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FOCUS AFRICA – 11 DICEMBRE 2019

Reconceptualising ECOWAS priorities: the judicial protection of human rights as a tool to strengthen effective integration?

Giovanni Ardito
PhD Candidate in public, comparative and international law

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1. Introduction

The Economic Community of West African States (the ECOWAS or the Community)[1] Court of Justice (the ECOWAS Court, the Court, or the ECCJ) is one of the leading sub-regional tribunals of the African continent. Originally conceived as a traditional Community Court entrusted to solve inter-State disputes relating to the ECOWAS law, the ECCJ experienced an articulated and uneasy reorganisation, in line with the evolving ECOWAS priorities.

After a worrying initial inactivity, and with the inclusion of human rights concerns into the West African agenda, the ECCJ was also given competence to hear cases of human rights violations, thus transforming into a hybrid "two-in-one"[2] tribunal.

Since then, the case load of the ECCJ mostly centred on this part of its mandate and, while the Court is sustaining the creation of a stable and conflict free environment in the region, it has rarely exercised jurisdiction on Community law. Running contrary to the expectations of its founding fathers, the ECCJ is now increasingly called to play a proactive role in favouring the ECOWAS effective integration.

* Articolo sottoposto a referaggio.

[1] As to 2019, the Member States of the Economic Community of West African States are: Benin, Burkina Faso, Cape Verde, the Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Nigeria, Senegal, Sierra Leone and Togo.

[2] S. T. EBOBRAH, *The ECOWAS Community Court of Justice: a Dual Mandate with Skewed Authority*, in K. J. ALTER - L.R. HELFER – M. R. MADSEN (eds.), *International Court Authority*, Oxford, 2018, p. 82.

In ascertaining the ECCJ's contribution to the realisation of the Community objectives, this paper will briefly introduce the context of regional and sub-regional integration in Africa. In accordance with the highlighted stages of sub-regional integration, the ECOWAS will be analysed in its main institutional features. In particular, the ECCJ will be considered from its evolutive perspective, by adequately marking the relevant steps towards the today's configuration. A specific focus will be given to the "layering" of the human rights mandate to highlight its very unique traits.

Having regard to the original project of ECOWAS policymakers to create a Court which resembled, from the institutional perspective and for its role in the advancement of the integration process, the European Court of Justice (ECJ),[3] this contribution will also discuss to which extent the ECJ model has been implemented in the ECOWAS system.

Taking into account the tools used by the ECJ to facilitate the achievement of the Community goals, an evaluation of the diversion effect of the ECCJ human rights mandate will show that the primacy of human rights litigation over Community disputes could even result in the Court's "judicial suicide".[4]

2. Integrating Africa: from development strategies to human rights protection

Regional and sub-regional integration in Africa has long attracted the attention of the legal and political discourse. Such phenomena have been mainly driven by the interplay between two opposing forces, which emerged right after the attainment of independence by African countries: the need to create larger trade areas bolstering the economic development of the continent and the imperative not to lose the sovereignty they had only recently gained.[5]

With the economic dimension dominating the imaginary of the integration process, in such scenario also human rights had a peculiar role to play, which only emerged at a later time, both in the regional and sub-regional spheres.

In the early 1960s, the main concerns for a united Africa were identified in security, employment and wealth: unsurprisingly, human rights did not figure among the aims to be achieved when the Organisation of African

[3]In this paper the expression "European Court of Justice" is used to refer to the judicial organ as established by the Treaty of Paris and evolved to the nowadays Court of Justice of the European Union. However, most of the provided reflections and comparisons refer to the Court before the entering into force of the Lisbon Treaty.

[4] S. T. EBOBRAH, *Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice*, in *Journal of African Law*, 2010, volume 54, p.25.

[5] See O. C. IHEDURU, *The 'New' ECOWAS: Implications for the Study of Regional Integration*, in T. M. SHAW – J. A. GRANT – S. CORNELISSEN (eds.), *The Ashgate Research Companion to Regionalism*, Burlington, 2011, p. 216.

Unity (OAU) was founded in 1963.[6] However, over a decade from its creation, it became evident that the recognition and protection of human rights were pivotal for the attainment of the socio-economic well-being of African peoples and they were soon incorporated into the regional agenda.[7]

Contrary to the OAU experience, the process of sub-regional integration was immediately anchored to clear economic objectives, which for more than a decade blurred the human rights discourse. This process articulated in three main waves, each characterised by peculiar features.[8] The first one, from 1960 to 1974, was stimulated by the pan-African spirit, aiming at restoring the African pride, dignity and identity. At this stage, the attempts to rapidly improve the economic independence of African countries revealed chaotic and unable to respond to the most compelling necessities. This resulted in the creation of the first Regional Economic Communities (RECs), which, in spite of the far-reaching aims as identified in their founding instruments, were not properly empowered to reach them.

The second wave of integration began in 1975 and was, instead, inspired by the euphoria generated by the Lagos Plan of Action drawn up by the OAU under the auspices of the United Nations Economic Commission for Africa. With most countries still economically dependent from former colonial powers, African leaders saw in the Lagos Plan of Action a chance to build, by the new millennium, an integrated African market with the support of the RECs of the five sub-regions.[9]

The first two waves of African integration were, thus, mainly grounded on the concern to enhance trade and industrial development and to consequently improve the living standard of the peoples. To this extent, RECs equipped themselves with an institutional configuration which resembled domestic architectures, with legislative and executive authorities. Judicial organs were generally omitted in the fear of their excessive activism, possibly resulting in the alteration of the delicate balance between community and domestic interests. For this reason, when rarely forecasted in RECs' founding treaty, regional tribunals were not created or rendered operative.

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[6] See L. N. MURUNGI – J. GALLINETTI, *The role of Sub-regional Courts in the Africa Human Rights System*, in *International Journal of Human Rights*, 2010, volume 7, p.120.

[7] See R. MURRAY, *Human Rights in Africa: from the OAU to the African Union*, Cambridge, 2004, pp. 1-48.
In Article 3 of the African Union Constitutive Act, human rights protection is listed below other issues like economic integration.

[8] See S. K. B. ASANTE, *Regionalism and Africa's Development: Expectations, Reality and Challenges,* New York, 1997, pp. 2-8; A. OYEJIDE – I. ELDABAWI – P. COLLIER (eds.), *Regional Integration and Trade Liberalization in Sub Saharan Africa*, New York, 1997, p. 147; and J. E. OKOLO – S. WRIGHT (eds.), *West African Regional Cooperation and Development*, Boulder, 1990, pp. 147-154.

[9] A significant step in this direction was taken with the Treaty establishing the African Economic Community, concluded in Abuja on 3rd June 1991 and entered into force 12th May 1994.

Despite the worthy causes, the overlapping membership of some African countries in similar but separate arrangements, the protectionist macroeconomic attitude of some of them and budgetary restraints (which sometimes resulted in Member States not to pay their dues) caused RECs achieving only limited results.

With the end of the Cold War, a third wave of regionalism, commonly known as the new regionalism,[10] spread. Mainly under the leadership of Commonwealth countries (particularly Nigeria and South Africa), eager to acquire hegemonic status in their respective areas, existing RECs underwent massive reorganization. Since the ideal of economic prosperity and political integration could remain a pipe dream if not supported by the reduction of conflicts, poverty and human rights abuses, the new regionalism was conceived as a multidimensional process, integrating human rights concerns into the economic development strategies. As "there is an obvious link between one of the main objectives of regional integration – improving the welfare of the people in the participating countries – and the realisation of socio-economic rights",[11] the sub-regional protection of human rights was perceived as crucial for the community integration.[12] Accordingly, some RECs engaged in treaty revisions with which the protection of human rights appeared as a principle (but not an aim) on which they rely.

In opposition to the previous experiences, in the third wave of regionalism RECs' tribunals had a role to play, particularly in coping with disputes arising among members States and between them and the institutions of the communities. Nonetheless, as a consequence of the limited status recognised to human rights, none of the tribunals was empowered to oversee their respect.[13] It only happened later on, at the very

[10] See S. KAPLAN, *West African Integration: A New Development Paradigm?*, in *Washington Quarterly,* 2006, volume 29, pp. 81–97.

[11] F. VILJOEN, *International Human Rights Law in Africa*, Oxford, 2007, p. 496. See also J. D. WOLFENSOHN, *Some Reflections on Human Rights and Development*, in P. ALSTON – M. ROBINSON (eds.), *Human Rights and Development: Towards Mutual Reinforcement*, Oxford, 2005, pp. 18-22.

[12] See F. VILJOEN, *The realisation of Human Rights in Africa through sub-regional institutions*, in *African Yearbook of international law*, 1999, volume 7, pp. 185-214.

[13] See G. PASCALE, *An Optimistic Perspective on the Proliferation of Human Rights Monitoring Bodies in Africa*, in *Diritti umani e diritto internazionale*, 2018, volume 12, p. 159.

beginning of the new millennium, via judicial law-making[14] or treaty protocols.[15] Indeed, the late competence in the field of human rights adjudication was not accompanied by the prompt development of a sub-regional catalogue of human rights, so that RECs' courts largely referred to the African Charter on Human and Peoples' Rights (ACHPR), entered into force in 1986.[16] In this way, "direct reference to the African Charter in the various economic treaties in Africa would, at least in theory, mean that the courts of justice and tribunals [were] bound to directly apply human rights rules in determining trade disputes".[17]

With these features, whether the proliferation of RECs' tribunals and their competence in the field of human rights is to be deemed as a blessing or a drawback should be evaluated on a case-by-case basis. Certainly, from the judicial perspective, RECs shall be prized for at least three reasons. First, the restricted membership of RECs allows their courts to address the cases in accordance with the peculiar features of each sub-region. Second, regional courts are generally considered as more accessible, both from a geographical and procedural perspectives. Finally, RECs are best suited to ensure that judicial decisions are enforced, through the tools provided by their founding treaties.[18]

3. Restoring the ECOWAS: the inclusion of human rights protection in the West Africa agenda

The Economic Community of West African States is the REC which best fits the described stages of integration and their significance.

[14] See A. POSSI, *Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice*, in *African Human Rights Law Journal*, 2015, volume 15, pp. 201-209. This is the case of the East African Community, in whose founding instrument human rights do not appear among the objectives of the Community. However, by interpreting the Treaty for the Establishment of the East African Community, and particularly its Article 6, the Community Court has developed a strong reputation in the field of human rights protection. See, in this regard, S. T. EBOBRAH, *Litigating Human Rights Before Sub-regional Courts in Africa*, in *African Journal of International and Comparative Law*, 2010, volume 17; and L. N. MURUNGI – J. GALLINETTI, *The role of Sub-regional Courts in the Africa Human Rights System*, *op. cit.*

[15] See *infra.*

[16] See African Charter on Human and Peoples' Rights, concluded in Nairobi on 27th June 1981 and entered into force on 21 October 1986. See, on the main aspects of the Charter, B. OBINA OKERE, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: Comparative Analysis with the European and American Systems*, in *Human Rights Quarterly*, 1984, volume 6, pp. 141-159.

[17] S. F. MUSUNGU, *Economic integration and human rights in Africa: A comment on conceptual linkages*, in *African Human Rights Journal*, 2003, volume 3, p. 93.

[18] See L. N. MURUNGI – J. GALLINETTI, *The role of Sub-regional Courts in the Africa Human Rights System*, *op.cit.* pp.127-129.

On 28 May 1975, fifteen West African States, in response to the Lagos Plan of Action, signed the ECOWAS Treaty (also the Treaty), establishing the Community.[19] Often described as "a regional zone of preference allowed under article XXIV of the GATT"[20] or "an economic community similar to the European Community"[21], its main aims were the promotion of cooperation in a wide range of fields[22] and, in particular, the removal of trade barriers to encourage development. In order to favour the achievement of the set goals, in the years following its inception more than thirty protocols were annexed to the Treaty, the most known of which relate to non-aggression, mutual assistance on defence and free movement of persons.[23]

From an institutional perspective, the ECOWAS Treaty forecasted the creation of an Authority of Head of States and Government, as the most important decision-making body; a Council of Ministers, with advisory functions to the Authority; an Executive Secretariat; and a Tribunal of the Community.[24] The objectives and the institutional architecture of the ECOWAS partially resembled the homologues of the European Economic Community (EEC), but Member States decided not to give the REC sufficient decision-making power and preferred to keep their sovereignty in almost all the fields of cooperation. From an economic standpoint, while the creation of a common market was particularly sponsored by Nigeria, in a bid to consolidate its regional hegemony, in the first decade of its existence ECOWAS did not endorse any free market policy.

By the end of the Cold War, and with the escalation of prolonged conflicts in some Member States, the priority of ensuring economic development and integration seemed to have lost its initial appeal.

With the aim to revive the original scopes of the Community, in 1991 the Authority convened a Committee of Eminent Persons entrusted to amend the original Treaty.[25] In 1993, as a result of its work and suggestions, the States parties to the original ECOWAS Treaty adopted the revised text of the Lagos Treaty (the Revised

[19] Treaty on the Economic Community of West African States, concluded in Lagos on 28th May 1975 and entered into force on 20th June 1975.

[20] C. A. ODINKALU, *Economic Community of West African States*, in C. H. HEYNS – M. VAN DER LINDE (ed.), *International Human Rights Law in Africa & Domestic Human Rights Law in Africa*, Leiden, 2004, p. 644.

[21] K. NOWROT – E. W. SCHABACKER, *The use of force to restore democracy: International legal implications of the intervention of ECOWAS in Sierra Leone*, in *American University International Law Review*, 1998, volume 14, p. 321.

[22] See Treaty on the Economic Community of West African States, Articles 2 and 3.

[23] See Protocol on non-aggression, concluded in Lagos on 2nd April 1978; Protocol A/P.1/5/79 relating to the free movement of persons, residence and establishment, concluded in Dakar on 29th May 1979; and Protocol A/SP.3/5/81 relating to mutual assistance on defence, concluded in Freetown on 29th May 1981.

[24] See Treaty of the Economic Community of West African Countries, Article 4.

[25] The decision to institute the Committee of Eminent Persons to revise the founding instrument of the Community was taken with Authority Decision A/DEC10/5/90 of 30th May 1990.

Treaty),[26] which once again committed governments to economic integration and set a timetable for the future monetary union.[27]

According to Article 3 of the Revised Treaty, the aims of the Community are, among the others, to "promote cooperation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples and to maintain and enhance stability, foster relations among Member States and contribute to the progress and development of the African continent".[28]

By comparing the original Treaty with the revised version, it is remarkable to notice that the former totally lacked any reference to human rights and human rights language. Even economic freedoms, recognised as the engine of economic integration, were mentioned in such a way not to create links with any social or economic right.[29] The Revised Treaty, on the contrary, put human rights at the centre of the constitutional framework of the Community.[30] Although they do not appear among the aims and objectives of ECOWAS, they are recalled in the preamble and among the fundamental principles at Article 4 (g), where, in pursuing the aims set in Article 3, States affirm their adherence to the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' rights",[31] to which all of them were already part. As a result, with human rights entering the ECOWAS agenda, "the Revised Treaty [became] an economic integration instrument that is couched in a human rights context as defined by African Charter".[32]

4. The incorporation of human rights protection in the ECOWAS Court mandate: a step in the right direction?

[26] See Revised Treaty of the Economic Community of West African States, concluded in Cotonou on 24th July 1993 and entered into force on 23rd August 1995.

[27] The reasons which motivated the resettlement of the ECOWAS are widely highlighted in K. OTENG KUFUOR, *The institutional transformation of the Economic Community of West African States*, London, 2006, p. 28.

[28] See Revised Treaty of the Economic Community of West African States, Article 3.

[29] See S. T. EBOBRAH, *Critical Issues, op.cit.* pp. 3-4.

[30] The Revised Treaty refers to some human rights in Article 59 (right of entry, residence and establishment), and Article 66 (c) (rights of journalists). The last one revealed particularly important for the jurisprudence of the ECCJ. It is of a peculiar character and quite unusual for the regional and sub-regional systems of human rights protection.

[31] Ibidem, at Article 4 (g).

[32] N. NWOGU, *Regional Integration as an Instrument of Human Rights: Reconceptualising ECOWAS*, in *Journal of Human Rights*, 2007, volume 6, p. 348.

Article 4 of the 1975 ECOWAS Treaty envisaged the creation of a Tribunal of the Community, with the aim to "settle such disputes as may be referred to it"[33] by its Member States and to "ensure the observance of law and justice in the interpretation of the provisions of the Treaty".[34]

The creation and transformation of the Tribunal revolve around three key stages, namely the voluntary failure to set the Court, the adoption of the 1991 Protocol (the Protocol or the 1991 Protocol)[35] and the 2005 Supplementary Protocol (the Supplementary Protocol), amending the former.[36]

In the immediate aftermath of the entry into force of the Treaty, peculiar political and legal reasons led Member States to take an inactive attitude, resulting in the lacked creation of the Tribunal.

From the political perspective, the Nigerian opposition to the inception of the Tribunal, on the ground that it could reduce its hegemonic power, certainly played a crucial role. In fact, ECOWAS Members, mostly relying on Nigerian oil revenues,[37] preferred not to contradict its stance and accepted that Article 4 remained unapplied. Yet, there was the perception that, by the words of the Treaty, the competence of the Court would have been a residual one. According to Article 56, in fact, the Tribunal was the last resort to apply to, only in case Member States had failed to settle their dispute through an agreement. This system, apart from

[33] Treaty on the Economic Community of West African States, Article 11.

[34] Ibidem, Article 56.

[35] See Protocol A/P.I/7/91 on the Community Court of Justice, concluded in Abuja on 6th July 1991 and entered into force on 5th November 1996.

[36] See Supplementary Protocol A/SP.1/01/05 amending the Preamble and articles 1, 2, 9 and 30 of the Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 paragraph 1 of the English version of the said Protocol, concluded in Accra on 19th January 2005 and temporarily entered into force upon signature on the same date.

Before the entry into force of this Supplementary Protocol, the Court was composed by seven judges, elected for a renewable five years term.

[37] See, among the others, I. A. GAMBARI, *Political and comparative dimensions of regional integration: the case of ECOWAS*, Atlantic Highlands, 1991, pp. 40-41 and O. J. B. OJO, *Nigeria and the Formation of ECOWAS*, in *International Organization*, 1980, volume 34, pp. 583-585. The Authors interestingly refer to the political clash between integrationists and anti-integrationists in Nigeria since the early 1970s. Ojo reports that anti-integrationists feared that the adhesion to a more integrated system of regional cooperation could have resulted into the request of sharing of oil revenues. This clearly run contrary to the well-established intention of Nigeria to replace the French economic leadership in the Francophone Africa and to acquire a central role in setting the agenda of the ECOWAS. While the integrationist party succeeded in including Nigeria in the economic integration process, the country also concluded an economic agreement with France, taking over its control on West African countries. For economic data, showing the financial condition of Nigeria in comparison to its neighbours, see J. E. OKOLO, *The development and Structure of ECOWAS*, in J. E. OKOLO – S. WRIGHT (ed.), *West African Regional Cooperation and Development*, Boulder, 1990, p. 42.

the risk of exposing the Treaty to misleading interpretations and application, would have rendered the existence of the Tribunal "largely redundant".[38]

From the legal standpoint, the forecasted ECOWAS Tribunal needed the adoption of a protocol setting its composition, competence, statute and other matters relating to its proper functioning. However, because of the long process of ratification, necessary to render protocols binding on Member States, most of them were never implemented and there was the serious risk that even a protocol on the Tribunal could remain idle for a long period of time.[39]

As part of the general commitment to revitalise regional integration in West Africa, in the early 1990s Member States expressed their intention to create a judiciary entitled to solve future disputes arising from the future Community legislation. The Legal Affairs Directorate of ECOWAS largely debated on the features of such new judicial body, with some officials preferring an *ad hoc* tribunal, in the light of the limited forecasted cases of disputes settlement.[40] Eventually, in 1991, on the basis of articles 4 (e)[41] and 11[42] of the Treaty, the Authority of Head of States and Government adopted the Protocol, creating the ECOWAS Community Court of Justice as the *permanent* Tribunal of the Community, with its seat in Abuja, Nigeria.

According to Article 9 of the Protocol, the ECCJ, currently composed of five judges of high moral character, in possession of the required expertise[43] and in office for a non-renewable four years term,[44] was competent to: 1) grant the observance of law and equity in interpreting and applying the provisions of the Treaty; 2) solve disputes referred to it by Member States or the Authority, when they concerned Member States *inter se*

[38] I. AKINRINSOLA, *Legal and Institutional Requirements for West African Economic Integration*, in *Law and Business Review of the Americas*, 2004, volume 10, p. 504.

[39] See, for a recognition of the ECOWAS sources of law, S.B. AJULO, *Sources of law of the Economic Community of West African States (ECOWAS)*, in *Journal of African Law*, 2001, volume 45, pp. 73-85.

[40] See K. J. ALTER - L. R. HELFER – J. R. MCALLISTER, *A new international human rights court for West Africa: the ECOWAS Community Court of Justice*, in *The American Journal of International Law*, 2013, volume 107, p. 746.

[41] See Treaty for the establishment of East African Community, Article 4 (e).

[42] Ibidem, Article 11.

[43] With regard to the necessary expertise, some scholars argue that for the vast case load related to human rights violations, judges should be selected in accordance with their knowledge in the field. See, in particular, S.T. EBOBRAH, *Critical issues, op.cit.,* pp. 11-14.

[44] See Supplementary Protocol A/SP.2/06/06 amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs 1, 3 and 7 and Article 7 Paragraph 3 of the Protocol on the Community Court of Justice, concluded and entered into force temporarily upon signature on 14th June 2006. See also Decision A/Dec.2/06/06 establishing the Judicial Council of the Community, adopted on 14th June 2006.

or a Member State and an institution of the Community; 3) solve controversies relating to the interpretation and application of the Treaty after attempts to amicably settle them had failed.[45]

At this stage, only State actors and Community institutions had access to the Court, and the same possibility was, instead, restricted for ECOWAS citizens. In other terms, the ECCJ was conceived as a classical international court, entrusted to mainly solve inter-State disputes. The barred access of private actors to the Court was immediately criticised by the Committee of Eminent Persons, which in its 1992 final report, suggested that " where […]a Community citizen alleges a breach or denial of a right conferred on him by a Community legislation, a Treaty provision or a Protocol, it should be possible for him to seek redress in the national Court or the Community Court of Justice".[46] The charges of the Committee obviously delayed the entering into force of the Protocol, which happened in 1996. However, it was only after Olusegun Obasanjo assumed the presidency of Nigeria, and tried to revitalise the international posture of its country by pushing ECOWAS integration,[47] that the first judges were elected in 2001. Still, lacking a case load, the Court remained idle until 2003 when an individual, Mr. Olajide Afolabi, filed an application against his own country, the Federal Republic of Nigeria, which revealed pivotal for the future of the Court.

In August 2003 the applicant, a Nigerian trader, concluded an agreement with customers from the Republic of Benin for the purchase and delivery of some goods. Having started his journey to Benin, he found out that his country had ordered the closure of the borders. Notwithstanding the attempts to explain his concerns to the border guards, Mr. Afolabi was prevented from continuing his journey. In the light of the loss deriving from the failure to conclude the transactions, and in his quality of Community citizen,[48] he filed an application in the ECCJ. He alleged that the right to freedom of persons and goods, as granted both by the Revised Treaty, and its relevant Protocols, and by the ACHPR had been violated.

In the preliminary objection phase, Nigeria challenged the jurisdiction of the Court on the ground that, as a private subject, the plaintiff was not authorised to apply to the ECOWAS Court. In this regard, Mr. Afolabi tried to rely on the provision stating that "Member State may […] institute proceedings against another Member State",[49] claiming that the word "may" was of a directory and not mandatory nature, so that

[45] See Protocol A/P.I/7/91 on the Community Court of Justice, Article 9.
[46] Committee of Eminent Persons for the Review of the ECOWAS Treaty, *Final Report*, June 1992, paragraphs 21-22.
[47] See J. SHOLA OMOTOLA, *From Importer to Exporter: the Changing Role of Nigeria in Promoting Democratic Values in Africa*, in J. Pretorius (ed.) *African Politics: beyond the third wave of democratisation*, Pretoria, 2008.
[48] For the concept of ECOWAS citizenship, see M.P. OKOM – J.A. DADA, *ECOWAS Citizenship: a Critical Review*, in *American Journal of Social Issues and Humanities*, 2012, volume 2, pp. 100-116.
[49] Protocol A/P.I/7/91 on the Community Court of Justice, Article 9 (3).

individuals were not clearly barred from applying to the Court. In addition, he also referred to the principle of equity as referred to in Article 9 of the Protocol,[50] maintaining that it suggested an extensive interpretation of the subjects allowed to bring a case before the ECCJ. Despite the applicant's arguments, the Court supported the Nigerian claims and dismissed the case. In their articulated decision, judges recognised that the issue rose "a serious claim touching on free movement and free movement of goods",[51] but they were of the opinion that the text of the Protocol was so unambiguous on the subjects legitimated to access the Court, that it did not leave any space for interpretation, even though it could lead to absurd conclusions.

If the ECCJ formally discharged the case, outside the Courtroom judges embraced a campaign to review the Protocol with the aim to pull the ECCJ out from its inactivity and favour the access of non-State actors. At a first glance, as some scholars have suggested, the ECCJ missed the chance to rely on its judicial law-making and follow the path of the European Court of Justice (ECJ)[52] which, pursuant to Article 164 of the Treaty of Rome,[53] had been able to extend its review on bodies not covered by the founding treaty.[54] However, conscious of the risks associated to an excessive activism, the judges did not decide the case to avoid critics when the judicial activity was only at its infancy: they, instead, opted for a legislative-driven mandate.

Following the introduction of human rights concerns into the agenda of the ECOWAS and after almost three years of campaigning, the ECCJ judges, the civil society and some Community officials succeeded in making Member States converge on the necessity to create a human rights litigation mechanism.

As a result, on 19 January 2005 they adopted the Supplementary Protocol, which in its preamble recognises the "role of the Community Court of Justice in the construction and acceleration of the integration process", largely modifies Article 9 of the Protocol and introduces a new Article 10.[55]

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[50] Ibidem, Article 9 (1).

[51] *Economic Community of West African States Court of Justice, Afolabi v. the Federal Republic of Nigeria*, Case No. ECW/CCJ/APP/01/03, Judgment, 27 April 2004, paragraph 55.

[52] See, for the general role played by the ECJ in the integration process, A. ARNULL, *The European Union and its Court of Justice*, Oxford, 2006; H. DE WAELE, *The Role of the European Court of Justice in the integration process: A contemporary and normative assessment*, in *Hanse Law Review*, 2010, volume 6, pp. 3-13; and D. TAMM, *The History of the Court of Justice of the European Union since Its Origin*, in A. ROSAS – E. LEVITS – Y. BOT (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Caselaw*, Hague, 2013.

[53] See Treaty establishing the European Economic Community, concluded in Rome on 25th March 1957 and entered into force on 1st January 1958, Article 164.

[54] See K. J. ALTER - L. R. HELFER – J. R. MCALLISTER, *A new international human rights court for West Africa, op.cit.,* p. 749.

[55] For the changes brought about by Article 10, see *infra.*

The revised Article 9,[56] dealing with the competences of the ECCJ, extends the jurisdiction of the Court to the legality, interpretation and application of regulation, directives and decisions of the ECOWAS; to the failure of Member States to honour their obligations under the Treaty; and, at paragraph four, establishes that "the Court has jurisdiction to determine case of violation of human rights that occur in any Member State".[57] Indeed, with the 2005 Protocol, the ECCJ transformed into what has been called a hybrid two-in-one tribunal, contemporarily empowered to hear Community and human rights disputes at once.[58]

Interestingly, the revised Article 9 does not mention any human rights instrument that the Court is called to apply when adjudicating pursuant to paragraph 4. Yet, the considerable freedom of the ECCJ in this field, which was prized as an opportunity to define and delimit the scope and legal parameters of its human rights mandate in its own image[59], was restricted by the same Court. In its famous *Ugokwe v. Federal Republic of Nigeria* judgment, the Court concluded that "even though there is no cataloguing of the rights that the individuals or citizen of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter"[60].

In another landmark case, *Koraou v. Republic of Niger*, it also added that "the adherence of the Community to the principles of the Charter signifies that, in absence of ECOWAS legal instruments relating to human rights, the Court ensures the protection of the rights spelt out in the Charter, without necessarily proceeding to do so in the same manner as would the African Commission on Human and Peoples' Rights".[61]

Having highlighted its absolute autonomy in interpreting the Banjul Charter, it maintained that the reference to the ACHPR does not extend to procedural norms applicable to the solution of the disputes.[62] The ECCJ,

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[56] Supplementary Protocol A/SP.1/01/05, Article 9.

[57] Ibidem, Article 9 (4).

[58] There are, however, some Authors preferring an ECCJ with an insignificant human rights jurisdiction. See R. F. OPPONG, *Legal aspects of economic integration in Africa*, Cambridge, 2011, p.126. See, more in general on the debate, L. PINESCHI, *Un'evoluzione imperfetta nella tutela del diritto a un ambiente soddisfacente: la sentenza della Corte di giustizia dell'ECOWAS sul caso SERAP c. Nigeria*, in *Diritti umani e diritto internazionale*, 2014, volume 8, p. 106.

[59] See T. ANANE-MAIDOH, *The Mandate of a Regional Court: Experiences from ECOWAS Court of Justice*, in (paper presented at) *Colloquium on the SADC Tribunal*, Johannesburg, 2013.

[60] *Economic Community of West African States Court of Justice, Ugokwe v. Federal Republic of Nigeria*, Case No. ECW/CCJ/APP/02/05, Judgment, 7 October 2005, paragraph 29. See also L. POLI, *La Corte di giustizia dell'ECOWAS: quali prospettive per un concreto miglioramento della tutela dei diritti umani in Africa?,* in *Diritti umani e diritto internazionale, 2014,* volume 8, p. 144.

[61] *Economic Community of West African States Court of Justice, Koraou v. Republic of Niger*, Case No. ECW/CCJ/APP/08/08, Judgment, 27 October 2008, paragraph 42.

[62] See S. T. EBOBRAH, *The ECOWAS Community Court of Justice*, *op.cit.,* p.90.

in fact, only relies on the ACHPR insofar as it provides a complete catalogue of human rights but refuses to stick to any other provision contained therein. Accordingly, the ECOWAS Court does not acknowledge the principle of exhaustion of local remedies, a well-established rule of customary international law[63] "the essential aim of which is to protect [the] national legal order[s]",[64] as referred to in Article 56 (5) of the ACHPR.[65] The Court maintained this stance several times in its case law, starting from the *Essien v. the Republic of The Gambia* judgement.[66] Before the preliminary objection of the Gambia, arguing that the principle is recalled in the ACHPR and is fundamental for the proper functioning of the human rights' protection system, the Court held that it is not bound by Article 4 (g)[67] of the Protocol nor by the Supplementary Protocol to apply the procedural rules provided by the Banjul Charter. It also highlighted that the determination of the ECOWAS legislator not to include the same procedural restraints of the ACHPR was a deliberate one.[68] This finds confirmation in the fact that ECOWAS policymakers did not fail to include the other conditions, mentioned in Article 9 (3) and in the new Article 10 of the Protocol. In particular, the former establishes that actions against Community institutions and Member States can only be filed within three years from the date

[63] See *International Court of Justice, Interhandel Case*, Judgment, 21 March 1959, I.C.J. Reports 1959, p.27. For the different perspectives on the matter (including the peculiar application of the norm in human rights treaties), see S. D'ASCOLI – K. M. SCHERR, *The rule of previous exhaustion of local remedies in international law doctrine and its application in the specific context of human rights protection*, in *EUI Working Paper Law*, no. 2007/02, pp. 11-15; C. F. AMERASINGHE, *Local Remedies in International Law*, Cambridge, 2004, pp. 64-73; and T. MERON, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989, pp. 171-181; G. PASCALE, *An Optimistic Perspective on the Proliferation of Human Rights Monitoring Bodies, op.cit.* pp. 163-165 and A. O. ENABULELE, *Sailing against the tide: Exhaustion of domestic remedies and the ECOWAS Court of Justice*, in *Journal of African Law*, 2012, volume 56, p. 287; A. A. CANÇADO TRINIDADE, *The application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, 1963; R. PISILLO MAZZESCHI, *Esaurimento dei ricorsi interni e diritti umani*, Torino, 2004, pp. 41-45; and A. VON STADEN, *Subsidiarity, exhaustion of domestic remedies, and the margin of appreciation in the human rights jurisprudence of African sub-regional Courts*, in *The International Journal of Human Rights*, 2016, volume 20, p.119.

[64] *European Court of Human Rights, De Wilde, Ooms and Versyp v. Belgium*, Case No. 2899/66, Judgment, 28 June 1971, paragraph 55.

[65] See African Charter on Human and Peoples Rights, Article 56 (5), stating that "Communications relating to human and peoples' rights referred to in Article 55 received by the Commission shall be considered if they: […] 5) are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.". The rule of previous exhaustion of local remedies is also dealt with at Article 35 of the European Convention on Human Rights and Article 46 of the Inter-American Convention on Human Rights.

[66] See *Economic Community of West African States Court of Justice, Essien v. the Republic of The Gambia*, Case No. ECW/CCJ/APP/05/05, Judgment, 14 March 2007.

[67] See Protocol A/P.I/7/91 on the Community Court of Justice, Article 4 (g).

[68] In the *Economic Community of West African States Court of Justice, Saidykhan v. Republic of The Gambia*, Case No. ECW/CCJ/APP/11/07, Judgment, 16 December 2010, the Court held that "the Supplementary Protocol is an example of legislating out of the rule of customary international law, regarding the exhaustion of local remedies" (paragraph 43).

when the right of action arose.[69] As for the latter, it grants individuals the access to the Court for human rights violations, provided that their submissions are not anonymous and the dispute has not been instituted before another international court.[70] If litigants no longer contest the ECCJ interpretation of the principle of exhaustion of local remedies, the lack of any such requirement implies a peculiar relation between the ECCJ and national Courts, often described as an "ostrich approach".[71]

Generally speaking, the supranational experiences of political and economic integration, particularly the European one, have shown that the coordination between the international and national judicial systems is essential to ensure a fruitful institutional dialogue. However, despite the formal commitment to facilitate relations between the ECCJ and domestic courts,[72] the ECOWAS Court seems to have discouraged such judicial exchange. This has been clearly pointed out by the same Court in *Ugokwe*, where it concluded that the "relationship existing between the Community Court and these national courts of Member States are not of a vertical nature"[73]and that in the field of human rights litigation, domestic courts and the ECCJ basically enjoy a concurrent jurisdiction.[74]

Moreover, in strict compliance with the *res judicata* principle, in *Tidjani v. Federal Republic of Nigeria*,[75] *Amenganvui and others v. Republic of Togo*[76] and *Umar v. Federal Republic of Nigeria*[77] the Court repeatedly maintained that it is not a court of cassation or a court of appeal for domestic tribunals. In particular, in *Tidjani,* the ECCJ explained that "any contrary decisions by this court will amount to this court acting on appeal in respect of the decision by […] domestic courts, which this court has no power to do and will at any rate not embarked on any such venture",[78] thus declining its jurisdiction *ratione materiae*.

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[69] See Supplementary Protocol A/SP.1/01/05., Article 9 (3).
[70] Ibidem, Article 10 (d) (i) and (ii).
[71] S.T. EBOBRAH, *Critical issues, op. cit.*, p. 14.
[72] See Supplementary Protocol A/SP.1/01/05, Articles 3 and 4.
[73] *Ugokwe v. Federal Republic of Nigeria, cit.,* paragraph 32.
[74] In his analysis of the subsidiarity in the human rights litigation in Nigeria and ECOWAS, Bado refers to this peculiarity as a *dual human rights order.* It would preclude the horizontal application of the ECCJ's human rights mandate. See K. BADO, *Good governance as a precondition for subsidiarity: human rights litigation in Nigeria and ECOWAS*, in *Commonwealth and Comparative Politics*, 2019, volume 57, pp. 247-248.
[75] See *Economic Community of West African States Court of Justice, Tidjani v. Federal Republic of Nigeria*, Case No. ECW/CCJ/JUD/01/11, Judgment, 8 February 2011, paragraphs 30-32.
[76] See *Economic Community of West African States Court of Justice, Amengavui and others v. Republic of Togo*, Case No. ECW/CCJ/APP/12/10, Judgment, 13 March 2012, paragraph 54.
[77] See *Economic Community of West African States Court of Justice, Umar v. Federal Republic of Nigeria*, Case No. ECW/CCJ/APP/12/11, Judgment, 14 December 2012, paragraph 21.
[78] *Tidjani v. Federal Republic of Nigeria*, cit. paragraph. 77.

For the referred peculiar and unusual features of the ECCJ's human rights mandate, in 2009 the Gambian authorities, in the wake of the two controversial judgments of *Manneh*[79] and *Saidykhan*, called for the ECOWAS Commission to convene a Meeting of Government Experts to revise the Supplementary Protocol. The two cases, which have been correctly considered as attempts of backlash against the ECOWAS Court,[80]were both filed in 2007 by an NGO on behalf of local journalists who had been repeatedly tortured by the Gambian authorities for having published news criticizing the government. In the *Manneh* case, the applicant contested the violation of the rights to dignity, freedom of movement and personal liberty, as recognised by the ACHPR. The strategy of the Gambian government, aimed at undermining the authority of the Court, consisted in ignoring the number of requests to appear before the ECCJ and in not delivering the necessary documents to assess the violation of human rights. The Court, in the light of the available evidences, ascertained the breaches and asked for the restoration of the human rights at stake and the payment of damages. Having acknowledged the adverse impact of the adopted approach, in the *Saidykhan* case the Gambia decided to oppose clear political and legal arguments. The case under the scrutiny of the Court concerned the detention and alleged torture of Musa Saidykhan, a local journalist, who suffered several electric shocks to his body with the aim to extract a confession about his involvement in a coup plot. Before the arguments raised by the applicant, the Gambia claimed that the suit represented "an affront to [its] sovereignty".[81] Few months later the Court issued an *interim* order and rejected the governmental objection. As also the existing procedural bars revealed unsuccessful to defeat the applicant's claim, the Gambia asked the ECOWAS Commission for the inclusion of the exhaustion of domestic remedies to the Supplementary Protocol, as a precondition for a human rights violation to be brought before the ECCJ like for all the other human rights systems. However, the proposal found the opposition of the civil society, the ECOWAS Commission and, surprisingly, of the majority of West African leaders, who wanted to keep the human rights competence of the Court as broad as possible. This request, in fact, came just after in 2006 ECOWAS governments agreed on rendering the Supplementary acts of the Authority binding:[82] having succeeded in

[79] See *Economic Community of West African States Court of Justice, Manneh v. Republic of The Gambia*, Case No. ECW/CCJ/APP/04/07, Judgment, 5 June 2008.
[80] See K. J. ALTER – J. T. GATHII – L. R. HELFER, *Backlash against international Courts in West, East and Southern Africa: Causes and Consequences*, in *European Journal of International Law*, 2016, volume 27, pp. 296-300.
[81] *Saidykhan v. Republic of The Gambia, cit.,* paragraph 11.
[82] See Supplementary Protocol A/SP.1/06/06 amending the Revised ECOWAS Treaty, concluded in Abuja on 14th June 2006, at Article 2, new Article 9 (3).

reinforcing the supranational nature of the Community, none of them wanted to endanger such renovated commitment.

5. A judicial path towards Community integration: the fascination of the ECJ

In drafting the institutional framework of their RECs, African, Caribbean and Latin American countries largely referred to the existing models of integration and could not resist the fascination of their emulation. With regard to RECs' judicial bodies, two main sources of inspiration were outstanding: the ECJ and the compulsory mechanism of dispute settlement of the World Trade Organisation. While the latter revealed useful for those regional communities willing to create free trade systems,[83] the ECJ model was appealing for at least three reasons: a preliminary ruling mechanism as a mean of enforcement of community law; a system allowing member States, community institutions and private litigants to contest the legality of community acts; and the existence of a supranational body entrusted to oversee State compliance with the court's judgments.[84]

As for the ECOWAS, the ECJ was a reference for its policymakers and for the Committee of Eminent Persons, seeking to reinforce the Community integration with the support of a solid judicial power, in line with the experience of the EEC.[85] However, despite the Protocol was drafted bearing in mind the ECJ model, two main reasons barred the ECCJ from being its net copy. The first one relates to the access to the Court. In the EU legal order, the individual access to the ECJ for actions for annulment and failure to act, as

[83] The judicial model of the World Trade Organisation has been adopted for the North American Free Trade Area, which has been created in 1992; for the Economic Community of the Commonwealth of Independent States, established in 1992; the Mercosur, as revised in 2002; and for the Association of Southeast Asian Nations Dispute Resolution Mechanism, created in 2004.
With regard to its main features and functioning, see J. G. MERRILS, *International dispute settlement*, Cambridge, 2017, pp. 205-234.

[84] See S. SMIS – S. KINGAH, *The Court of Justice of the European Union and Other Regional Courts*, in F. BAERT – T. SCARAMAGLI – F. SÖDERBAUM (eds.), *Intersecting Interregionalism*, London, 2014, p. 160 and M. MESSINA, *I modelli di integrazione economica in Europa ed in Africa: l'esperienza della UE e dell'ECOWAS a confronto*, in P. PENNETTA (ed.), *L'evoluzione di sistemi giurisdizionali regionali e influenze comunitarie: Salerno 1-2 ottobre 2009*, Bari, 2010, pp. 115-123.

[85] See, on the general contribution of international courts to the evolution of legal systems, J. SCOTT – S. STURM, *Courts as Catalysts: Rethinking the judicial role in new governance*, in *Columbia Journal of European Law*, 2007, volume 13, pp. 5-6.

regulated by Articles 263 and 265 of the Treaty on the Functioning of the EU (TFEU),[86] has been an important spur for integration.[87]

In the ECOWAS system, the access to the Court is governed by Article 10 of the Protocol. According to it, individuals have full access to the Court for cases of violation of human rights but, in the light of paragraph (c), they can institute proceeding for inaction of the Community institutions or for annulment of a Community act, only insofar as a *specific* right of the applicant has been breached.[88] When comparing the ECOWAS and the EU provisions, it is evident that the latter does not set such a strict requirement, but only refers to individual and direct *concern*. The meaning of the words "individual" and "direct" has been clarified by the ECJ, which maintained that an act individually affects a person when it is of a relevance exclusively for him[89] and directly regards an individual as long as the negative effects are a consequence of the adoption of the disputed act.[90] Interestingly, when required to evaluate to which extent a Community act or inaction could violate the individual rights pursuant to Article 10 (c) of the Supplementary Protocol, the ECOWAS Court referred to the ECJ and concluded that "an individual holder of such right, in the sense required by this provision, is the person whose interest is directly and immediately affected by the act or inaction that is being contested. This means that if the person is not directly or immediately affected by the act he/she seeks for annulment, such person cannot be accepted to submit a case under Article 10 (c) of the Protocol on the

[86] See Treaty on the Functioning of the European Union, concluded in Lisbon on 13th December 2007 and entered into force on 1st December 2009, Articles 263 and 265, former Articles 230 and 232 TEC.

[87] Several authors have recognised the importance of private access to the effectiveness of international courts. Among them, see O. KEOHANE – A. MORAVCSIK – A. SLAUGHTER, *Legalised disputes resolution: interstate and transnational*, in *International Organisations*, 2000, volume 54, pp. 472-476. With specific regard to the EU, see R. ADAM – A. TIZZANO, *Manuale di diritto dell'Unione Europea*, Torino, 2017, p. 295, where the Authors state that " è questa indubbiamente […] la conferma di quanto sia avanzata la risposta offerta da quel sistema [giurisdizionale dell'Unione europea] al problema della tutela giurisdizionale degli individui presso istanze internazionali".

[88] In this last regard, it shall be noticed that the English, French and Portuguese versions of Article 10 (c) of the Supplementary Protocol are inconsistent. While the English text refers to "act or inaction of a Community official", the French version writes "tout acte de la Communauté" and the Portuguese one "actos da Comunidade". However, in the landmark case of *Mrs. Oluwatosin Rinu Adewale v. Council of Ministers, ECOWAS, The President of the ECOWAS Commission, The President of the ECOWAS Community Court of Justice, and the Acting Director of Administration & Finance of the Community Court of Justic*e, the ECCJ interpreted Article 10 (c), recognising individual access to the Court pursuant to this paragraph, for "act or inaction of the Community or its official" (paragraph 45), thus merging together the three different wordings.

[89] See *Court of Justice of the European Economic Community, Plaumann & Co v. Commission of the European Economic Community*, Case No. 25/62, Judgment, 15 July 1963; and *European Court of Justice, Telefónica SA v European Commission*, Case No. C-274/12 P, Judgment, 19 December 2013.

[90] See *Court of Justice of the European Economic Community, Sniace SA v. Commission of the European Communities*, Case No. C-260/05 P, Judgment, 22 November 2007; and *Court of Justice of the European Economic Community, Spain v. Lenzing*, Case No. C-525/04 P, Judgment, 22 November 2007.

Court of Justice".[91] In this perspective, while the EU provision granted a much broader *locus standi* to individuals, which facilitated the economic integration process, the ECOWAS norms limited the contribution of individuals to the advancement of the Community goals, by not entitling them to widely contest the acts and inactions of the institutions.

As a matter of facts, the restricted individual access to the ECCJ not only accounts for a steady divergence from its reference model but has also impacted on the judicial interpretation of Community law. Lacking the chance for individuals to easily require the Court to evaluate the content of a Community act or a Community inaction, the ECCJ has missed the opportunity to shape the directions of the integration process and to favour a dialogue between the ECOWAS institutions and citizens, with the aim to accelerate the pace of integration.

With regard to the second element, although the Supplementary Protocol recognises, at new Article 10 (f) the possibility for domestic courts to refer any interpretative issue pertaining to the Treaty, Protocols or regulation to the ECCJ, the procedures to be followed are mostly obscure to all the involved actors.[92] On the contrary, EU Member States made large use of Article 267 TFEU[93] on preliminary rulings, which represents one of the keystones of the modern asset of the European legal order.[94] National courts, particularly lower domestic courts, always felt enthusiastic to share with the highest jurisdiction of the community their concerns related to the interpretation of the treaty and they did not perceive the judicial empowerment of the ECJ as being brought about at their expenses or as a limitation of their autonomy. In most of the cases, they took the chance to cooperate with the ECJ as a way to reaffirm their role in the integration process vis-à-vis the domestic executive branches.[95]

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[91] *Economic Community of West African States Court of Justice, Adewale v. Council of Ministers, ECOWAS, The President of the ECOWAS Commission, The President of the ECOWAS Community Court of Justice, and the Acting Director of Administration & Finance of the Community Court of Justic*e, Case No. ECW/CCJ/APP/11/10, Judgment, 16 May 2012, paragraph 45.

[92] See S. T. EBOBRAH, *The role of the ECOWAS Community Court of Justice in the integration of West Africa: Small strides in the wrong direction?,* in *iCourts Working Paper Series*, Copenhagen, No. 27/2015, p. 22.

[93] See Treaty on the Functioning of the European Union, Article 267 TFEU, former Article 177 TEEC.

[94] As known, the judicial protection of human rights in the EU first evolved through preliminary ruling judgments. See, in this regard, *Court of Justice of the European Economic Community, Erich Stauder v. Stadt Ulm-Sozialamt*, Case No. 26/69, Judgment, 12 November 1969; *Court of Justice of the European Economic Community, Internationale Handelsgesellschaft mbH contro Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case No. 11/70, Judgment, 17 December 1970 and *Court of Justice of the European Economic Community, Roland Rutili v. Ministre de l'intérieur*, Case No. 36/75, Judgment, 28 Ottobre 1975.

[95] See J. H. H. WEILER, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, in *Comparative Political Studies*, 1994, Volume 26, p. 523; T. TRIDIMAS, *The ECJ and National Courts: Dialogue, Cooperation and Instability*, in D. CHALMERS – A. ARNULL (eds.), *The Oxford Handbook of European Union Law*, Oxford, 2015, pp. 403-430; U.

In line with the identified trend of a limited dialogue with domestic courts, the ECCJ has not pushed too hard into the operationalisation of this part of its mandate and almost fifteen years after the renovation of the ECCJ competences, no request for preliminary ruling has been filed. A possible reason for the failure of the proper working of the preliminary ruling mechanism could be found in the limited maturity of the African democratic system.[96] The ECOWAS judges, in fact, tend to perceive the judiciary of Member States as arms of the governments, with limited authority and strong politicisation.[97]

In any case, even if the ECJ model has not found full compliance in the implementation of the ECCJ mandate, ECOWAS judges always looked, in terms of methods and solutions, at the European jurisprudence when delivering their judgments.

Apart from the mentioned *Afolabi* case,[98] in *Coordination Nationale des Délegués Départmentaux de la Filière Café Cacao (CNDD) v. République de Côte d'Ivoire*[99] the Court, clearly referring to the ECJ,[100] elaborated on the principle of the primacy of the ECOWAS law and applied a systematic interpretation[101] to the relevant Community provisions. Since the ECOWAS law is not explicitly given primacy on domestic legal orders[102], before the request of Ivory Coast to dismiss the case for lack of competence in solving the dispute, the ECCJ

JAREMBA, *The Role of National Courts in the Process of Legal Integration in the European Union: Retrospective and Prospective*, in F. A. N. J. GOUDAPPEL – E. M. H. HIRSCH BALLIN (eds.), *Democracy and Rule of Law in the European Union*, The Hague, 2016, pp. 49-62; and, for a statistical analysis, T. PAVONE – R. D. KELEMEN, *The evolving judicial politics of European integration: The European Court of Justice and National Courts revisited*, in *European Law Journal*, 2019, volume 25, pp. 1-22.

96 See S. T. EBOBRAH, *The role of the ECOWAS Community Court of Justice, op.cit.,* pp. 17-18.

97 See S.T. EBOBRAH, *The ECOWAS Community Court of Justice*, *op. cit.*, p.101 and K.J. ALTER – L. R. HELFER – J. R. MCALLISTER, *A new international human rights court, op.cit.*, p. 763. According to the authors, this has become evident in the aftermath of the mentioned controversial judgments against the Gambia and Nigeria. As the national judicial authorities of the countries did not reveal supportive in any of the stages of the proceedings, the judiciaries have been considered as too much reliant on the governmental power and unable to autonomously pursue justice. This conviction is also reflected in the way in which judges, particularly of the highest jurisdictions, are elected in some of the West African countries and the political interference which sometimes take place in their appointment.

98 See *supra.* In that case, the ECCJ overtly declared to adopt a different approach from the one taken by the ECJ.

99 See *Economic Community of West African States Court of Justice, Coordination Nationale des Délegués Départmentaux de la Filière Café Cacao (CNDD) v. République de Côte d'Ivoire,* Case No. ECW/CCJ/APP/02/09*,* Judgment*,* 17 December 2009.

100 See *Court of Justice of the European Economic Community, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case No. 26/62, Judgment, 5 February 1963; and *Court of Justice of the European Economic Community, Pubblico Ministero v Flavia Manghera and others*, Case No. 59/75, Judgment, 3 February 1976.

101 See C. CURTI GIALDINO, *Articolo 19*, in C. CURTI GIALDINO (a cura di), *Codice dell'Unione europea operativo. TUE e TFUE commentati articolo per articolo, con la Carta dei diritti fondamentali dell'Unione europea,* Napoli, 2012, p. 249.

102 However, Article 5 (3) of the Revised Treaty, stating that "Each Member State undertakes to honour its obligations under this Treaty and to abide by the decisions and regulation of the Community", could be interpreted in this sense. This is even clearer if it is read in conjunction with Article 9, as amended by Supplementary Protocol A/SP.1/06/06, reforming the legal regime of the Community.

maintained that "les États membres de la CEDEAO, en tant que parties contractantes du droit communautaire CEDEAO ou en tant que garants de la mise en oeuvre des droits humains reconnus dans le Traité Révisé de la CEDEAO sont débiteurs de ces droits et peuvent à ce titre être assignés devant l'Institution Judiciaire Principale de cette Communauté".[103] Through a systematic interpretation of article 5 (3) of the Revised Treaty,[104] the judges deduced the primacy of the ECOWAS law on the national law, from the very nature of the Community aims. When analysing the relevance of this judgment, one element shall be highlighted: whilst the principle of primacy of the EU law has been elaborated through judicial law-making, championed since the *Hamblet* case[105] and reinforced by the leading case *Costa/ENEL*[106] to be finally confirmed in Article 288 TFEU,[107] the *CNDD v. République de Côte d'Ivoire* did not produce the same ripple effect in the ECOWAS legal order.[108] In particular, such principle, as elaborated by the Court, has never explicitly become part of any ECOWAS legally binding instrument.

Another relevant occasion in which the ECCJ drew from the ECJ case law pertains to a 2008 dispute, where it was called to rule on the quality of an applicant contesting the legality of a regulation passed by the Council of Ministers of the Community. In *James c. Conseil des Ministres, Parlement de la CEDEAO et Commission de la CEDEAO*,[109] the ECCJ was called to provide a definition of "qualité à agir". To this extent, it repeatedly recalled the jurisprudence of the ECJ, aligning itself with the formula elaborated by the European Court in the *Plaumann* case.[110]

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103 *Coordination Nationale, cit.*, paragraph 48.

104 See Revised Treaty of the Economic Community of West African States, Article 5 (3), stating that "Each Member State undertakes to honour its obligations under this Treaty and to abide by the decisions and regulations of the Community".

105 See *Court of Justice of the European Economic Community, Jean Humblet v Kingdom of Belgium*, Case No. 6/60, Judgment, 16 December 1960.

106 See *Court of Justice of the European Economic Community, Flaminio Costa v. E.N.E.L.*, Case No. 6/64, Judgment, 15 July 1964.

107 See Treaty on the Functioning of the European Union, Article 288.

108 See P. J-B. BAKO, *L'influence de la jurisprudence de la CJUE sur l'interprétation juridictionnelle du droit communautaire ouest-africain (CEDEAO-UEMOA)*, in *Geneva Jean Monnet Working Papers*, No. 07/2016, p. 18.

109 See *Economic Community of West African States Court of Justice, James v. Conseil des Ministres, Parlement de la CEDEAO et Commission de la CEDEAO.,* Case No. ECW/CCJ/JUD/01/08, Judgment, 16th May 2008.

110 See *Court of Justice of the European Economic Community, Plaumann & Co, cit.,* in particular, "Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed." (p. 107).

If the reference of ECOWAS judges to the ECJ jurisprudence ought to be prized as an attempt to foster the stability of the Community legal system, the *ad litteram* replication of the ECJ formulas is not functional to the very development of the Community goals. Indeed, the EU and ECOWAS do not share overlapping aims and do not stick to the same legal background, so that decisions which are consistent with the EU legal order would hardly be *in toto* suitable for the ECOWAS system. In the same vein, the ECCJ judicial trend not to provide detailed arguments in support of its decisions when explicitly referring to the ECJ case law is questionable. The ECCJ, as a Community judicial organ, is called to provide its own legal argumentations while interpreting the Treaty provisions. If reference to other Court's jurisprudence is not *per se* an issue, the ECCJ should be careful not to lose its autonomy and to balance the need of relying on authoritative judicial sources with the necessity to avoid references of doubtful value.[111] In this regard, ECOWAS judges are at least called to make sure that the drawing of solutions from the ECJ does not result in a mere transposition of contents in different settings. They should, instead, allude to the European jurisprudence in such a way to promote the necessary adjustments to the Community legal order and to engage in the achievement of its goals.

6. The human rights mandate of the ECCJ: a diversion from effective integration?

Despite ECOWAS policymakers conceived the ECCJ as a driver of Community integration through its interpretation and enforcement of ECOWAS law, the perception that "human rights adjudication has become the most prominent aspect of the work of the ECCJ" has created the "impression that its primary role is to monitor compliance with the international human rights commitment of the Member States".[112]

The significance of the ECCJ contribution to the protection of human rights cannot certainly be underestimated since it is the result of the African countries' efforts to create a better and stable environment for the future economic development of the region. It is any longer a mere doctrinal intuition that the ECOWAS Court is slowly converting into a full human rights tribunal.[113] Data[114] reveal that in the last five

[111] See, P. J-B. BAKO*, op.cit.*, p. 30.
[112] S. T. EBOBRAH, *The role of the ECOWAS Community Court of Justice*, *op. cit.*, p.17.
[113] See, among the supporters of this transformation, E. S. NWAUCHE, *The ECOWAS Community Court of justice and the horizontal application of human rights*, in *African Human Rights Law Journal*, 2013, volume 13, p.41. For a different perspective, see L. POLI, *La Corte di giustizia dell'ECOWAS, op.cit.,* p.142.
[114] Statistics, from 2015 to 2019 (until August) have been elaborated by the Author, on the basis of the cases adjudicated by the Court and reported on its website. In particular, in 2015, 27 cases have been heard by the ECCJ and only one case (ECW/CCJ/APP/23/14), related to the failure of a Member State to comply with Community obligations, has not been framed as a human rights violation, but pursuant to Article 10 (a). In 2016, of the 25 cases adjudicated by the

years only one to two of the more than twenty cases yearly filed in the Court are not framed as human rights litigations and they do not refer to the interpretation of ECOWAS legal instruments, but are consent judgments to friendly settlement of disputes or decisions requiring States to comply with previous judgments. When in 2005 the Court was given extended mandate in the field of human rights, no one challenged that it stood as a "layering" of its commitments, i.e. the addiction of a new goal or priority to the existing ones, rather than a conversion or a total redeployment. Yet, as the Court has mostly set itself up as a gear of the regional mechanism of human rights protection, it is not unrealistic to conclude that the human rights mandate has partially supplanted the original ones and that " a major point of concern in the current functioning of the ECCJ is its conceptualisation of its human rights mandate as a general rather than a functional human rights mandate".[115] In other terms, contrary to the ECJ practice, the ECCJ has so far been unable to frame human rights cases filed pursuant to Article 9 (4) in such a way to interpret the ECOWAS law and, as a consequence, facilitate the realisation of Community goals. Actually, the ECCJ had a number of chances in this regard. For instance, the *Falana v. Republic of Benin*,[116] a dispute concerning the restriction of freedom of movement in the region, was framed as a violation of the ACHPR, but the Court did not refer to the Community Protocol on free movement of persons, residence and establishment when delivering its decision.

One possible explanation why the ECCJ is currently preferring to act as a human rights tribunal rather than as a Community court, could be found in the unclear ECOWAS competences, resulting in the impossibility to apparently identify the boundaries of its human rights mandate.[117] For example, when in 1970s the ECJ focused on human rights issues, its practice showed that, despite subsequent enlargement of its scrutiny,[118]

Court, two did not concern human rights (ECW/CCJ/APP/04/16 and ECW/CCJ/APP/37/15). In particular, in one dispute, although framed as a violation of human rights, the Court did not exercise its jurisdiction because of the death of the Applicant, in the other liability issues were at stake. In 2017, the ECCJ heard 14 cases. Only one decision (ECW/CCJ/APP/ 06/12) was a consent judgment. As for 2018, on a total number of 24 cases, two (ECW/CCJ/APP/22/16 ECW/CCJ/APP/37/15/ REV) were not filed in accordance with Article 9 (4) of the Protocol: one was dismissed for lack of *locus standi* and the other regarded the request to review a previously delivered decision. For the period from 2003 to 2015, see the statistics reported in S. T. EBOBRAH, *The ECOWAS Community Court, op.cit.*, pp. 94-98.

[115] S. T. EBOBRAH, *The role of the ECOWAS Community Court of Justice*, *op. cit.*, p.26.

[116] See *Economic Community of West African States Court of Justice, Falana v. Republic of Benin,* Case No. ECW/CCJ/APP/TD/07*,* Judgment*,* 24 January 2012.

[117] See S. T. EBROBAH, *Critical issues, op.cit.*, p. 12.

[118] See J. KINGSTON, *Human rights and the European Union – An evolving system*, in M.C. LUCEY – C. KEVILLE (eds.), *Irish Perspectives on EC Law*, Dublin, 2003, pp. 271-275.

its human rights jurisdiction was limited to the fields in which the EU law applied.[119] In this way, the adjudication of human rights disputes did not stand alone but represented a chance for the Court to interpret the relevant EU legislation and to proceed with legitimacy in the direction of new arrangements.[120] On the contrary, lacking a clear identification of the boundaries of Community and State competences, the ECCJ human rights mandate provided by the Supplementary Protocol has been framed without any link to the ECOWAS law. This obviously resulted in the incapacity of the ECCJ to play the same role of the ECJ, which succeeded in "transform[ing] the Rome Treaty into a *de facto* constitution for the EU".[121]

In spite of the ECJ, which in a long time span developed the doctrine of direct effect (1960s), granted the protection of human rights (1970s),[122] realised the deepening of the rule of law (1980s) and fostered institutional balance (1990s),[123] up to now the ECCJ has mainly committed to the creation of a stable and

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On the evolution of the protection of human rights in the context of the EU, see among the others P. ALSTON, *E.U. and Human Rights*, Oxford, 1999; O. DE SCHUTTER, *Fundamental Rights in the European Union*, Oxford, 2013; S. DOUGLAS-SCOTT, The European Union and Human Rights after the Treaty of Lisbon, in *Human Rights Law Review*, 2011, volume 11, p. 645; F. SEATZU, *La tutela dei diritti fondamentali nel nuovo Trattato di Lisbona*, in *La Comunità internazionale*, 2009, volume 64, p.43; L.S. ROSSI, *Diritti fondamentali, primato e autonomia: il bilanciamento fra i principi "costituzionali" dell'Unione europea*, in L. A. SICILIANOS – I. A. MOTOC – R. SPANO – R. CHENAL (eds.) *Regards croisés sur la protection nationale et internationale des droits de l'homme - Liber Amicorum Guido Raimondi*, Oisterwijk, 2019, 775-798.

For the judicial perspective, see also *supra note* 94.

[119] See J. HOLMES, *Human rights protection in European Community Law: The problem of standards*, in J. FERRER BELTRAN – M. NARVAEZ MORA (eds.), *Law, Politics and Morality: European Perspectives*, Berlin, 2016; and A. TIZZANO, *The role of the ECJ in the protection of fundamental rights*, in A. ARNULL – P. EECKHOUT – T. TRIDIMAS (eds.), *Continuity and Change in EU Law*, Oxford, 2008, in which the author maintains that " it is safe to say that the protection of fundamental rights is one of the fields of law where the intervention of the European Court of Justice has been most remarkable and far-reaching" and "As is well known, the three founding Treaties made no provision for the protection of human rights as such. The reason lies probably in the fact that, at the time of their adoption, the economic integration undertaken by the six founding members of the Communities appeared a matter completely unrelated to that of fundamental rights. Such a reference might also have been considered unnecessary where all Member States had, a few years earlier, signed another pan-European instrument which specifically addressed the protection of fundamental rights: the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in 1950" (pp.125-126).

[120] See S.T. EBOBRAH, *Critical issues, op.cit.,* p.12.

[121] K. J. ALTER – L. R. HELFER*, Nature or nurture? Judicial law making in the European Court of Justice and the Andean Tribunal of Justice*, in *International Organization*, 2010, volume 64, p. 564.

[122] See G. DE BÚRCA, *The Road not Taken: The European Union as a Global Human Rights Actor*, in *American Journal of International Law*, 2011, volume 105, pp. 649-693. See also*, European Court of Justice, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 2/94, Opinion, 28 March 1996, at paragraph 33, where the ECJ maintains that "It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures".

[123] See J. BOULOUIS, *Á propos de la fonction normative de la jurisprudence. Remarques sur l'oeuvre jurisprudentielle de la Cour de Justice*, in M. WALINE (ed.), *Mélanges offerts à Marcel Waline, Le Juge et le droit public*, Paris, 1974, pp. 149-162.

conflict free environment as a precondition for economic integration, indeed with twofold results. On the one hand, the recent political crises having taken place in the ECOWAS countries could suggest that no improvement has been made in this direction.[124] On the other hand, it is undoubtable that the authority of the Court as a human rights tribunal is slowly increasing.[125] In the recalled *Ugokwe* case, for instance, Nigerian officials complied with the provisional measures issued by the ECCJ, despite they touched upon the delicate topic of Nigerian elections. In the same way, notwithstanding the controversial outcome of the *Ebrimah* and *Saidykhan* cases against the Gambia, the country passed from its common habit of non-participation to the hearings to active involvement in proceedings before the ECCJ.[126]

In the light of the recent developments, as it seems that the more ECOWAS follows the path of human rights litigation, the more it is departing from the role policymakers identified for it, the Court should carefully avoid its *de facto* transformation into a full human rights court. Having to comply with a very uneasy task, i.e. balancing its forecasted role in the ECOWAS institutional architecture with the need not to unduly reduce the sovereignty of its Member States through its jurisprudence, the only recent foundation of the ECCJ is still a selling point in rethinking and reinforcing its contribution to the Community integration. In particular, the Court is called to avoid its "killing",[127] as experienced by the Southern Africa Development Community Tribunal in the aftermath of the *Campbell* judgment.[128] In any case, while the latter has developed a human rights competence on an uncertain legal basis and without the consent of the States, the ECCJ jurisdiction in the field is tightly anchored in the Supplementary Protocol and it is exercised in accordance with the attributed mandate.[129]

[124] See, for instance, the First and the Second Civil War in the Ivory Coast (from 2002 to 2007 and from 2010 to 2011), the Mali Civil War (since 2012), the Constitutional crisis in Gambia (since 2017) and the Civil War in Guinea (in 2008).
[125] The Federal Republic of Nigeria has also appointed the Competent National Authority Responsible for Implementing Decisions of the Court, as a specific body entrusted to grant the implementation of the ECCJ judgments.
[126] See S. T. EBOBRAH, *The ECOWAS Community Court of Justice, op.cit.,* p. 92.
[127] K. ALTER – J. T. GATHII – L. R. HELFER, *Backlash against International Courts*, *op.cit.*, p. 114.
[128] See *Southern Africa Development Community, Campbell and Another v. Republic of Zimbabwe,* Case No. SADC (T) 03/2009, Judgment, 5 June 2009.
[129] See, with regard to the SADC Tribunal, G. J. NALDI – K. D. MAGLIVERAS, *The New SADC Tribunal: Or the Emasculation of an International Tribunal*, in *Netherlands International Law Review*, 2016, volume 63, pp. 133-159; B. CHIGARA, *What should a Re-constituted Southern African Development Community (SADC) Tribunal Be Mindful of to Succeed?*, in *Nordic Journal of International Law*, 2012, volume 81, 2012, pp. 341-377; F. COWELL, *The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction*, in *Human Rights Law Review*, 2013, volume 13; and T. REINOLD, *When is more more? The proliferation of international courts and their impact on the rule of law in Africa*, in *The International Journal of Human Rights*, 2019, volume 23, pp. 1345-1346.

7. Conclusion

Despite the ambiguity of the results achieved so far, the ECCJ has certainly managed to become a reference for the whole African continent. Compared to other sub-regional courts, in fact, its experience has been different on several grounds. To start with, contrary to the East African Community Court and the SADC Tribunal,[130] ECOWAS judges had not to ascertain their competence to hear cases of violations of human rights. This resulted in the speeding up of the exercise of jurisdiction and in the quick delivery of merit judgments of a legally binding nature.[131] In this regard, the mechanism of human rights protection has revealed so efficient and close to West African peoples, that ECOWAS citizens mostly prefer to file a case in the ECCJ rather than using the tools provided by the ACHPR[132].

Moreover, the human rights mandate of the ECOWAS Court enjoys the support of Community institutions, particularly the Commission, which despite not having really engaged in ensuring compliance of Member States with the Court's decisions,[133] "redirect[s] opposition to the Court in ways that address member states' concerns without compromising the judges' independence".[134]

With the mentioned features, it "appears that the more ECOWAS progresses towards acquiring the character of a human rights institution, the more it opens space for contradictions between its original goals and its emerging character".[135] The absence of a consistent case law as a Community Court does not mean in any

[130] See, for an overview on the posture of sub-regional tribunals towards human rights litigation, G. PASCALE, *An Optimistic Perspective on the Proliferation of Human Rights Monitoring Bodies*, *op.cit.,* pp. 145-171. The SADC Tribunal, as already highlighted, was not given competence to decide cases concerning human rights violation through a provision of the funding treaty of the Community. It acquired such competence via interpretation of the preamble and Article 4 (c) and 6 (2) of the 1992 SADC Treaty and, thus, contrary to the will of some Members of the Community. As for the EAC Court, its human rights competence originated through judicial initiative. Article 27 (2) of the funding instrument forecasted the conclusion of a Protocol attributing such jurisdiction, but its negotiations encountered many obstacles. While it has not been adopted yet, the EAC Court never stopped to deal with human rights disputes.

[131] As mentioned, the competence to hear human rights cases was attributed to the Court through the Supplementary Protocol. Since then, the preliminary objections on its jurisdiction do not occupy much of the arguments of the parties and of the Court, which in most of the cases directly deals with the merits of the filed suit.

[132] Data can be easily drawn by comparing the number of cases filed in the ECCJ, as shown in the provided statistics (see supra and S. T. EBOBRAH, *The ECOWAS Community Court of Justice, op. cit.*, p. 95), and the communications filed in the African Commission on Human and People's Rights, available on the Commission's website at https://www.achpr.org/statistics. Interestingly, only in Nigeria and the Gambia the number of communications to the ACHPR is closer to the cases filed in the ECCJ. The general trend can be justified on different grounds, including the different approach to the previous exhaustion of local remedies. See also S. T. EBOBRAH, *Human rights development in sub-regional courts in Africa during 2008*, in *African Human Rights Law Journal*, 2009, p. 334-335.

[133] See S. T. EBOBRAH, *The ECOWAS Community Court of Justice, op. cit.*, p. 100.

[134] K. J. ALTER – L. R. HELFER – J. R. MCALLISTER, *A new international human rights court for West Africa, op.cit.*, p.777.

[135] S. T. EBOBRAH, *Critical issues, op. cit.*, p. 25.

way that Member States have abandoned cooperation in the area of economic integration. This is also confirmed by the adoption of the so-called Vision 2020 by the ECOWAS Conference of Heads of States and Government in 2007.[136] Aimed at transforming the "ECOWAS of States" in the "ECOWAS of Peoples", it nonetheless shows that only a limited progress has been made from 1993, as most of the Vision 2020 goals still resemble the aims of the Community as enumerated in the Revised Treaty. Particularly, while good results have been achieved in the field of freedom of movements of peoples, the same is not true for the movements of goods, the facilitation of investments and the monetary union.[137] In any case, these faint achievements have not been propelled by the ECCJ, which has mostly remained silent in the field of Community law.[138]

With this background in mind, the hiatus between expanded mandate in human rights and the attitude not to adjudicate on ECOWAS law is at risk of becoming unbridgeable. The decision of ECCJ judges in *Afolabi* to dismiss the case and wait for a legislative-driven mandate for human rights litigation is resulting in a deeper and deeper demarcation of the Court's competences. Contrary to the experience of the ECJ, which was able to extend its mandate to oversee the respect of human rights in a way functional to the guarantee of the economic freedoms, the ECCJ is accentuating the discontinuity among its competences as a Community and human rights tribunal.

With most of the adjudicated cases relating to the protection of human rights, resisting the temptation to definitely convert into a human rights tribunal and proposing a more proactive stance towards the interpretation of the ECOWAS law will reveal fundamental for the fruitful achievement of the desired economic and political integration, which still is the priority of the enlarged and more comprehensive West African agenda.

[136] See ECOWAS Vision 2020, adopted by the Authority of Heads of States and Government on June 2007, available at http://araa.org/sites/default/files/media/ECOWAS-VISION-2020_0.pdf.
[137] See K. B. ASANTE, *Economic Community of West African States*, in J. KRIEGER (ed.), *The Oxford Companion to Politics of the World*, Oxford, 2001, p. 233.
[138] See A. O. ENABULELE, *Sailing against the tide, op.cit.*, p. 287.