*. The new jurisdictional competences extend to determination of cases of violation of human rights that occur in any Member State of the Community, exercise of the power of arbitration pending the establishment of the Arbitration Tribunal provided under Article 16 of the Treaty, construction of any documents wherein the parties confer jurisdiction for dispute settlement on the Court, and such other jurisdiction as the Authority may grant the Court.<sup>99</sup> In addition, the Supplementary Protocol grants

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<sup>98</sup> Protocol on the CCJ as amended: Art 9 (2) and (3)

<sup>99</sup> Protocol on the CCJ as amended: Art 9 (4), (5), (6) and (8)

the Community Court of Justice all such powers as are already conferred or may subsequently be conferred by Protocols and Decisions of the Community. With this, the jurisdiction of the Community Court of Justice is couched in such wide and expansive terms that the Court can virtually exercise jurisdiction on any matters whatsoever subject to such limitations that may be apparent in the light of the provisions of the Protocol and Supplementary Protocol defining its competence and jurisdiction.

#### Widened Access

The enhanced jurisdictional competence of the Community Court is reinforced by the direct access granted to individuals and corporate bodies to approach the Court for resolution of disputes. By Article 10(c) of the Protocol as amended, access to the Court is open to, in addition to the Member States and Community Institutions, individuals and corporate bodies to challenge actions or inactions of the Community or violation of human rights in any member State. It also entertains cases from the staff of the Community institution, after exhaustion of internal appeal processes<sup>100</sup> and references from national courts on issues that border on interpretation of Community texts. The referral jurisdiction seeks to link the national courts with the judicial framework of the ECOWAS. Apart from the issue of jurisdiction and access, the Supplementary Protocol seeks to further enhance the status of the Community Court of Justice by strengthening the mechanisms for enforcement of its decisions.<sup>101</sup>

Overall, the amendments introduced by the Supplementary Protocol have enhanced the jurisdiction and competence of the Court in more than one ways. In addition, the liberal provision of Article 32(6) of the Rules of the Court permits filing

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<sup>100</sup> See Economic Community of West African States (ECOWAS), *Staff Regulations*

<sup>101</sup> Supplementary Protocol A/SP.1/01/05 – Art 6

of pleadings by telefax or other technical means. This provides the Court with wide operational scope of the competence and jurisdiction that enables it to play leading role in “eliminating obstacles to the realisation of Community objectives and accelerating the integration process”.<sup>102</sup> The import of this enhanced jurisdictional competence is not lost on the Court itself. In the words of Aminata Malle-Sanogo, the immediate past President of the Court, the new provisions have endowed the Court “with very wide powers to enable it exercise control over the commitments made by the Member States”.<sup>103</sup>

### **Scope of Expanded Jurisdiction**

The competence of the ECOWAS Court is tied to issues bordering on the interpretation or application of the provisions of the Treaty, and the Court may not take cognisance of a case that has no bearing to the actions or inactions of the Community Institutions and officials. Two exceptions to this general rule can be garnered from the provisions of the Supplementary Protocol. In the first instance, cases involving violations of human rights occurring in the Member States are not necessarily tied to the Treaty and other associated texts of the Community. In this respect, the Court may call in aid the provisions of Article 19(1) of the 1991 Protocol that permits it to apply the provisions of Article 38 of the Statute of the ICJ. The Court can also apply the provisions of the African Charter on Human and People’s Rights and other similar regional, continental and global human rights instruments as well as national constitutions of the member states concerned in determining the

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<sup>102</sup> Supplementary Protocol A/SP.1/01/05 - Preamble

<sup>103</sup> *Year 2007 Annual Report of the Community Court of Justice, ECOWAS* ( Abuja, 27 November 2007)

extent of the liabilities of state parties in cases involving human rights violations.<sup>104</sup> This is particularly so in view of the provisions of Article 4(g) of the Revised Treaty which affirms and declares the adherence of the Member States of the Community to “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”. Secondly, the provision of the new Article 9(6) of the Protocol as amended, which permits parties to invoke the jurisdiction of the ECOWAS Court by mutual agreement, may not necessarily tie the hands of the Court where the matter does not relate to interpretation or application of the Treaty and other Community legal texts.

Except in the two instances noted above, perhaps, the Community Court of Justice may not be competent to determine a case involving issues that do not relate to the interpretation or application of the Treaty and other legal texts of the Community. This submission is in accord with the reasoning of the Community Court of Justice in an application that was brought before it within the first month of its newfound jurisdiction in February 2005. In the case of *Jerry Ugokwe v Federal Republic of Nigeria & Christian Okeke*,<sup>105</sup> the Court of Appeal, which is the court of last resort on elections into the National Assembly in Nigeria, gave judgment against the Applicant, who was earlier sworn in as a Member of the House of Representatives. With the voiding of his election by the Election Petition Tribunal and affirmation of same by the Court of Appeal, the Plaintiff had no further right of appeal under Nigerian law. Instead of vacating the Assembly seat to enable his successor (the Intervener in this case) to be sworn in, the Plaintiff brought application before the ECOWAS Court on the ground of lack of fair hearing before the Nigerian courts. He sought annulment of

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<sup>104</sup> *Habre v Senegal*, Interim Ruling No. ECW/CCJ/APP/02/10 delivered on 14 May 2010

<sup>105</sup> [2004-2009] CCJELR 37

the judgments of the Nigerian courts, and in another application brought on the same date, a special interim order to restrain the Nigerian electoral body from invalidating his election and the National Assembly from swearing in the other person to take over his seat.<sup>106</sup> His rival claimant to the seat who was declared the winner of the election by the domestic courts also applied to join the suit as an Intervener. The Respondent, the Federal Republic of Nigeria, raised a preliminary objection that the application was inadmissible on the ground that the Community Court lacked the jurisdiction to entertain the matter that was within the exclusive competence of the domestic courts of Nigeria.

The question that arose in the case *inter alia* was whether the ECOWAS Court could entertain a case bordering on electoral disputes in Member States of the ECOWAS, especially when there are complaints of lack of fair hearing as claimed in the instant case. The Court declared that “in the current stage of legal texts applicable to ECOWAS, no provision, whether general or specific, gives the Court powers to adjudicate on electoral issues or matters arising therefrom”.<sup>107</sup> It accordingly dismissed the application for want of jurisdiction, insisting that the Court had no power to adjudicate on electoral issues, which are cognisable only by national courts of the Member States of the ECOWAS.

The decision of the Court in *Ugokwe* also touched on the extent of the jurisdiction of the Court when issues bordering on violations of human rights are raised in disputes on matters that are ordinarily cognisable in the domestic courts as in the instant case. The Court stated that it felt obliged to consider the application in the instant case notwithstanding that it bordered on electoral matters that were cognisable

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<sup>106</sup> ‘ECOWAS Court Stops Inauguration of Lawmaker’, *The Punch* (Lagos, Friday, June 3, 2005) 8

<sup>107</sup> (n 3) at 46

only at the domestic courts because “the Applicant raises the legal plea on right to fair hearing”.<sup>108</sup> The Court invoked Article 19(1) of the 1991 Protocol permitting application of the provisions of Article 38 of the Statute of the ICJ, including “the general principles of law recognised by civilised nations”. Thus, a matter bordering on human rights violations need not necessarily relate directly to interpretation or application of the Treaty and associated legal texts to be cognisable by the Court. It is on the basis of this that the Court granted an interim order that stayed the execution of the judgments of the Nigerian domestic courts, which lapsed with the dismissal of the suit when the final judgment was delivered.<sup>109</sup> However, the Court held that in the instant case, there was no such violation of fair hearing, the Applicant having participated in the trial at both the Election Petition Tribunal and the Court of Appeal in Nigeria. It consequently declared itself incompetent to adjudicate on the principal application of Ugokwe, and declined jurisdiction on the application of the Intervener.

By pronouncing its competence to adjudicate on issues that borders on human rights, the ECOWAS Court laid a foundation of its subsequent attempt to expand the scope of its jurisdiction beyond mere interpretation and application of the Treaty provisions. It used the expanded jurisdiction to extend the frontiers of regional integration in various aspects of the law of the Community. Details of these are discussed in Chapter V.

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<sup>108</sup> *ibid*

<sup>109</sup> See *The Guardian* (Lagos, Tuesday, January 24, 2006) 68



## Chapter IV

### **INSTITUTIONAL MACHINERY OF THE COMMUNITY COURT**

#### **Introduction**

This Chapter examines the internal structure, organisation and processes of the ECOWAS Court. It highlights the organisational framework and functioning mechanisms that are central to effective performance of the administrative and judicial functions of the Court, the internal dynamics of which ultimately determine the output and performance of the Court. Specifically, it examines the membership of the Court including the status and tenure of the Judges, their qualification and appointment, exit and disciplinary mechanisms, management structure and judicial machinery for day-to-day administration of the Court, and the procedural rules for the discharge of the judicial function. Such an understanding of the actual working of the Court in practice, when situated within the context of the expanding powers of the Court and its position within the organisational architecture of the Community, will afford a better appreciation of the outputs of the Court's decision-making processes.

#### **Membership**

The Protocol on the Community Court of Justice prescribes seven Judges for the Court. The Court has been fully composed of the full complement of Judges at all times since the first batch of seven Judges was inaugurated at the 24<sup>th</sup> Session of the Authority of Heads of State and Government in Bamako, Mali, in December 2000.

The Judges so appointed and their nationalities were:<sup>1</sup> Mr Anthony Alfred Benin (Ghana); Mrs. Awa Daboya Nana (Togo); Mrs. Sanogo Aminata Malle (Mali); El Mansour Tall (Senegal); Mr. Barthelemy Toe (Burkina Faso); Mrs Hansine Napwaniyo Donli (Nigeria); and Mr. Soumana Dirarou Sidibe (Niger). All of them took their Oaths of Office before the Chairman of the Authority of Heads of State and Government in Bamako on 30 January 2001<sup>2</sup> while the Court held its inaugural sitting on 22nd January, 2004. The total number of Judges that have served on the Court to date is ten, while the process of appointing new Judges to replace the four whose tenure were due to expire since January 2011 is still not completed as of December 2012. Thus, four of the seven pioneer Judges still remain on the Court while the three of them whose tenure expired in January 2009 have been replaced by Mr Mosso Benfeito Ramos (Cape Verde); Mrs Clotilde Nougbo Medegan (Benin); and Mr Eliam Monsedjoueni Potey (Cote d'Ivoire).<sup>3</sup> While the pioneer Judge had the benefit of renewable appointments, the new ones were appointed for a non-renewable term of four years in line with existing regulations. The Judges are assisted in their work by Personal Assistants and other administrative officials of the Court headed by the Chief Registrar.

### Status of Judges

The issue of the status of the Judges of the Court within the Community were raised soon after the appointment of the first batch of Judges. Upon the recommendation of the Administration and Finance Commission, through the Council of Ministers, that the Members of the Court should be statutory appointees with their

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<sup>1</sup> Decision A/DEC.1/12/00 appointing the Judges of the Community Court of Justice

<sup>2</sup> [2003] *OJ*, 44/21, 85

<sup>3</sup> Supplementary Act A/SP.8/12/08, [2008] *OJ*, 54/58

salary scales aligned to those of the Heads of specialised institutions of the Community “without prejudice to the benefits attached to the specific office of the Judges”,<sup>4</sup> the Authority of Heads of State and Government, at its Summit in Dakar, Senegal,<sup>5</sup> in December 2001 decided that the Judges are statutory appointees within the terms and intendment of ECOWAS governing instruments, As statutory appointees,<sup>6</sup> the appointment and conditions of service of the Judges are prescribed by the Authority of Heads of State and Government. In line with the report of the 55<sup>th</sup> session of the Council of Ministers calling for harmonisation of the terms of office of statutory appointees, the tenure of office of the Judges was streamlined with those of other Community Institutions and fixed at four years non-renewable term under Article 18(3)(f) of the Revised Treaty as amended by the Supplementary Protocol A/SP.1/06/06, and is required to be based on “a transparent, equitable and predictable system of rotation” in line with rotational schedule prepared by the ECOWAS Commission for approval of the Authority.<sup>7</sup> Like other statutory appointees, their conditions of service are prescribed by Regulation C/REG.16/12/07, which places the Judges on the same salary scale as Commissioners of the ECOWAS Commission, Heads of specialised institutions and the Financial Controller while the President of the Court enjoys equal status as the Vice President of the ECOWAS Commission.<sup>8</sup>

The Judges also enjoy other privileges by virtue of the nature of their duties. One of this is their independence. They are described in the Protocol as “independent

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<sup>4</sup> ECOWAS Community Court of Justice, *2002 Annual Report* 11

<sup>5</sup> *Ibid* 5

<sup>6</sup> For the terms and conditions of “Statutory Appointees”, see Decision A/DEC.3/7/91, *OJ* (Vol 19, July 1991) 13 and Supplementary Act A/SA.9/01/07, [2006-2007] *OJ* 50/97

<sup>7</sup> Supplementary Protocol A/SP.1/06/06 – Art 18(4)

<sup>8</sup> [2007-2008] *OJ*, 52/48-49. This was a great improvement over the earlier conditions of service, which equated the salaries of the President and Judges of the Court to those of the President and Managing Director of the ECOWAS Bank for Investment and Development (EBID) respectively. See *2003 Annual Reports* 31

Judges”, selected and appointed by the Authority of Heads of State and Government of the Community. The use of the word “independent” to qualify the Judges is perhaps intended to emphasise the fact that the judges are expected to owe their loyalty to the ECOWAS and not to their countries of origin. This independence is complemented by the fact that the Judges are accorded diplomatic privileges and immunities.<sup>9</sup> Also, as part of the structuring of the Community Institutions to meet the challenges of regional integration in line with global trends and dynamics, new guidelines for appointment of the Judges were approved in 2006, later complemented by establishment of a Judicial Council that oversees the appointment, discipline and removal of Judges of the Court. An elaborate procedure of appointing Judges have also been put in place, all in an attempt to enhance the status of the Judges and to insulate them from the vagaries of practical politics and unpredictable political situations in the Member States of the ECOWAS. In fact, the Judges of the Court are precluded from exercising any political or administrative function or engaging in any other occupation of a professional nature.<sup>10</sup>

It is important to stress, however, that the scope of independence and integrity of the Court and its Judges cannot be gauged by mere reference to the provisions of the constitutive instruments. This is because there are several ecological factors beyond legal texts and constitutional provisions that are known to have threatened the independence of the national judiciaries in many of these countries,<sup>11</sup> and it cannot simply be assumed that the supranational status of the ECOWAS Court is a sufficient antidote to the problem. Nonetheless, the express reference to the independent status

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<sup>9</sup> “Protocol A/P.1 /7/91 on the Community Court of Justice”, [1991] *OJ*, 19/4-14

<sup>10</sup> Protocol A/P.1/7/91 – Art 4(11)

<sup>11</sup> See, for example, MOA Alabi, *The Supreme Court in the Nigerian Political System 1963-1997*, (Demyaxs Publishers, Ibadan, 2002) 114-324

of the Judges necessarily emphasises the intention of the founding fathers of the Court to insulate this institution as much as possible from the vagaries of inter-state power politics that are bound to permeate the decision-making structures and processes of the other organs. It appears thus that while the Authority of Heads of State and Government retains the prerogative to appoint the Judges, and to that extent some measure of control over the workings of the Court, the specifics of the day-to-day administration of and decision-making in the Court remains solely in the hands of the Courts, its Judges and other officials unfettered by any other organs or institutions or even member-states of the ECOWAS. The influence of individual countries on the composition of the Court is further reduced by the provision of the Protocol that precludes any two Judges from the same country from serving on the Court at the same time.

### Tenure

The provisions of the Protocols on the tenure of office of the Judges of the Community Court of Justice have witnessed some changes over time. By Article 4(1) of the Protocol A/P.1/7/91 on the Community Court, the Judges of the Court are appointed for a five-year term, renewable only once for another five-year term, with a proviso on different tenure for the first batch of appointees to the Court. Perhaps, for the sake of ensuring continuity through overlapping of the tenure of the Judges, the Protocol has a caveat that four of the pioneer Judges shall have five-year terms while three Judges shall have three-year terms. The determination of which of them falls into either of the two tenure categories was done by a lot drawn by the Chairman of the Authority immediately after the first appointments have been made. It was in line with this provision that Article 2 of Decision A/DEC.1/12/00 gave three-year tenures

**Table 1: Tenure of Office of Judges of the ECOWAS Court, 2001-2012**

S/N	Judges	Nationalities	1 <sup>st</sup> Tenure	2 <sup>nd</sup> Tenure	Remarks
1	Mr Anthony Anthony BENIN	Ghana	30/01/2001 -29/1/2006	30/01/2006- 29/01/2011	Tenure expired but still on the Court
2	Mrs Awa Nana DABOYA	Togo	30/01/2001 -29/1/2006	30/01/2006- 29/01/2011	Tenure expired but still on the Court
3	Mrs Hansine Napwaniyo DONLI	Nigeria	30/01/2001 -29/1/2006	30/01/2006- 29/01/2011	Tenure expired but still on the Court
4	Mr Soumana Dirarou SIDIBÉ	Niger	30/01/2001 -29/1/2006	30/01/2006- 29/01/2011	Tenure expired but still on the Court
5	Mrs S. Aminata MALLE-SANOGO	Mali	30/01/2001 -29/1/2004	30/01/2004 - 09/02/2009	Tenure expired and left the Court <sup>12</sup>
6	El-Hadji -Mansour TALL	Senegal	30/01/2001 -29/1/2004	30/01/2004 - 09/02/2009	Tenure expired and left the Court
7	Mr Barthélémy TOE	Burkina Faso	30/01/2001 -29/1/2004	30/01/2004 - 09/02/2009	Tenure expired and left the Court
8	Mr Mosso Benfeito RAMOS	Cape Verde	-	10/02/2009- 09/02/2013	Non- renewable
9	Mrs Clotilde Médégan NOUGBODÉ	Benin	-	10/02/2009- 09/02/2013	Non- renewable
10	Mr Eliam Monsédjouéni POTEY	Côte d'Ivoire	-	10/02/2009- 09/02/2013	Non- renewable

Sources: *OJ*, Vols 38 (p 3), 44 (p 85), 48 (p 60), 54 (p 58)

<sup>12</sup> Although the tenure of Judges Malle-Sanogo, Tall and Toe expired on 29/01/2009, they had to continue in office until their successors were sworn into office on 10 February 2009. See *The Community Court of Justice, ECOWAS at Ten (10) Years 2001-2011* (Abuja: Harlem Publishers, 2011) 30

to each of Justices Malle (Mali), Tall (Senegal) and Toe (Burkina Faso), while the other pioneer Judges had a five-year tenure each.<sup>13</sup> Except for this proviso, which relates to the first appointments of the pioneering Judges only, the Judges of the Community Court of Justice have guaranteed and secured tenure, subject to resignations, removal or incapacitation in line with the relevant provisions of the Treaty and Protocols of the ECOWAS.

The appointments of the Judges made under the provisions of the Protocol are renewable on the basis of eligibility for one additional term of five years only.<sup>14</sup> Accordingly, the appointments of the three pioneer Judges with initial three-year tenure were renewed by the Authority of Heads of State and Government vide Decision A/DEC.4/12/03 for another term of five years each effective 30 January 2004.<sup>15</sup> This rule has since changed. By the Supplementary Protocol A/SP.2/06/06, a Judge of the Court is now appointed for non-renewable term of four years. This new provision reconciles the appointment of the Judges with that of other statutory appointees of the ECOWAS, which is now fixed as one non-renewable term of four years by the new Article 18(3)(f) of the Supplementary Protocol A/SP.1/06/06 amending the old Article 18(4)(a) of the Revised Treaty of 1993.

Whether this new change affects the tenure of those Judges appointed under the old regime is not stated. But a decision of the Court on a related situation that arose in another Community Institution, the Inter-Governmental Action Group Against Money Laundering (GIABA), points to non-retroaction of the new provision. In an advisory opinion sought by the President of the ECOWAS Commission on the implication of the new four-year non-renewable term rule on the appointment of the Director

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<sup>13</sup> [2000] *OJ*, 38/3

<sup>14</sup> Protocol A/P.1/7/91 – Art 4(1)

<sup>15</sup> [2003] *OJ*, 44/21-22

General and Deputy Director general of GIABA whose first term lapsed after the new provision came into effect, the Court held that the new provision of the Supplementary Protocol could not be construed to suspend, modify or abolish the terms of office of the DG and DDG of the GIABA, but that once the appointments lapsed after the coming into effect of the new law, they could not be renewed.<sup>16</sup>

Since the appointments of the pioneer Judges of the Court were renewed before the new law came into being, they were not affected by the provisions of the new law. But the subsequent appointments of new Judges in January 2009 followed the new legal regime. Under the 1991 Protocol on the Community Court of Justice, a Judge may over-stay his/her tenure where the term of office expires while the Judge is still involved in the determination of a case that is yet to be concluded.<sup>17</sup> This is to avoid creating a vacuum where an appointing process remains incomplete at a time a vacancy occurs in the Court. As noble as this seems, it is liable to abuse by litigants, the Judge concerned and indeed the Member States of the Community, and could be used to unduly elongate a Judge's term of office by litigants who may resort to all manner of frivolous applications to prolong a case and hence impede speedy dispensation of justice. A Judge may connive with litigants in this regard or even deliberately stage-manage a prolongation of a case before him/her. It may also be used where the appointing authority is so inclined, or where any sufficient number of the Member States have sufficient interest in a particular Judge handling any particular matter as to warrant granting that Judge an extension of tenure by the back door. More offensive is the last part of the quoted provision (as highlighted above) that permits a Judge to continue in office even after his replacement until all part-

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<sup>16</sup> *Request for Advisory Opinion Sought by the President of ECOWAS Commission on Renewal of the Tenure of Director General and Deputy Director General of GIABA [2004-2009]* CCJELR 201

<sup>17</sup> Protocol on CCI - Article 4(3)



heard cases in which he/she participates are disposed of. Such an incongruous situation would definitely constitute an affront to the provision of Article 3(2) of the same Protocol that fixes the composition of the Court at seven Judges. Happily, this provision of Article 4(1) of the 1991 Protocol has been deleted and replaced with a new one brought about by the Supplementary Protocol A/SP.2/06/06 that simply requires a Judge to remain in office only “until the appointment and assumption of office of his successor”. This provisions also covers the four pioneer Judges (including the current President of the Court) who remain in office as of December 2012 when their tenure officially expired in January 2011.

Although the tenure of Judges of the ECOWAS Court is fixed at four years, a Judge may not spend four years on the Court’s bench if his/her appointment is made to replace another Judge that is unable, for whatever reason, to complete his/her statutory term. In that case, the succeeding Judge holds office only for the remainder of the term of office of his/her predecessor. Both the Treaty and the Protocol are, however, silent on whether the new Judge must be appointed from the same country as the Judge s/he is replacing. Political expediency and current practice in respect of other appointees<sup>18</sup> would dictate that the new Judge be appointed from the same country as the Judge s/he replaces in order to complete the tenure unless such a replacement could not be found from the country concerned. This may not be unlikely, particularly for the small countries that have sometimes depended on the larger ones to fill vacancies in the top echelon of their national courts.<sup>19</sup>

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<sup>18</sup> [2006-2007] *OJ*, 50/138-139

<sup>19</sup> For example, the Chief Justice and many senior judges of the Gambian courts are nationals of Nigeria.

## **Qualifications for Appointment of Judges**

For a person to qualify for appointment as a Judge of the Community Court of Justice, he/she must meet the requirements laid down in the Protocol and supplementary Protocols relating to the qualifications for appointment as a Judge of the Court. A combined reading of the provisions of Article 3 of Protocol A/P.1/7/91 as amended by Supplementary Protocol A/SP.2/06/06 reveals the importance of such criteria as nationality, moral character, professional qualification and age, and other procedural issues as nomination by the government and participation in screening, which are discussed in this Chapter, in the appointment process.

### **Nationality**

An applicant for position of Judge of the Community Court of Justice must be a national of one of the Member States of the ECOWAS, and must be nominated by that Member State. Where the applicant has dual nationality among the Member States, he/she would be regarded as a national of the country in which s/he ordinarily exercises his/her civil and political rights. Since no Member State can have more than one member on the court at the same time, an applicant cannot be a national of any Member State already represented on the Court unless the applicant is applying to complete the remainder of the term of a Judge who is unable to complete his/her term of office.

### **Moral Character**

The subjective criterion of high moral standing as a qualification for appointment to the bench is common to judicial appointments at whatever level of

governance.<sup>20</sup> Its inclusion in the ECOWAS legal instruments as a criterion of appointment is not novel. The emphasis on “high moral Character” is to underscore the unique nature of the judicial function, and not necessarily because there are such objective standards that could be uniformly applied across board. Nonetheless, the Judicial Council of the Community, which is the body statutorily saddled with the responsibility for recruitment of Judges for the Court, has its own guidelines that are taken into consideration in making its recommendations as further discussions on this issue in the later part of this Chapter show.

### Professional Qualification

Professional competence is important for appointment as a Judge anywhere in the world.<sup>21</sup> Such competence may derive from training or experience or a combination of both in varying degrees. Also, what constitutes professional qualification varies among the Member states of the Community, but attempts have been made in the instruments of ECOWAS to set objective standards that could be easily verified. The professional qualification of an applicant is tied to the requirements of his native country. An applicant is required to “possess the qualification required in their respective countries for appointment to the highest judicial offices”. This does not seem to pose a problem since the recruiting body, which is composed of the heads of the highest courts of the Member states, is expected to be conversant with those qualifications. While previous appointment as a Judge in the native country may serve as evidence of professional competence in law, the Protocol does not specifically state so providing only that the candidate has a

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<sup>20</sup> Brooks W. Daly, ‘International Courts and Tribunals Interest Group: Judicial Selection’ (2011) 105 *Am. Soc’y Int’l L. Proc.* 67. See also Deborah L Rhode, ‘Moral Character as a Professional Credential’ (1985) 94:3 *Yale Law Journal* 491

<sup>21</sup> See G Alan Tarr, *Judicial Process and Judicial Policymaking* (Boston: Wadsworth, 2010)

cumulative experience of “no less than twenty (20) years professional experience”. This is so because, as is the practice in other international courts,<sup>22</sup> “jurisconsults of recognised competence in international law, particularly in areas of Community Law or Regional Integration Law” are also qualified to apply for appointment as Judges of the Community Court of Justice. This is not a novelty. For international courts, generally non-possession of prior judicial experience has not been a disqualifying criterion for judgeship appointment. From what we know about the CJEU,<sup>23</sup> little cognate domestic judicial experience may hardly disqualify a candidate for appointment into the Court, particularly where the candidate, being a recognised juriconsult, has the strong backing of his home country and other regional leaders. For the ECOWAS Court, the requirement that prospective appointees be qualified for appointment to the highest courts in their respective nationalities presupposes that they must have considerable judicial experience. Whichever way one views it, a Judge of the Court is required to have considerable legal/judicial experience and competence. As the President of the Court attests, the Judges of the Court have had “outstanding legal careers” in their respective countries of nationality.<sup>24</sup> All the present appointees have had considerable judicial experience at the national level.

### Age

Age is a major criterion of appointment of a person as a Judge of the ECOWAS Court. By the provisions of Article 3(7) of the Protocol on the Community Court of Justice, no person below the age of 40 years or above the age of 60 years can be appointed as a Judge of the Court. Also, a person who is above the age of 65 years is not eligible for reappointment as a Judge of the Court. This latter provision is no

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<sup>22</sup> Statute of the International Court of Justice – Art 2; TFEU - Art 253

<sup>23</sup> Anthony Arnall, et al, *European Union Law* (5<sup>th</sup> ed, Sweet & Maxwell, London, 2006) 392-93

<sup>24</sup> Community Court of Justice, ECOWAS, *Annual Report 2003*, 15

longer relevant as Judges of the Court are now appointed for a non-renewable term of four years only. It is not clear why the retirement age of the Judges is peg at 60 years when judges in many countries of the West African region stay up to 65 or even 70 years on the bench of the higher courts.

Apart from this clearly spelled out criteria, there may be other considerations that combine to guide the appointing authority in making the final selection among several eminently qualified candidates. Generally, gender consideration has not been a major issue as despite the preponderance (60%) of men among the Judges of the Court, all the three Presidents to date have been female. For the Authority, the overriding consideration seems to be the need to appoint “competent judges, who can contribute, through the quality of their decisions, to the development of Community Law”. Whether this vision is borne out in practice is an issue for keen observation as the Community legal order unfolds through the activities of the Court.

### **Appointment Process**

One aspect of the machinery for effective functioning of the Community Court of Justice that has witnessed considerable changes in recent times is the procedure adopted in the selection and appointment of suitable candidates as Judges of the Court. Under the old and the new regimes, elaborate procedural frameworks, designed to promote transparency and attract the best available legal minds within the region, exist for selection and appointment of Judges of the Court. Under the 1991 Protocol on the Community Court, the selection process begins with compilation by the President of the ECOWAS Commission (formerly Executive Secretary) of a list of nominees (arranged in alphabetical order) of Member-States, no state being allowed

to nominate more than two persons. The list is forwarded to the Council of Ministers which prunes it down to fourteen persons, who are proposed by the Council to the Authority. The Authority of Heads of State and Government makes its final selection from the list of nominees recommended by the Council of Ministers. This procedure was used in making the appointments of the pioneer Judges of the Court. At that time, every Member State submitted names of two nominees out of which the Central Committee selected seven for appointment by the Authority of Heads of State and Government. In line with the new status of the Judges as statutory appointees, the process of renewing the appointments of the pioneer Judges (in December 2003 and December 2005) was slightly different. The Ad Hoc Ministerial Committee on the Selection and Evaluation of the Performance of Statutory Appointees considered the eligible candidates and submitted its report to the Council of Ministers. The Council considered the Report and made its recommendations after considering presentations from the ECOWAS Commission and the Community Court of Justice.<sup>25</sup> It is on the recommendations of the Council that the Authority of Heads of State and Government took the final decision to renew the appointments.<sup>26</sup>

While the selection process originally put in place under the 1991 Protocol and other regulations has largely remained, an amendment of Article 3(4) of the Protocol by the Supplementary Protocol introduces new dimensions to the selection process. In addition to giving recognition to the existence of a Judicial Council of the Community, with responsibility for screening of eligible candidates for judicial positions, the Supplementary Protocol has now streamlined the nomination process by requiring the Authority of Heads of State and Government to first allocate vacant

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<sup>25</sup> Recommendation C/REC.4/12/03, [2003] *OJ*, 44/85

<sup>26</sup> Decision A/DEC.4/12/03 [2003] *OJ*, 44/21; Decision A/DEC.21/01/06 [2006] *OJ*, 48/60

positions to Member States instead of the open system of nomination hitherto adopted. The procedure creates an early gate-keeping mechanism and prevents undue influx of applications which may become too unwieldy to be efficiently managed for the purpose of screening and selecting qualified candidates. Once the Authority of Heads of State and Government thus initiate the appointment process by allocating vacant positions to Member States in line with a schedule of rotation prepared and maintained by the ECOWAS Commission, the bulk of the work is passed to the Judicial Council of the Community, which reports to the Authority through the Council of Ministers

### **The Role of the Judicial Council of the Community**

The Judicial Council of the Community (JCC) was established by Decision A/DEC.2/06/06 with responsibility for “the recruitment and discipline of judges of the Community Court of Justice”. Its creation was part of the restructuring of the Court as directed at the 53<sup>rd</sup> and the 55<sup>th</sup> sessions of the Council of Ministers. The restructuring of the Court, in so far as it pertains to recruitment and discipline of Judges, was aimed at guaranteeing that the most suitable persons occupy the positions of Judges and that the Judges remain above board throughout their stay on the Court’s bench. The composition, duration of term and powers of the Judicial Council are treated elsewhere,<sup>27</sup> and need not be repeated here. What we need to stress here is that the composition and operational modalities of Judicial Council change depending on whether it is sitting as a recruitment agency or as an agency for exercise of

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<sup>27</sup> Chapter I, n 86

disciplinary control over the Judges of the ECOWAS Court. It has its own Rules of Procedure for the exercise of its powers in these two broad areas of its functions. A meeting to consider the draft of the Rules of the JCC was organised by the ECOWAS Commission in Abuja in September 2007.<sup>28</sup>

The JCC is composed, for the purpose of recruitment of Judges, of the Chief Justices of the Supreme Courts (or their representatives) of the Member states to which position of Judges have not been allocated. This provision of Article 2(1) of Decision A/DEC.2/06/06 is capable of conflicting interpretations. It is not clear whether the expression “to which positions of judges have not been allocated” is used to refer to those Member States that do not currently have their representatives on the Court at all or those Member States from which nominations are not invited for a particular recruitment exercise. Whichever way it is interpreted, it is clear that “the applicant Judges should not be from the same States as any member of the panel”.<sup>29</sup> The current practice, adopted during the recruitment of new Judges (in 2008 and 2010) appears to support the latter reasoning. Before meeting to consider applications received, the Judicial Council is required to set in motion a competitive selection process beginning with calls for applications in line with regulations governing statutory appointments.

Competitive selection process for appointment of Judges of the Community Court of Justice begin with advertisements in the Official Journal of the Community, the national gazettes and newspapers widely circulated in the Member States to which the vacant positions have been allocated by the Authority of Heads of State and Government. The advertisement must state the required qualifications and terms of

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<sup>28</sup> Community Court of Justice, ECOWAS, *2007 Annual Report*

<sup>29</sup> *CCJE at Ten* (n 12)30



the applicants and must be open to all eligible citizens of the countries concerned. After the closing date for submission of application, the Judicial Council, which is serviced by the ECOWAS Commission,<sup>30</sup> compiles the list of applicants and shortlists three candidates from each of the Members States to which the vacant positions have been allocated. Thereafter, the Judicial Council will conduct selection interviews taking into consideration all the requirements discussed above, and thereafter recommend one candidate per Member State for appointment as a Judge of the Court. The recommendations of the Judicial Council are channelled to the Authority of Heads of State and Government through the Council of Ministers. This was the procedure adopted for the appointments of Judges during the 2008 and 2010 recruitment exercises. During the 2008 exercise, which commenced as early as January with the allocation of the vacant posts to Benin Republic, Cape Verde and Cote d'Ivoire, the Judicial Council conducted a competitive selection process that ended with a proposal to the 61<sup>st</sup> ordinary session of the Council of Ministers in Ouagadougou in November 2008, and the latter body made the needed recommendations to the Authority of Heads of State and Government, which concluded the process in December of the same year by appointing the Judges at its meeting in Abuja. The same feat was not, however, achieved during the 2010 exercise, as the process of appointing new Judges is still on-going two years after the expiry of the tenure of the remaining four pioneer Judges of the Court. No plausible reason for the delay is available.

It appears from the new process of appointing the Judges of the Community Court of Justice that prospective appointees are no longer required to be nominated by their countries of origin to be eligible for such appointments. At least, this is no longer

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<sup>30</sup> See, eg, Article 5(4) of Decision A.DEC.2/06/06 establishing the JCC, [2006] *OJ*, 49/41

a formal requirement. However, going by the observable trends in the Community and other international organisations, it is doubtful whether a candidate would get such a statutory appointment without the strong backing of his/her home country. The appointment is made for a non-renewable four-year term, and a Judge is appointed in replacement of another Judge whose tenure is yet to expire, the new Judge is appointed under the same conditions as his/her predecessor. A Judge subscribes to the oath of office before the Chairman of the Authority of Heads of State and Government before assuming the duties of the new office. The effective date of the appointment is the date of swearing in.

### **Cessation of Membership of the Court**

The membership of a Judge in the Court may cease by temporary absence, permanent incapacity, resignation, or termination. Where a Judge is temporarily absent, he/she may be replaced by another Judge of the Court for the period of his/her absence.<sup>31</sup> In case of permanent incapacity such that the Judge is no longer able to perform the duties of the office as a Judge of the Court, or resignation, the President of the Court will inform the President of the ECOWAS Commission who will report the situation to the Judicial Council of the Community. A resignation takes immediate effect, except that the resigning Judge is permitted under the Protocol to continue to hold office until the appointment and assumption of office of his/her successor.<sup>32</sup> The replacement of the Judge follows the same procedure as are adopted for appointment of new Judges of the Court. However, the terms of office of the new Judge are the

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<sup>31</sup> Protocol A/P.1/7/91 – Art 4(5)

<sup>32</sup> Protocol A/P.1 /7/91 – Art 7(2)

same as those of the resigning Judge and the new Judge, who must be of the same nationality as the departing Judge, serves for only the remainder of the tenure of his/her predecessor.<sup>33</sup>

## **Disciplinary and Removal Procedures**

Matters concerning the discipline, including removal from office, of the Judges of the Community Court are now governed by the combined provisions of the 1991 Protocol, Decision A/DEC.2/06/06 establishing the JCC, and the Rules of Procedure of the JCC. As earlier noted, the Judicial Council is differently composed when it is exercising its disciplinary power. In this regard, it is composed of: (a) the Chief Justices of the Supreme Courts of Member States which do not have Judges on the Community Court of Justice; and (b) one representative of the Judges of the Court elected by the judges among themselves for one year, provided that a Chief Justice could be represented by another Justice of the Supreme Court if the Chief Justice is indisposed. When thus composed, the Judicial Council is empowered to examine cases of “gross misconduct and inability to perform the functions of a judge by reason of physical or mental disability”.<sup>34</sup> The Judicial Council examines the case in line with its Rules of Procedure and, where criminal acts committed by a Judge are involved, make its recommendations to the Authority through the Council of Ministers.

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<sup>33</sup> Protocol A/P.1/7/91 as amended – Arts 7(3) and 8

<sup>34</sup> Article 4(2) of Decision A/DEC.2/06/06, [2006] *OJ*, 49/41

## **Administration of the ECOWAS Court**

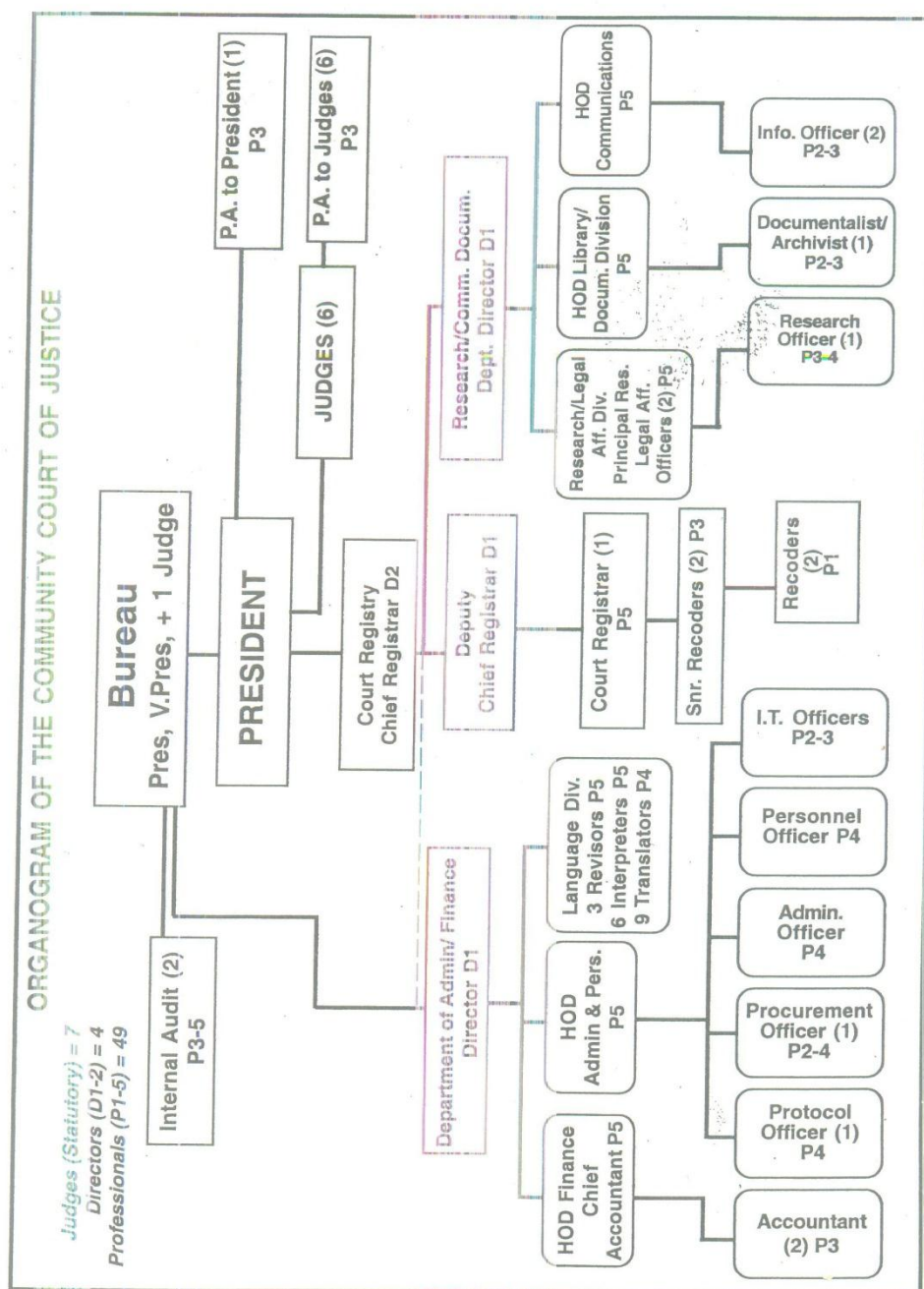
One notable defect of the 1991 Protocol on the Community Court of Justice was the lack of a clear administrative structure or delineation of the powers and functions of the decision-making units of the Court. Article 3(2) of the Protocol merely provided for election of a President and Vice President among the Judges to serve for a three-year term. Thus, as part of the comprehensive restructuring of the Institutions of the ECOWAS, the Supplementary Protocol A/SP.2/06/06 not only amends the inadequate provisions but also creates a Bureau for the Court. Also, on the recommendation of the Administration and Finance Commission, the Council of Ministers approved a new organisational chart for the Court. With these steps, a new organisational structure for efficient functioning of the Community Court of Justice is now in place.

### **Organisational Structure**

The organisational structure of the Community Court of Justice resembles that of any international court of comparable status. By the new organogram, the President of the Court is the overall head of the Court. He heads the Court in the performance of both its judicial and administrative function. In this sense, the President is assisted by both the Bureau and the Registry.

By the organisational chart (Figure 1), the Court is delineated into Departments and Divisions with clearly demarcated lines of authority. At the apex of the organisational structure is the Bureau, followed by the offices of the Judges and other operational departments.

Figure 1: The Organogram of the Community Court of Justice, ECOWAS



## The Bureau

The Bureau of the Court, established under Article 3(1) of the Supplementary Protocol A/SP.2/06/06, comprises the President, the Vice President, and “the oldest and longest serving judge of the Court”.<sup>35</sup> The use of the term “oldest and longest serving judge” in the legal texts appears cumbersome and confusing. The Court seems to interpret the provision as meaning the oldest Judge. The current Dean of Judges, Donli, is the oldest in age and longest serving, being the pioneer President of the Court for six years. The Court itself has used the term “the oldest serving Judge”<sup>36</sup> to describe the occupant of the position now often referred to as the “Dean of Judges”.<sup>37</sup> Before the Protocol on the Community Court of Justice was amended in 2006, only the President and the Vice President constituted the Bureau, and were elected for a three-year term each.<sup>38</sup> Article 3(2) of the Protocol A/P.1/7/91 has now been amended by Supplementary Protocol A/SP.2/06/06, and by the new provisions, each of the President and the Vice President is elected for a renewable two-year term. The officials are elected by the Judges themselves, although evidence exist that the “Heads of sisters Institutions” do influence the outcome.<sup>39</sup> Based on this, the Court has had four Bureaux to date, as shown in Table 2 below.

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<sup>35</sup> Supplementary Protocol A/SP.2/06/06 - Art 3(1); Regulation C/REG.2/06/06 – Art 3(2)

<sup>36</sup> *2007 Annual Report* (n 27)

<sup>37</sup> *CCJE at Ten* (n 12) 24

<sup>38</sup> Protocol A/P.1/7/91 – Art 3(2)

<sup>39</sup> Community Court of Justice, ECOWAS, *Annual Report 2009-2011*, p 7

**Table 2: Bureau of the ECOWAS Court, 2002-2012**

<b>Bureau</b>	<b>Tenure</b>	<b>President</b>	<b>Vice President</b>	<b>Dean</b>
First Bureau	29 January 2001 – 28 January 2004	Hansine N. DONLI (Nigeria)	El-Mansour TALL (Senegal)	-
Second Bureau	29 January 2004 – 28 January 2007	Hansine N. DONLI (Nigeria)	Soumana D. SIDIBE (Niger)	-
Third Bureau	29 January 2007 – 09 February 2009	Aminata MALLE-SANOGO (Mali)	Anthony Alfred BENIN (Ghana)	Barthelemy TOE (Burkina Faso)
Fourth Bureau	10 February 2009 to date <sup>40</sup>	Awa Nana DABOYA (Togo)	Benfeito Mosso RAMOS (Cape Verde)	Hansine N. DONLI (Nigeria)

Sources: *Annual Reports*, 2002 (p 4), 2004 (p 5), 2007, 2009-2011 (p 8)

The Bureau has overall direction over the Court. Its main responsibilities as stated in Regulation C/REG.2/06/06 include: Overall responsibility for strategic orientation of the Court and for supervision of its administration and management; Examination of the draft work programme of the Court and provision of policy guidelines for the Court's annual budget; Definition of the procedures relating to the internal organisation of the Court in line with the relevant Community texts; and (d) Overall responsibility over the management of the Court's budget through the Director of Administration and Finance.

The functions of the Bureau are therefore mainly administrative, and its role essentially is to serve as the main policy-making unit of the Court under the headship of the President. It also has responsibility, through the Director of Administration and

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<sup>40</sup> CCJE at Ten (n 12) 31

Finance, over the financial management of the Court. The Bureau is headed by the President of the Court, who presides over its meetings. As the head, the President also represents the Court in its dealings with other institutions of the Community, participates in inter-institutional meetings, and is the main contact point of the Court for external organisations and individuals. He is responsible for the general administration of the Court and controls the main administrative machinery of the Court through the Chief Registrar. The President also has responsibility for organisation of judicial activities of the Court, including convening and presiding over Court hearings and deliberations, attribution of functions to members of the Court, and placing and taking up initiatives as a leader. The Vice President of the Court represents the Court in the absence of the President, and when the office of the President is vacant, exercises the powers and functions of the President. Where both the President and the Vice President are not available, any other Judge appointed in accordance with the Rules of the Court may exercise all the powers of the President in line with the order of precedence established by the Rules.

### The Judges

The Judges of the Court, other than those serving in the Bureau, perform essentially judicial functions. These include participation in all the sessions of the Court, including sitting to hear cases, examining witnesses and experts, contributing to deliberations, and in general exercising all the powers and functions of a court of law. A Judge of the Court may also serve as a Judge Rapporteur if so appointed by the President. The Judges rank equally in precedence according to the date of their



appointment to (or, in case of equality, age of retirement from) the Court.<sup>41</sup> Judges do have Personal Assistants, who come and leave with them.<sup>42</sup> The College of Judges has a Deliberations Room for their joint meetings. Apart from the Judges who are Statutory Appointees, other workers of the Court belong to either of the Professional Staff or the General Staff, and their conditions of service are regulated by the Staff Regulations.<sup>43</sup>

### Operational Departments

There are three key administrative units of the CCJE - Registry, Administration and Finance, and Research, Documentation and Communication. The Registry is the nerve centre of the Court, “the central memory of the Institution”.<sup>44</sup> It is headed by the Chief Registrar, who is assisted by the Deputy Chief Registrar, both of them professional staff and career officers. The Chief Registrar is appointed by the Court for six years, and can be reappointed for another term of six years.<sup>45</sup> The Chief Registrar works under the overall control and direction of the President of the Court. The powers and functions of the Chief Registrar are defined by Regulation C/REG.2/06/06 and the Rules of the Community Court of Justice. The main functions of the officer are:

(a) To supervise, monitor and coordinate the activities of the registry of the Court, and in this regard, provide services that are required for efficient discharge of the judicial functions of the Court by the Judges;

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<sup>41</sup> *2003 Annual Report* (n 24) 32

<sup>42</sup> *Annual Report 2009-2011* (n 38) 30

<sup>43</sup> Economic Community of West African States (ECOWAS), *Staff Regulations*

<sup>44</sup> *Annual Report 2009-2011* (n 38) 11

<sup>45</sup> The Rules of the CCJ, ECOWAS – Art 9(3)

- (b) To accept, process, transmit and serve all applications, pleadings and supporting documents, and take custody of documents and other records of the Court;
- (c) To supervise the preparation of the minutes of the proceedings and other record of the Court;
- (d) To attend all the sittings of the Court, and assist the President and the Judges in the discharge of their official functions;
- (e) To take care and custody of the seal, archives and publications of the Court; and
- (e) To supervise the units (departments and divisions), and serve as the main link between the President and other operational units of the Court.<sup>46</sup>

Apart from the Deputy Registrar, the work of the Registry, which constitutes a major bulk of the Court's administrative duties, is carried out through Registrars of various categories, Recorders, Clerks, Secretaries and other junior staff members. The Director of Administration and Finance (DFA) heads the Administration and Finance Department, which manages the day-to-day running of the administrative machinery of the Court. He relates directly to the Bureau. The main functions of the officer are defined in Article 5 of Regulation C/REG.2/06/06 to include: (a) serving as the main channel of communication between the departments and the President of the Court on administrative matters; (b) responsibility for ensuring that procedure for staff recruitment follows the relevant provisions of the ECOWAS Staff Regulations; (c) preside over the meetings of the appropriate advisory committees on staff recruitment; (d) preparation of annual draft budget in line with general guidelines provided by the Bureau and the Court's work programme; and (e) be the accounting officer of the Court and in this regard submit quarterly financial statements to the bureau through the President. The key units of the Department are Finance and Accounting Division

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<sup>46</sup> Community Court of Justice, ECOWAS, *2004 Annual Report* 23

and Administration and Human Resources Department. Others include Stores, Protocol, Procurement and Maintenance, Logistics and Transport, and Computer units. The Research, Documentation and Communication Department is headed by a Director, and has three operational units – Research/Legal Affairs, Library/Documentation, and Information/Communication.

Other units are not directly under the control of the Court administration. The Cost Controller, who performs functions similar to those of an internal auditor, reports directly to the Financial Controller of the parent organisation, ECOWAS. Also, the Security Unit is managed by the host country as part of its responsibility under the headquarters agreement. Although Agents, Lawyers and Advisers are not *stricto sensu* part of the Court's organisational structure, their contributions go in no small way to facilitate the work of the Court.

### **Functions and Activities**

As the principal legal organ of the ECOWAS, the primary responsibility of the Court is to interpret the provisions of the Treaty and the associated Protocols, Conventions, Decisions, Regulations, Directives and other acts of the Community or any of its Institutions. The main function of the Court is judicial, and the interpretative powers of the Court in this regard may be invoked in one of three ways as follows:

- (a) to settle contentious disputes arising out of interpretation or application of the Community texts, as submitted by Member States, Institutions, corporate bodies and individuals;
- (b) to give advisory opinions on requests from the Authority of Heads of State and Government, the Council of Ministers, the President of the ECOWAS Commission, or

any other Institution or Member State of the Community, on any questions relating to interpretation or application of these legal texts. Such advisory opinions are not binding, and may be adopted or rejected by the Institution or member State to which it is directed.<sup>47</sup> A request for advisory opinion is addressed to the Chief Registrar and not the President of the Court;<sup>48</sup> and

(c) to give preliminary ruling on any issue referred to it by a domestic court of a Member State where such an issue borders on the interpretation of any provisions of any legal texts of the Community. Unlike Article 267 TFEU,<sup>49</sup> which permits the domestic court to submit a question by way of constitutional reference for which the CJEU is expected to give a preliminary ruling to guide the domestic court's decision,<sup>50</sup> the provisions of the Supplementary Protocol on this issue is directory and not mandatory.<sup>51</sup> This is, perhaps, why no such request for preliminary ruling has come before the Court in twelve years.

The ECOWAS Court also possesses some arbitral competence. While, it may be arguable whether it is a court of arbitration, Article 9(5) of the Protocol as amended by the Supplementary Protocol of January 2005 permits the Court to act as an arbitrator pending establishment of the Arbitration Tribunal provided for under Article 16 of the Revised Treaty. As the Court takes steps to have Arbitration Rules to facilitate the exercise of its arbitral functions,<sup>52</sup> it is yet to create an Arbitral Chambers and no arbitration proceedings have been brought before it. The Court is expected to,

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<sup>47</sup> The Council of Ministers at its 55<sup>th</sup> Session did not approve the advisory opinion given by the Court on 05/12/2005 in ECW/CCJ/ADV.OPN/01/05 on the tenure of the Speaker of the Community Parliament

<sup>48</sup> *Request for Advisory Opinion Sought by the President of ECOWAS Commission on Renewal of the Tenure of Director General and Deputy Director General of GIABA (2004-2009)* CCJELR 201 at 207

<sup>49</sup> Art 234 EC ( 177 EEC)

<sup>50</sup> GF Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Oxford: Hart Publishing, 2000) 8-9

<sup>51</sup> Protocol A/P.1/7/91 as amended: Art 10(f)

<sup>52</sup> 2007 Annual Report (n 27) 28

in the performance of its judicial duties, ensure the observance of law and the principles of equity as well as the general principles of international law encapsulated in Article 38 of the Statute of the International Court of Justice. It also administers the oath of office on ECOWAS officials.<sup>53</sup>

The ECOWAS Court performs other non-judicial functions that contribute to the overall effectiveness of the Court in delivering on its mandate under the law of the ECOWAS. Indeed, the Court normally classifies its activities into two broad areas – the judicial functions and the administrative activities. Within the latter category is included such other non-judicial functions of the Court as sensitisation programmes aimed at promoting the Court and its activities, capacity-building programmes for the staff of the Court, visitations and exchanges, inter-institutional cooperation activities with Community institutions and other international organisation, and participation in international conferences.<sup>54</sup> It is particularly involved in cooperation endeavours with the Court of Justice of the European Union, the Court of Justice of the *Union Économique et Monétaire Ouest Africaine* (UEMOA), Common Court of Justice and Arbitration of OHADA (*L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*), CEMAC, EAC, and the African Court of Human and Peoples' Rights among other international judicial institutions.<sup>55</sup> In addition, the Court is also involved in research, particularly in areas that focus on integration. Towards this end, it maintains a Research Department. The Court has expressed its willingness to embark on research into laws that promote or hinder integration process, and has signified its intention to work on the harmonisation of the legal and judicial systems of Member states of the ECOWAS and make recommendations to appropriate authorities for

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<sup>53</sup> *Annual Report 2009-2011* (n 38) 71

<sup>54</sup> Community Court of Justice, ECOWAS, *Annual Report 2008*, 4-5

<sup>55</sup> *2007 Annual Report* (n 27) 20-23

implementation. While the Library of the Court is being stocked and the Court seemingly receptive to academic enquiries, it is yet to embark on any meaningful research activity almost a decade after the first President of the Court promised to tackle Article 57 of the Revised Treaty.<sup>56</sup>

### **Judicial Machinery of the Court**

The operational modalities of the Court in the performance of its judicial functions are governed essentially by a combination of the provisions of the Protocol as amended and the Rules of the Community Court of Justice. In this regard, the President, the Vice President and the Judges of the Court are the key actors, assisted by the Chief Registrar and other administrative officials of the Court having critical role to play in the discharge of the judicial functions of the Court such as the Deputy Chief Registrar, registrars of various cadres, Recorders, Translators and Interpreters, Research Officers and Assistants, Legal Officers and Assistants, and Librarians and Documentalists/Archivists among others.

### **Composition**

The Community Court of Justice sits as a panel of seven Judges in order to perform its judicial duties. All the Judges need not sit at the same time, however. Article 14 of the Protocol on the Community Court of Justice prescribes the quorum of the Court as the President and at least two Judges, with a proviso that any sitting of the Court shall comprise of an uneven number of Judges. The Court can thus be composed of 3, 5 or 7 Judges for the hearing and determination of any particular case.

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<sup>56</sup> 2004 Annual Report (n 45) 30

The current practice is to create a panel of three or five judges for a case. Analysis of the reported cases (2004-2009) of the Court does not show any consistent pattern or criteria for determining the size of panels selected to hear cases. Close to three-quarters of the 18 reported cases considered over a period of six years were determined by a panel of three Judges, and this cut across different classes in which all manner of issues ranging from human rights, legality of community acts, jurisdiction, *locus standi* and relationships to national courts were raised. The issues raised before the remaining four panels (composed of five Judges each) also cut across human rights, jurisdiction and challenge of community acts. The only visibly consistent pattern relates to the two requests for advisory opinions, which were determined by a panel of five judges each. The composition of the panels did not also have any bearing on the cases that were filed in the registry of the Court, save that the panels raised in last two years (2008-2009) had three members each. The discretion therefore appears to be that of the President of the Court alone who is empowered under the Rules to select such panels.

The instruments governing the operation of the Court do not provide any criteria for determining the size of any panel. But the Protocol and the Rules require the President to preside at all the sittings and deliberations of the Court,<sup>57</sup> although there is permission for the Vice President or any other Judge to preside or exercise any other power in the absence of the President.<sup>58</sup> It does not seem that the ranking of Judges equally in precedence according to their seniority in the Court, as required by Article 5 of the Rules of the Court, apply to sittings of the Court, as Appendix I seems to suggest. Whoever presides, all the Judges that sit on a case are required to

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<sup>57</sup> Protocol A.P.1/7/91 – Art 14(1); The Rules of the CCJE – Art 7

<sup>58</sup> Protocol A/P.1/7/91 – Art 4(4), (8) and (10); The Rules of the CCJE – Arts 7 and 8

participate in the proceedings and deliberations as well as the determination of the case before the Court.

### Language

The ECOWAS Court is a multi-language court, with English, French and Portuguese being the official and working languages of the Court,<sup>59</sup> and documents of the Court are produced in the languages. For a proceeding, one of the three languages is selected as the language of the case. This is chosen by the applicant, except that where the defendant is a Member State the official language of the defendant is adopted instead.<sup>60</sup> The language of the case is usually the language of the applicant's country, but there is nothing in the Rules that prevent the Applicant from choosing other language if he/she believes that the language would better serve the purpose of the case. Once the language of a case is determined, it is used in all the proceedings of case from filing of pleadings, through the oral proceedings and deliberations to the final judgment, subject to necessary translations as may be required by the Rules. An exception to the rule permits the Court to use any of the official languages in oral proceedings,<sup>61</sup> including granting a waiver where a witness or an expert is unable to depose or express himself or herself in the language of the case.

It does not appear, however, that the Court is bound to adhere to the language of the case in construing the provisions of any enactments or community texts. Indeed, the Court has often compared different versions of Community texts in construing seemingly ambiguous provisions of such texts irrespective of the language of the case.

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<sup>59</sup> Revised Treaty – Art 87; Protocol A/P.1/7/91 as amended – Art 31

<sup>60</sup> The Rules of the CCJE – Art 25(2)

<sup>61</sup> The Rules of the CCJE - Art 25(6)



Thus, in a recent *Case Concerning Edoh Kokou v ECOWAS Commission*,<sup>62</sup> the Court examined the “irreconcilable differences between two versions” of Article 69(e) of the ECOWAS Staff Regulations and accorded priority to the French version above the English version because of “a glaring contradiction” in the latter when construing the extent of the power of the head of a Community Institution to dismiss an employee of the Community. Similarly, in the case of *Peter David v Ambassador Ralph Uwechue* where a discrepancy in the English text on the one hand and the French and the Portuguese texts on the other hand of the Supplementary Protocol of January 2005 was discovered,<sup>63</sup> the Court construed the English version of the text in the light of the other versions, which were more in accord with the general principles of administrative law.

Similar provisions apply in the CJEU, where an Applicant chooses any of the procedural languages of the EU in direct actions (i.e., cases starting and ending in the CJEU). In case of a reference for preliminary ruling, the language of the Court making the reference is adopted. In order to eliminate the language problem in its day-to-day activities, the CJEU, as a matter of procedure, uses French as its internal working language, and all pleadings are required to be translated into French, and thereafter into the other procedural languages. Also, the Advocate General is required to deliver his opinion in any of the Court’s procedural languages, usually the Advocate-General’s first language. However, the judgments and opinions of the CJEU are available in all the procedural languages except Irish.<sup>64</sup>

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<sup>62</sup> Case No. ECW/CCJ/APP/05/09, Judgement No. ECW/CCJ/JUD/03/10 delivered on 8 July 2010

<sup>63</sup> [2010] 3 CCJLR 135 at 159

<sup>64</sup> Anthony Arnall, *The European Court of Justice* (2nd ed, OUP, 2006) 395-96

## Sitting

The Court is by law required to hear and determine cases at its seat in Abuja, Nigeria. It is permitted by Article 26(2) of Protocol to sit elsewhere “where the circumstances or facts of the case so demand”. Such circumstances have not been authoritatively itemised by the Court. It has shifted base to accommodate indigent litigants,<sup>65</sup> in deference to old age or health of a party,<sup>66</sup> or, as done in recent times,<sup>67</sup> to create awareness about the work of the Court.<sup>68</sup> It has rejected request for external session where it felt otherwise.<sup>69</sup>

## Representation

The Protocol requires a party before the Community Court of Justice to be represented by an Agent who may in turn nominate Advocates or Counsel. No qualifications are prescribed for the Agents, but Advocates or Counsel are expected to be legally qualified to practice before the courts in their respective home countries. Such Agents, Advocates or Counsel are granted privileges, immunities and facilities necessary for the discharge of their duties before the Court only, and the Court may waive the immunity where he/she has conducted himself/herself in manner incompatible with the dignity of the Court or uses the rights for purposes other than that for which they were granted and the Court considers that the proper conduct of

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<sup>65</sup> Niamey, Niger, in the case of *Koraou v Niger* [2004-2009] CCJELR 217; Ouagadougou, Burkina Faso, on 25/09/2009 in the case of *Edoh Kokou v ECOWAS Commission*, unreported judgement no. ECW/CCJ/JUD/03/10 of 08/07/2010

<sup>66</sup> Bamako, Mali, in the case of *Keita v Mali* [2004-2009] CCJELR 63

<sup>67</sup> Burkina Faso, *Annual Report 2009-2011* (n 38) 70

<sup>68</sup> Ibadan, Nigeria, in the case of *SERAP v Nigeria*, Suit No. ECW/CCJ/APP/08/09, Judgment No. ECW/CCJ/JUD/18/12,

<[http://www.courtecowas.org/site2012/pdf\\_files/decisions/judgements/2012/SERAP\\_V\\_FEDERAL\\_REPUBLIC\\_OF\\_NIGERIA.pdf](http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf)> accessed on 24 December 2012

<sup>69</sup> *Bakare Sarre and others v Minister of Justice of Mali and others*, Suit No. ECW/CCJ/APP/09/09, summary in *Annual Report 2009-2011* (n 38) 21

the proceedings would not be thereby hindered. One may query the logic behind an Applicant having to appoint an Agent in addition to engaging Counsel or Advocate. This could be explained within the context of the fact that the Protocol originally limited the parties before the Court to state parties. “Agents”, within the context of the Rules, can therefore be interpreted to mean any one standing in to represent a litigant Member State by way of an official of government empowered to answer to the name of the state party when the case is called in the Court. This may also be applicable to corporate litigants. An individual litigant need not appoint an Agent if he/she could appear himself, and he/she would be competent to appoint Advocates or Counsel of his/her choice to prosecute the case.

### **Procedural Framework**

The work of the ECOWAS Court, like those of other courts, is “inextricably bound up with the procedural framework in which it operates”.<sup>70</sup> The procedural framework of the Court follows patterns that are similar to those of any other international courts of comparative status and operation, and involves pre-trial, trial, and post-trial stages, combining elements of written and oral procedures. It is governed by the provisions of the Protocol, the Supplementary Protocol, and the Rules of the Court.

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<sup>70</sup> Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (Stevens & Sons, London, 1977) 33. See also Koen Lenaerts, Dirk Arts and Ignace Macelis, *Procedural Law of the European Union* (2<sup>nd</sup> ed, Sweet & Maxwell, 2006)

### Preliminary Considerations

The procedural framework for exercise of the Court's judicial function is divided broadly into two – the Written Procedure and the Oral Procedure. However, there are certain other considerations that a party may have to bear in mind before approaching the Court for resolution of disputes. The Court sits in Abuja, Nigeria, but may sit occasionally in any other place within the Community where the circumstances so require.<sup>71</sup> The date and time of the sittings of the Court are fixed by the President, subject to the provisions of the Protocol on vacation holidays.<sup>72</sup> The proceedings of the Court are open, except where circumstances of any cases otherwise dictate; deliberations are held in closed sessions, but judgments are given in the open court.<sup>73</sup>

### Written Procedure

The Written procedure commences with the filing and service of pleadings, within the required time provided in the Rules, by which the parties are afforded the opportunities of stating their cases in clear terms. An originating Application (or Request for Advisory Opinion) is required to conform to the mandatory requirements of Article 33 of the Rules as to form and contents. The contents must include: The name and address of the Applicant; the designation of the party against whom the application is made; the subject-matter of the proceedings and a summary of the pleas in law (or question for advisory opinion) on which the application is based; the form of order sought by the Applicant; where appropriate, the nature of any evidence offered in support of the application; an address for service in the place where the

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<sup>71</sup> Protocol A/P.1/7/91 - Article 26(2). External sessions outside Abuja have been held in Bamako, Mali (March 2007), Niamey, Niger (October 2008), Ouagadougou, Burkina Faso (September 2009), and Ibadan, Nigeria (December 2012). The annual Legal year Service also held occasionally outside Abuja. See *Annual Report 2009-2011*, 9

<sup>72</sup> The Rules of the CCJE – Art 24

<sup>73</sup> The Rules of the CCJE – Arts 23, 61(1)

Court has its seat and the name of the person who is authorised or has expressed willingness to accept such service. In case of non-compliance, the Rules require the Chief Registrar of the Court to prescribe a period not more than 30 days within which the Applicant must comply, failing which the Court may decide, after hearing the Judge-Rapporteur, whether the non-compliance renders the application formally inadmissible. Similar provisions exist in respect of Defence, Reply and Rejoinder.<sup>74</sup> The Rules as to service of pleadings are strictly enforced, except where leave for extension of time is granted by the Court. Once pleadings are closed, whether by the parties or by order of the Court, no new plea in law may be introduced in the course of the proceedings unless based on matters of law or of facts which came to light in the course of the proceedings.<sup>75</sup> Where such a new plea is permitted, the President of the Court may allow the other party time to answer on that plea. Requests for advisory opinions are heard in closed sessions, although the opinions are delivered in the open Court and transmitted to the Applicant or any other authority designated in the Request as the receiver of the Advisory Opinion.<sup>76</sup>

### Preparatory Measures

Once pleadings are closed or just before that,<sup>77</sup> a number of preparatory steps are taken by the Court before opening the Oral Procedure. The most important of such steps is the preparation of a Preliminary Report by the Judge-Rapporteur, the essence of which is to give a summary of the case. A Preliminary Report also contains recommendations on preparatory measures of inquiry or any other preparatory steps

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<sup>74</sup> The Rules of the CCJE – Arts 35, 36 and 37

<sup>75</sup> The Rules of the CCJE – Art 37(2)

<sup>76</sup> ECW/CCJ/ADV.OPN/01/05 - *Request for Advisory Opinion from the Executive Secretary of ECOWAS* .... [2004-2009] CCJELR 55; ECW/CCJ/ADV.OPN/01/08 – *Request for Advisory Opinion by the President of ECOWAS Commission* ... [2004-2009] CCJELR 201

<sup>77</sup> The Rules of the CCJE - Art 39(1)

that need to be taken before the Oral Procedure, if required, is opened. Such preparatory measures, conducted by the Judge-Rapporteur or by other persons or organisations on the order of the Court,<sup>78</sup> may involve personal appearance of the parties, request for information and production of documents, oral testimony, commissioning of expert's report, or inspection of a place or thing in question.<sup>79</sup> It may also involve issuance of letters rogatory for examination of witnesses and experts in foreign countries.<sup>80</sup> The Judge-Rapporteur may also recommend, and any party upon written application may apply, that the Oral Procedure be dispensed with.<sup>81</sup> Such other interlocutory/interim measures as expedited procedures, stay of proceedings, intervention, exceptional review and third party proceedings may be taken before the oral procedure is commenced.<sup>82</sup> The Registry also takes other administrative steps, including translation of pleadings into the official languages of the Court and service of processes, which often causes delay "because of the limited number of translators".<sup>83</sup> All these steps have to be concluded before cases are set for hearing.

### Oral Procedure

The Oral Procedure in the Community Court of Justice involves the actual hearing of the case in the light of the pleadings as well as the report of the Judge-Rapporteur and other preparatory measures. The hearing is presided over by the President who has responsibility for the proper conduct of the case. The hearing is

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<sup>78</sup> Protocol A/P.1/7/91 – Art 16

<sup>79</sup> The Rules of the CCJE - Art 41(2)

<sup>80</sup> Protocol A/P.1/7/91 – Art 18; The Rules of the CCJE – Art 48. For the Supplementary Rules of the CJEU relating to letters rogatory, legal aid and reports of perjury by a witness or expert, see [1974] *Official Journal of the European Union* L350/29, as amended [1997] *Official Journal of the European Union* L103/4 and [2006] *Official Journal of the European Union* L72/1

<sup>81</sup> The Rules of the CCJE – Arts 39(2) and 40

<sup>82</sup> The Rules of the CCJE – Arts 41 – 51, 59 and 78 - 89

<sup>83</sup> *Annual Report 2009 – 2011* (n 38) 92

conducted in the open court, except in circumstance where the rules permit hearing *in camera*. Parties are heard only through their agents, advisers or lawyers, and the Judges may put questions to these agents, advisers and lawyers for clarifications. The Court may depart from strict application of the procedural rules by ordering an Expedited Procedure where there are exceptional circumstances that warrant urgent treatment of a case. The Oral procedure is opened and closed at the pleasure of the Court after hearing the parties. Conduct of oral procedure is not compulsory. Whether non-conduct of the oral procedure is fatal to a case is not yet clear as the Court did not make any pronouncement on the issue when the opportunity presented itself in a recent case.<sup>84</sup>

The ECOWAS Court exercises all the inherent powers and sanctions of a court of law. It may order provisional measures or give provisional instructions either *suo muto* or after hearing the parties.<sup>85</sup> It may order expedited procedures for hearing of a case,<sup>86</sup> hear and rule on application for preliminary objection,<sup>87</sup> hear and determine application for intervention,<sup>88</sup> order a stay of proceedings<sup>89</sup> or suspension of operation or enforcement,<sup>90</sup> or give judgement in default of appearance and/or pleadings.<sup>91</sup>

### Judgments

Proceedings before the Court may be brought to an end before a final judgment is pronounced through an application for discontinuance where the parties have

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<sup>84</sup> *Federal Republic of Nigeria & ors v Djot Bayi & ors*, unreported judgement delivered in Suit No. ECW/CCJ/APP/10/06 on 03/06/2010

<sup>85</sup> The Rules of the CCJE – Art 20

<sup>86</sup> The Rules of the CCJE – Art 59

<sup>87</sup> The Rules of the CCJE – Arts 87 and 88

<sup>88</sup> The Rules of the CCJE – Art 89. See also *Jerry Ugokwe v Nigeria* [2004-2009] CCJELR 37

<sup>89</sup> The Rules of the CCJE – Art 78

<sup>90</sup> The Rules of the CCJE – Arts 79-86

<sup>91</sup> The Rules of the CCJE – Art 90. See also the case of *Chief Frank Ukor v Rachard Awodioko Laleye & anor* [2004-2009] CCJELR 19 at 22

reached an amicable settlement,<sup>92</sup> or by an application for stay of proceedings which is a temporary halt. Otherwise, a case that goes to full trial is concluded by a judgment of the Court, which is delivered in the open court. The contents of the judgment are: a statement that it is the judgment of the Court, the date of its delivery, the names of the President and of the judges taking part in it, the name of the parties, the name of the Chief Registrar, the description of the parties, the names of the agents, advisers and lawyers of the parties, a statement of the forms of order sought by the parties, a statement that the parties have been heard, a summary of the facts, the grounds for the decision, and the operative part of the judgment, including the decision as to costs.<sup>93</sup> The judgment is signed by the President, the Judges who took part in the deliberations and the Chief Registrar.<sup>94</sup> In giving its judgment, the Court is enjoined to have regard to the provisions of the Treaty, the Protocols and the Rules as well as “the body of laws contained in Article 38 of the Statute of the ICJ.”<sup>95</sup> By the practice of the Court, the President does not have to sign a judgment if he is not a member of the panel that heard a case.

#### Post-Trial and Enforcement Procedures

The judgement of the Community Court of Justice is final and binding from the date of its delivery, immediately enforceable, and not appealable.<sup>96</sup> Nonetheless, the Rules of the Court permit some post-judgment alterations that are found necessary for the just determination of a case. Such alterations may include *Rectification* of clerical mistakes, errors in calculation and obvious slips in the judgment, and *Supplementary*

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<sup>92</sup> The Rules of the CCJE – Arts 72 and 73

<sup>93</sup> The Rules of the CCJE – Art 60

<sup>94</sup> The Rules of the CCJE - Art 61

<sup>95</sup> Protocol A/P.1/7/91 - Article 19(1)

<sup>96</sup> Protocol A/P.1/7/91 – Art 19 (2); The Rules of the CCJE – Art 62,



*Judgment* where the Court omits to give a decision on a specific head of claim or on costs.<sup>97</sup> Also, the Protocol permits the Court to *interpret* its own decision on application by any party or any Community Institution raising a doubt about the meaning or scope of that decision.<sup>98</sup> The Court may also undertake an “*exceptional review*” of its judgments where a third party contests the judgement on the ground that the decision prejudices the rights of the third party who could not, for justifiable reasons, participate in the original case,<sup>99</sup> or for *revision* of a contested judgment.<sup>100</sup>

The conditions under which the Community Court will revise its own judgments were articulated by the Court in the case of *Federal Republic of Nigeria & others v Djot Bayi & others*.<sup>101</sup> In that case, a Member State of the ECOWAS that was represented by Counsel throughout the proceedings in a case contested the final judgment of the Court, which awarded substantial damages against the country on the ground that oral proceedings were not conducted at the trial and that the respondents did not adduce any evidence to justify the award of damages in their favour. Following the provisions of Article 25 of the Protocol on the Community Court of Justice and Article 92 of the Rules, the Court held that there are three conditions precedent to a successful application for review or revision of a judgment or decision of the Court as follows: (a) the application must be made within five years of the delivery of the judgment in contention; (b) the application must be filed within three months of discovery of new fact(s) upon which the application is based; and substantively (c) discovery of new fact(s). For the last (substantive) condition to be satisfied, the new facts discovered must be “of a decisive nature”, hitherto “unknown

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<sup>97</sup> The Rules of the CCJE – Art 63, 64

<sup>98</sup> Protocol A/P.1/7/91 – Art 23; The Rules of the CCJE – Art 95

<sup>99</sup> The Rules of the CCJE – Art 91

<sup>100</sup> The Rules of the CCJE – Arts 92-94

<sup>101</sup> Suit No. ECW/CCJ/APP/10/06, unreported judgement delivered on 3 June 2010

to the Court or the party claiming revision”, and such ignorance “not due to negligence”.

One area in which the Supplementary Protocol of January 2005 seeks to enhance the power of the ECOWAS Court is in enforcement of its judgments. The new provision, now Article 24 of the Protocol on the Community Court of Justice as amended, requires each Member State of the ECOWAS to designate a competent national authority to which the writs of enforcement issued by the Court could be directed for the purpose of giving effect to its judgment. To enforce its judgment, the Court issues a writ of execution directed to the relevant authority so designated by the Member State so concerned. Such a writ cannot be suspended except by the Court itself. Once received, a writ of execution is executed according to the civil procedure rules of the state concerned.<sup>102</sup>

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<sup>102</sup> Protocol A/P.1/7/91 as amended: Art 24

## Chapter V

### CASES AND ISSUES IN THE COMMUNITY COURT

#### Introduction

This Chapter examines the final outputs of the judicial work of the ECOWAS Court: the cases filed and the issues of regional integration arising from the judgments of the Court. The first part analyses the volume of the cases filed in the Court's Registry and the impact of these on frequency of Court sessions, variety of cases and litigants, and case load management. In this regard, all the 133 cases filed at the Court's Registry since inception<sup>1</sup> constitutes the raw materials for data analysis. Available statistics from the records of the Court<sup>2</sup> show that judgments and considered rulings were delivered in 65 (about 49%) of these cases, while others are at various stages of the proceedings – struck out, adjourned for hearing, adjourned *sine die*, discontinued, or awaiting translation. Of these decisions, only 19 (about 14%) are officially reported, 4 are available in private law reports, 5 are available on the Court's website, and certified true copies (CTC) of 8 were available for purchase by the Researcher.<sup>3</sup> Thus, only 36 (about 55%) of the decided cases are available for use in our analysis. These cases, delivered between April 2004, the “effective date of

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<sup>1</sup> This is the figure as of 3 December 2012, and excludes the 10 applications for revision of judgments/rulings

<sup>2</sup> Appendices II and

[http://www.courtecowas.org/site2012/index.php?option=com\\_content&view=article&id=157&Itemid=27](http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27) accessed 20 December 2012

<sup>3</sup> The last visit to the Court was on 3-5 December 2012

functioning”<sup>4</sup> of the Court and November 2012, are categorised according to the nature of the issues of regional integration raised in the decisions. This broad classification provides the needed framework for jurisprudential analyses and discussions of the contributions of the ECOWAS Court to the emerging regional legal order in the West African region.

## **Case Management**

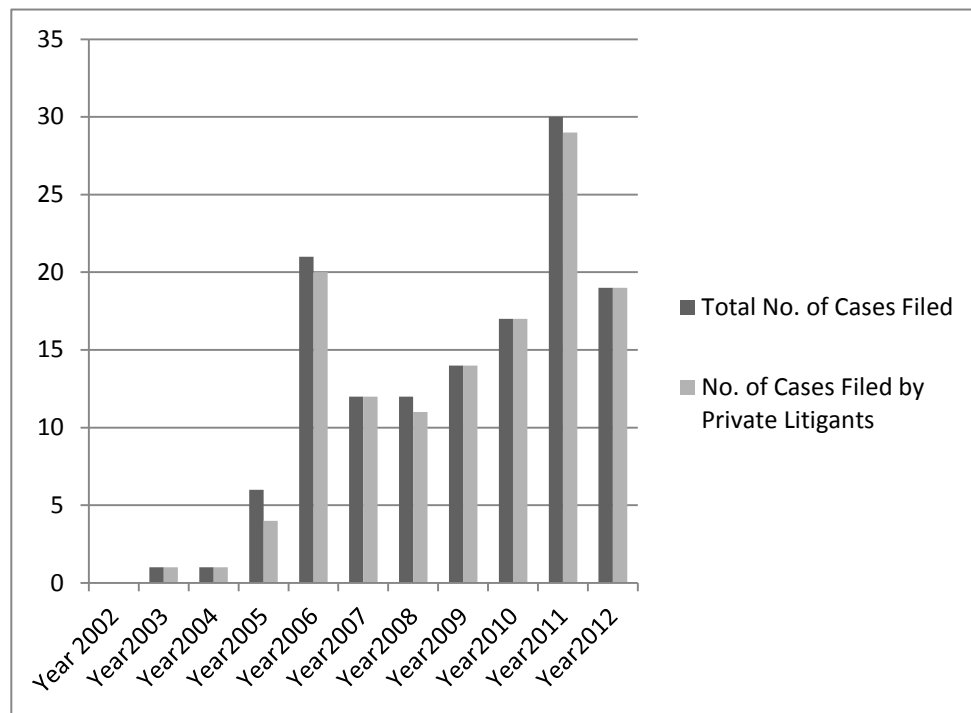
Cases are the raw materials for the work of any court, including the ECOWAS Court. The management of these cases and the decisions thereupon therefore constitute the bulk of the work of the Court. As noted in Chapter IV, the flow of cases into the docket of the Community Court of Justice was threatened at inception by two interrelated factors: the limited jurisdiction and restricted access to the Court under the 1991 Protocol and subordination of the judicial framework of the Court to other mechanisms of dispute settlement. The strict and restrictive interpretation given by the Court to the scope of its own jurisdiction compounded the problem.<sup>5</sup> The widened access and enhanced jurisdiction afforded by the Supplementary Protocol A/SP.1/01/05 was a major catalyst for the increase in the workload of the Community Court of Justice. The surge in the judicial activities of the Court is evident in the increasing number of applications filed, court sessions held, and judgments delivered. The increase in the inflow of litigation into the docket of the Court depicted in Figure 2 shows a significant rise from two cases within the first four years (2001-2004) to six (including one for advisory opinion) in 2005, leaping to 21 in 2006, with a rising

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<sup>4</sup> [2004-2009] CCJELR vii (Hon Justice Awa Nana Daboya)

<sup>5</sup> *Afolabi v Nigeria* (2004-2009) CCJELR 1

**Figure 2: Patterns of Cases Filed in the ECOWAS Court, 2001-2012**



Source: Adapted from the List of Cases Filed Year 2004-2012<sup>6</sup>

trend thereafter, totalling 133 to date. Apart from these, more than 32 interlocutory applications had been filed as of September 2007.<sup>7</sup>

A noticeable trend is that most of the cases filed since 2005 when access to the Court was widened and its jurisdiction expanded was brought by private litigants. The cases are mostly in the areas of human rights (more than 90%), contracts, declaratory reliefs and administrative matters. The increase in private litigation seems to have positively induced other sources of litigation albeit slowly. For the first time, the Court received a request for Advisory Opinion from the President of the ECOWAS

<sup>6</sup> Obtained from the Registry of the Court on 3 December 2012

<sup>7</sup> Welcome Address by the Chief Registrar, Community Court of Justice, ECOWAS, Mr Tony Anene-Maidoh, at the Opening of the 2007/2008 Legal Year of the Community Court of Justice on 18th September 2007, <<http://www.ecowascourt.org/texts1/repreg.html>> accessed 05 December 2009

Commission.<sup>8</sup> In the same year, 2005, an inter-institutional dispute involving the Community Parliament and the Council of Ministers was referred to the Community Court for resolution.<sup>9</sup> Apart from these, non-governmental organisations, corporate bodies, Community officials and employees, and even Member States and Institutions of the Community now appear before the Community as parties, either as Applicants, Respondents or Interveners.

The litigating parties that have attended the Court came from varying and diverse backgrounds. As the records of the Registry show,<sup>10</sup> about 53% of the 262 lead parties (1<sup>st</sup> Applicants and 1<sup>st</sup> Defendant in cases with multiple parties) in the 133 cases filed between October 2003 and November 2012,<sup>11</sup> were private litigants. More than 95% of these private litigants appeared as Plaintiffs/Applicants. They included individuals and corporate bodies that have flooded the Court with litigation since access was widened in January 2005 and members of the staff of Community Institutions claiming certain reliefs in their individual capacities on matters bordering on master-servant relationships and employment. Of course, individual litigants account for more than 70% of the private litigations, a situation not unexpected since most of the cases bordered on violations of human rights and legality of community acts, among others.<sup>12</sup>

While the ratio of public to private litigants almost equalled (139:123), all the Institutions and Member States appeared as Defendants/Respondents except in a very handful of cases. Instances in which such public litigants appeared as applicants fall into three categories: In Requests for Advisory Opinion; in applications for revision of

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<sup>8</sup> Suit No. ECW/CCJ/ADV.OPN/01/05; Advisory Opinion No. ECW/CCJ/ADV.OPN/01/05 (2004-2009) CCJELR 55

<sup>9</sup> *Parliament of the ECOWAS v Council of Ministers of the ECOWAS* [2004-2009] CCJELR 29

<sup>10</sup> List of Cases Filed Year 2004 – 2012, unpublished court records obtained on 3 December 2012

<sup>11</sup> Only one party is recorded for each Request for Advisory Opinion

<sup>12</sup> See the analysis in the next section

decisions of the Court;<sup>13</sup> and in applications for preliminary objections to substantive applications, which are raised, as a matter of course, in most cases, on grounds of lack of jurisdiction, non-exhaustion of local remedies, inadmissibility, or mis-joinder/non-joinder of parties. Generally, disputes in which the main opposing parties are Community Institutions and/or Member States are rare; only one such inter-institutional case is on the record.<sup>14</sup> The decision of the Court in that single case that Member States and Institutions must explore the option of amicable settlement before approaching the Court seems to have discouraged litigation among the Institutions of the Community. To date, no Member State has filed any case before the Community Court against another Member State, while only the Republic of Cote d'Ivoire has two consolidated cases against a Community Institution pending before the Court.<sup>15</sup> There has been no preliminary reference from the national courts of the Member States.<sup>16</sup>

An increase in the docket of the Court necessarily increases the frequency of court sessions. Apart from the consequential increase in the number of panels, which are in most cases (78%) composed of three Judges each, the Court had to hold more sessions in order to accommodate the increasing rate of case inflow into the Court. As the graphical representation of the patterns of the sessions of the Court (Figure 3) shows, there has been a progressive increase in the number of sessions, which rose astronomically from 5 sessions in 2004 to 43 in 2007, suffered some recession in

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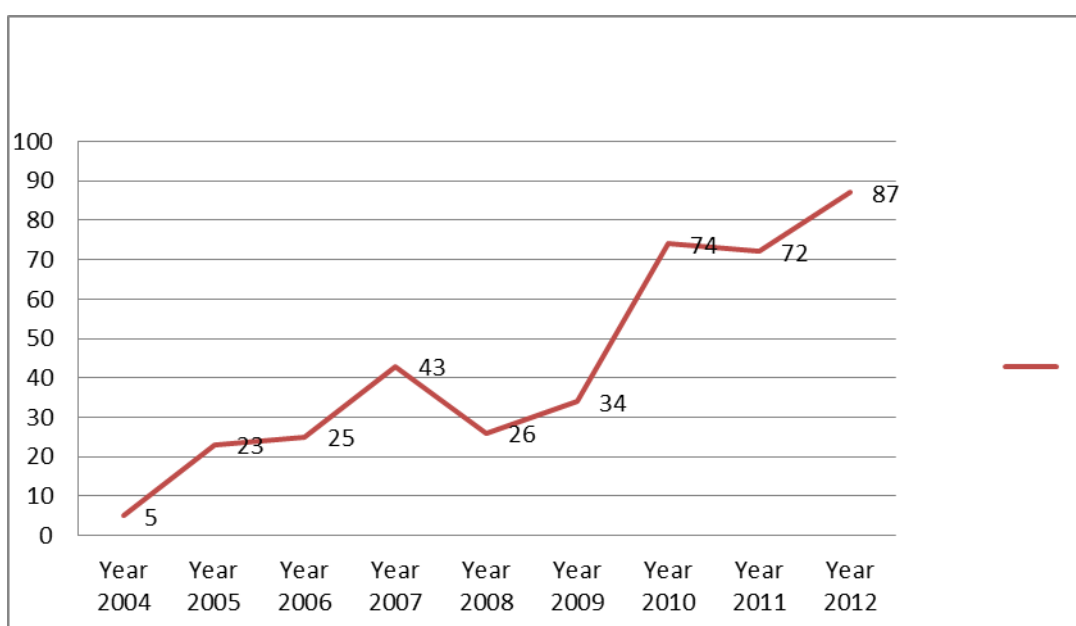
<sup>13</sup> ECW/CCJ/APP/04/06 – *Executive Secretary ECOWAS v Lijadu-Oyemade*, unreported judgement delivered on 16/11/2006; ECW/CCJ/APP/10/06 – *Nigeria v Djot Bayi*, unreported judgement delivered on 03/03/2010

<sup>14</sup> *Parliament of the ECOWAS* (n 8)

<sup>15</sup> ECW/CCJ/APP/01/11 – *Cote d'Ivoire & anor v Authority of Heads of State and Government*; and ECW/CCJ/APP/16/10 – *Ivorian Foundation for the Observation and Monitoring of Human Rights and Political Life (FIDHOP) & ors v Authority of Heads of State and Government (ECOWAS)*

<sup>16</sup> Contrast this with the Court of Justice of the Andean Community, founded on the Cartagena Agreement, where references from the national courts constitutes majority of the cases

**Figure 3: Patterns of Court Sessions of the ECOWAS Court, 2004 - 2012**



Source: Adapted from the Court Sessions Report, January 2004 - November 2012<sup>17</sup>

2008 and 2009, and peaked in 2010, 2011 and 2012 when 74, 72 and 87 sessions respectively were held. The Court has held a total of 389 sessions since inception, including multiple sessions per day in recent times. Given the consistent patterns of case inflow into the Court and the fact that the number of active Judges of the Court cannot exceed seven at any time, it is unlikely that the increasing rate at which multiple sessions of the Court is currently held would be reversed, notwithstanding the fact that the Court has only one courtroom

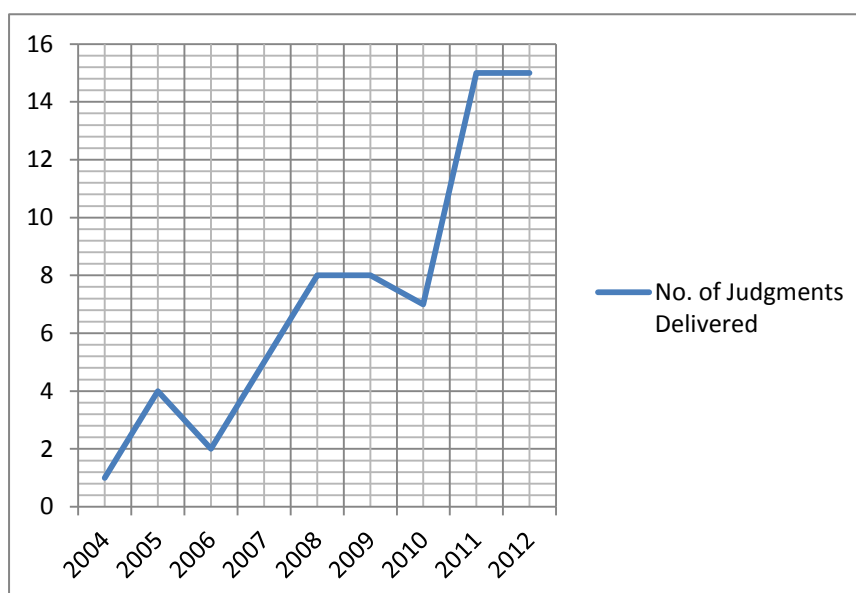
The number of judgments and rulings delivered by the Court has increased, but there are conflicts in the available data. While the Court listed a total of 65 decided cases on its website as of 03 December 2012, a list of its decisions from inception provided by the Registry on the same date contain 61 judgments, including six final

<sup>17</sup> Obtained from the Registry of the Court on 3 December 2012



rulings on cases filed for revision of its previous decisions. Nonetheless, it is clear (see Figure 4) that there has been an increase in the number of judgments delivered by the Court on a yearly basis. Given the fact that these figures do not include the several interim judgments that were delivered,<sup>18</sup> the pressure of work could not but be significant. Overall, statistics from all sources supports the observation that there has been

**Figure 4: Trends of Cases Decided by ECOWAS Court, 2004-2012**



Source: Adapted from website<sup>19</sup>

tremendous increase in the workload of the Court (see Table 3), and this trend may continue for the next few years, especially as the Court seeks to carry out many non-

<sup>18</sup> Community Court of Justice, ECOWAS, *Annual Report 2009-2011*, p 19

<sup>19</sup> <[http://www.courtecawas.org/site2012/index.php?option=com\\_content&view=article&id=157&Itemid=27](http://www.courtecawas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27)> accessed 3 December 2012

judicial activities such as sensitisation visits and training programmes targeted at projecting the Court to the public.<sup>20</sup>

**Table 3: Workload of the ECOWAS Court, October 2003 – December 2012**

Total No. of Cases File	133
Total No. of Court Sessions Held	389
Total No. of Decided Cases	55
Total No. Of Rulings Delivered	56
Total No. of Cases Awaiting Judgments/Rulings *	10
Total No. Of Cases Awaiting Trial *	33
Cases Filed for Review of Judgments/Rulings	10
Judgments on Cases Filed for Review of Judgments	6

\* As of 27 September 2012<sup>21</sup>

Source: Court records, 03 December 2012

### Workload Distribution

There seems not to be any particular pattern followed in the distribution of case files among the Judges of the Court. Often, the Court sits in panels of three Judges, with one of the panel members presiding. The resort to panels, as against the full court of seven Judges sitting together, seems unrelated to the workload of the Court. Even the first and only case before the Court in its first four years (2001-2004) was heard by such a small panel.<sup>22</sup> This is curious for a Court that had its full complement of seven Judges at a time when its workload was expectedly light. While composition of small panels sitting in multiple sessions per day in later years may be justified by the

<sup>20</sup> *Annual Report 2009-2011* (n 17) 35-44

<sup>21</sup> Welcome Address by the Chief Registrar, Community Court of Justice, ECOWAS, Mr Tony Anene-Maidoh, at the Opening Ceremony of the 2012/2013 Legal Year of the Community Court of Justice, ECOWAS on 27<sup>th</sup> September 2012

<sup>22</sup> For details of all the sittings of the Court in this case of *Afolabi v Nigeria* [2004-2009] CCJELR 1, see the special report of the Court on the case, *Mr Afolabi Olajide vs Federal Republic of Nigeria*, 2004/ECW/CCJ/04, Abuja, Nigeria

increasing number of cases filed in the Court, such a practice at the early years is difficult to justify. The fact that the issues raised in the case touched on the jurisdictional competence of the new Court should have dictated a sitting composed of all the Judges of the Court. The Court has been consistent in this pattern as our analyses of the composition of the panels that participated in giving the 36 judgments reviewed in this Chapter shows that only in seven cases was a large five-man panel put in place while all the seven Judges of the Court have never sat on a case as a full panel. Also, there is no consistent pattern that could suggest any guides for explaining the variations in the composition of the panels as the cases handled by the small and the large panel cut across virtually the same issues. A notable exception in this regard is that each of the two requests for Advisory Opinions from the President of the ECOWAS Commission was handled by a panel of five Judges. Whether this is a rule or a mere coincidence is difficult to ascertain for now. Unfortunately, the Rules of the Court have no provision on this matter.

### **Case Disposal Patterns**

An overview of the cases filed before the Court reveals a fairly stable pattern of case disposal. The pioneer case, which was filed in October 2003 was disposed of on a preliminary objection in six and a half months, which was not unreasonable compared to observable patterns in the national courts of some of the Member States of the ECOWAS.<sup>23</sup> Except for Advisory Opinions, which are timeously disposed of on an average of 15 days, due, perhaps, to their non-contentious nature, cases before

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<sup>23</sup> See Mojeed Olujinmi A. Alabi, "Justice Denied": Problems and Prospects of Decongesting the Supreme Court of Nigeria' (2005) 3:2 Nigerian Bar Journal 51- 68

the Court takes between one and four years to get disposed of. Exceptions to this pattern occurred in the early years when three of the cases were determined in approximately six months. Recent patterns have shown an average of two years, while some have taken up to four years to get finally determined. (See Appendix II for details).

Also relevant to the discussion of the patterns of disposal of cases before the ECOWAS Court is the success rate in terms of whether the decisions of the Court is favourable or otherwise to the litigants that instituted the cases. Such an analysis may not be authoritative for now, but can indeed serve as a pointer to the possible satisfaction index that may be useful in determining the frequency at which the Court would be approached in the future to adjudicate on disputes. This is done on the logic that a high success rate may induce frequent resort to the framework of the Court while the opposite may discourage litigation. A look at Table 4 below reveals that majority of the Plaintiffs (over 68%) in the 34 contentious cases before the Court (28 judgments and 6 rulings) under consideration were not granted the reliefs

**Table 4: Plaintiffs' Success/Failure Rates in Decisions of ECOWAS Court, 2004-2012**

<b>Disposal Stage</b>	<b>Success</b>	<b>Failure</b>	<b>Total</b>
Rulings	3	3	6
Final Judgments	8	20	28
<b>Total</b>	<b>11</b>	<b>23</b>	<b>34</b>

Sources: Adapted from Appendix I

they sought. This pattern applies more to final decisions than to interlocutory rulings, and it appears from Appendix I that the failure rates were higher in the initial four

years (2004-2007) compared to the period since 2008 to date. These trends are explainable. A reading of the judgments and rulings shows that the ECOWAS Court is loath at shutting its gate to litigants, and guards its jurisdiction jealously in line with the practice of other judicial institutions worldwide. It therefore often ruled against preliminary objections on such grounds as lack of jurisdiction, inadmissibility and non-joinder except where absolutely justifiable to do so. Although the high rate of failure in the initial years had a tendency to discourage litigation before the Court, it did not. In fact, litigation increased because of the expanded jurisdiction and increased access to the Court brought about by amendments to the Protocol on the Community Court. For the time being, it is safe to assume that the success rate would increase as litigants get clearer understanding of the scope of jurisdiction and competence of the Court in future, as evidence from the success/failure rates in the last three years tend to suggest.

### **Variety of Cases and Issues**

The ECOWAS Court has, within the first decade of its existence given decisions on a number of cases bordering on a variety of issues. Available records show that the Court delivered 61 judgments, including six revision of judgments, between the time it gave its first judgement in April 2004 and November 2012.<sup>24</sup> Apart from these, there are 57 rulings delivered by the Court over the same period.<sup>25</sup> The seeming overlap suggests that multiple rulings and judgments are delivered in

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<sup>24</sup> Judgments of the Court From 2004 to November, 2012, unpublished court records obtained on 3 December 2012

<sup>25</sup> Rulings of the Court From 2004 to November, 2012, unpublished court records obtained on 3 December 2012

some cases. Most of these cases raised multiple issues that cannot be easily compartmentalised. This is particularly so because most of the cases raise issues that cut across various aspects of the Court's jurisdiction and competence. Nonetheless, an attempt is made to classify these cases, for analytical purpose. The classification is based on the types of relief sought by the Applicants in relation to the Court's competence, as well as judicial pronouncements and extra-judicial comments of leading members of the Court. The classification is as follows:

- (a) Violations of human rights;
- (b) Control of the acts of the Community (Regulations, Directives, Decisions and other subsidiary instruments), its Institutions and officials, including issues bordering on non-contractual obligations of the Community in relation to wrongs done to third parties in the discharge of official functions under Article 10(c) of the Protocol as amended. Matters pertaining to determination of legality of Community acts (or judicial review) are also discussed under this head, but does not extend to matter that pertain to any challenge to official acts by an employee of the Community in relation to his/her employment, which are treated under the next heading;
- (c) Community public service, that is, disputes between the institutions of the community regarding the Community and its officials;
- (d) Enforcement of Treaty obligations against Member States (or, to use the word of Justice Donli, "infringement proceedings calling on Member States to fulfil their obligations"<sup>26</sup>) where there are allegations of non-fulfillment or infringement of obligations under the ECOWAS Treaty and associated Protocols and Conventions as

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<sup>26</sup> Hansine Donli, 'The Constitutional Powers of ECOWAS Court' *Nigerian Tribune* (Lagos, Monday, 2 January 2006) 32

well as other legal instrument to which the Member State is a party; and, cases of failure by MS to honour their obligations; and

(e) Relationship of the Community Court with the national or domestic courts of the Member States.

The various categories are by no means mutually exclusive. A great deal of effort is made to identify the key issue around which other issues revolve in each of the reported and certified unreported judgements. This framework is adopted to simplify the task of analysing the work of the Court, by isolating patterns and trends that could add up to building a Community legal order in line with the analytical focus of the entire research work.

Figure 5 below, adapted from Appendix I, which in turn derives from a full reading of all the judgments and opinions considered, gives a graphic illustration of the relative size of the various category of issues that have been subject of judicial pronouncements by the Community Court. Expectedly, issues bordering on violations of human rights and fundamental freedoms constitute the largest chunk of the cases. In fact, the Court is gradually acquiring the status of an “alternative forum for transnational human rights litigation in West Africa”.<sup>27</sup> This is understandable. Cases of human rights violations abound all over Africa, and countries of the West African sub-regional are no exception.<sup>28</sup> Although many of the Member States of the ECOWAS have ratified the African Charter of Human and Peoples’ Rights,<sup>29</sup> with

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<sup>27</sup> Ladan, Muhammed Tawfiq, ‘Ways of Strengthening Legal and Judicial Integration in ECOWAS Sub-Region’, A Presentation Made at the 2012-2013 Legal Year Ceremony of the ECOWAS Community Court of Justice, Abuja, Nigeria, 27<sup>th</sup> September, 2012

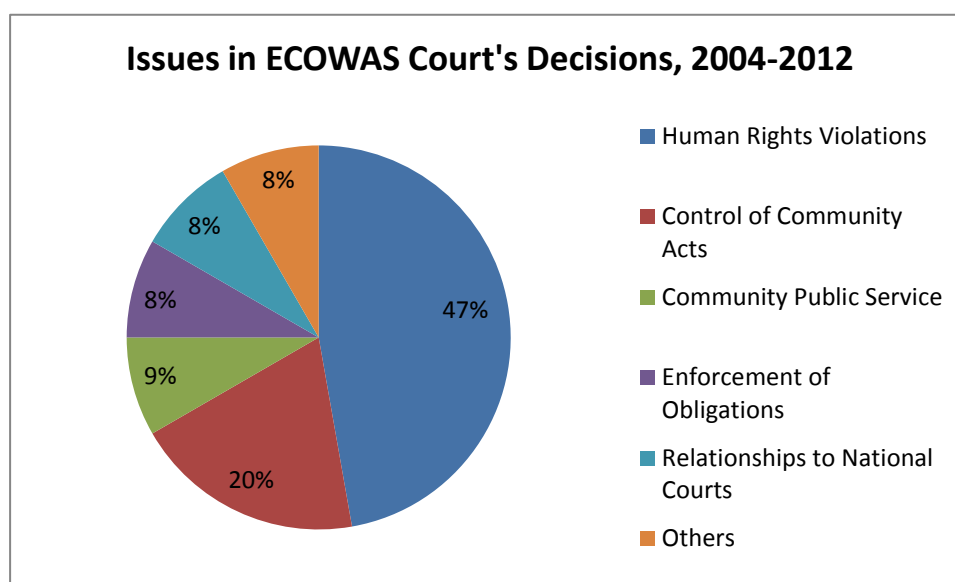
<sup>28</sup> See Amnesty International, *Amnesty International Report 2012: The State of the World’s Human Rights* (London: Amnesty International, 2012)

<sup>29</sup> Available at:

<[http://www.africa-union.org/official\\_documents/treaties\\_%20conventions\\_%20protocols/banjul%20charter.pdf](http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf)>  
accessed on 07 December 2012

obligations to put in appropriate mechanisms for observance of enforcement of these rights, these national frameworks, where they exist at all, are weak.<sup>30</sup>

**Figure 5**



Sources: Adapted from Appendix I

Unfortunately, the continental framework afforded by the existence of the African Court on Human and Peoples Rights is yet to be fully utilised.<sup>31</sup> Notwithstanding the existence of scores of groups purporting to defend the cause of democracy, the rule of law and human rights, prosecution for violations of human rights remain unaffordable by many Africans who suffer the scourge of hunger, disease and want to contend with. The expansion of the jurisdictional competence of the Community Court of Justice of the ECOWAS to cover cases of human rights abuse brought by individuals therefore provided a more affordable alternative to the framework of the African

<sup>30</sup> Mojeed Olujinmi A Alabi, 'Extra-Territorial Approach to Anti-Corruption, Integrity and Public Service Ethics in Africa: A Review of Frameworks and Implementation Challenges' (2010) 2:2 *Journal of Alternative Perspectives in the Social Sciences* 495-522

<sup>31</sup> Frans Viljoen, *International Human Rights Law in Africa* (2<sup>nd</sup> ed, Oxford: Oxford University Press, 2012) 410-468



Court, based in faraway Arusha, Tanzania. The fact that the Community Court sometimes sits outside Abuja to hear cases brought by indigent litigants and that costs in human rights cases are sometimes awarded against the Defendant/Member States<sup>32</sup> are particularly attractive, coupled with the emergence of many non-governmental organisations (e.g. SERAP) that are committed to keeping the judicial machinery of the Court running. Issues bordering on enforcement of Treaty obligations and for control of Community acts are often lumped together and dwarfed in emphasis by human rights issues, which account for the relative high volumes of such cases as distinctively classified. In fact, as the Court itself observed in a case, there is hardly any matter before the Court in which human rights violations are not raised either as principal or subsidiary issues.

### **Cases and Issues**

The Community Court of Justice of the ECOWAS has an important role to play in giving meaning to and promoting the development of a regional legal order in West Africa. Effective discharge of this crucial mandate demands that the Court articulate the nature of this Community legal order that is expected to govern relationships and transactions within the Community as well as define the limits and extent of the domestic legal orders of the State Parties to the Treaties and other legal texts. In this regard, the Court is expected to, through its decisions, judgments, rulings and opinions, interpret and clarify the nature of the Community legal order. Accordingly, this section is devoted to an examination of the leading issues of regional integration

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<sup>32</sup> See, e.g., *Saidykhan v Gambia*, unreported Suit No. ECW/CCJ/APP/11/07, Judgement No. ECW/CCJ/JUD/08/10

that have arisen in the two broad areas of the Court's decisions – community law and human rights,<sup>33</sup> with a view to distilling from them the contributions of the Court to the development of the regional integration efforts of the parent organisation, the ECOWAS. The analysis takes into account all the pronouncements of the Court in the 36 cases under consideration, in the various issue-areas already identified, including the advisory opinions. While the Court has stated that its advisory opinions are mere “advice and guide” that do not have any force of law like its judgments,<sup>34</sup> such advisory opinions are also referred to where relevant to the discussion. This is so because the Court itself is bound by its own advisory opinions.<sup>35</sup> The essence of reviewing these cases is to extract certain strands of thoughts that could be regarded as building blocks of the Community legal order, which could become useful guides as to direction of future decisions of the Court.

(a) **Violations of Human Rights**

Cases alleging violations of human rights by individuals and corporate bodies constitute a major bulk of the work of the ECOWAS Court within the first decade of its existence. Evidence from the records of the Court show that more than half of the reported judgments of the Court deals primarily with issues of human rights violations and another 20% raises issues that border on human rights violations as secondary issues. In fact, virtually all the cases filed by individuals and corporate bodies before the court are couched in human rights terms, and the Court has had to examine the *rationale materiae* of each case to actually separate those that pertain to human rights violations from those that did not. Such is the preponderance of human rights litigants

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<sup>33</sup> 2002 Annual Report 18

<sup>34</sup> *Folami v Community Parliament* [2010] 3 CCJLR 50 at 58

<sup>35</sup> *Ibid* at 59

that the Court itself has classified its work broadly into two - human rights and community law.

The human rights jurisdiction of the ECOWAS Court derives from the provisions of Articles 9(4) and 10(d) of the Protocol as amended, which grants individuals access to the Court for enforcement of human rights. There is a caveat; the applicant must not be anonymous and the application cannot be filed whilst the same matter is before another international Court. The attitude of the Court in the construction of these provisions have been positive, even if cautiously. Thus, despite declining jurisdiction in *Ugokwe v Federal Republic of Nigeria and another*,<sup>36</sup> the Court indicated *obiter* its preparedness to entertain human rights issues once properly brought before it.<sup>37</sup> Moreover, while the Court will not assume jurisdiction on causes of action that arose before its jurisdiction was expanded in January 2005,<sup>38</sup> it is prepared to interpret the scope of its jurisdiction in human rights cases to accommodate suits alleging violations that continued up to the time the Court became seized of such matters.<sup>39</sup>

The exercise of the human rights jurisdiction of the Court takes cognisance of the provisions of the African Charter and other international instruments mentioned in the Revised Treaty of the ECOWAS, frequently cited before it. In respect of the Banjul Charter in particular, the Court has stated that it would continue to adhere to the principles of the Charter, in the absence of ECOWAS legal instruments relating to human rights, “without necessarily proceeding to do so in the same manner as would the African Commission on Human and Peoples’ Rights”.<sup>40</sup> It has also given

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<sup>36</sup> [2004-2009] CCJELR 37 at 46

<sup>37</sup> *Ibid* at 48

<sup>38</sup> *Ukor v Laleye* [2004-2009] CCJELR 19

<sup>39</sup> *Tidjani v Nigeria* [2004-2009] CCJELR 77 at 85

<sup>40</sup> *Koraou v Niger* [2004-2009] CCJELR 217 at 227

recognition to the fundamental rights provisions in the national constitutions of the Member States<sup>41</sup> as well as other international instruments such as the Universal Declaration of Human Rights of 1948, International Covenants on Civil and Political Rights of 1966, and International Pact on Civil, Economic, Social and Cultural Rights of 1966.<sup>42</sup>

The ECOWAS Court has stated that redressing violations of human rights with appropriate sanctions is part of its core functions.<sup>43</sup> The test for the exercise of this major function was laid down in the case of *Alhaji Hammani Tidjani v Federal Republic of Nigeria and others*, in which the Plaintiff alleged, inter alia, violation of his rights to fair trial and to property. The Plaintiff had been arrested, detained and tried for trans-border criminal activities by the domestic courts of Nigeria, and his appeal against decisions of the national courts against his preliminary objections to the jurisdiction of the courts were still pending when he approached the Community Court of Justice. The Court declared itself incompetent to hear the case on the merit. It, however, seized the opportunity of the case to lay the test which an applicant alleging human rights violations must satisfy in order to succeed before the Court. According to the court, an applicant must prove that: (a) there is a right recognized by the African Charter which needs to be protected; (b) the right has been violated by the Defendant(s); (c) there is no action pending before another international court in respect of the alleged breach; and (d) there was no previously laid down law that led to the alleged breach or abuse of the right complained of.<sup>44</sup> These tests were re-

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<sup>41</sup> E.g, *Koraou* (n 40) at 234

<sup>42</sup> See, e.g., *Essien v Gambia* [2004-2009] CCJELR 113; *Habre v Senegal*, unreported Interim Ruling No. ECW/CCJ/APP/02/10 of 14/05/2010

<sup>43</sup> *Koraou* (n 40) at 232

<sup>44</sup> [2004-2009] CCJELR 77at 88

emphasised a year later in the case of *Ebrimah Manneh v Republic of The Gambia*,<sup>45</sup> where the arrest and detention of a Gambian journalist by the government of his country was held contrary to Article 6 of the African Charter with consequential award of monetary compensation to the Plaintiff. By awarding compensatory damages, the ECOWAS Court extended its powers beyond mere declaratory relief.

The Court has been cautious in awarding damages for human rights violations, insisting that each leg of the test it laid down in the *Tidjani* case be established, and that a case would not be heard simply because an applicant alleges human rights violations without establishing the *rationale materiae* of the case, that is that the disputes concern human rights.<sup>46</sup> In fact, the court stated in the *Tidjani* case that the essence of the human rights framework of the African Charter is not to undermine the criminal law system of the Member States of the AU but rather to protect the citizens from unjustifiable interference by the State in citizens' enjoyment of their human rights. Alleged violations would thus be entertained only where the due process of the law was not followed in the execution of the tasks that constitute the alleged violations. According to the Court in the *Tidjani* case, relying on the proviso in Article 6 of the African Charter, a State has the right to prosecute suspects for criminal offences and the Court would interfere with the exercise of that power only if the suspect has been arrested, detained and/or tried "under a non-existing law or a law made specifically after his arrest, or detention or for an offence which did not exist at the time of his arrest or detention".<sup>47</sup>

Also, where the issues involved in an alleged human rights violations are criminal in nature, the Court has stated that it would not assume jurisdiction since

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<sup>45</sup> [2004-2009] CCJELR 181 at 189-90

<sup>46</sup> *Chukwudolue v Senegal* [2004-2009] CCJELR 151

<sup>47</sup> [2004-2009] CCJELR 77 at 90

such issues clearly lie outside the jurisdiction of the Community Court of Justice. As the Court stated emphatically in the case of *Edoh Kokou v ECOWAS Commission* in which the Applicant alleged physical aggression, maltreatment and endangering the life of an officer at post, the Court held the actions to “constitute criminal offences, which do not fall within the jurisdiction of this Court”. Moreover, an Applicant cannot use the “peoples’ rights” provisions (Arts 19-24) of the African Charter to claim individual rights since these rights are enjoyable only “collectively and not individually.”<sup>48</sup>

It is part of the conditions for admissibility of human rights cases before the ECOWAS Court that the alleged violations must occur within the territory of the Member State against which the legal action is taken.<sup>49</sup> Only a Member State of the ECOWAS can be a defendant in any case involving human rights issues before the Court. Also, human rights litigations cannot be brought against individuals or corporate bodies or against the Community itself or any of its Institutions or officials.<sup>50</sup> While individuals and corporate bodies cannot appear as Defendants before the Community Court of Justice, they are the principal Plaintiffs. An applicant need not to have been charged or arrested before he can come to the Court (*Habre* case), sufficient only that there is a real threat of violation. Also, an applicant need not exhaust local remedies before he can approach the Court for relief. In fact, the Court has been consistent in its pronouncement that the international rule of exhaustion of local remedies does not apply to the Court.<sup>51</sup> A Plaintiff may not approach the court

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<sup>48</sup> *Pinheiro v Ghana*, unreported Suit No. ECW/CCJ/APP/07/10, Judgment ECW/CCJ/JUD/11/12, delivered on 6 July 2012

<sup>49</sup> Protocol on the CCJ – Art 9(4)

<sup>50</sup> *David v Uwechue* [2010] 3 CCJLR 135 at 154-155

<sup>51</sup> *Ocean King v Senegal*, unreported Suit No. ECW/CCJ/APP/05/08,

<[http://www.courtecowas.org/site2012/pdf\\_files/decisions/judgements/2011/OCEAN\\_KING\\_NIG\\_LT](http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2011/OCEAN_KING_NIG_LT)

while litigation on the matter is pending before a domestic court because that may amount to abuse of the court process (*Tidjani* case) ).

Additional conditions for admissibility of human rights cases were articulated in the *Case Concerning Hissein Habre v Republic of Senegal*.<sup>52</sup> The applicant must satisfy the Court that: (a) the issues submitted for determination pertain to a right “which has been enshrined for the benefit of the human person”, and that “it is the violation of that right which is being alleged”; (b) the obligations in respect of those rights are binding on the respondent State by virtue of the State being a signatory to the instruments encapsulating the right; and (c) the violations alleged occurred within the territory of the respondent State. Also, the Court held in the case of *Moussa Leo Keita v Republic of Mali* that such allegations of violations of human rights must be specific or clearly stated to be cognisable by the court.<sup>53</sup> It was held further in the *Habre* case that the originating application must satisfy the criteria of admissibility laid down in Article 10(d) of the Protocol as amended. These criteria are: (a) relief for violation of human rights; (b) which is not anonymous; and (c) is not before another international court for adjudication. For an application to be declared inadmissible on the ground of not satisfying the last of the three criteria, any body before which the matter is pending must be an international court competent to adjudicate on human rights matter. Thus, a body such as the UN Committee against Torture, which is an enforcement mechanism for monitoring States’ implementation of the provisions of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not a court within the meaning and intendment of the

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D\_v\_REPUBLIC\_OF\_SENEGAL.pdf> accessed on 22 December 2012; *Alade v Nigeria*, unreported Suit No. ECW/CCJ/APP/05/11, Judgment No. ECW/CCJ/JUD/10/12, delivered on 11 June 2012

<sup>52</sup> Interim Ruling No. ECW/CCJ/APP/02/10 delivered on 14/05/2010

<sup>53</sup> [2004-2009] CCJELR 63 at 74-75

relevant provisions of the Protocol and Supplementary Protocol defining the jurisdictional competence of the ECOWAS Court. Also, the AU, not being principally concerned with administration of justice, does not, in the opinion of the Court, qualify as an international court. Nonetheless, it appears from these decisions that where any of the claims before the Court is not covered by competence of that other “international court”, or where the subject matter of the disputes before the two courts totally differs, the ECOWAS Court would assume jurisdiction.

The coverage of human rights litigations before the Court is not limited to civil and political rights. It extends to social, economic and cultural rights specifically recognised under the African Charter.<sup>54</sup> Although it ruled against the Plaintiff in the case of *Etim Moses Essien v Republic of Gambia and another* for not successfully establishing that his rights were violated,<sup>55</sup> the Court found his action "rooted in the inherited rights of the salaried worker, and thus recognisable as fundamental rights".<sup>56</sup> With that pronouncement, the Court laid the foundations for some subsequent decisions that drew attention to it as an important forum for pursuit of litigations beyond the purview of civil and political rights. Thus, in the case of *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v President of the Federal republic of Nigeria and others*, a non- governmental organisation sued the government of Nigeria and some foreign oil companies for alleged violations in the oil- producing Niger Delta region of Nigeria of the rights to "adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to clean and healthy environment; and to economic and

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<sup>54</sup> *Ayika v Liberia*, unreported Suit No. ECW/CCJ/APP/07/01, Judgment No. ECW/CCJ/JUD/09/12 delivered on 8<sup>th</sup> June 2012

<sup>55</sup> [2004-2009] (CCJELR 113)

<sup>56</sup> *Ibid* at 128



social development" due to the failure, complicity and/or negligence of the Defendants jointly and severally to take appropriate steps to address environmental pollution and land degradation in the area. In its ruling on preliminary objections to its jurisdiction by the Defendants, the Court, in December 2010, recognised these socio-economic rights but nevertheless declined to entertain the action because it had no jurisdiction between the defendants who were not Member States or Institutions of the Community against whom only cases of human rights violations could be brought before the Court. In this case, the ECOWAS Court criticised the current regime of international law as it relates to accountability of multinationals for violations of human rights in the developing countries, which it considered "one of the most controversial issues in International Law". It has, in recent times, ruled in favour of the right to education<sup>57</sup> and clean environment free of pollution.<sup>58</sup>

Enforcement of human rights and award of compensatory damages for violations have been possible where the legal actions are maintained against State parties to the ECOWAS Treaty. The position of the Court on this point has been aptly demonstrated in three cases before it that have generated immense international attention in recent years. These are the cases of *Hadijatou Mani Koraou v The Republic of Niger*,<sup>59</sup> *Musa Saidykhan v Republic of the Gambia*,<sup>60</sup> and *Djot Bayi Talbia v Federal Republic of Nigeria*.<sup>61</sup> In each of these cases, the ECOWAS Court upheld the violations alleged and awarded compensatory damages after adumbrating on the principles guiding its judicial attitudes and approach in such matters. In the

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<sup>57</sup> <<http://serap-nigeria.org/ecowas-court-to-fg-nigerians-have-a-legal-right-to-education/>> accessed on 22 December 2012

<sup>58</sup> <<http://www.amnesty.org/en/for-media/press-releases/groundbreaking-ecowas-court-judgment-key-moment-holding-governments-and-com>> accessed on 22 December 2012

<sup>59</sup> [2004-2009] CCJELR 217; [2010] 3 CCJLR 1

<sup>60</sup> Unreported judgement no. ECW/CCJ/JUD/08/10 of 16/12/2010

<sup>61</sup> [2004-2009] CCJELR 245

*Koraou* case, a liberated slave who left the home of her master/concubine and subsequently contracted a marriage was found guilty of bigamy and sentenced to jail along with her accomplices. While the proceedings in the domestic courts were pending, she invoked the jurisdiction of the ECOWAS Court alleging discrimination, slavery and unlawful detention. The Community Court held that the Plaintiff was a victim of slavery, “a grave violation of human dignity”,<sup>62</sup> who could not benefit from the administrative and judicial authorities of his country. It held further that although the discrimination suffered by the Plaintiff could not be attributed to the Republic of Niger but the country was nonetheless blameworthy for the inability of its administrative and judicial authorities to provide the needed protection. The Community Court accordingly awarded substantial damages against the country in favour of the Plaintiff.

In the *Saidykhan* case where a Gambian journalist complained of violations of his right to personal liberty, dignity of his person and fair hearing, after being arrested, detained and tortured by agents of the State without trial, the Community Court of Justice awarded substantial compensatory damages to the Plaintiff. The key principle of the Community legal order of the ECOWAS brought to the fore in the *Koraou* case is that non-exhaustion of local remedies cannot be a bar to bringing an action for human rights violations before the Community Court of Justice. In that case, the appeal filed by her against the decision of the domestic court was still pending when Hadijatou Mani Koraou approached the ECOWAS Court. The issue of non-exhaustion of local remedies was therefore canvassed as the main defence before the Court. Rejecting the contention of the Defendant in this regard, the Court interpreted the provisions of Article 10(d) of the Protocol on the Community Court of

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<sup>62</sup> *Koraou* (n 40) at 236

Justice as amended very liberally to preclude any rule of exhaustion of local remedies. It stated that Article 10(d) sets the conditions which a party must satisfy before bringing human rights cases before the court, and that exhaustion of local remedies was not one of them. According to the Court, it is “not the duty of the instant Court to add to the Supplementary Protocol conditions which have not been provided for by the texts”.<sup>63</sup>

The liberal approach of the Court towards the rule of exhaustion of local remedies is legendary. In *Etim Moses Essien v Republic of the Gambia*, a Professor recruited on a two-year contract by a donor agency was remunerated in US Dollars. Upon the renewal of the contract for another term, the University of the Gambia sought to pay the Professor in the local currency (*Dalasis*) at the same rate as other Lecturers. He refused and then sued the Defendants before the Community Court of Justice alleging economic exploitation and violations of his rights to equal pay for equal work. The Defendants raised preliminary objection on the grounds *inter alia* that the Plaintiff did not exhaust local remedies before approaching the ECOWAS Court for relief. The Court ruled against the preliminary objection. Three years later, in its 2010 ruling in the case of *Femi Falana and another v Republic of Benin and others*,<sup>64</sup> the Court held the provisions of Article 10(d) aforementioned as an exception to the general rule of international customary law that a party must exhaust local remedies before accessing an international court. The Court emphasised other exceptions to the general rule that permit recourse to international mechanisms

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<sup>63</sup> Ibid 230

<sup>64</sup> [2010] 3 CCJLR 114

“where such internal remedies are non-existent or unduly delayed and unreasonably prolonged or unlikely to bring effective relief”,<sup>65</sup> as it indeed did in the *Koraou* case.

Such a liberal approach to human rights litigation also informed the Court's decision in the consolidated cases of *Djot Bayi Talbia and other v Federal Republic of Nigeria*.<sup>66</sup> In this case, the crew members of a foreign vessel caught illegally loading Nigeria's crude oil were arrested, detained and later brought before a domestic court of Nigeria, which declined jurisdiction over the trial and ordered the release of the Plaintiffs. The Plaintiffs then sued Nigeria claiming reparation for violation of their human rights and loss of employment. On the question whether the actions by the Plaintiffs are statute-barred by virtue of Article 9(3) of the amended Protocol on the Community Court which barred actions founded on violations of human rights from being brought after three years from the date the cause of action accrued, the ECOWAS Court stated that the said provision was only applicable to cases against the Community or those of the Community against another and does not affect cases between individuals and member States. It therefore declared that the limitation period stipulated in Article 9(3) aforementioned did not apply to the case, which it declared admissible before it.

(b) **Control of Community Acts**

The contribution of the ECOWAS Court to the emergence of a Community legal order in the West African region is facilitated by the provisions of the Protocol on the Community Court of Justice as amended by the Supplementary Protocol A/SP.1/01/05. By Article 9(1) of the Protocol as amended, the Court is competent to

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<sup>65</sup> Ibid 130

<sup>65</sup> Unreported judgement no. ECW/CCJ/JUD/03/10 of 08/07/2010

<sup>66</sup> [2004-2009] CCJELR 245

adjudicate on any disputes relating to the interpretation and application of the legal texts of the Community, including the Treaty, Conventions, protocols, regulations, directives, decisions and other subsidiary instruments. Towards this end, the Court can determine actions that are grounded on: (a) the legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; and (b) the action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions. The Court also has the power, by Article 9(2), to determine non-contractual liability of the Community. These provisions subject the actions of the Community Institutions and officials to the principle of legality. Such actions can be instituted by a Member State, the Council or the President of the ECOWAS Commission in an action challenging the legality of an action in relation to the Community texts.<sup>67</sup> Individuals and corporate bodies are also allowed to bring actions for control of actions and inactions of a Community official where such actions or inactions violate the rights of the individual's or corporate bodies concerned. The action cannot be maintained by community citizens unless it violates their rights. The status of an individual as a community citizen *simpliciter* does not afford such a right,<sup>68</sup> unless his interest is “directly and immediately affected by the act or inaction”.<sup>69</sup>

Issues relating to legality of actions and inactions of the Community, its institutions and officials have featured in some of the cases filed in the Court's registry in recent times. Such applications, complaining of violation of the treaty and the associated legal texts, often ask for annulment of the acts complained of as well as

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<sup>67</sup> Protocol on the CCJ - Article 10(b)

<sup>68</sup> *Oserada v Council of Ministers* [2004-2009] CCJELR 167

<sup>69</sup> *Adewale v Coouncil of Ministers*, unreported Suit No. ECW/CCJ/APP/11/10, Judgment No. ECW/CCJ/JUD/07/12, available at [http://www.courtecowas.org/site2012/pdf\\_files/decisions/judgements/2012/MRS\\_OLUWATOSIN\\_RI\\_NU\\_ADEWALE\\_v\\_COUNCIL\\_OF\\_MINISTERS\\_ECOWAS\\_&\\_3\\_ORs.pdf](http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/MRS_OLUWATOSIN_RI_NU_ADEWALE_v_COUNCIL_OF_MINISTERS_ECOWAS_&_3_ORs.pdf), accessed on 22 December 2012

damages. Often claims relating to legality of community acts or to actions and inactions of Community officials are often made together with claims for violations of human rights, or even disputes of a contractual nature involving simple business transactions. The Community Court of Justice had to spend a great deal of its time to separate such disputes from pure human rights cases, and in doing so helps to clarify the Community legal order in these two broad areas of the Court's competence.

It appears from the provisions of Article 10(b) of the Protocol as amended that only the President of the ECOWAS Commission and the Council of ministers, among other institutions of the ECOWAS, can bring an action to challenge the legality of any action in relation to any Community text. This is not the case in practice. The Community Parliament instituted an action against the Council of Ministers in 2005 and neither the defendants nor the Court *suo motu* challenged the capacity of the Plaintiff to bring the action. In that case, *Parliament of the Economic Community of West African States v The Council of Ministers of the Economic Community of West African States and another*,<sup>70</sup> the Regulation C/REG.20/01/05 adopted by the Council of Ministers to regulate the organisational chart of the Community Parliament and which granted some supervisory power over the Parliament to the President of the ECOWAS Commission was challenged by the Parliament as *ultra vires* the Council of Ministers. The action was dismissed on the basis of a challenge to the jurisdiction of the Court on the ground the Plaintiff did not explore the option of amicable settlement which was a condition precedent to inter-institutional litigations within the Community as provided for under Article 76(1) of the Revised Treaty. In its judgement, the Court stated that the expression "either party" used in Article 76(2) of

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<sup>70</sup> [2004-2009] CCJELR 29

the revised Treaty in reference to member states or the Authority "must be extended in a large sense" to include institutions of the Community.

The ECOWAS Court is not however prepared to extend the right of action to challenge Community acts to individuals and corporate bodies unless such Applicants could show evidence of their rights being prejudiced by the actions complained in line with Article 10(c) of the Protocol as amended. This was the position of the Court in the lead case of *Odafe Oserada v ECOWAS Council of Ministers*. In that case, the Plaintiff challenged and requested for annulment of Regulation C/REG.5/06/06 by which the post of the Secretary General of the Community Parliament was allocated to the Republic of Guinea as an exceptional measure. The Plaintiff complained that reserving the position, not being a statutory position that is required to be filled on rotational basis, for citizens of the Republic of Guinea only violates the principle of equal opportunity for citizens of the Community and that it was a violation of the provisions of the African Charter on Human and Peoples' Rights. Neither the Applicant nor the organisation he represented claimed any interest in occupying the vacant position. The Court dismissed the application on the ground that neither the Applicant nor his organisation had suffered any harm for which reparation was required. The court made a number of pronouncements on the conditions that an action challenging Community acts must satisfy in order to succeed. For such an action to be admissible before the Court, there must be "the existence of an act or inaction of a Community official which violates the rights of the person requesting the annulment of such act". The alleged grievance must not be hypothetical, and the

complainant must have some direct, personal and certain interest which he/she seeks to protect from infringement.<sup>71</sup>

It is clear that the Plaintiff in that case lost out because of lack of sufficient interest in the subject matter of the litigation to warrant interference of the Court with the decision of the Council of Ministers. Where such an interest exists, the Community Court would entertain the case. In the case of *Starcrest Investment Limited v The President of ECOWAS Commission and others*,<sup>72</sup> a company registered in Nigeria bid for the acquisition and exploitation of some oil blocs, none of which was awarded to it. The Plaintiff, which considered itself the most pre-qualified company during the bidding exercise, then petitioned the Authority of Heads of State and Government of the ECOWAS alleging fraud against Nigeria. The petition was submitted to the Defendant for processing. The Plaintiff sued the 1st Defendant before the ECOWAS Court for refusal, failure and/or neglect to act on the said petition by processing it for the attention of the Authority, and pleaded for damages. Dismissing the preliminary objection of the Defendants, the Court ruled that the complaint of the Plaintiff concerning the alleged inaction of the President of the ECOWAS Commission, a Community official, was admissible.

Such an action must be maintained against the Community or the Institution, and not against the particular community official in his private capacity.<sup>73</sup> Thus, in the case of *Peter David v Ralph Uwechue*,<sup>74</sup> where the Plaintiff, a Security Orderly engaged by the Defendant in his capacity as the Special Representative of the President of the ECOWAS Commission in Abidjan, sued the latter for failing to pay

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<sup>71</sup> [2004-2009] CCJELR at 177-178

<sup>72</sup> (2010) 3 CCJLR 99,

<sup>73</sup> Under the law of the CARICOM, only the Community can answer for any complaint against any of its Organ, Body or official.. See Article 228 of the Revised Treaty of Chaguaramas (RTC)

<sup>74</sup> [2010] 3 CCJLR 135



the balance of his entitlements, the action was held incompetent for non-joiner of the Community. The Court stated further that in such situation, it is the Community itself and not the institutions or officials that are officially held accountable.

Actions for control of or the legality of Community acts may be maintained against the Community by a Member State, institution, or official of the Community, and by individuals and corporate bodies too. At the institutional level, requests for advisory opinion may be made by appropriate institutions to determine the legality or otherwise of certain actions as was done by the President of the ECOWAS Commission when he requested the Community Court of Justice to determine the legality of the action of the Speaker of the Community Parliament when he decided to remain in office after the expiry of the life of the Parliament over which he presided.<sup>75</sup> The Court declared the action as legal.

(c) **Community Public Service**

Closely related to actions challenging the legality of community acts are those actions that relate to the Community Public Service. Both categories of actions before the Court challenge the legality of certain decisions of Community institutions or officials, and applications in respect of them are often filed together. However, an action that falls into this category normally concerns the relationship between the Community and its officials. They are cases that border essentially on employer-employee relationship although challenges are raised against community texts and acts. Such actions are founded on the provisions of the Protocol on the Community Court of Justice as amended by the Supplementary Protocol of January 2005. By

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<sup>75</sup> *Request for advisory opinion from the Executive Secretary of ECOWAS relating to Article 23(11) of the Rules of Procedure of the Community Parliament and the provisions of Article 7(2) and 14(2)(f) of the Protocol on the Community Parliament [2004-2009] CCJELR 55*

Article 9(f) of the said amended Protocol, the ECOWAS Court is competent to adjudicate in any dispute relating to the Community and its officials. A dispute relating to the Community public service can be entertained only if the dispute is between an official of the Community and the Community itself or one of its Institutions.

A few of such cases, both successful and unsuccessful, have been handled by the ECOWAS Court, and the pronouncements of the Court in the determination of the cases have contributed to current understanding of the nature of the public service of the Community. The *locus classicus* in this regard is the case of *Qudus Gbolahan Folami and another v Community Parliament (ECOWAS)*,<sup>76</sup> which was instituted in 2008. In this case, the Plaintiffs were offered employment on fixed term and permanent contracts respectively by the Community Parliament, and their employments were stated to be governed by the ECOWAS Staff Regulations. Both officers were attached to the office of the Speaker of the Parliament. When the tenure of the Speaker expired, the Defendant wrote to the Plaintiffs that their contracts of employment had expired, stopped payment of their salaries, and asked them to vacate their official quarters. The Plaintiffs initiated proceedings claiming wrongful termination of their contracts of employment which were governed by the ECOWAS Staff Regulations, contending thereby that the terms of their employment was not tied to the Speaker's tenure. They sought declaration that they were still staff of the Community Parliament, reinstatement, payment of arrears of salaries and entitlements, and order against forcible ejection from their official residence. The Court dismissed their application. The Court declared that it could not force the employees on their employers and that only an action for damages for wrongful

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<sup>76</sup> [2010] 3 CCJLR 50

termination could succeed. It refused to order specific performance of the contract of employment, insisting that its earlier advisory opinion on the matter notwithstanding, the tenure of the Speaker ended automatically when the tenure of the Legislature lapsed. Also, it held that where a contract of employment is terminated, howbeit wrongfully, the only relief available was award of damages and not specific performance.

A similar scenario played itself out in the case of *Edoh Kokou v ECOWAS Commission*,<sup>77</sup> which involved unlawful dismissal of an employee in the public service of the Community. An employee, who was a victim of a physical attack by his immediate superior officer and suffered from neck trauma and headaches, made a complaint before a domestic court and sought transfer to another Department. His appointment was subsequently terminated. After exhausting the internal remedies provided under the ECOWAS Staff Regulations without success, he filed an application at the ECOWAS Court claiming damages on multiple grounds, reinstatement, and payment of salary arrears among others. The Defendants claimed that the one-year renewable contract of the Plaintiff was simply not renewed. The Court did not order reinstatement or give an order for transfer of the Plaintiff to another Department as demanded but awarded monetary compensation for the wrongful termination of the Plaintiff's appointment. In that case, the Court stated that the Head of a Community Institution could not terminate the contract of an officer without following the procedure laid down in the ECOWAS Staff Regulations. For such an action to succeed, as it partly does in this case, the action must be brought against the Community and not against the individual superior officer as stated in the

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<sup>77</sup> Unreported Suit No. ECW/CCJ/APP/05/09, ECW/CCJ/JUD/03/10, delivered on 8 July 2010

case of *David v Uwechue*.<sup>78</sup> Also, an action of this nature can only be maintained by an employee of the Community and not by an outsider or a prospective employee.<sup>79</sup>

(d) **Enforcement of Obligations**

In signing the Treaty, Conventions, Protocols and other legal texts, Member States of the ECOWAS commit themselves to certain obligations which they undertake to promote in their respective countries and the region as a whole. These obligations are mandatory and each Member state is expected to abide by the obligations of membership without much ado. Apart from these, Member States have in their individual capacities subscribed to some international regulatory and legal frameworks that commit them to certain obligations, some of which instruments are also affirmed by the Treaty and other legal instruments. While Member States are ordinarily expected to fulfil these obligations on an on-going basis, occasional failure, neglect or refusal may occur that require enforcement actions on the part of other Member States, Institutions or other interested parties to ensure compliance with the obligations and commitments freely entered into by them.

Actions for enforcement of Community obligations against a Member State or institution, or what Donli calls “infringement proceedings”,<sup>80</sup> are permitted to be instituted before the Community Court of Justice, ECOWAS. By Article 9(a) and (b) of the Protocol on the Community Court of Justice as amended by the Supplementary Protocol, the jurisdiction of the ECOWAS Court extends to include the interpretation and application of the principal and subsidiary legal instruments of the Community.

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<sup>78</sup> [2010] 3 CCJLR 135 at 158

<sup>79</sup> Adewale (n 69)

<sup>80</sup> Donli (n 25)

To this end, Member States or the President of the Commission can bring an action for failure of a Member State to fulfil its obligations.

Very little litigation before the ECOWAS Court has been brought under this head of claims. Often, actions founded on violations of human rights made some claims of failure to fulfil obligations against Member States, particularly in respect of the African Charter on Human and Peoples' Rights. Many of such cases abound, which have been cited in the discussion of the approach of the Court towards human rights issues above. There are other such cases which seek to compel States to abide by the Treaty and other obligations as the core claim, even while alleging human rights violations. In the case of *Olajide Afolabi v Federal Republic of Nigeria*,<sup>81</sup> the Plaintiff alleged that the unilateral closure by Nigeria of its border with the Benin Republic infringed the provisions of Articles 3(2)(d)(iii) and 4(g) of the Revised Treaty of 1993 and the Protocol on the Free Movement of Persons and Goods, in addition to violating his fundamental rights. He accordingly sought a mandatory order of injunction to restrain Nigeria from further closing the borders. The case was not heard on the merit as the Court declined jurisdiction to entertain the suit because individuals at that time had no direct access to the Court.

In the case of *Femi Falana and another v Republic of Benin and others*,<sup>82</sup> the Plaintiffs sought declaratory relief in respect of the erection of checkpoints, toll gates and other obstacles at the border posts of all the fifteen Defendants who are Member States of the ECOWAS on the ground that they infringed Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment. They also sought orders of the Court mandating the Defendants to remove and restraining them from erecting

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<sup>81</sup> [2004-2009] CCJELR 1

<sup>82</sup> [2010] CCJLR 114

any such barriers that constituted obstacle to free movement of persons and goods. The action, which was also founded on human rights violations succeeded against those States where the Plaintiff had travel while the case against those defendants where the Plaintiffs have not travelled to were dismissed as speculative.

Also, in the *Case Concerning Hissein Habre v Republic of Senegal*,<sup>83</sup> another case partly founded on human rights violations, the Plaintiff challenged the infringement by the State of its obligations under the Constitution and various international human rights instruments as well as such principles as *res judicata*, separation of powers and independence of the judiciary, asking the ECOWAS Court to declare any proceedings against the Plaintiff by the Defendant in respect of certain allegations of atrocities perpetrated by the Plaintiff when he was the President of the Republic of Chad as violations of the obligations of the State of Senegal under the various Treaties, Declarations, Charter and Covenants listed in the initiating application. The interim ruling on the preliminary objections raised by the Defendants dwelt extensively on the jurisdiction of the Court to hear the case for human rights violations while the substantive matters are still pending before the Court.

The rarity of cases that distinctively challenge infringement of Treaty obligations and the fact that such cases also raise issues of human rights violations is, perhaps, a consequence of the way Article 10(d) of the Protocol on the Community Court of Justice as amended is worded. This provision seems to lay emphasis on individual's access to the court for allegations of violations of human rights. It may be that allegations of human rights violations are easier to prove than other classes of cases. The prevalence of non-governmental organisations focussing on human rights issues may have also contributed to this. As the decision in the case of *Parliament v*

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<sup>83</sup> Unreported Interim Ruling No. ECW/CCJ/APP/02/10 of 14/05/2010

*Council of Ministers*<sup>84</sup> has shown, exploration of out-of-court settlement of disputes is a condition precedent to an Institution or Member State of the ECOWAS bringing litigation against another Member State or institution. Furthermore, an individual cannot bring a case to challenge violations of community obligations. In the recent case of *Pinheiro v Ghana*, where the Applicant (a Nigerian) sought to enforce the obligations arising from the ECOWAS Protocol on Free Movement of Persons, Right of Residence and Establishment<sup>85</sup> to get him enrolled as a Legal practitioner in Ghana, the ECOWAS Court interpreted the scope of Article 10(a) very restrictively and held that “only a Member State or the ECOWAS Commission has access to the Court to compel a Member State to fulfil an obligation”.<sup>86</sup> These have caused the dearth of such cases.

An applicant instituting a case for enforcement of Community obligations against a Member State or Institution must make a demand on the application of any legal texts of the Community, be it the Treaty itself or any of the associated Protocols or Convention, the breach or non-observance of which would justify invoking the jurisdiction of the Court for enforcement. Where no such demand is made, the action would fail. That is the import of the decision of the Court in the case of *Moussa Leo Keita v The Republic of Mali*, the facts of which are reviewed in the next section, in which the Court rejected the Plaintiff’s allegations of infringement as constituting a fundamental human rights violations because the initiating application made no demand on the applicable texts adopted for the functioning of the Community, that is, the Treaty, Conventions, Protocols and other subsidiary instruments.<sup>87</sup>

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<sup>84</sup> [2004-2009] CCJELR 29

<sup>85</sup> Protocol A/P.3/5/82, [1982] OJ, 4/21

<sup>86</sup> Unreported Suit No. ECW/CCJ/APP/07/10, Judgment ECW/CCJ/JUD/11/12, delivered on 6 July 2012

<sup>87</sup> [2004-2009] CCJELR 63 at 72

(e) **Relationship with National Courts**

One area of the Community legal order that seems to have been authoritatively and consistently articulated by the Court through its judgments is the definition of the nature of the relationships that ought to exist between the Community Court of Justice and the national courts of the Member States of the ECOWAS. As an international institution founded by mutual agreement of the States, the relationships of the national courts to the Community Court is important for determination of the nature of the Community legal order in two interrelated ways. In the first instance, the advent of the Community Court necessarily provides additional framework for ventilation of grievances which is expected to be explored by the citizen in the resolution of conflicts and disputes. Accordingly, it would be important that the respective areas of competences of the Community Court and the domestic courts of the Member States are distinctively streamlined to produce a holistic community legal order devoid of frictions. Secondly, the enforcement of decisions of the Community Court of Justice is necessarily tied to the nature of the relationships between the regional legal order and the legal orders of the countries comprising the Community. Of course, the definition of the nature of such relationships rests with the Community Court of Justice which, in line with the provisions of the Community legal texts, create an accommodative framework for the domestic legal order within the overall regional legal order of the Community, whether supranational or otherwise.

Some key provisions of the ECOWAS Community texts are relevant to any analysis of the nature of the relationships expected between the domestic courts of the Member States and the Community Court of Justice. By Article 5(3) of the Revised Treaty, the Member States undertake individually to honour their respective obligations under the Treaty and abide by the decisions of the Community. The



obligations and undertakings extend to giving the Community Court of Justice the needed independence to execute its mandate under the Treaty and the Protocols.<sup>88</sup> However, the decisions of the Court, which are final, binding and cannot be appealed against,<sup>89</sup> are not self-executing but rather depend on the cooperation of the domestic courts of the Member States for their enforcement. Indeed, the wording of the enforcement provisions of Protocol as amended<sup>90</sup> underscores the crucial role of the Member states and of their judicial institutions in ensuring effective implementation of the decisions of the Community Court of Justice. This brings into focus the role of the domestic court in the working of the Community Court of Justice.

Although Article 22(3) of the Protocol enjoins the Member States and institutions of the Community to “take immediately all necessary measures” for the execution of the Court’s decisions, the provision looks directive rather than mandatory. The Court stated *per obiter* in *Ugokwe v Federal Republic of Nigeria* (supra) that the domestic courts of the Members States are obliged to implement the decisions of the Community Court. However, neither the Treaty nor the Protocol makes provision for consequences of disobedience of the order of the Court. This is unlike the situation under EU law which gives the CJEU specific powers to fine Member States , in cases brought by the European Commission under Article 258 TFEU, for non-application of EU laws. While one can argue that the Court may assume inherent jurisdiction, like any court of law, to punish for contempt of its decisions and orders, the point cannot be stressed too far in view of the sovereign

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<sup>88</sup> Revised Treaty – Art 15(3)

<sup>89</sup> Protocol on the CCJ – Art 19(2)

<sup>90</sup> Art 24(2)

status of Member States. In fact, the Court itself has stated that it has no criminal jurisdiction.<sup>91</sup>

Leaving aside the issue of enforcement, there are other ways by which the ECOWAS Court and the domestic courts of the Member States are expected to relate. Article 10(f) confers referral jurisdiction on the ECOWAS Court from courts of the Member States. This provisions differ however from the preliminary reference procedure under the TFEU. Under the law of the ECOWAS, the preliminary reference can be made only on matters pertaining to interpretation of the Community legal texts, and can be initiated by any party to a dispute before a domestic court or by the court *suo motu*. The Protocol does not give any indication as to the status of such preliminary rulings, that is, whether the domestic court is bound to decide the case before it in accordance with the preliminary ruling of the Community Court or whether it is just a guide which the domestic court could apply or neglect. Elsewhere, the national courts of the Member States of the CARICOM are obliged to refer such questions to the Caribbean Court of Justice “before delivering judgment”,<sup>92</sup> thereby creating the impression that the national court has to be guided by the preliminary ruling of the CCJ. In the EU, a ruling on such preliminary reference is binding not only on the national court that made the reference but on all the national courts of the Member States and may constitute *res judicata* on the particular point of law.<sup>93</sup>

The Protocol on the Community Court of Justice grants exclusive competence to the Court on any disputes regarding interpretation or application of the Community legal texts and bars recourse to any other form of judicial settlement on such

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<sup>91</sup> *Edoh Kokou v ECOWAS Commission*, Unreported Suit No. ECW/CCJ/APP/05/09, ECW/CCJ/JUD/03/10, delivered on 8 July 2010

<sup>92</sup> RTC – Art 214

<sup>93</sup> See Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2010)

matters.<sup>94</sup> The scope of this provision is wide, and may become applicable to all manner of issues before the domestic court. It may be asked, for example, whether this provision can constitute an automatic ouster of jurisdiction of the domestic courts where issues that are within the exclusive competence of the ECOWAS Court form the basis of any matter before the domestic court. It may also become applicable where a litigant before a domestic court simultaneously files another litigation before the Community Court of Justice on whatever excuse. It could be asked whether in such an incongruous situation, either of the two courts could stay its own jurisdiction on the application of any of the parties on the basis of the existence of that other litigation.

Of course, it could be asked whether a relationship of superiority-inferiority exists between the domestic courts and the ECOWAS Court. Moreover, by the amendments to the Protocol effected by the Supplementary Protocol, enforcement of decisions of the ECOWAS Court lies in the hands of national, including judicial, authorities,<sup>95</sup> which could also raise a number of practical and jurisprudential questions. All these and several others are issues that may become subject of pronouncements by the Court with the passage of time. For now, the nature of the relationship between the Community Court of Justice and the national courts would depend on how the two sets of courts see their respective roles in the emerging legal order of the ECOWAS.

A number of cases determined by the Community Court of Justice in recent times have shed some light on some of the issues raised which have clarified the understanding of the mutual relationships between the ECOWAS Court and the

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<sup>94</sup> Protocol A/P.1/7/91 – Art 22(1)

<sup>95</sup> Protocol A/P.1/7/91 as amended – Art 24

national courts. Many of these cases have been discussed under the various sections of this Chapter above, but also touched issues that are relevant to the discussions under this heading. Often the Court seized the opportunity of the issues raised in such cases to make some notable pronouncements that now define the approach of the kind of relationship, vertical or horizontal, that ought to exist between it and the national courts of the Member States in the light of the provisions of the legal texts and accepted rules of customary international law. For instance, one of the grounds upon which the *Tidjani* case was dismissed by the court was the question of the competence of the Nigerian courts having been raised by the Plaintiff and determined by the national courts, the Plaintiff was stopped from raising the same issue which may amount to re-litigating the issue before the ECOWAS Court. The ECOWAS Court has consistently held that it is not an appellate court over the decisions of the domestic courts of the Member States of the ECOWAS.

In *Frank C. Ukor v Rachard Laleye and another*,<sup>96</sup> a Community citizen of Nigerian nationality alleged human rights violations against the 1<sup>st</sup> Defendant and the Republic of Benin (2<sup>nd</sup> Defendant). The case centred on business transactions between the Plaintiff and the 1<sup>st</sup> Defendant. However, the goods that were the subject-matter of the transactions and the vehicle conveying them were seized by the Beninoise gendarmes upon an order for seizure for purpose of protection made by the Cotonou Court of First Instance on the application of the 1<sup>st</sup> Defendant. The Plaintiff sought relief against the State for violation of his rights to property, to free movement of goods and to equal protection under the Community law. He also sought a declaration that the seizure and detention of the goods and the vehicle were unlawful. Upholding the preliminary objection raised by the Defendants, the Court held that there was no

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<sup>96</sup> [2004-2009] CCJELR 131

violation of human rights involved in the case. It held further that since the goods and the vehicle were detained and seized upon an order of a court of law, the ECOWAS Court could not consider the grounds on which the order was made because it was not an appellate court of the national judicial system.

The ECOWAS Court normally refrains from interfering with orders made by the national judicial authorities of the Member States, even where the complaints relate to issues of human rights violations. In *Amouzou Henri and others v The Republic of Cote d'Ivoire*,<sup>97</sup> the Court held that the preventive detention of the Plaintiffs, who were being investigated by a Tribunal set up by the government of Cote d'Ivoire within the framework of a clean-up in the Coffee/Cocoa sector of the country's agriculture, was not arbitrary since the detention, which was sanctioned by the national courts on appeal by the Plaintiffs, emanated from a judicial procedure.

As a rule, the ECOWAS Court will not entertain disputes between individuals that have no bearing to the activities of the Community. Thus, where a matter is within the exclusive competence of national judicial authorities, the Court will not intervene. In the Ugokwe case,<sup>98</sup> where the subject-matter of the litigation arose out of electoral matters already settled by Nigerian courts, the Community Court of Justice dismissed the case of the Plaintiff who complained of lack of fair hearing before the national court, asking for annulment and stay of execution of the decisions of the Nigerian courts. In its October 2005 judgment on the case, the Court held that being a product of a Treaty which granted it "specific powers and prerogatives", it was not part of its jurisdiction to re-examine or order a stay of decisions of the Nigerian courts. In taking this cautious approach, the Court appreciates the limits of its

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<sup>97</sup> [2004-2009] CCJELR 281

<sup>98</sup> [2004-2009] CCJELR 37

competence as prescribed by the signatories to the Treaty and Protocols defining the machinery and functioning of the Court. This is a major limitation no doubt. But as the Court itself explains in another case, *Moussa Leo Keita v Republic of Mali*, its jurisprudence on the matter cannot be compared with that of any other international court.<sup>99</sup>

This does not mean that the Court must decline jurisdiction once a case has been previously litigated in any national court. It stated in the recent case of *Sikiru Alade v Federal Republic of Nigeria* that while it does not compose itself as an appellate court over the decisions of national courts, it is competent to determine “matters that flow from the decisions which allegedly pose the questions of violations of human rights”.<sup>100</sup> Given the context in which the Court operates as of now, it is unlikely that such a feat as already achieved in the relationship between the CJEU and the domestic court of the Member States of the organisation would be achieved by the ECOWAS as a regional community in not-too-distant future.

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<sup>99</sup> [2004-2009] CCJELR 63 at 73

<sup>100</sup> Unreported Suit No. ECW/CCJ/APP/05/11, ECW/CCJ/JUD/10/12 delivered on 11 June 2012

**ECOWAS COURT AND DEVELOPMENT OF COMMUNITY LEGAL  
ORDER IN WEST AFRICA: PROGRESS, CHALLENGES, AND PROSPECTS**

**Introduction**

The establishment of the Community Court, described as “one of (its) greatest achievements”,<sup>1</sup> was part of the institutional reform process of the ECOWAS targeted at overcoming the challenges of growth and development in an increasingly globalising world.<sup>2</sup> The late addition of the Court was a consequence of the limited scope of the economic integration process as originally envisaged and the belief that disagreements on matters that concern socio-economic and technical cooperation were better resolved through arbitration and diplomatic means. It was also the manifestation of lack of clear appreciation of the role of such a Court in the integration process, since the founding fathers of the organisation operated under various kinds of dictatorial regimes that gave little regard to the rule of law. The weakness was not a peculiarity of the ECOWAS region but has a wider continental dimension. Regional integration laws in Africa have been largely defective in their conception, orientation and relational framework.<sup>3</sup> In the circumstances, long-term objectives are sacrificed for immediate gains, with the attendant deleterious consequences for overall growth and development. One outward manifestation of

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<sup>1</sup> *The Punch* (Lagos, May 26, 2005), per Mamadou Tandja, Chairman of ECOWAS and President of Niger Republic

<sup>2</sup> ECOWAS was not the only regional Community threatened by the forces of globalisation and liberalisation. The revision of the Treaty of the CARICOM was one other response. See Saunders, op cit, p 761

<sup>3</sup> Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge: Cambridge University Press, 2011)

such limited vision is that institutions are created and agreements are concluded without a clear idea of, or as deliberate attempts to subvert, the desired end results.

The establishment of the Court, in July 1991, coincided with the end of the Cold War, with the attendant growth of democracy, the rule of law, human rights and economic interdependence. These new developments had a positive influence on African leaders, supported by the EU, which, through EPAs, represented itself as a model, readily adopted by West African countries in view of the historical experiences and linkages between Africa and Europe. The Court was created to complement the regional integration efforts of the ECOWAS, along the patterns already developed in the European Union.

The ECOWAS Court has not, and could not have, functioned like the CJEU, after which it is modelled. It suffered delay both in its development and in operational modalities, arising from inadequate legal instruments and implementation challenges. Though established in 1991, the Court did not commence operation until a decade later, and made its first judicial pronouncement only in October 2004. Thus, more than ten years after its pioneer Judges were inaugurated in Bamako, Republic of Mali in January 2001, the Court is yet to attract much scholarly attention compared to the CJEU, which it sought to replicate, or other transnational judicial institutions of its kind in other parts of the developing world such as the CARICOM.

The dearth of scholarly work on the ECOWAS Court is arises from the relative newness of the Court, the inadequate legal framework that constrained its effective contributions, and difficulties in accessing the Court and its primary documents. Yet, the role and significance of such a Court, within the institutional machinery of the Community, is central to the overall success or otherwise of the regional integration efforts of the ECOWAS. As the principal legal organ, the Court has the power to



interpret the legal instruments of the Community, give advisory opinions on issues affecting the Community, and resolve disputes of transnational importance within the West African sub-region. The extent to which it has performed the important role of deepening regional integration through constructing the legal order upon which the entire process rests is the core area of analytical interest that this Thesis has sought to explore.

### **Significance of the Research**

Existing literature has focused on the factors for and against successful regional integration efforts in Africa, seeking to account for the wide gap between the grand designs of regional integration efforts on the one hand and the little concrete achievements on the other hand. Such previous scholarly works tend to take the EU experience as a reference base, trying to ascertain the degree of conformity with, or departure from, that model. With specific reference to the ECOWAS, the literature centres, almost exclusively, on the economic aspects of regional integration, seeking to account for the successes and failures, while projecting into the future. The role of the ECOWAS in the Liberian and other crises in the sub-region since the 1990s shifted attention to the analysis and performance of ECOWAS as a regional security community, with emphasis on the role of Nigeria as a regional hegemon. Often, the analyses have excluded references to the legal dimensions of the regional integration process. Initial scholarly works on harmonisation of laws and legal/judicial cooperation in West Africa predate, and necessarily exclude, the ECOWAS Court. In addition, existing works that give some insights into the legal dimensions of regional integration in Africa make scanty reference to the role of regional (economic) courts.

Recent attempts at providing the needed framework for analysing the progress and performance of regional courts in Africa exclude in-depth consideration of the ECOWAS Court, due to a combination of factors, including but not limited to the late arrival of the Court on the regional scene and the slow pace of its development processes.<sup>4</sup> Thus, notwithstanding the avowed objectives of making the Court the principal legal organ for facilitating effective regional integration in the sub-region, its role and significance in the integrative process has not enjoyed much visibility in contemporary scholarship.

This is the gap in scholarship that this thesis attempts to fill. The focus is on the activity, role and functioning of the Court of Justice in the regional integration process of ECOWAS. It has sought to provide answers to the question, “what does the ECOWAS Court do and how does it go about doing its work?” It has explored all aspects of the work of the Court – origin and development, legal basis and instruments, functioning and operation, structural organisation and relationships to the other Community Institutions, internal working and processes, cases and judicial pronouncements, and contributions and constraints. The work of the Court is analysed within the situational context of the Court as an Institution of the ECOWAS. Accordingly, this thesis pays particular attention to the various institutional reforms of the ECOWAS, from the comprehensive revision of the Treaty in 1993 to the latest institutional reforms since 2010, and the impact of these on the work of the Court.

The thesis adapts the methodology of the Social Sciences to the study of one of the leading institutions that is expected to define the course, patterns and development of regional integration in West Africa. It makes use of primary data collected through library and archival materials, as well as in-depth observations and critical analysis of

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<sup>4</sup> See Chapter II on Literature Review

the judgments and pronouncements of the Court. Data collected from these multiple sources are analysed with illustrative tables and figures to assess the performance and progress of the Court, highlight the key constraints and weaknesses in the law, machinery and processes of the Court, and gauge the capacity of the Court, in the light of existing legal texts and operating environment, to deliver on its mandate.

### **Summary of Research Findings: Opportunities and Constraints**

The study reveals that the late consideration given to the need for a court of justice within the regional integration scheme of the ECOWAS was not an accident of history. The kind of contextual environment that catapulted the CJEU into a pre-eminent position at inception did not exist in West Africa, before and after the creation of the Court. The lack of any provision on a Community Court in the original 1975 Treaty was a reflection of the dominant character of the contextual environment of the time, which gave little premium to matters pertaining to justice and the rule of law. As of the mid-1970s when the ECOWAS was formed, majority of the countries of the West African sub-region were under some form of military rule and dictatorial one-party rule. Also, the pre-colonial African systems of justice, which were not obliterated notwithstanding almost a century of colonialism, were non-adversarial and were geared towards reconciliation and promotion of communal peace rather than assertion of individual rights. It is doubtful, given the character of the contextual environment, whether the establishment of a Court of Justice at inception would have had any different impact on the course and pattern of regional integration in West Africa. It is for this same reason, perhaps, that the Arbitration Tribunal provided for

under the original and the revised Treaties have not become operational for upward of four decades.

The ECOWAS Court was created in July 1991, with the hope that it would function like the CJEU. Like the latter, it is the main judicial organ of the ECOWAS empowered to resolve disputes arising from the interpretation and application of the Treaty and associated Conventions, Protocols and other subsidiary instruments. It also gives advisory opinions on requests made to it by Member States and appropriate institutions of the Community (notably the ECOWAS Commission), and gives preliminary rulings on matters referred to it from the national courts of the Member States. There are variations, however, in the orientations and performance of the two Courts. The ECOWAS Court suffered from inadequacies of legal instruments at inception that seriously hampered its ability to take the kind of bold steps to which the CJEU was credited in its earlier decisions in *Van Gend en Loos*,<sup>5</sup> *Costa v ENEL*,<sup>6</sup> and *Internationale Handelsgesellschaft*.<sup>7</sup> Whereas the CJEU comprises at least three separate Courts, notably the Court of Justice, the General Court (formerly the Court of First Instance), and specialised courts (currently the Civil Service Tribunal),<sup>8</sup> the ECOWAS Court is a single Court with no appellate chamber. It is only one Court empowered to exercise all the functions of these three European courts at the same time. As the sole regional enforcement machinery for human rights violations, it also exercises jurisdictions analogous to those of the European Court of Human Rights at Strasbourg. The Court has neither the kind of legal backing nor the contextual environment that favoured a strong CJEU.

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<sup>5</sup> Case 26/62, [1963] ECR 1

<sup>6</sup> Case 6/64, [1964] ECR 585

<sup>7</sup> Case C-11/70, [1970] ECR 1125

<sup>8</sup> See Art 19 TEU

The lack of political will for a strong regional court was reflected in the fact that it took the ECOWAS upward of ten years to get the needed ratification of the Protocol establishing the Court. Even after getting the required number of Member States' ratification in 2000 and subsequent inauguration of the Court in 2001, it could not function effectively because of some institutional weaknesses occasioned by inadequacy of the legal instruments creating it. Most notable in this regard was the major inadequacies in the Protocol defining the competence and operational modalities of the Court. These related mainly to the grossly limited jurisdiction and competence of the Court, restriction on access to the Court by individuals and corporate bodies, existence of alternative dispute resolution mechanisms that must be explored before parties could approach the Court, and lack of provision for modalities for enforcement of the decisions of the Court. The access and jurisdictional limitations rendered the Court practically irrelevant as only one case was filed before it in three years.

The position of the Community Court of Justice, within the institutional architecture of the ECOWAS, is difficult to ascertain with precision. Although listed in the revised Treaty as the fifth Institution, its exact position in relation to the other Institutions is sometimes confusing. This is perhaps why, by the end of 2012, there is no organisational structure depicting the position of each organ, institution and other agencies within the overall organisational architecture of the ECOWAS. While each institution has an approved organogram,<sup>9</sup> there is no such organogram for the ECOWAS as a regional community. Some ECOWAS publications and the new

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<sup>9</sup> [2006] *OJ*, 49/53; [2007] *OJ*, 51/18

website,<sup>10</sup> for example, listed only three “Institutions” while the others such as the Authority, the Council and the ECOSOC are listed as “Organs”.<sup>11</sup> Yet within the operational framework of the ECOWAS Commission, it appears the Court of Justice is sometimes treated on the same basis as such other bodies as the EBID, GIABA and WAHO that are not listed in the Treaty.

The lack of political will for a strong judicial enforcement mechanism reflected in the creation of weak legal and institutional mechanisms, and made the ECOWAS Court inherently weak at inception. There were also constraints of social and political forces, including the general apathy towards the work of the Court in an environment devoid of the kind of litigious character that propelled the CJEU to action in the EU. Accordingly, for a considerable period after its inauguration, the Court was little patronised, and its activities remained shrouded in mysteries even in legal circles. The Court itself did not help matters at inception. The literal and strict approach adopted by the Court towards the provisions of the Protocol limiting its jurisdictional competence did little to reverse this natural course of events. Even when the judicial activities of the Court continue to witness upward progression since the amendment of the Protocol in 2005, the expanded jurisdiction and access has not translated into improved performance in terms of delivering justice and extending the frontiers of integration as the “community arbiter”.<sup>12</sup>

The performance and operational dynamism of the ECOWAS Court are constrained by the limited role conception envisioned for it. The interpretative powers of the Court are tied to the applicable texts and instruments of the ECOWAS - Treaty

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<[http://www.courtecowas.org/site2012/index.php?option=com\\_content&view=article&id=52&Itemid=17](http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=52&Itemid=17)> accessed 4 January 2013

<sup>11</sup> Economic Community of West African States (ECOWAS), *Information Brochure: Towards an ECOWAS of People* (Abuja: ECOWAS, nd) 03

<sup>12</sup> 2002 Annual Report 31

and the associated Conventions, Protocols, Regulations, Directives and other subsidiary instruments. It therefore seems incompetent to intervene in all manner of disputes, including human rights violations, which do not relate, directly or otherwise, to the applicable texts of the Community.<sup>13</sup> The strict constructionist approach of the Court and its technique of avoiding direct confrontation with national courts of the Member States have done little to enhance the cause of a supra-national legal order.

The dearth of cases that touched directly the issues of regional integration, as this study finds, also threaten the development of a community legal order in West Africa. More than 90% of the cases filed before the Court do not pertain to control of Community acts or enforcement actions against the Member States. This is, perhaps, because the Community texts have not invested the Court with sufficient power in this regard. Although the Court has exclusive jurisdiction on Community matters, the jurisdiction is not compulsory. The provisions of the Treaty on the dispute resolution mechanisms of the Community clearly subordinate adjudication to diplomatic and other pacific means of settlement. Member States and Institutions, including officials and employees, are mandated under the Treaty to explore out-of-court options, and judicial resolution can be resorted to only where such other mechanisms have failed. Thus, within the legal regime of the ECOWAS, recourse to the ECOWAS Court remains only a step of last resort, after all the other diplomatic means of dispute settlement have failed. This contrasts sharply with what obtains in the CARICOM, for example. In the latter organisation, the provisions on alternative means of dispute settlement do not preclude recourse to the Caribbean Court of Justice (CCJ).<sup>14</sup> On the

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<sup>13</sup>See *Ugokwe v Nigeria* [2004-2009] CCJELR 37

<sup>14</sup> Article XXIII, Agreement Establishing the Caribbean Court of Justice, signed on the 14<sup>th</sup> day of February 2001 at St. Michael, Barbados.

other hand, ECOWAS Community Institutions and Member States must explore the option of amicable settlement as a condition precedent to approaching the Court.<sup>15</sup>

The development of the community legal order is further threatened by the emerging patterns of relationship between the ECOWAS Court and the national courts of the Member States. The approach of the Court, in declining appellate jurisdiction over decisions of the national courts, no doubt helps to avoid needless confrontation with the latter and thereby promotes the measure of judicial cooperation necessary for implementing the decisions of the former. Unfortunately, this positive signal from the Community Court has not been reciprocated by the national courts. Although the Court has exclusive jurisdiction to interpret Community law, this is not complemented by an effective preliminary reference system as obtains in the EU. Article 10(f) of the Supplementary Protocol of 2005 does not make it mandatory for national courts to make such references.<sup>16</sup>

This is not always the case in courts of similar jurisdiction. Under the CARICOM, for instance, a national court is bound to make reference to the CCJ where issues that border on the interpretation or application are raised. In the EU, preliminary reference within the framework of Article 267 TFEU has been useful in facilitating uniform interpretation and application of EU laws in the individual Member States.<sup>17</sup> For the CJEU, references for preliminary rulings have constituted

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<sup>15</sup> *Parliament of the ECOWAS v Council of Ministers of the ECOWAS* [2004-2009] CCJELR 29

<sup>16</sup> A High Court Judge of Burkina Faso insists that the provision “is rather an obligation and not an option”. See Ouedraogo, W. Julie Rose, “Preliminary Ruling as a Means of Legal Integration and Consolidation of ECOWAS Community Law by Member States”, Paper Presented at the Solemn Ceremony of the 2012-2013 Legal Year of the Community Court of Justice, ECOWAS, Held at the Seat of the Court, Abuja, Nigeria, 27<sup>th</sup> September, 2012

<sup>17</sup> Claire Kilpatrick, ‘Internal Market Architecture and the Accommodation of Labour Rights: As Good as It Gets?’, in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: Cambridge University Press, 2012)



the largest chunk of new cases in recent times, rising to 265 in 2007, 288 in 2008, 302 in 2009, 385 in 2010 and 423 in 2011.<sup>18</sup>

Inadequate provision on preliminary reference in the ECOWAS jurisprudence is a major defect that threatens uniform application of Community law, which is the goal of preliminary reference. One direct result of this has been the lack of a single preliminary reference from any national court to the ECOWAS Community in the twelve years of its existence. The lack of preliminary references also, perhaps, account for the fact that rather than approach national courts, citizens and corporate bodies now prefer to approach the Community Court at first instance, particularly on issues of human rights violations since exhaustion of local remedies is not a condition precedent to bringing such actions. It may also help to explain the disproportionately high percentage of human rights cases before the Court, while the development of the core community law suffers. The ECOWAS Court cannot afford to be different from other international courts in this regard.

Talking about international courts in general, the internal organisation and structure of the ECOWAS Court, necessary for effective discharge of its judicial mandate, are not necessarily unique. Like similar institutions within and outside the continent of Africa, it is a multi-language court. Cases before the Court are conducted in any of the three official languages - English, French and Portuguese, while decisions are required to be published in all the languages. This multi-lingual character of the Court is a major source of other challenges currently facing the Court. The language problem is not peculiar to the Court; it is common to all international courts and institutions. The problem is particularly acute in the case of the ECOWAS where the Court's tasks have been made onerous by poor drafting and linguistic

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<sup>18</sup> CJEU, *Annual Report 2011* 96

inconsistency. Often, this creates obvious interpretation problems for the Court when the same provisions in an enactment in different languages give rise to different literal meanings. In such situations, the Court has had to embark on the difficult task of comparing different linguistic versions in attempts to give proper construction to conflicting provision of certain Community texts and fill in the needed gaps. Other obvious administrative problems associated with the multi-lingual character of the Court are aggravated by inadequacy of resources, human, material and financial. The Anglo-French rivalry in the region has prevented the adoption of a single working language for the ECOWAS or any of its Institutions. The problem is compounded by inadequate translation/interpretation/revising services,<sup>19</sup> which slowed down the rate of case disposal and delayed production and publication of the judgments and rulings of the Court.<sup>20</sup>

Like other international courts and tribunals,<sup>21</sup> the ECOWAS Court comprises Judges appointed through a process that mixes politics and professional competence. It is composed of seven Judges, each of whom has a fixed, non-renewable four-year term. It has always had its full complement of Judges, all totalling ten since inception. The positions of Judges are allocated among the Member States on rotational basis, and no two nationals of a State can serve on the Court at the same time. The appointment process follows an open, transparent and competitive process among the nationals of the States to which vacant positions are allocated. The Judicial Council of the Community (JCC) conducts the selection process. The JCC, which also handles disciplinary matters, is composed of the Chief Justices of the Supreme Courts of the

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<sup>19</sup> Community Court of Justice, ECOWAS, *2003 Annual Report* 9-10

<sup>20</sup> Ibid 113

<sup>21</sup> See Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics* (Oxford: OUP, 2010)

Member States. The rigorous selection process guarantees the independence of the Judges who, as statutory appointees, rank equally as officials of comparative status within the Community public service.

The ECOWAS Court suffered at inception from a lack of clear organisational/administrative structure, and its organisational architecture, as well of those of the ECOWAS Commission and the Community Parliament, was not properly streamlined until mid-2010. The Court now has an organogram and an administrative structure showing functional delineation of powers among the various Departments/Divisions/Units and officials. The Court is administered by a Bureau comprising the President, Vice President and the Dean of Judges, the latter being the most senior Judge of the Court, elected by the Judges among themselves for a renewable term of two years. The Chief Registrar and the extensive bureaucratic apparatus of the Court assist the President in his day-to-day administration of the Court. The Judges also have Personal Assistants and research officers.

The ECOWAS Court hears and determines cases in panels of three, and occasionally five, Judges. Although there is nothing in the Protocol or the Rules of the Court against this, all the seven Judges have never sat together as a full panel, even during the early years when its workload was expectedly low. The study finds no consistent patterns or any particular criteria adopted by the Court in determining the composition of panels to hear cases or in the distribution of workload among the Judges. With increased workload and one courtroom, the Court now sits in multiple panels per day, sometimes outside the seat of the Court in Abuja, Nigeria. The procedural framework of the Court, as defined by the Protocols and the Rules of the Court, is essentially the same as those of other international courts, combining

elements of both written and oral procedures, with opportunities for departure from strict application of the rules in exceptional circumstances and for just cause.

As a collegiate institution, the ECOWAS Court delivers a single, collective decision with no dissenting opinions. The decisions of the Court are final and not appealable. This issue is generating some disquiet within the legal profession in West Africa. The problem is not in the declaration of the decisions of the Court as final, which is not a novelty. What seems a departure is that the Court does not have an appellate chamber. Although its decisions are subject to post-judgement review or revision in appropriate proceedings brought before it, like other similar courts, the ECOWAS Court does not have an appellate division separate and distinct from the “general” court or the court of first instance. As the Community Court itself declares, it is a court of first and last resort in the Community law of the ECOWAS.<sup>22</sup> Unfortunately, while the Court has given an indication of its intention to have an appellate division, this would require an amendment of the mandatory provisions of Article 76(2) of the Treaty declaring the finality of its decisions. The extant provision would require careful consideration as the workload of the Court increases in future.

Analysis of the cases filed in the Registry of the ECOWAS Court reveals progressive increase in workload since 2005 its jurisdiction was enhanced and access to its framework enhanced. There has also been increase in the frequency of court sessions and number of judgments and rulings delivered, with attendant distribution of workload among the Judges. This has also affected the varieties of parties/litigants before the Court, the variety of issues that arise from the cases determined by the Court, and the patterns of case management by the Court. As a major fall-out of the increased volume of litigation, the Court now sits in multiple panels per day, which

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<sup>22</sup> *Ugokwe* (n 13) at 51

increased the number of sessions held per year astronomically, rising to the highest within the last two years. Almost all the applicants, with the exception of a few were private individuals and corporate bodies, a development that continues to justify the adoption of the Supplementary Protocol that widened access to the Court from 2005. A further analysis shows that majority of the applicants that initiated proceedings before the Court within the first ten years of its operations were not granted the relief they sought. This calls in to question the approach of the Court and potential impact of higher failure rates on the work of the Court. This seems not to be a serious concern for now, at least, in view of the ever increasing demand for judicial intervention by the Court, particularly in matters pertaining to human rights and fundamental freedoms. What gladdens the heart is that the success rate seems to have improved howbeit slightly in the last three years, suggesting, perhaps, that satisfaction rate with the work of the Court among litigating applicants may increase as litigants and their Counsel begin to have a better understanding of the scope of the Court as well as its practice and procedure.

The ECOWAS Court is relevant only to the extent that its pronouncements are authoritative on points of Community law and are binding on all Member States, Community Institutions and officials. There are important decisions and pronouncements of the Court that point clearly to the Court's understanding of the nature of the Community that the leaders of the ECOWAS envisioned when they signed the Treaty establishing the organisation. There are occasions when the Court demonstrated timidity or some measure of judicial self-restraint, arising from its patently liberal attitudes towards the provisions of the legal texts of the Community, which it interprets in a very strict sense to avoid undue collisions with other Community Institutions and domestic Courts of the Member States. Nonetheless, a

proper analysis of these decisions reveals the preparedness of the Court to take bold decisions, albeit cautiously, to enforce the provisions of the Treaty and other Community texts. The Court has provided the needed relief to the Community citizens against slavery and inhuman treatment,<sup>23</sup> illegal and unconstitutional acts of government, violations of human rights,<sup>24</sup> including socio-economic and political rights,<sup>25</sup> and environmental pollution.<sup>26</sup> Other pronouncements of the Court point to a preparedness to sanction Member States for breach or infringements of Treaty obligations. Through its decisions, it has shown willingness to control the acts of the Community, its Institutions and officials in order to bring them within the confines of the law, in their dealings with third parties as well as those engaged in the public service of the Community. As Yakubu Gowon, a founding father of the ECOWAS, recently notes, the Court has, through its decisions, encouraged “African leaders to be more committed to serving the people and for individuals and governments to resolve differences without recourse to brute force”.<sup>27</sup> The ECOWAS Court is emerging, even if slowly, as the key player in the development of the community legal order in West Africa.

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<sup>23</sup> *Koraou v Niger* [2004-2009] CCJELR 217

<sup>24</sup> *Manneh v Gambia* [2004-2009] CCJELR 181; *Alade v Nigeria* unreported Suit No. ECW/CCJ/APP/05/11, Judgment No. ECW/CCJ/JUD/10/12, delivered on 11 June 2012; *Ayika v Liberia*, unreported Suit No. ECW/CCJ/APP/07/01, Judgment No. ECW/CCJ/JUD/09/12 delivered on 8 June 2012

<sup>25</sup> <<http://serap-nigeria.org/ecowas-court-to-fg-nigerians-have-a-legal-right-to-education/>> accessed on 5 January 2013

<sup>26</sup> *Registered Trustees of the Socio-Economic Rights and Accountability Project v President of Nigeria*, unreported Suit No. ECW/CCJ/APP/08/09

<sup>27</sup> Yakubu Gowon, Keynote Address by His Excellency, General Dr Yakubu Gowon, GCFR, at the 10<sup>th</sup> Anniversary Celebration of the Community Court of Justice, ECOWAS on Tuesday, 05 July, 2011 at the Main Auditorium of the ECOWAS Commission, Asokoro - Abuja

## Continuing Challenges

The need to improve the machinery of the ECOWAS Court for enhanced performance of its role lie at the heart of the series of revisions to the Treaty, Protocols and other legal texts of the ECOWAS, a reform process that is still ongoing. Nonetheless, the Court continues to face many challenges in its day-to-day operations that have significant impact on its performance and prospects. Some of these problems are specific to the Court while the others have wider, organisational dimensions.

The issue of enforcement has remained a major concern, to the Court itself<sup>28</sup> and the ECOWAS Commission.<sup>29</sup> The enforcement framework provided under the Supplementary Protocol 2005 seems inadequate. It depends on the goodwill of the Member States, including the national courts, for success. As of September 2012, only 3 Member States out of 15 have designated national authorities for processing writs of execution for enforcing the decisions of the Court as required by Article 24(4) of the Supplementary Protocol.<sup>30</sup> In such circumstances, the Court remains at the mercy of the political leadership and the national courts of the Member States for enforcement of its decision. Although the Court acknowledges that it has not experienced a case of refusal or impossibility of enforcing its decisions, it notes that in only two of about 30 decisions (7%) have the designated national authorities or any of the parties involved officially reported compliance.<sup>31</sup> In many, the Member States and Institutions have

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<sup>28</sup> See the 'Press Release' dated at Abuja 25 September 2012

<sup>29</sup> Address of H.E. James Victor Gbeho, President of the ECOWAS Commission at the Opening Ceremony of the 10<sup>th</sup> Year Anniversary Celebration of the ECOWAS Court of Justice, Abuja, 4 July 2011

<sup>30</sup> Welcome Address by the Chief Registrar, Community Court of Justice, ECOWAS, Mr Tony Anene-Maidoh, at the Opening Ceremony of the 2012/2013 Legal Year of the Community Court of Justice, ECOWAS on 27<sup>th</sup> September 2012

<sup>31</sup> Community Court of Justice, ECOWAS, *Annual Report 2009-2011* 94

made excuses to avoid compliance or institute proceedings for revision of judgments as strategies of escaping or frustrating the decisions of the Court. There is the need to invest the Court with the power to impose effective sanctions for default of its proceedings and decisions, as possessed by the CJEU which can impose fines for such default under Article 260 TFEU.

There are also administrative problems that have slowed down the progress of the Court. The programmes of digitalisation/computerisation of the operations of the Court, maintenance of its website, and development of its ICT and Reference Library have been hampered on account of budgetary constraints. It is one problem that is expected to ease out with provision of adequate work force and audio-visual/recording/telegraphic equipment, including online translating and revising devices, as the Court advances in age. The importance of human resource development through training, conferences, workshops, seminars, study tours and other capacity-building programmes cannot be over-emphasised in view of the many technical and professional terminologies that the operators of the translation service of the Court would need to be accustomed to across linguistic disparities. Progress along this line may be constrained or facilitated, as the case may be, by availability of funds within the overall budgetary resources of the larger community administration. Other administrative logistic challenges associated with the growth of an institution operating within an economic framework of limited resources, financial or otherwise, are expected to ease out with time. It is important to appreciate the fact that this problem is not peculiar to the Community Court of Justice. It is a common complaint of all the Institutions and agencies of the ECOWAS. The Community itself suffers from severe resource scarcity. In the circumstances, building the capacity of the Court and its personnel for improved service delivery has been difficult to sustain.



The ECOWAS Court, like the other Community institutions, has suffered from inadequacy of funds in the required amount to meet the basic requirements for effective discharge of its mandate. This has affected the work of the Court in several ways. Apart from the Court's inability to move its sessions across the region to make its framework accessible to indigent prospective litigants, the dearth of funds has also affected the human and material resources available for discharge of the judicial functions of the Court.

The ECOWAS as the parent organisation has its own share of the challenges, which permeate the processes and functioning of its Institutions and the Member States. It lacks adequate resources to finance integration programmes and has sometimes depended on external partners such as the European Union to finance some of its activities. The dearth of funds arises from several resources. Many of its Member States are economically underdeveloped and depend on foreign aids and grants to sustain their national economies. In the circumstances, contributions to the common purse have fallen into arrears of several years for some countries. The introduction of the Community Levy has not solved the constraints of finance. The situation is compounded by non- implementation of Community decisions in some countries, which are reflections of lack of sufficient commitment to and political will for the regional integration process. Multiple membership of intergovernmental organisations by Member States has not only tasked the resources of some of them but has created divided loyalty. The problem is particularly evident in the relationship between the ECOWAS and the West African Economic and Monetary Union (UEMOA).<sup>32</sup> Indeed, the old colonial ties and allegiances along the Anglo-French

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<sup>32</sup> The two organisations now seem to have established basis for some form of cooperation. See, for example, the Final Communiqué of the 36<sup>th</sup> Ordinary Session of the Authority of Heads of State and

divide have sometimes threatened common approach to some regional problems. The rivalry between Nigeria as the largest country with the highest financial contributions and France which maintains its colonial ties with the majority Francophone countries has also been a source of concern since inception. Various measures are already being taken to moderate the problem. These include the introduction of sanctions for non-compliance, creation of national links with the ECOWAS Commission, and exclusion of defaulting Member States from occupying the position of Chairmanship of the Authority of Heads of State and Government, among others. The extent to which these measures can stem the ugly tide is yet to be fully seen.

The surge in the judicial and non-judicial activities of the ECOWAS Court since 2005 has brought the constraints of human, material and financial resources to observable level that required immediate intervention by the appropriate Institutions of the Community and the Member States of the ECOWAS. The ability of the Court to cope with the expected workload is necessarily a function of the extent to which the several challenges facing the Institution can be moderated to such a level that they would not constitute an unnecessary clog in the wheel of effective regional integration process in the sub-region. Even as it is, the capacity of the Court is not yet fully tasked. Many Community citizens have still not fully grasped the essence of the Court. The cost of litigation before the Court, which sits permanently in Abuja, has also been a source of concern.<sup>33</sup> The obstacles associated with the costs of filing cases before the Court include the long distances and travel costs as well as lack of effective monitoring and enforcement of the Protocol on Free Movement of Persons, Residence

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Government of the ECOWAS where the ECOWAS and UEMOA Commissions were directed to step up negotiations, as a common regional approach, on the Economic Partnership Agreements (EPAs) with the EU. See [2009] *OJ*, 55/117

<sup>33</sup> 2007 Annual Report 29

and Establishment,<sup>34</sup> which is the most important Community texts as far as the Community citizens are concerned. In the absence of efficient system of legal aid at the national level in the midst of mass poverty, many Community citizens are still unable to engage the machinery of the Court for enforcement of their rights or resolution of disputes, particularly on issues that are within the exclusive competence of the Community Court of Justice.

The high proportion of private individuals and corporate bodies, compared to other classes of litigants before the ECOWAS Court tends to suggest that citizens now have a better understanding or clearer appreciation of the role of the Court in the resolution of disputes of supranational/transnational significance. This may not necessarily be so. It is even doubtful if the additional mechanisms for ventilation of grievances afforded by the existence of the Court is capable of changing the non-litigious character of the cultural environment. For the individuals, a combination of factors might not promote recourse to litigation. This may include lack of education, mass poverty in the absence of functioning legal aid schemes in many of the Member States, weak civil society, and lack of political commitments to protection of individual and group rights. Whatever may be the underlying factors that have made the use of the framework of the Court of Justice unattractive, the fact remains that the machinery is underutilised and this has the potential of slowing down the rate at which the Court can contribute to the regional integration process through its decisions. Vague awareness of the existence and procedural rules of the Court persists, even within the legal profession. The multiplicity of the received legal orders (American, English, French, Portuguese) in addition to a variety of indigenous Islamic

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<sup>34</sup> Protocol A/P.1/5/79 [1979] *OJ*, 1/3

and customary laws make the task of harmonisation necessarily difficult, and this could impact negatively in the development of a community legal order.

## **Prospects**

The challenges facing the ECOWAS Court may continue for some time, but are surmountable. The prospects in this regard would depend on a combination of factors in which the Court itself, its litigating clientele, the parent organisation (ECOWAS), and the Member States and Institutions would play critical roles.

The future of the Court lies in its ability to construct a community legal order. In this sense, all impediments to the use of its framework for dispute resolution among the Institutions and Member States would have to be removed. Judicial resolution of conflicts should not remain an option of last resort, otherwise recourse to the court for settlements of disputes among the Institutions and Member States of the Community would remain at a low ebb. The ECOWAS Commission, the official Community representative in interest, could not be expected to take the lead beyond what it current does, to propel the litigating engine of the Court to action. Even if individual heads of Community Institutions are disposed to exploring litigation as a major option in seeking to establish a Community legal order, they are incapacitated by the mandatory provisions of the Treaty and the Protocol which specifically encourage peaceful settlement of disputes by means other than litigation.<sup>35</sup> While diplomatic options would remain important, they should not preclude recourse to litigation.<sup>36</sup>

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<sup>35</sup> Protocol A/P1/7/91 on the CCJ – Art 9(3); Revised Treaty of the ECOWAS – Art 76(1)

<sup>36</sup> The provisions for alternative “voluntary” modes of settling disputes among the Member States of the CARICOM under the Revised Treaty of Chaguaramas (RTC) are “without prejudice to the exclusive and compulsory jurisdiction” of the Community Court of Justice. See Articles 188(4) and 191-210 RTC, <[http://www.caricom.org/jsp/community/revised\\_treaty-text.pdf](http://www.caricom.org/jsp/community/revised_treaty-text.pdf)> accessed on 27 April 2010

The human rights cases before the Court more than compensate, perhaps, for the dearth of cases on core community law. Its preparedness to entertain human rights cases without exhaustion of local remedies draws such cases to it. Also, the Court is better poised more than the ACtHPR for example to adjudicate on human rights since its jurisdiction is not tied to a country making a declaration accepting the competence of the Court to receive cases under the Protocol on the ACHPR.<sup>37</sup> Of course, the link between regional integration and human rights could be mutually reinforcing. This is because increased respect for human rights and fundamental freedoms could open the gate for enforcement of Treaty obligations and vice versa. As the EU experience has shown, citizens' enforcement actions aimed at compelling Member States to conform to Treaty obligations have deepened the process of regional integration. Current patterns of case-flow management in the ECOWAS Court suggests that the regional integration process would be deepened more by private-sector driven litigation than by inter-State and/or inter-Institutional battle of wits before the Community Court of Justice.

The provisions of the Protocol (as amended) on enforcement of the decisions of the ECOWAS Court need further improvement. The current law seeks to integrate the national and the regional legal regimes to make writs for enforcement of the Court's decisions executable in the same manner as those of the domestic courts. This requires collaboration between officials of the Community Court and designated national offices of the Member States, often the Offices of the Attorney General, the Prosecutor General or the Chief Law Officer. This places the Community Court at the mercy of national authorities in enforcement of its decisions. While one may not

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<sup>37</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights – Art 34(6)

advocate an independent enforcement mechanism operated by the Court, the current practice could be strengthened by giving the Court power to sanction Member States and Institutions for default of its processes and decisions in line with global best practice.<sup>38</sup>

The effectiveness of the Community Court necessarily requires the collaboration of the national legal and judicial authorities. One must commend the very cautious attitudes of the ECOWAS Court towards issues that may bring conflict of jurisdiction between it and the national courts, notwithstanding criticisms of its restrictive approach to construction of the extent of its powers vis-à-vis national laws.<sup>39</sup> Unlike the CJEU,<sup>40</sup> there is no vertical jurisdictional link between the ECOWAS Court and these national courts. The Community Court's strategy of avoiding jurisdictional conflicts with the national courts has confined it strictly to issues of Community law. Neither would one advocate revision of the applicable Community texts to extend the scope of the Court's jurisdictional competence in this regard, at least for now. Even in the EU,<sup>41</sup> extending the frontiers of regional integration had involved an intricate mix of judicial interpretation by the Court as well as discussions and negotiations among the Member States, over a considerable period. The ECOWAS Court is not alone, among its African peers, in taking a measured and restrictive approach to the scope of its powers, particularly in relation to the Member States. The African Court on

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<sup>38</sup> Under the CARICOM, the Community Court of Justice is specifically empowered "to make any order for the purpose of ... investigation or punishment of any contempt of court that any superior court of a Contracting Party has power to make as respects the area within its jurisdiction". See Article XXVI(b) of the Agreement Establishing the Caribbean Court of Justice 2001 (CCJ Agreement), <[http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj\\_agreement.pdf](http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf)> accessed on 27 April 2012

<sup>39</sup> Andrew W Maki, 'ECOWAS Court and the Promise of the Local Remedies Rule' <<http://hrbrief.org/2009/11/ecowas-court-and-the-promise-of-the-local-remedies-rule/>> accessed on 14 November 2012

<sup>40</sup> Article 267 TFEU; Article 234 EC

<sup>41</sup> See, generally, Trevor Hartley, *The Foundations of European Union Law* (7<sup>th</sup> ed, Oxford: Oxford University Press, 2010) 1-10

Human and Peoples' Rights has similarly exercised self-restraint by refusing to dabble at matters clearly outside the scope of its jurisdiction as defined in the Protocol on its functioning, for which it has also received intense criticism.<sup>42</sup> The recent suspension of the Tribunal of the SADC for giving decisions that affected some Member States<sup>43</sup> is a useful pointer to the inherent logic of such an approach.

The prospects of the Community Court of Justice within the scheme of regional integration in West Africa require that the machinery of the other Community Institutions be strengthened. The work of the CJEU has been facilitated over the years by the existence of institutions that could lay claim to represent the EC/EU without any allegiance whatsoever to national authorities. This makes it easy for the EC/EU and its Institutions to take enforcement actions against recalcitrant Member States. For the ECOWAS, until perhaps the institutional reforms carried out since 2006, the Community Institutions were dominated by representatives of the Member States who owed little or no allegiance to the Community itself or any of its Institutions. The institutional machinery of the ECOWAS Commission, the official representative-in-interest of the Community, needs to be sufficiently reinforced to take independent decisions in the overall interests of the Community within the policy frameworks provided by the political Institutions of the Community.<sup>44</sup> Such a development would also assist the mechanisms provided for enforcement of the decisions of the Court since the Court itself, unlike the CJEU, lacks power to fine Member States or compel national officials and institutions to abide by its decisions and orders. The

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<sup>42</sup> Kayode Oladele, 'African Court Restricting Access to Justice', *Punch* (Lagos, Monday, August 20, 2012) 46-47

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<[http://africancourtcoalition.org/index.php?option=com\\_content&view=category&layout=blog&id=54&Itemid=68&lang=en](http://africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=54&Itemid=68&lang=en)> accessed 5 January 2013

<sup>44</sup> The EFTA Surveillance Authority (ESA) is empowered under Article 31 of the Surveillance and Court Agreement (SCA) to institute cases of violations of EEA law before the EFTA Court. See OJ [1994] L 344, 3. See also Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct Rep 245

Commission needs to collaborate with the ECOWAS Court in ensuring compliance with the decisions of the Court by other Community Institutions and the Member States. As Ladan notes, “regional integration of any sort (economic, political, legal, etc) cannot be achieved without some measure of supranationalism”.<sup>45</sup>

The internal machinery and organisation of the ECOWAS Court also need some review to better position the Court for efficient and effective delivery of its mandate. Some of the steps require changes to the legal texts of the Community while others involve mere policy review and administrative reorganisation. Apart from the need for an appellate chamber already discussed, ECOWAS leaders need to review the decision to have an Arbitration Tribunal separate and distinct from the Court of Justice. Given the findings of this study, it is unlikely that any such Tribunal would be created in the near future. Even then, the temporary arbitral jurisdiction of the Court has not been invoked for seven years. As the Court takes steps to develop its Arbitration Rules and Practice Directions,<sup>46</sup> it is recommended that the Treaty provisions on arbitration should be reviewed to confer the power on the Court of Justice, including taking such other consequential decisions as increasing the number of Judges of the Court. An example of such a measure that readily comes to mind is the Common Court of Justice and Arbitration of the OHADA.

Other administrative measures are necessary. The various units and divisions of the ECOWAS Court need to be staffed with the right calibre of professional and non-professional staff. Moreover, the infrastructures of the Court in terms of library and reprographic equipment need upgrading in order to meet the challenges of modern

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<sup>45</sup> Muhammed Tawfiq Ladan, ‘Ways of Strengthening Legal and Judicial Integration in ECOWAS Sub-Region’, A Presentation Made at the 2012-2013 Legal Year Ceremony of the ECOWAS Community Court of Justice, Abuja, Nigeria, 27<sup>th</sup> September, 2012

<sup>46</sup> *Annual Report 2009-2011* (n 31) 73



adjudication. As of now, only an insignificant proportion of the judgments and rulings of the Court is reported. The Court is making efforts to update its new website, the old site having collapsed for lack of needed resources to maintain it. The decisions of the Court and other relevant documents are not readily available, whether online or in hard copies due to lack of the needed human, material and financial resources. The Court has no official journal or case reporter of its own, while the Official Journal of the ECOWAS, published by the ECOWAS Commission, is irregular in production. This causes delay in processing court records as some originating processes are required to be published before they can be heard. Lack of regular updating of the official website of the Court and of the ECOWAS makes the task of accessing data about the Court and the Community for research purposes unduly arduous and tasking. It could also make the task of sensitising Community citizens about the existence and operation of the Court difficult. Resource constraints, financial or otherwise, would continue to hamper efforts in this and many other regards unless the needed political will is mustered among the leaders of ECOWAS to re-order their priorities in favour of enhancement of the capacity of the Court to deliver on its assigned mandate.

Threat of resource constraints to the development of a regional legal order in West Africa also flows from the larger environment; it does not flow from the Court alone. Mass illiteracy and poverty among the citizens of the Community have made the Court inaccessible to the vast majority of the Community citizens. The current practice of holding external sessions has been useful but remains unsustainable for logistic purpose. In the circumstances, the Court should consider the proposal by Ladan that the Registry of the Court be decentralised in order to make for a more “affordable, accessible and speedier” dispensation of justice by the Community

Court.<sup>47</sup> A more viable option, perhaps, would be to put in place buoyant and functioning systems of legal aid in the Member States to assist indigent litigants. Unfortunately, legal aid schemes are not yet functioning well in most of the countries of the sub-region. It is also doubtful whether many of the countries would want to fund legal aid systems that are likely to increase the spate of public interest litigations with the attendant social and economic costs.

A system of legal aid for indigent litigants, maintained and driven by civil society organisations committed to entronement of specific core values, could be a feasible option for tackling the problem of resource constraints. So also is the provision of *pro bono* services by Lawyers. The anti-slavery pronouncements that shot the Court into international limelight in 2009 were made in the judgment delivered in a case<sup>48</sup> sponsored by a non-governmental organisation based in Niger Republic, in collaboration with Interights and Anti-Slavery International.<sup>49</sup> But such organisations with long term commitments and financial strength are not present in significant proportion in the sub-region. Nonetheless, some human rights organisations are beginning to use the framework of the court to pursue public interest litigations, which the Court welcomes. It is also worth considering the novel suggestion of a former President of the ECOWAS Court for a kind of “legal solidarity-system”, involving all the stakeholders, towards moderating the costs to private litigants of accessing the Court.<sup>50</sup> The permission given in the Protocol and the Rules of the Court for the use of fast-track and modern means of information and

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<sup>47</sup> Ladan (n 45)

<sup>48</sup> *Koraou v Niger* [2004-2009] CCJELR 217

<sup>49</sup> Helen Duffy, ‘Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court’ (2009) 9:1 Human Rights Law Review 151

<sup>50</sup> Speech Delivered by Hon. Justice Aminata Malle-Sanogo, President, Community Court of Justice, ECOWAS, at the Solemn Court Sitting to Mark the Opening of the Legal Year 2007-2008 of the Community Court of Justice, ECOWAS, Abuja, 18 September 2007 <<http://www.ecowascourt.org/texts1/repprez.html>> accessed 05 December 2009

communication technology such as telefax in delivering pleadings and other court processes could also go a long way to moderate the problem. However, given the low standard of the provision of these facilities throughout the West African sub-region, the extent to which these provisions could moderate the cost and other attendant risks of litigation before the Court of Justice cannot be settled for now. The quality of the lawyers that appear before the Court could also assist in orderly development of Community jurisprudence, as Saunders notes in respect of the Court of Justice of the Caribbean Community (CARICOM).<sup>51</sup> Thus, the suggestion made by Salami that the study of Community law be included in the curriculum of the Law Schools of African Universities is worth a restatement here.<sup>52</sup> Such a development, in addition to regular exposure of the Judges and officials to regular capacity building programmes could go a long way in facilitating progressive development of Community law not only in the West African sub-region but in Africa as a whole.

Regular review of the rules of practice and procedure of the ECOWAS Court to meet current demands and challenges is recommended for improved service delivery. The Rules of the Community Court of Justice were adopted some ten years ago, and have not been revised. Constant review of the Rules in the light of experience, development in science and information technology, and judicial decisions, is recommended in order for the Court to be able to meet current challenges and prepare itself for the future. Also, the Rules of the Court need to be supplemented with regular Practice Directions for the guidance of legal practitioners and litigants in order to

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<sup>51</sup> Adrian D Sanders, 'A Commentary on the Early Decisions of the Caribbean Court of Justice in Its Original Jurisdiction' (2010) 59 *International and Comparative Law Quarterly* 778

<sup>52</sup> Iwa Salami, "Legal and Institutional Challenges of Economic Integration in Africa" 2011 *European Law Journal* 17(5): 667-682

facilitate the work of the Court in accordance with accepted norms of adjudication within the international system.

### **Future Research Directions**

In as much as this thesis has attempted to cover as comprehensively as possible the various aspects of the work of the ECOWAS Court, it has its own limitations. The limitations derive from many sources. It is a single case study, and does not make any pretence to compare the Court, which is still in its infancy, with the CJEU or any other regional or international court. As a pioneer and original work on the ECOWAS Court, the findings of the study would require further validation through additional data and research before they can be the basis of any useful comparison. Although there were improvements in the library and documentation facilities of the Court in the course of the research, many bottlenecks still exist. In the first instance, the environment of the Court is not friendly enough for scholarly research. Access to the Court is not only restricted, the procedure for negotiating the access remains cumbersome. It requires sustained interest and considerable expenditure of time and money (lodging and transportation) to get the needed access.

Negotiation of access to the premises of the ECOWAS Court to collect primary data for the analysis contained in this thesis was a herculean task. In the first instance, both the ECOWAS Commission and the ECOWAS Court pride themselves as diplomatic institutions, to which free access is restricted. For upward of two years, the researcher travelled to Abuja six times without gaining the needed access to the Registry and Library facilities of the Court. The status of the researcher as a Barrister and Solicitor of the Supreme Court of Nigeria, entitled to practise before the Court,

and a University Lecturer did little at the initial stage. Formal letters from the two Universities to which the researcher is affiliated were key strategic influences that eventually facilitated access to the library of both the Court and the Commission. Even then, the officials of the Court, including the Chief Registrar and other registry staff, would volunteer information only with the approval of the President of the Court. The approval to get primary data from the Registry and to make use of the Library eventually came, after several and repeated calls and visits.

The ECOWAS Court now has Legal, Research and Library units that are located out of the premises of the Court, and staffed by officials who are willing to respond to request for information. Information and data are released only in line with the strict disclosure rule, and only on the permission of the President of the Court through the Chief Registrar. Even then, the units can only operate within the limits of available resources. The Library has more publications on other Courts such as the CJEU and regional integration process of other regions than the ECOWAS Court itself. The few publications on the Court and on the ECOWAS regional integration process are mainly information bulletins, manuals and leaflets that are useful for beginners and journalists rather for academic writers. Also, the Library of the ECOWAS Commission, separately located from the library of the Court, houses many publications, including the Official Journal of the Community and other legal texts, but close to nothing on the work of the Community Court of Justice. With several months of visits to the two Libraries and the libraries of related institutions in the region, the Researcher is able to gather substantial information that can be readily made use of, but not without supplementing them with additional primary data available only through months of regular visits to the seat of the Court in Abuja, Nigeria.

However, this did not solve the problem of getting the Judges for *viva voce* interviews as originally planned. Although the researcher secured an appointment to have preliminary discussions with all the Judges of the Court, with a view to giving them some insights into the nature of the research questionnaires and the proposed interviews, the meeting could not hold due to a combination of factors: lack of access to the premises of the Court, inability of the President's Secretary to locate the original letter inviting the researcher to a meeting with the Judges, absence of the President of the Court, Court vacations, and inability to secure the presence of all the Judges for the preliminary meeting. All these frustrated the initial desire to have direct interviews with the Judges of the Court.

Fortunately, the Registry of the Court keeps a pool of data about the work of the Court, particularly in relation to filing and disposal of cases, even if not the required format and quality for rigorous quantitative analysis. The raw data were re-ordered and codified in formats required for rigorous analysis and interpretation. Additionally, judgments and rulings of the Court are not readily available for various reasons ranging from inadequate translation equipment to lack of finance. Only 23 cases were available in the law reports, while certified true copies of judgments of many were not available because they were yet to be translated. The list of decided cases on the new website did not contain the full judgments in many cases. The analysis of the cases and issues is therefore limited to those judgments that were available.

It is within these constraints of access and availability of data in the required quantity and quality that the research work was carried out. The analysis and submissions, as engaging and comprehensive as they are, do not tell the whole story about the Court. More work still needs to be done for a better understanding of the Court, to see where it conforms to or departs from patterns already set by other

regional/international courts, particularly the CJEU. Such a detailed comparative analysis would not be possible until there is improved access to data on the work of the Court comparable to those of the other courts. Such comparison would also require an exploration of the contextual characteristics of the operational environment of the different courts that determine the extent and limits of their operations. The quantitative analysis of the case management and distribution of workload already carried out in this research work needs to be extended further to answer questions relating to the rate of in-flow and out-flow of cases, the duration of hearings, and the principles guiding selection of panels to hear cases, among others. Attempts have been made in this thesis to mention these areas. This study does not go into the details of the patterns of workload distribution among the Judges and the factors that guide the distribution of such workload. The available information on such issues are, for now, unreliable since no concrete data is available on them, and what came out of the researcher's interactions with the actors of the Court could not be independently verified.

In the circumstances, quantitative data in larger numbers would be required to validate or deny the tentative findings of this study. As the Court advances in age, it is expected that data on such and other issues would become readily available for scholarly analysis and isolation of trends and patterns. Also, as the Court is expected to become more receptive to research enquiries as it advances in age, it may be possible to have direct interviews of the Judges and work on their profiles. This is an area the researcher intends to explore through expected collaborative funding by the iCourts, a new centre for study of international courts based in Copenhagen, Denmark. A collective profile of the Judges of the Court could become an interesting area for further research. Deeper reflections on the idiosyncratic characteristics of the

Judges and how these have influenced the work of the Court could become significant areas of research interests. Such further study may present interesting results when related to the attitudes of the Court towards leading issues of regional integration that have been articulated in its judgments and rulings. As the decisions of the Court become more readily available, engaging analysis of the judgments and rulings may become a useful area for further research. This could also cause an exploration of the judicial approach of the Court in the exercise of its interpretative powers, which may further provoke comparative analysis of the judicial approach of the Court and other courts of similar jurisdiction. In essence, the range of issue areas to which future research agenda may be directed are wide, and the options may readily present themselves as more data and scholarly analysis of the work of the Court become more readily available.



### Appendix I: Summary of Selected Judgments of the CCJE, 2004-2012

S/N	Case Title	Composition of Panel	Issues Determined	Date Filed <sup>656</sup>	Date of Decision	Type of Decision	Order
1.	Afolabi v Federal Republic of Nigeria	3 = HN Donli, Nana Daboya, Malle-Sanogo	Human rights/Jurisdiction	10/10/03	27/04/04	Judgment	Struck out; no jurisdiction
2.	Ukor v Laleye	5 = HN Donli, SD Sidibe, Nana Daboya, AA Benin, Malle-Sanogo	Human rights/Jurisdiction	19/04/04	27/05/05	Judgment	Inadmissible; no merit
3.	ECOWAS Parliament v Council of Ministers	3 = HN Donli, SD Sidibe, Malle-Sanogo	Community acts / Jurisdiction	17/05/05	04/10/05	Judgment	Condition precedent not met
4.	Ugokwe v Federal Republic of Nigeria	3 = HN Donli, Nana Daboya, El-Mansour Tall	Relationship to national courts	17/05/05	07/10/05	Judgment	Court lacks competence
5.	Executive Secretary of ECOWAS	5 = HN Donli, SD Sidibe, B Toe, Nana Daboya, Malle-Sanogo	Advisory Opinion/Community acts	21/11/05	05/12/05	Advisory Opinion	Affirms Bureau Decision
6.	Keita v Rep of Mali	3 = HN Donli, Nana Daboya, SD Sidibe	Relationship to national courts/Human rights	12/07/06	22/03/07	Judgment	Court not competent
7.	Tidjani v Federal Republic of Mali	3 = AA Benin, B Toe, El-Mansour Tall	Relationship to national courts/Human rights	08/03/06	28/06/07	Judgment	Court incompetent

<sup>656</sup> Information on filing date got from the List of Cases Filed from 2003 to November 2012 (unpublished), obtained from the Registry of the Court

	of Nigeria						nt
8.	Essien v The Gambia	5 = HN Donli, Malle-Sanogo, AA Benin, Nana Daboya, El-M. Tall	Human rights/Relationship to national courts	18/11/05	14/03/07	Ruling	Case admissible
9.	Essien v Republic of the Gambia	5 = HN Donli, Malle-Sanogo, AA Benin, Nana Daboya, El-Mansour Tall	Human rights/Relationship to national courts	18/11/05	29/10/07	Judgment	HRs not violated
10.	Ukor v Laleye	3 = HN Donli, Malle-Sanogo, SD Sidibe	Human rights/Relationship to national courts	27/07/05	02/11/07	Judgment	No HRs violation
11.	Chukwudolue v Republic of Senegal	3 = Malle-Sanogo, AA Benin, HN Donli	Human rights/Jurisdiction	29/11/06	22/11/07	Judgment	No jurisdiction
12.	Oserada v ECOWAS Council of Ministers	3 = Malle-Sanogo, Nana Daboya, El-Mansour Tall	Community acts/ <i>Locus standi</i>	01/06/07	16/05/08	Judgment	Case inadmissible; no interest
13.	Manneh v Republic of the Gambia	3 = AA Benin, Nana Daboya, El-Mansour Tall	Human rights	04/05/07	05/06/08	Judgment	HRs violations upheld
14.	President of ECOWAS Commission	5 = Malle-Sanogo, AA Benin, B Toe, Nana Daboya, SD Sidibe	Advisory Opinion/Community acts	30/05/08	16/06/08	Advisory Opinion	Negative
15.	Koraou v Republic of Niger	3 = Malle-Sanogo, Nana Daboya, El-Mansour Tall	Human rights/Relationship to national courts	14/09/07	27/10/08	Judgment	HRs violations upheld
16.	Talbia v Federal Republic of Nigeria	3 = HN Donli, Nana Daboya, El-Mansour Tall	Human rights/Inadmissibility	30/11/06	28/01/09	Judgment	HRs claims dismissed
17.	Linas International	3 = Nana Daboya, HN Donli, AA Benin	Contract/Inadmissibility	25/10/07	19/03/09	Judgment	Court lacks

	Nig. Ltd v Ambass of Mali						jurisdiction
18.	Henri v Republic of Cote d'Ivoire	3 = Nana Daboya, BM Ramos, AA Benin	Human Rights	15/01/09	17/12/09	Final	No HRs violations
19.	CNDD v Republic of Cote d'Ivoire	3 = Nana Daboya, BM Ramos, AA Benin	Human rights/Jurisdiction	15/01/09	17/12/09	Judgment	No HRs violations
20§	Folami v Community Parliament	3 = HN Donli, Nana Daboya, SD Sidibe	Public service/Community acts/contracts	12/04/06	28/11/08	Judgment	Dismissed ; no merit
21§	Starcrest v President of ECOWAS Commission	3 = Nana Daboya, HN Donli, AA Benin	Community acts	2009	02/07/09	Ruling	P/Objectio n dismissed
22§	Falana v Benin Republic	3 = Nana Daboya, HN Donli, AA Benin	Enforcement of treaty obligations/Human rights	25/10/07	03/06/10	Ruling	P/Objectio n fails
23§	David v Uwechue	3 = BM Ramos, HN Donli, AA Benin	Community acts/public service/Human rights	14/04/09	11/06/10	Ruling	No jurisdiction
24*	Nigeria v Bayi	3 = Nana Daboya, HN Donli, AA Benin	Review of judgement of the Community Court	2006	03/06/10	Ruling	Failure
25*	Kokou v ECOWAS Commission	5 = Nana Daboya, BM Ramos, HN Donli, AA Benin, SD Sidibe	Public service/Community acts	21/04/09	08/07/10	Final	Success in part
26*	Habre v Senegal	5 = Nana Daboya, BM Ramos, HN Donli, AA Benin, CM Nougbo	Human rights/Treaty obligations	06/10/08	18/11/10	Judgment	Success
27*	SERAP v Nigeria	5 = BM Ramos, HN Donli, AA Benin, Medegan Nougbo	Human rights	23/07/09	10/12/10	Prelim	Failure
28*	Saidykhan v	3 = HN Donli, Nana Daboya, AA	Human rights	19/11/07	16/12/10	Final	Success

	The Gambia	Benin					
29*	Pinheiro v Ghana	3 = Ramos, Donli, Potey	Treaty obligations/ Human Rights	28/08/10	06/07/12	Judgment	No <i>locus standi</i>
30*	Alade v Nigeria	3 = Donli, Ramos, Potey	Human Rights	21/03/11	11/06/12	Judgment	HRs upheld
31*	Ayika v Liberia	3 = Donli, Ramos, Benin	Human Rights	04/04/11	08/06/12	Judgment	HRs upheld
32†	Starcrest President, Commission v	3 = Donli, Daboya, Benin	Community acts	06/02/08	08/07/11	Judgment	Case dismissed
33†	Ocean King v Senegal	3 = Donli, Daboya, Benin	Human rights/Relationship to national courts	14/07/08	08/07/11	Judgment	No <i>locus</i> in HRs
34†	Petrostar v BlackBerry	3 = Donli, Benin, Potey	contracts	16/10/08	18/03/11	Judgment	Case succeeds
35†	Falana v Benin	3 = Donli, Daboya, Benin	Treaty obligations	25/10/07	24/01/12	Judgment	Dismissed
36†	Adewale Council of Ministers <sup>657</sup> v of	3 = Ramos, Medegan, Potey	Public service/Community acts	09/11/10	16/05/12	Judgment	No <i>locus standi</i>

§ Reported in CCJLR [Pt 3] only; all the others (S/N 1-19) are reported in [2004-2009] CCJELR

\* Unreported (certified true copies obtained)

† Available at <[http://www.courtecawas.org/site2012/index.php?option=com\\_content&view=article&id=157&Itemid=27](http://www.courtecawas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27)> accessed 20 December 2012

<sup>657</sup> Summary of the facts of the case in *Annual Report 2009-2011*, 49

## Appendix II: Disposal of Cases at the CCJE, 2004-2012

S/N	Case Title	Type of Decision	Date Filed	Decision Date	Months/Days)
1	Afolabi v Nigeria	Judgment	10/10/03	27/04/04	6/17
2	Ukor v Laleye	Judgment	19/04/04	27/05/05	13/08
3	ECOWAS Parliament v Council of Ministers	Judgment	17/05/05	04/10/05	4/17
4	Ugokwe v Nigeria	Judgment	17/05/05	07/10/05	4/20
5	Executive Secretary	Advisory Opinion	21/11/05	05/12/05	0/14
6	Keita v Mali	Judgment	12/07/06	22/03/07	8/10
7	Tidjani v Nigeria	Judgment	08/03/06	28/06/07	15/20
8	Essien v The Gambia	Ruling	18/11/05	14/03/07	15/26
9	Essien v The Gambia	Judgment	18/11/05	29/10/07	23/19
10	Ukor v Laleye	Judgment	27/07/05	02/11/07	27/05
11	Chukwudolue v Senegal	Judgment	29/11/06	22/11/07	11/23
12	Oserada v Council	Judgment	01/06/07	16/05/08	11/15
13	Manneh v The Gambia	Judgment	04/05/07	05/06/08	13/01
14	President of ECOWAS Commission	Advisory Opinion	30/05/08	16/06/08	0/16
15	Koraou v Niger	Judgment	14/09/07	27/10/08	12/13
16	Talbia v Nigeria	Judgment	30/11/06	28/01/09	25/28
17	Linass v Ambassador of Mali	Judgment	25/10/07	19/03/09	16/24
18	Henri v Cote d'Ivoire	Final	15/01/09	17/12/09	11/02
19	CNDD v Cote d'Ivoire	Judgment	15/01/09	17/12/09	11/02
20	Folami v Parliament	Judgment	12/04/06	28/11/08	31/16
21	Starcrest v Commission	Ruling	2009	02/07/09	n.a
22	Falana v Benin Republic	Ruling	25/10/07	03/06/10	31/08
23	David v Uwechue	Ruling	14/04/09	11/06/10	13/27
24	Nigeria v Bayi	Ruling	2006	03/06/10	n.a
25	Kokou v Commission	Final	21/04/09	08/07/10	14/17
26	Habre v Senegal	Judgment	06/10/08	18/11/10	25/12
27	SERAP v Nigeria	Prelim	23/07/09	10/12/10	16/17
28	Saidykhan v The Gambia	Final	19/11/07	16/12/10	36/27
29	Pinheiro v Ghana	Judgment	28/08/10	06/07/12	22/08
30	Alade v Nigeria	Judgment	21/03/11	11/06/12	14/20
31	Ayika v Liberia	Judgment	04/04/11	08/06/12	14/04
32	Starcrest v Commission	Judgment	06/02/08	08/07/11	41/02
33	Ocean King v Senegal	Judgment	14/07/08	08/07/11	35/24
34	Petrostar v Blackberry	Judgment	16/10/08	18/03/11	29/02
35	Falana v Benin		25/10/07	24/01/12	50/29
36	Adewale v Council	Judgment	09/11/10	16/05/12	18/07

n.a – not available

Source: Adapted from Appendix I

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