AN ANALYSIS OF THE LEGAL FRAMEWORK FOR THE ESTABLISHMENT OF ECOWAS COURT OF JUSTICE

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CERTIFICATION

This is to certify that this work was carried out by ARUABUIKE, Nath Ogbu in the Department of Jurisprudence and International Law.

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DEDICATION

This work is dedicated to God Almighty for his love and mercies. To my wife Mrs. N.P. Aruabuike for her love and Support. To my late Father Aruabuike Ndukwe whose great past is my present might and future right, and to all sons and daughters of Okoko Item, living, dead and yet unborn.

DECLARATION

I declare that this is an original work carried out by N. O. Aruabuike in the Department of Jurisprudence and International Law.

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ABSTRACT

The Economic Community of West African State (ECOWAS) is a confederation of 15 states, that chose to come together to forge a relationship that is geographically expressive, but economic, political and social development driven. ECOWAS was created in 1975 to replace the Customs Union of Western African States originally created in 1959 to redistribute customs duties collected by the coastal areas of Western Africa. The ECOWAS Court of Justice was established as the machinery that will regulate the conduct of the different states that have come together to forge a relationship. This will aid in regulating the conduct of states, especially as there are different legal systems, currencies, cultures and languages. This court became necessary as conflicts resulting in this relationship, cannot be settled by the court of individual states, hence the need for the court of the community. The aim and objectives of the thesis is to analyze the factors influencing the effectiveness of the ECOWAS Court, it's organs and relationship to one another, and also focusing on the Court of Justice as an organ in the integration process. In dealing with the task of this thesis, doctrinal research methods is applied. Doctrinally, the study utilizes primary sources like statutes, treaties, protocols and pacts, as well as secondary sources, mostly seminar and conference materials, journals of the community and law journals. After gathering of information, the following are observed; that provisions made for training of court officials are inadequate; It is further observed that the refusal of a member state to apply the decision of the court is a failure to fulfill its obligations which may attract sanctions. It is also observed that with regard to access to the court by applicants other than member states and the chief executive of the ECOWAS Court, access is also available to individuals and corporate bodies by articles 9 and 10 of the protocol. Based on the observations above, the study recommends that for the ECOWAS Court to be able to contribute its own quota in dealing with the long term goals, substantial attention should continue to be focused on creating an appeal court where litigants who are not satisfied with the judgment of the ECOWAS Court can further ventilate their grievances. This study has contributed to knowledge by creating greater awareness of ECOWAS Court of Justice through effective legislation.

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LIST OF ABBREVIATIONS

E.C.J	-	ECOWAS Court of Justice
E.C.H.R	-	European Court of Human Rights
I.C.J	-	International Court of Justice
I.C.C	-	International Criminal Court
I.C.T.R	-	International Criminal Tribunal for Rwanda
I.T.L.O.S	-	International Tribunal for the Law of the Sea
I.C.T.Y	-	International Criminal Tribunal for Yugastavia
E.C.C.J	-	ECOWAS Community Court of Justice
E.U.	-	European Union
N.W.L.R	-	Nigeria Weekly Law Reports
D.E.L.S.U.	-	Delta State University
U.D.H.R	-	Universal Declaration of Human Rights
N.E.P.A.D	-	New Partnership for African's Development
W.T.O	-	World Trade Organization
E.T.L	-	ECOWAS Trade Liberalization
E.P.A	-	Economic Partnership Agreement
A.U.E.S.C	-	African Union Economic and Social Council
W.H.O	-	World Health Organization
C.C.J.L.R	-	Community Court Judgment Law Reports

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

In October 1999, the Economic Community of West African States (ECOWAS) decided to establish a court of justice following a two-day meeting of justice ministers in Abuja. The court shall address issues from member states and institutions of ECOWAS, as well as issues relating to defaulting nations. The Economic Community of West African State is a loose con-federation of 15 Nation States, who chose to come together to forge a relationship, that is geographically expressive, but economic, political and public development driven. ECOWAS was created in 1975 to replace the Customs Union of West African State governments originally created in 1959 to redistribute custom duties collected by the coastal states of Western Africa.[1] The treaty of the Economic Community of African State was revised at the Cotonou summit of July 1993 at which time the existent tribunal originally envisioned, was replaced with a Community Court of Justice.

The revision of the treaty (including the addition of the Court of Justice) was intended to help the organization meet its goal of an Economic Union, and also enable members settle their disputes. The modified treaty entered into force in 1995, while the judges of the Community Court of Justice were appointed only in January 30, 2001.

However, the Court got one stringent limitation on the impact it could have in the Community- a narrow field of access. Only the Authority of Heads of State and government (the executive of the community comprised of all the Member States) and the member states acting separately were permitted to initiate contentious cases in the Court. The power to request advisory opinions on the Treaty was limited to the Authority, the Council of Ministers, Member States, the Executive Secretary and other organizations of the community.

[1] ECOWAS Treaty of 25/5/1975.

The effect of this limited access to the Court was that until 2003, the court was idle.

In 2004, in a landmark case of *Olajide Afolabi .v. Federal Republic of Nigeria*[2], filed by an individual businessman against the government of Nigeria for a violation of community law in the closing of the border with Republic of Benin, the court held that under the Protocol[3], only member state could institute cases. The court's ruling sparked off a discussion, headed by the judges themselves, over the need to amend the protocol to allow for legal and natural individuals to have standing before the court.[4]

In January 2005, the community adopted the Additional Protocol[5] to permit individuals to bring suits against member states. Beyond this monumental change, the Council of Ministers took the opportunity to revise the jurisdiction of the court to include review of violations of human being rights in all member states.

The need for this Community Court cannot be over emphasized, because as different states have come together to forge a relationship, there will be need to have the machinery that will regulate their conduct, especially as there are different legal systems, currencies, culture and languages etc. There is bound to be conflicts resulting from this relationship, which cannot be settled by the Court of individual states, hence the need for the Court of the Community. According to Omorogbo:

> Conflict problems are inevitable… Disputes that might arise are better settled by a Community Court rather than by domestic Court.[6]

The revised ECOWAS Treaty of 1993, has provided a concrete foundation on which the ECOWAS Court is built, away from the position in the 1975 treaty, art. 56 provides thus:

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[2] Case no ECW/CCJ/04 p72 Para 62.
[3] Supplementary Protocol A/P. 1st July 1991.
[4] Banjo, A. "*The ECOWAS Court and the Politics of Access to Justice in West Africa"* Africa Development, Vol. xxxll, No 12007, 69.
[5] Supplementary Protocol A/SP/01/05.
[6] Omorogbo, Y. *The Legal Framework for Economic Integration in the ECOWAS Region*: An Analysis of the Trade Liberalization Scheme 5 RADIC 1993 p. 365.

> Any dispute that may arise among the member state governments regarding the interpretation or application of the treaty shall be amicably settled by direct agreement.
>
> In the event of failure to settle such dispute, the matter may be referred to the tribunal of the community by a party to such disputes and the decision of the tribunal will be final.

Also Art 4 of the 1975 treaty did provide for *"... the tribunal of the Community ..."* as one of the institutions of the ECOWAS.

However, the ECOWAS Community Court as is being examined in this work, is created by Article 6 and 15 of the revised treaty of 1993, and rooted by Protocol of 1st July 1991, Completed by the supplementary protocol A/Sp. 1st January 2005. The court itself was put in place at the 24th session of the ECOWAS Authority of Heads of state and Government, which held at Bamako, Mali from the 15th through the 16th of December 2000. Art 6 of the treaty places the Court at (No 5), on the list of establishments of the community.

The provisions of the Protocol and supplementary Protocol are in pursuance of the basic aims of the founding fathers of ECOWAS, targeted at providing the proper framework for the creation of an international court, to which countries may submit their disputes. Though the Court did not take off immediately (as it only did so from 2001), it has had many years of looking at what the international court of justice, the African Court of Justice, the Western European Court of individual rights, and various other courts of a global or inter regional grouping have to function with.

The dialectics of international politics, i.e, of giving up sovereignty and keeping it at the same time, the jurisprudential problems of the efficiency of laws, the place of the court in the juridical hierarchy of states, the jurisdictional problems of geography, will

increasingly become matters that the terse wordings of the treaty may not treat completely.[7]

1.2 Statement of the Problem

It would appear that following the establishment of the ECOWAS Court of Justice, there has arisen subtle but effective agitation for the widening of the scope of the jurisdiction of the court over the issues it can deal with and the issue of locus standi before it. Effectively, the adoption of the Supplementary Protocol (Article 33 of protocol A/p. 1st July 1991 (Community Court of Justice Amendment Protocol) and the subsequent coming into force by 1st January 2005 has set down the new covenant and aspirations on the work of the ECOWAS Court by realigning and expanding it's Jurisdiction geographically, demographically and juridically.[8]

The new form is a reaction to the unwholesome and long held perception of the ECOWAS institution over the past years of its creation, as a body that lacks effective mechanism for implementing a vital part of the integration process "Court for the Community.[9] As has been pointed out earlier[10], in spite of the provisions calling for the community Court in the 25th May 1975 treaty as well as art. 6 and 15 in the modified treaty of 1993, it was not until the conference of the 24th session of the ECOWAS authority of heads of state and government, which was held at Bamako in Mali from the 15th to 16 Dec 2000 that the court was actually set up.

Since then, situations have shown up in the Court of ECOWAS which have illustrated the overall nature of the integration process while highlighting both the achievements and its under achievements, especially regarding its avowed objectives. Whilst it is a welcome development, the locus granted to individuals and even corporate and business bodies, the locus granted to state courts to seek referral and interpretation, the locus

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[7] Kunig P., *Regional Protection of Human Rights by International law, the Emerging African system*, Beaden Baden: Nomos verlagsgesellschaft,1985 p. 121.
[8] Supplementary Protocol (Art 33 of Protocol A/P. 1st July 1991 Community Court of Justice Amendment Protocol) and the subsequent coming into force of A/sp. 1st January 2005.
[9] Ibid.
[10] Gasiokwu, M.O.U, *International Law and Diplomacy* (Selected essays) Enugu, Changlo Ltd 2004) p. 249

granted to persons, or firms who enter into an agreement opting for ECOWAS Court as its court of choice, runs counter to so many founded cannons of law, as well as a lot of practical complications. The assumption of the function of the arbitration tribunal under Article 16(1) of the Revised Treaty 1993, pending the establishment of the said tribunal poses a departure from the basis of the creation of the tribunal as a complementary out fit, not a co-terminous one.

The procedure for referrals, enforcement of judgments or directives, especially ones that are described by the treaty and protocol as binding, posses a lot of cross country problems, as well as a huge impact on the delivery and administration of justice. The growing legal frontiers that is created therein, will task the minds of litigants and jurists within the ECOWAS Countries, more so Nigeria, where the court is located, and majority of the cases arising on the ECJ, have originated from or in connection with.

The court rules which have been made in pursuance to the protocol, also raises a few issues in the administration of justice. For example to modern provision of instituting action by faxes or through e-mail, corresponding with a provision that once an action is instituted, the Courts take judicial notice of its processes.

The operations of the court also exposes the logistical problems of ECOWAS, in relation to novel provisions of moving the location of the court to respond to the needs of local litigants.

Specific questions that immediately arise are:

a. How can a person, institution, or authorities be seised of this jurisdictions?

b. What are the legal and institutional framework for the effective operation of the court?

c. Are these provisions adequate?

d. What enforcement techniques are there, for implementing the decisions of the Court?

e. How do these enforcement methods enhance the court's performance in the dispensation of justice and in the implementation of the goals of ECOWAS.

These problems and many more need evaluation and preferment of suitable working mechanism.

1.3 Aim and Objectives

This study is aimed at analyzing the factors affecting the effectiveness of the court (ECOWAS), its organs and relationship to one another, then focusing on the court of justice as an organ in the integration process. It then examines the contents of the various legal provisions that make the framework efficacious in the pursuit of justice, equity and fair play.

1.4 Specific Objectives

The specific objectives are as follows;

a. To determine the essential provisions of the treaty, protocols- the instruments that the concept, practice and procedure of the ECOWAS Court of Justice is hinged upon.

b. To evaluate the position of the Court of Justice in the league of international regulation and in the hierarchy of courts of its nature and juxtapose it alongside the workings of the laws and regulations of related home courts.

c. Identify lacunae found in the selected laws and proffer suggestions for filling the gaps.

d. To put in context, the many issues of states, the ECOWAS citizens and their rights, under the expanding scope of the powers of the ECOWAS Court vis a vis its threatening look on local courts.

e. provoke further research in this area of law.

1.5 Research Method

The study adopts doctrinal approach to the issues raised. Doctrinally the study utilizes primary sources like statutes, treaties, protocols and pacts, as well as secondary sources of mostly, seminar and conferencing materials, journals of the community and law publications. An overview of the rudiments of international laws as it generally affects integration organizations similar to the ECOWAS, practice and conventions existing for the establishment of similar courts as well as their enabling statutes was carried out. Following this, modern state and community practice in Europe and in the Latin Americas, the Southern Africa areas, is examined and weighed along with the workings of modern political organs and emergent integrative units of the type of ECOWAS Court.

Reports of the cases currently being handled, in the ECOWAS parliament alongside the views of attorneys for some of the community states, have been sought and evaluated alongside the views of practitioners, the views of the heads of the administrative units as well as those who are conversant with the new role the court is to play. Also oral interviews are conducted as a way of conditioning and complementing the library structured research.

1.6 Literature Review

As would be expected, a lot has not been written on the subject of the ECOWAS Court. However the examination of issues which are the subject matter of the areas for study in this work reveal a lot of general but applicable literature. The ideas of community Court have been canvassed into living, and in areas where they exist, have become subject of criticisms and reviews. The views of learned authors as to the concept of jurisdiction as relevant to community courts and subject of rights as attributable generally and particularly to nation state. The modus of access by European citizens to the European

court of Justice has been also severally written upon. Many of these studies show that the maxim *"Ubi jus, ubi remedium"* lie at the bottom of the establishment of courts.

With the basic principle of *"Uti possidetis"* holding African countries to their colonial borders, and the realization that the international community does not intend to change its mind, cooperation for survival is the only option. Learned authors have therefore tried to enquire and profess positions on what and how the ensuring treaties and conventions ought to be treated with regard to their workings and acceptance in international law. This has given rise to the monists-who assert that municipal law are an integral part of a universal legal order which international Laws is also a part of, because the ability of a state to exercise any capacity, derives from the idea of law. As a result, municipal law and international law are part and parcel of one system of law generally.

However, Kunz in his book, the changing laws of Nations[11], believes that international law and Municipal law are different systems; this is so because there is a difference in the content and scope of the laws. The first is the difference in source, since for instance, Municipal laws are derived from customs and practices developed within fixed boundaries of the state, along with statutes from its legislature, whereas international laws comes up out of traditions and agreements. Furthermore as the subject of state law are individuals and companies within a state, the subjects of international law are solely the state and international organizations.

Thirdly, whereas the municipal law is law of the sovereign state to its subject, the problem of international law, does not mean that the issuing authority is imposing law from a position superior to the state. Although Kunz's work addresses the problem of the position of Municipal rule in international law and vice versa, it did not give the philosophical basis behind the lifestyle of trans-national Courts, this is the lacuna this work intends to fill.

[11] Kunz J.L *The Changing Laws Of Nations*, (Ohio: Ohio University press,) (1968) p.123

Given these positions, *Gasiokwu,*[12] posits that a third theory which holds more appeal in present day reality is the Harmonization theory. By this theory, neither the monist nor the dualists are accepted as conclusive theories, as the logical consequence of the theories do not agree with the manner of functions of international and municipal courts and organs. He posits that the starting point of legal order is man himself, with regards to his fellow man. That man falls within the jurisdiction of the international and municipal legal systems and therefore international law and municipal legislation should be seen as concordant body of doctrines, each autonomous in the way it is directed at a specific and in some ways exclusive part of human conduct, but all are harmonious in their total aim of human good. *Gasiokwu* has also attempted to address the problems associated with ECOWAS and its protocols but did not examine the ECOWAS Court of Justice as an organ of the community.

The issue of the way the treaties between nations is treated is very germane to the workings of any organization whose creation is with a partial surrender of sovereignty and consequent acceptance by the domestic authority setting up the contracting government. Whenever there is a conflict between the provision of the treaty and the local law, the issue of primacy would become relevant, according to *Brownlie.*[13]

> Antipathetic to the legal corollaries of the existence of sovereign states and reduces municipal law to the state of pensioner of international law.[14]

He further contends a system where a nation's laws play a secondary role to international law cannot be said to be consistent with the status of statehood.

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[12] Gasiokwu, M.O.U, *International Law and Diplomacy* (Selected essays) (Enugu, Chenglo Ltd, 2004)
[13] Brownlie, I, *Principles of International* Law (3rd ed.) (Oxford: Daredon Press, 1979) p. 34
[14] Brownlie supra p. 84.

The concept of sovereignty which *Brownlie* based his argument is, according to *Kelsen,* necessary juridical conception, necessary as the expression of the unity of a legal system. Sovereignty can therefore only be supreme and exclusive, an attribute of the highest legal order of international law cannot be said to be consistent with the status of statehood.[15]

However Starke argues that the transformation is the theory where the laws as made by international bodies ought to be given acceptance through a local enactment to bring it into use in the locality, and validates the extension to individuals. This position probably explains the requirement in the constitutions of several African and West African Countries e.g S. 12(1)[16] of the 1999 Constitution, of the Federal Republic of Nigeria which calls for the legislation of international agreements into Nigeria law by its legislature to take it into being. Treaty is common term to include accords, pacts, agreements, charters, conventions, covenants, protocols, statutes as contained in Art. 2 of the Vienna convention on laws of treaties and as explained by Meyers in "The titles and scope of treaties"[17] The organization created by treaty, such as ECOWAS has acquired the capacity and power of their own. Hence the problem of incorporating them into municipal law before they have effect on the individuals within the municipal establishing. These organizations now have a personality of their own, as seen in the Reparation for Accidental Injuries Case.[18]

Once countries get together for the purpose of setting up an organization, for the purpose of Economic, social and political integration, it is expected that you will see either war or peace. *Njemanze*[19], in his publication *"The legal battle between Cameroun and Nigeria over Bakassi Peninsula"*. State whether we have battle or peace, there has to be a Cause. To prevent war, we need to find a way to stop it-to cause it to stop. To have

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[15] "No Treaty between Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. See section 12(1) 1999 Nigeria Constitution.
[16] American Journal of International Law (1987)pp. 574-605.
[17] ICJ reports 1949, pg. 174.
[18] Njemanze B.A *The Legal Battle between Cameroon and Nigeria over the Bakassi peninsula Published by Onii P.H. Owerri: (2003) p.7.*
[19] Weis, P., *Nationality and Statelessness in International Law* (London: 1979) p.60.

peacefulness, we have to find the way that will cause tranquility. "He goes on at pg. 172 to convey the substance of justice is to ensure peace as justice is". The upholding of rights and the abuse of wrongs by the law.

The literature in the field of the term citizenship in particular are multifarious and diverse. Different specialists attempted to define the word using their own perspectives in this regard, a leading scholar in the area, Weis, defines the term as:

> Specific relationship between a national and state of nationality conferring mutual rights and duties on both.[20]

Weis, need to be reminded that the condition may offer safety to its people both at home and abroad but there has never been any compulsion to do so.

The researcher is of the view that Weis definition is thus an artificial building designed to masquerade the class essence of bourgeois citizenship.

Oppenheim, has also dealt with the term and in distinguishing between these terms, tried to assign content to citizenship.

According to him:

> The term citizen is as a rule employed to designate person endowed with full political and personal rights within the United States, while some persons, such as are on possessions which are not among states forming the union are described as nationals.[21]

Nationals, in the light of the statement above, are individuals inhabiting territory and possessions that do not constitute area of the union of the states one is actually at a loss understanding the relationship between the United States, and these territories and possessions including people on them. If the territories do not form part of the union, but are mere belongings of the union, then it is possible to contemplate a colonial situation.

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[20] Oppenheim, *International Law*: A Treatise 1995 Vol. 642-645.
[21] Nylander, A.V.J *The Nationality and Citizenship Laws of Nigeria* (Lagos: University of Lagos Press, 1973), p.1

In that context, it can be suggested that persons on colonized territories are nationals of the metropolis. *Nylander*, on his part viewed the terms differently.

According to him:

> The concepts of nationality and citizenship connote different aspects of the same relationship of a state. Nationality deals with the international aspect and citizenship with the municipal. Nationality acquired however developed within Municipal legislation rather than international law. Matters of nationality are in principle remaining within the home jurisdiction of state governments. Nationality thus possesses both a municipal and an international rules aspect.

The learned author here distinguished between citizenship and nationality as different aspect of the same relationship. He went on to separate nationality into municipal and international aspects; but without assigning material to them as the criteria for distraction.

However, Morris[22], and other specialists in the field are not comfortable with the views indicated by the above authors. For instance, Cheshire and North are of the view that nationality represents a man's political status by virtue of which he owns allegiance to some particular country. It is the submission of these authors that the political status of the person in a state is a consequence of the individuals legal romantic relationship with the particular state.

Therefore nationality is also a legal relationship between a person and a particular state on the basis of which the jurisdiction of the state extends to him.[23]

Recognition of the important role of judicial institutions in international laws dates back to the 19th century early treaties of friendly relations among states had always contained arbitral clauses with the attendant emergence of often on ad hoc basis.

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[22] Morris, J.C. *Conflict of Law* (2nd Ed. London: Stevens & Sons, 1980) p. 201.
[23] Peter North *Private International* Law (London: Cheshire's & North PM, 1974) p. 185

The emergence of long lasting international judicial bodies as major actors within the international system was a particular phenomenon of the 20th 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.

One question that should be raised in any discerning mind is the reason why would the international system require a separate set of international courts and tribunals when nation 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 feels it is in the entire interest of state actors to accept such "constrained independence" because of the impact it has in enhancing the credibility of international law.[24]

Another eminent scholar, was of the view that:

> In an international system comprising multiple actors disputes are unavoidable. In a situation of conflicting interests among nations, the necessity to creates a legal order could not be overemphasized. Also some form of law and order is required in the functioning of the international system.

Indeed, as with the domestic sphere the existence of a body of laws and regulations within the international system necessarily presupposes that equipment be put in place for codification as well as interpretation and application of such laws.[25]

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[24] (Supra)

[25] Laurence, R.H, *"Why State create International Tribunals*: A Theory of Constrained Independence, in Stefan Voigt, Max Albert, and Dieter Schmidtchen (eds), *International Conflict Resolution*: Conference on New Political Economy 23 (Tubrngen: Mohrsiebeck, 2006) 253-276.

Odinkalu, had also postulated in a paper presented at the conference of the Court of Justice on the Rule of law in the process of integration of West African held at Abuja Nigeria between 12 – 14 November, 2007, was of the view that the nature and role of ECOWAS Court of Justice are three courts in one, that it is simultaneously the judicial organ of the community, the Administrative tribunal of ECOWAS as an international institution and pending the establishment of the Arbitration tribunal provided for under Article 16 of the Revised Treaty is also a court of arbitration.[26]

With due respect to the distinguished scholar, it is submitted that the ECOWAS Community court are four courts in a single; the judicial organ of the Community with composite treaty supervision, over sight functions, the administrative tribunal of the ECOWAS pending the establishment of the arbitration Tribunal provided at under Article 16 of the revised treaty, a court of arbitration, and a human being rights court for the sub. region.

1.7 Scope of Work

This research will focus on the problems associated with the court and proffer possible solutions thereto.

Although protocol of the court was adopted in 1991, the court only became operational in 2001 with the appointment and swearing in of its members. The Community Court of Justice is thus a very young institution as it was only setup some years ago. As is to be expected of such a young institution the Community Court of Justice had a great deal of teething problems and is still facing a lot of problems, and it is these issues this work plan to address.

[26] Odinkalu C.A., "Rule of Law in the Process of Integration of West African, a paper presented at the conference in Abuja Nigeria between 12 – 14 November, 2007"

CHAPTER TWO

ESTABLISHMENT OF ECOWAS COMMUNITY COURT OF JUSTICE

2.1 Establishment of ECOWAS Community Court of Justice

The ECOWAS Court of Justice, was created by the protocol signed 1991 and later was included in Article 6, in 1993, of the Revised Treaty of the Community.

The fundamental aim of the Court is to guarantee "the recognition of law and equity in the understanding and use of the Treaty, Protocols and Conventions added thereto, and to be vested with duty regarding settling such question as might be refer to it as per the arrangements of Article 76(2) of the Treaty and dispute amongst states and Establishments of the community." [27]

Upon its creation, the jurisdiction of the Court was constrained to the determination of disputes between member states and establishments of the community.[28] Be that as it may, the 2005 Supplementary Protocol extended the order of the Court to mediate on issues identifying with individual rights infringement emerging from the member states of the ECOWAS and furthermore to go about as arbitrator pending the establishment of the Arbitration Tribunal of the Community.

As for the nature and role of the Court, it has been said that "… the community Court is three courts in one. It is at the same time the legal organ of the community, the Administrative Tribunal of ECOWAS as a global organization and, pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Revised Treaty is additionally a court of arbitration. [29]

The extended command of the court has led to a situation whereby 85% cases finished up by the Economic Community Court of Justice as at December 2009 are identified with claims of human rights infringement from within the ECOWAS member states.[30] The

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[27] Preamble to Protocol A/A.1/7/01 on the Community Court of Justice
[28] Article 9 of the1991 Court protocol
[29] Odinkalu .C. A, ECOWAS Court of Justice in the "Protection of Human Rights, a Paper Presented at the Conference of the Court of Justice on the Rule of Law in the Process of Integration of West Africa held at Abuja Nigeria 12-14 November 2007".
[30] Femi Falana, *ECOWAS COURT: Law and Practice* (Lagos: Legal Text Publ.2010) p.16.

ECOWAS Community Court of Justice was created pursuant to the provisions of Article 6 and 15 of the Revised Treaty of ECOWAS.

Protocol A/P1/7/91 identifying with the Community Court of Justice unmistakably expresses that the court is the essential lawful body organ of ECOWAS with the fundamental capacity of settling disputes related with the interpretation and application of the provisions of the revised treaty and attached conventions and protocols. The essential target of the administration of justice is to render justice as per law.

The court is urged in Article 9 (1) of its Protocol to guarantee the observances of law and of the principles of equity in the interpretation and application of the Treaty. The Protocol additionally charges the court to set up its own Rules of technique.[31] The ECOWAS Court as administrative Tribunal of the Community, has three fundamental Rule that International Tribunals use in settling the issues of translation of Treaty.

The main relates to the real content of the treaty and the investigation of the words utilized. The second approach takes a gander at the aim of the parties embracing the Treaty while the third deals with the object reason for the Treaty. However any genuine understanding of a treaty in international law should consider all parts of the treaty, from the words utilized to the intention of the parties aims of the treaty.[32]

Article 31(1) of the Vienna Convention proclaims that a Treaty shall be translated in compliance with common decency as per the customary importance to be given to the terms of the treaty in their specific circumstance and in the light of its object and reason.

It has regularly been stressed that the elucidation of the treaty must be based above all upon the content of the treaty particularly where the words are clear and unambiguous. In such a circumstance the normal and standard meaning of the terms of the treaty must be applied.[33]

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[31] Landan T.M. Access to justice as a "Human Rights under the ECOWAS Community Law", a paper presented at the common wealth Regional Conference on the theme: The 21st Century Lawyer: Present challenges and future skills.
[32] (supra)
[33] Official Journal of ECOWA Vol. 19, July 1991, 4 -11 see also (1996)8 RADIC 228 -238.

The Community Court of Justice applied this rule in Olajide Afolabi v. Government Republic of Nigeria[34] a citation where it held that the written text of clear and unambiguous holding that only member states can institute proceeding before it on behalf of their nationals.

The administrative tribunal of the ECOWAS Commission, pending the establishment of the Arbitration tribunal provided for a court of arbitration for the sub-regions under article 16 of the Revised treaty.

Specifically, the Court has jurisdiction over cases of infringement of human rights that happen in any member state, Proceedings relating to the failure of member states to satisfy their commitments can only be instituted by member states or the Executive secretary. In addition to member states and the Executive secretary, the council of ministers may also initiate proceedings to determine the legality of official action in relation to a community instrument, individuals, corporate and business bodies also have position too.

Individuals may apply to the court, for relief for violation of their rights in this last category but must satisfy two conditions. They must not be anonymous nor be initiated if the same matter is pending before another international court for adjudication.

2.2 An Analysis of the Legal Framework Work for the Operation of the ECOWAS Court of Justice

Article 6(C) and 15 (1-14) of the ECOWAS Revised Treaty (1993) provide for the establishment of a court of justice of the community.[35] These provisions should, however, be read along with those of the protocol on the Community Court of Justice initialed in 1991. Also Article 57 of the Revised ECOWAS Treaty Provides that:[36] Member states undertake to cooperate in judicial and legal matters with a view to harmonizing their

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[34] (2007) ICCJLR

[9] See Article 57 1993 Revised Treaty and Final Report of Eminent Persons on the Harmonization of Commercial Law in ECOWAS, Lagos, 1996.

[10] Omorogbe, Y. "The Legal Framework for Economic Integration in the ECOWAS Region: An Analysis of the Trade Liberalization Scheme", *African Journal of International and Comparative La w*, (1993) 5 RADIC 355-370.

judicial and legal system. The modalities for the implementation of that arrangement should be the subject matter of a protocol. The agreement would most probably be one of the building blocks for ECOWAS rules applicable in the Member State of ECOWAS.

A Committee "of eminent people on the Harmonization of Commercial Laws in ECOWAS"[37] met from 27 to 29 August, 1996. The Committee of three persons represented the three linguistic zones of ECOWAS; and by extension, the three legal systems in the sub-region. It would appear that the setting up of the Committee was a logical response to the appeals previously made in legal literature for the harmonization of the laws of ECOWAS countries.[38]

The ECOWAS Treaty of 1975 as well as its 1993 version mention, *expressis verbis,* and in several places, the word "harmonization."[39]

Accordingly, as stipulated in article 3(2)(a) of the Revised Treaty, all national policies, programmes, and activities in the domain of" agriculture, (exploitation of)[40] natural resources, industry, transport and communication, energy, trade, money, finance, taxation, education, information, culture, science, technology, tourism and legal matters" should be harmonized. The harmonization would, proprio vigore, entail legal consequences. All the areas described in the Treaty should be regulated through a legal regime strictly peculiar to ECOWAS as a global person under international laws.[41]

The issue to be addressed in answering this question will be analyzed as follows:

i. Evolution of ECOWAS Rules;

ii. Definition of sources of Law; a. Primary and b. Secondary.

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[11] In the 1975 Treaty the Word "Harmonious" occurs 3 times;" Harmonise"5 times;" Harmonization" 11 times. In the Revised Treaty of 1993, the Word "Harmonious" occurs 4 times; "Harmonize" 14 times; "Harmonization" 15 times, and Harmonizing 3 times.
[12] The Emphasis is the Author's.
[13] Rama-Montaldo*, "International Legal Personality and Implied Powers of International Organizations",* in the British Year Book of International Law, 1970, 111-155.
[14] Art. 2,3, Protocol A/P. 1/7/9 on the Community Court of Justice.
[15] Article 5(2) of the Revised Treaty.

2.3 Composition of the Court

The community Court of Justice built up under Article 11 of the Treaty as the fundamental lawful organ of the community will be constituted and execute its function in accordance with the provision of this protocol.[42]

The Court shall be composed of autonomous judges chose and delegated by the Authority from Nationals of the Member States who are people of high good character, and have the capability required by their individual nations for appointment to the most noteworthy legal office, or are legal scholar counsels of recognized skill in international law.

The Court shall comprise of seven (7) individuals, no two of whom may be nationals of a similar state. The members of the Court shall choose a President and a Vice-President from among their number who shall serve for a term of three (3) years.

Somebody who for the motivations behind the enrollment of the Court could be viewed as a national of more than one Member state will be regarded to be a national of the one in which he commonly practices civil and political legitimate rights.

The Members of the Court shall be named by the Authority and chose from a list of individuals nominated by member States. No Member State shall choose more than two people.

The Executive Secretary shall prepare a list in alphabetical order of all the people nominated which he might forward to the council.

The Authority shall appoint the individual of the court from a short list of fourteen people proposed by the council.

No member below the age of forty (40) years or more will be qualified for appointment as an member of the court. An individual from the Court should not be qualified for appointment after the age of sixty-five (65) years.

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[16] Article 5(2) of the Revised Treaty.

2.4 The Need for the community Courts

Because of the composition of the ECOWAS Community in their effort to integrate economic frontiers between member states, the creation of common market operation of the basis of free movement of goods, people, services and capital, became imperative. With this arrangement, people moved from one place to another.

General transactions that may not be regulated by their own municipal laws but by the laws of the states where they find themselves at any point in time and if they continue to rely on that court, there is a probability that justice may ellude them, thus the need for ECOWAS Court of Justice where member states, organizations and individuals can come to seek justice for any violation of right that may have occurred in virtually any of ECOWAS countries.

Again, ECOWAS as an organization has several laws and regulations i.e, treaty, protocols, conventions etc that regulate most aspect of the relationship between the member state governments. The interpretation of the provisions of these laws, treaty, conventions and protocols cannot possibly be left within the jurisdiction of any particular member state. It therefore becomes germane that a central judicial body should be constituted to serve as a general platform for the resolution of disputes arising from the implementation of any of these laws.

The ECOWAS modified treaty is the grundnorm or the supreme law of the Community.[43] Accordingly, each member state is required, relative to its constitutional procedures, to take all necessary methods to guarantee the enactment and dissemination of such legislative and statutory texts as may be necessary for the execution of the provisions of the revised treaty.[44]

It is therefore important to know that Community Court of Justice was basically established to function as a judicial organ, administrative tribunal and arbitration tribunal of the community pending the establishment of the Arbitration tribunal as provided under

[17] (2009) CCJLR (TP2) 58
[18] ECOWAS, Review of the ECOWAS Treaty: Final Report of the committee of Ruminant persons, para 57-58 (1992)

article 16 of the treaty.

The Court is expected to use applicable texts produced by the community in furtherance of the integration process.

In *Mousa Leo Keita v. State of Mali*[45] the community Court emphasized the importance of applicable texts made by the community when it held that:-

As regards material competence, the applicable texts are those produced by the community for the needs of its functioning towards financial integration: the revised treaty, the protocols, conventions and subsidiary legal instrument adopted by the best authorities of ECOWAS.

In its report on the review of the ECOWAS treaty of 1975, the Committee of Eminent persons had suggested 'that the principle of supra-nationality should be introduced in the authority and regulations of council shall be binding on not only the institutions of the community but on member states as well."[46]

In accepting the report member states of the community fully subscribed to the establishment of an integral community legal regime for the region. It has been observed that the member state of the community desired to establish a community court for an integrated community legal system unconstrained by any requirement to exhaust home remedies.[47] There are two sources of the community law: primary and derived sources. While the main source include the modified treaty, protocols, conventions etc the derived sources consist of regulations, directives, decisions, resolutions, recommendation and judgments.[48]

Under the new legal regime of ECOWAS,[49] community Acts are known as

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[45] (2008) 1 CCJLR (PTI) 1

[46] Saidon Nourou "Tall-Sources of ECOWAS Law, a paper Presented at the Conference of the Court of Justice on the Rule of Law in the Process of Integration in West Africa held at Abuja, 12-14 November, 2007".

[47] Article 9 of 2006 supplementary Protocol.

[48] "there is hereby established a court for the Community".

[49] Seen Supplement Axt A/SA.3/01/10 Amending New Article 9 of the ECOWAS Revised Treaty as Mended by supplementary Protocol/SA.1/06/2006 in ECOWAS Official Journal vo/56, October 2009, February, 2010 page 31.

supplementary acts, regulations, directives, decisions, declarations, enabling rules, recommendations and opinions. The Authority of Heads of State and Government shall adopt supplementary acts issue directives, make decisions, declarations and formulate recommendations while the Council of Ministers adopt decisions or formulate suggestions and opinions. The commission shall adopt enabling rules for execution of acts of the Authority and the council can make recommendations and render opinions. The supplementary acts adopted by the Authority are binding on the Community institutions and member states without prejudice to article 15 of the revised treaty. Unless otherwise provided for in the supplementary protocol or in any other protocol, community acts will be used by unanimity, consensus or by two thirds majority of the member state of ECOWAS.[50]

Supplementary acts are acts which complement the treaty and, annexed thereto and incumbent on member states to abide by the supplementary acts, subject to the provisions of article 15 of the treaty. Regulations are acts with general application enacted by the council of ministers and shall be relevant in member state. They shall have binding pressure on ECOWAS establishments. Directives are acts through which the authority or council of ministers arrange for member states the objectives to be accomplished. They are binding on member states. Decisions are act which have individual effect and directed to the people for whom they are meant. Under the said acts, decisions are also binding. Enabling guidelines have the same legal force as the functions of council. Declarations are acts by which the power demonstrates its commitment or takes a position on a specific subject Recommendations are acts through which proposals are made to the recipients to adopt a particular position or take an action. Opinions are acts through which opinions or views are expressed on any subject. Opinions and recommendations are not binding.

Except indicated in the treaty or subsequent act, all acts of the community will be followed by unanimous decision, by consensus or two-third majority.[51]

2.5 Parties who can Approach the Court

[50] (unreported) suit No: ECW/CCJ/APP/02/2009: Arrest ECW/CCJ/JUD/05/09/of 17 December 2009.
[51] Article 76(1) of the Revised Treaty

From the combined effect of Articles 9 and 10 of the 2005 Supplementary Protocol, the institutions and individuals who have the competence to institute cases before the Court are the following:

i. The member state governments of ECOWAS

ii. The Institutions of ECOWAS

iii. The Staff of ECOWAS

iv. Individuals and commercial body in proceeding for the determination of an act or inaction of the Community official which violates the privileges of the individuals or corporate bodies.

v. Individuals or corporate and business bodies which are victims of violation of Individual Rights.

vi. The national courts or the parties concerned, when the court has to adjudicate on initial grounds upon the interpretation of the treaty, protocols or Rule.

In Co-ordination *Nationale Des Delegues Departmentaux de la Filiere Caf'a Cacao (CNDD) v. Cote D'ivoire*[52] the defendant questioned the capacity of the applicant, a legal person to institute a claim for human rights before the court on the basis of the 2005 Supplementary Protocol.

In dismissing the dispute of the respondent, the court held that in spite of the fact that there is no express offer of access to lawful people in the 2005 Supplementary protocol such entities could be permitted by temperance of Article 1(h) of the ECOWAS Protocol on Democracy and Good Governance which gives that:

> Each individual association shall be allowed to have response to normal or common laws courts, a national organization built up inside the system of a international instrument on person rights, to guarantee the protection

[52] (2009) CCJLR (Pt 2)23

of his/her rights.

2.6 Pre-Action Measures

As for any dispute including the Member states and organizations of ECOWAS with respect to the elucidation and utilization of the provisions of the Treaty, the parties are compulsorily required to participate in the friendly determination of same through direct agreement. This will be without partiality to the provisions of the Modified Treaty and important protocols.[53]

Where the parties neglect to determine the question amicably either party or some other Member state or the expert may refer the issue to the Court whose choice on the issue should be last and not at the mercy of appeal. In *Parliament of the Economic Community of Western world Africa Claims v. The Council of Ministers of the Economic Community of West African* state[54] the Applicant tested the legitimacy of the order of the respondent to rebuild its staff and suspend the installment of non-approved pay rates and advantages in opposition to Article 12. 2 and 3 of the Revised Treaty.

The case was found inadmissible as parties had not fulfilled the condition precedent. In directing the parties to explore an amicable settlement of the dispute. The Court held:

> The allusion made by Article 76 paragraph 2 to 'either party' must be extended in a large sense rather than restricted only to citizens/litigants who could come prior to the court; in this context, we have the institutions of the community.

The said Article compels the parties to have recourse to amicable settlement before coming to the community Court of Justice.

In the present case, nothing indicates that amicable resolution was tried. Consequently, it is proper to send the applicant to accomplish this first formally.[55]

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[53] Gasiokwu M.O.U & Dakas *Diplomatic & Consular Law*. Selected Essay Swith Basic Documents, (Jos Chenglo Limited, 2006)p 135.
[54] (2009) CCJLR (pt 2) 23.
[55] *See Afolabi v. Federal Republic of Nigeria* (2008) 1 CCJLR (PTI) 1.

2.7 The Status of the Court in International Law

An international organization has been rightly defined as:-

A collectivity of state established by a treaty with a constitution and common organs developing a personality distinct from that of their member and being a subject of international law with treaty making capacity.[56]

In this direction, it is deducible that international organizations are products of bilateral or multilateral treaties. They are usually formed to enhance the common interest of their members, with such members retaining their sovereignty while being bound by the terms of a revocable agreement.

International organization may be public or private, regional or sub-regional and formed with various motives which may be political, economic or social. Their powers are usually derived from their constitution or ones that are implied as being essential for the attainment of the objects for which these are formed. They also posses legal personality exemplified by their treaty making powers, capacity to bring an action in their own names as well as the enjoyment of privileges and immunities also enjoyed by states as subjects of international law.[57]

The status of ECOWAS Court of Justice is similar to that of International Court of Justice. Therefore on the hierarchy of superiority of the legal text applicable in the Community Court it has been observed in the case of Keita v. State of Mali.

> There is no formal hierarchy between convention, custom and general principles of law but the general practice is to follow the successive order used in Article 38: Treaty Law, custom and general principles of law.
>
> Article 38(1) (d) state that judicial decisions and teachings are subsidiary means and in most cases, treaty law will be considered as priority.

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[56] S*ee the case of Keita v. The State of Mali* (Supra) 58
[57] (Unreported) suit No. ECW/CCJ/APP/02/08/ of Nov. 17, 2009

Apart from the capabilities of the community court which are set out in the revised Treaty, Protocols, supplementary Protocols and Rules of Procedure of the court, it is empowered to apply the body of laws and regulations as contained in Article 38 of the statutes of the International Court of Justice which are:

1. The court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply.

    a. International conventions, whether general or particular, creating rules expressly recognized by the contesting state.

    b. International custom, as evidence of an over-all practice accepted as laws.

    c. The general principles of law identified by civilized nations.

    d. Subject to the provisions of Articles 50, judicial decisions and the teaching of the most highly certified publicists of the various nations, as subsidiary means for the determination rules of law.

This provision shall not prejudice the power of the court to decide a case *ex aequo et* bono if the parties agree thereto. From time to time the community court invokes the provision of article 38 of the statute of the international court of justice to fill lacunae.[58]

The attitude of the court to matters which have been determined by national courts was obviously stated when it held:[59]

In this perspective the community court of Justice is powerless, it cannot adjudicate upon the decisions of the National courts. Within the meaning of the community court of justice, it can only intervene when such courts or parties in litigation expressly so request it within the rigorous context of the interpretation of the positive law of the community. Hence, the objection raised by the defence about the *ratione materae* Halise competence of the court must be declared admissible.

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[58] *Oyemade v. ECOWAS* (Supra)
[59] Article 9(10 of the 1991 Protocol.

It is the view of the Community Court that the appeals envisaged by Articles 76(2) of the ECOWAS Revised Treaty and Article 9, 10 and 11 of the 1991 Community Protocol as amended concern issues which are only possible within the following contexts:

a. Appeals against the legality of acts, instruments and other decisions of the community.

b. Appeals against declining in the obligations of a member state of the community.

c. Disputes associated with the interpretation and application of the treaty and related instruments.

The appellate jurisdiction of the community court is however limited by complaints arising from the decision of the council of ministers of staff matters.

It was an appeal brought before it as a court of last resort within the ECOWAS personnel regulations. This was confirmed by the court when it held that:[60]

> This Court is sitting as an appellant Court and not as a Court of first instance; hence certain rules come into play. First and most important, the court cannot and must not substitute its view of the facts for that of the Joint Advisory Committee. In other words, even if the court, given the same facts, would have arrived at a different summary of the committee on the reality, since they had the benefit and advantage of seeing and hearing the witnesses. Secondly, this court must ensure fairness in the processes especially that the accused is given a reasonable opportunity to be heard in defence, either in person or by lawyer or witnesses or a commission of all three. Thirdly the court must be sure that the relevant procedures of the staff rules and/or personnel regulations were observed.

2.8 Jurisdiction of the Community Court

Jurisdiction is the authority which a Court has to decide issues that are litigated before it

[60] Donli H.N, "The Law", Practice at the Conference of the Court of Justice on the Practice and implication, a paper Presented at the Conference of the Court of Justice on the Practice and Procedure held at Bamako, Mali 7-9 December 2006.

or to take cognizance of matters presented in a formal way for its decision. The limit of the Authority are forced by the statute, Charter or Commission under which the court is constituted and may be extended or confined by comparable means.

The introduction to the Court protocol provides:

> the fundamental part of the Community Court of Justice is to ensure the recognition of the law and equity in the elucidation and utilization of the Treaty, conventions and traditions attached thereto and to the seized with obligation regarding settling such disputes as may be alluded to it in respect to the provision of the Article 56 of the Treaty and disputes amongst states and its organization of the community.[61]

The Court was charged to guarantee the recognition of law and of the standards of equity in the understanding and utilization of the provision of the Treaty.[62]

The Protocol of the Court makes provision for the jurisdiction of the Court in Articles 9 and 10, while article 10 enables the Court to give advisory legal supposition on question of the Treaty and the Protocol. Article 9 handles the Courts adjudicative fitness and provides thus:

1. The court shall guarantee the recognition of law and of the ideas of value in the elucidation and utilization of the provision of the Treaty.

2. "The Court may be able to manage dispute refer to it in accordance with the methods of Article 56 of the Treaty, by Member States or the Authority when such question emerge between the member states or between at least one Member State governments and the Organizations of the Community on the translation or use of the provision of the Treaty."

3. A member State may, as for its nationals organization institute proceedings against another Member State or Institution of the

[61] *Community Parliament v. Council of Ministers of ECOWAS and Executive Secretary of ECOWAS* No ECW/CCJ/APP/03/05
[62] Article 3(1) of the 1991 Protocol.

community. Identifying with the understanding and utilization of the provision of the Treaty, after endeavors to settle the dispute agreeably have fizzled.

4. The Court might have any power presented upon it, particularly by the provision of this protocol. The impact of the provision of this Article is to deny subjects access to the Court.

The issue of absence of quick access to the Court by people was of incredible worry to the Court since it adversely affected its operations. It is noteworthy to take note of that no Member State or Organization of ECOWAS within the said period recorded any case before or notwithstanding for a counseling supposition. It had been evident that people must be conceded utilization of the Court for it to turns out to be completely operational. The court accordingly made a proposition for its alteration in the vicinity of 2001 and January nineteenth 2005. At the point when Protocol A/P1/7/91 was at long last changed just two cases were documented before the Court and both were put together by people straightforwardly. In perspective of the rupture of Articles 9 (3) of the Protocol of the Court, the Court held that it has no jurisdiction to engage the two issues.

In *Afolabi Olajide v. Government Republic of Nigeria*[63] The Court held that the applicant cannot bring proceeding other than as given in Article 9 (3) of the Protocol. Likewise the Court struck out the plaintiffs case in *Frank Ukor v. Richard Lalaye* for resistance with the provision of Article 9 (3). The plaintiff, Chief Frank Ukor dwelling in Nigeria however executing business amongst Nigeria and Benin Republic, lodged a case against the respondent in the Court of Justice ECOWAS aimed at quashing an order for seizure of his vehicle with enlistment number XG.796JJJ and in addition his merchandise found on board the truck, such order having been issued by Cotonou Court of first instance on eighth January 2004.

Article 9 of the Supplementary Protocol achieved the coveted advancement of the Community Legal Order and in this manner it is important to analyze it for legitimate

[63] (2007) ICCJLR (Pt 1) 1
[38](2009) 2 CCJLR

appreciation.

1. Article 9: of the Amended Protocol on the Jurisdiction of the Court expresses: the Court has capability to settle on any question identifying with the accompanying.

   a. The elucidation and utilization of the Treaty, traditions and conventions of the group.

   b. The elucidation and utilization of the principles, mandates choices and other auxiliary lawful gadgets embraced by ECOWAS;

   c. The legitimateness of controls, mandates, choices and other backup lawful apparatuses utilized by ECOWAS.

   d. The disappointment by individuals States to respect their duties under the Treaty, Conventions, and Protocols, standards, orders or choices of ECOWAS.

   e. The provisions of the Treaty, Conventions and Protocols: rules mandates or choices of ECOWAS Member State.

   f. The community and its own authorities: and

   g. The activity for damages against a Community, Institution or an official of the community for just about any action or oversight in the exercise of established functions.

2. The Court shall have the vitality to decide any non legally binding obligation of the Community to pay damages or make reparation for standard works or oversights of any Community Organization on Community officials in the execution of formal obligations or functions.
3. Any activity by or against a Community Institution of any Member of the Community shall be statute barred after three (3) years from the day when the privilege of activity emerged.

4. The Court has jurisdiction to decide case of infringement of individual benefits that happen in essentially any Member State.

5. Pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Treaty, the Court shall have power to act as arbitration with the end goal of article 16 of the Treaty.
6. The court shall have jurisdiction over issue provided in an agreement where in certainty the parties give that the Court should settle dispute due to the agreement.

7. The Court shall have every power given to it by the provisions of this Protocol and also whatever other power that may be given by consequent Protocols and decisions of the community
8. The Authority of Heads of State and Government shall have the ability to give the Court the power to settle on a particular dispute that it might refer to the Court other than those particular in the Article.

   However, the provisions under Article 9 are wide: the provisions of Article 10 confines the parties to particular issues for lucidity, Article 10 provides Access to the court as following:

a. Member States, and unless regularly gave in protocol, the Executive Secretary where action is brought for bombing by a Member State to fulfill a commitment:

b. Member expresses, the Council of Ministers and the Executive Secretary in continuing for the assurance of the determination the legality of an action with regards to any Community instant message:

c. People and corporate bodies in proceedings for the determination an act of or inaction of a Community official which abuses the rights to the people or corporate.

d. People on application for alleviation for infringement of their human right: the submission of application for which shall: I. Not be private; nor ii. Be made while a similar issue has been instituted before another international Court for mediation.

e. Personal of any Community Organization after the staff Member has depleted all appeal methods accessible to the officers under the ECOWAS Staff Rules and Regulations.

f. Where in any action before a Court of a member State, an issue emerges with regard to the elucidation of the provision of the Treaty, or the other Protocols or regulations the National Court may individually or at the request of any parties to the action refer the issue to the Court for translation.

g. Where in for all intents and purposes any action before a Court of a member State, an Issue happens with respect to the understanding of provision of the Treaty, or the other Protocol or Regulations, the National Court may alone or at the demand of any parties to the action refer the issue to the Court for elucidation.

2.9 Actions for Human Right

The action for infringement of person appropriate by people are inside the ability of the court aside from where the action neglects to indicate the name of the applicant Action for breech of the standards of reasonable hearing may fall inside the ambit of the skill of the Court. Among others which peruse may appear to be beyond the jurisdiction of ECOWAS Court but on the thought of the application shape it was discovered that the application relied on an asserted breach of the process of sensible hearing.

i. Advisory Jurisdiction

The court has jurisdiction to give advisory opinion in regard of legal inquiries sent to it in the article states underneath the methodology for the proceedings provided with clarity. Article 10 respect of Advisory Opinion provides as follows:

1. The court may, at the request of the Authority, Council, a number of Member States, or the Executive Secretary, and every other organization of the Community communicate, inside a advisory capacity a legal, a lawful opinion on questions of the Treaty.
2. Demand for advisory opinion as contain an statement of the questions whereupon which advisory supposition is required. They should be joined by every single document likely to toss light upon the inquiry.

The advisory opinion is given in broad daylight and in the exercise of his advisory functions the Court shall be represented by the provision of the Protocol which apply in contentious cases, where in certainty the court recognizes them to be relevant.

The court also has jurisdiction in respect of Arbitration issues. Articles 9 (5) of the revised Protocol gives that the court shall have ability to go about as arbitrator for the purpose of Article 16 of the Treaty of ECOWAS.

Article 16 of the Treaty gives that there shall be established an Arbitration Tribunal of the community and the status, composition, power, strategy and different issues concerning the arbitration Tribunal might be set out in its Protocol relating thereto.

ii. Locus Standi

Another aspect of the jurisdiction of the Court is with respect to locus standi or who can bring an action before the Court. Member States and the Executives Secretary are named as parties to an action brought for failure by Member State to fulfill an obligation. The question is whether organizations not stated therein can institute proceedings for illegality by an institution in the application of the community text. A deep thought or reflection on the issue reveals that it may fall under the realm of general concepts of law mentioned in the preceding paragraphs.

Locus standi is conferred by the Treaty or protocol and parties must show sufficient interest to be permitted to access the Court. However, the council, and members state standing by right as they are considered to have direct interest in any action under review.

These privileged applicants do not have to establish a particular interest in the action.[64] In Article 76 of the Treaty, it is provided that any dispute regarding the interpretation or the use of the provisions of this treaty shall be amicably settled through immediate agreement without prejudice to the provisions of the Treaty and relevant Protocols.

The second part of the provision states that where parties neglect to settle, either party or any other Member States or the Authority may send the matter to the Court of the Community whose decision will be final and shall not be subject to appeal. The conditionality provided in paragraph (1) of Article 76 of the Treaty, that cases shall be amicably settled through direct agreement has to be fulfilled before parties may institute actions in the Court.

The law on fulfilling a condition precedent is basic and the parties shall comply prior to the Court can assume jurisdiction in the case. In the book, "Laws of Treaty." it is stated that a condition precedent must be fulfilled before the Treaty becomes operational. In addition to the reality that conditions precedent must be satisfied, it must be shown that the condition precedent has been fulfilled before filling the action, together with the contract document that there was no agreement to settle out of Court.

2.9.1 Independence of the Court

The independence of the community Court is guaranteed. Appropriately, Judges of the Court are required to carry out the functions assigned to them individually from Member State, Governments and Institution of the Community.[65]

Decisions of the Court are binding on Member States and Institutions of the community, individuals and corporate bodies.[66] The status, powers, composition, functions, procedure and other issues pertaining to the effective performance of the Court have been laid out in the 1991 Protocol, the 2005 and 2006 Supplementary Protocols, the Rules of Procedure of the Court and the many Decisions issued by the Power of Heads of State

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[64] *Community Parliament v. Council of Ministers of ECOWAS and Executive Secretary of ECOWAS* No ECW/CCJ/APP/03/05
[65] Article 3(1) of the 1991 Protocol.
[66] Article 15(b) of the Revised Treaty.

and Government in relation to the Court.

The Community Court is self accounting. Its financial and accounts management is carried out by the Director of Administration and Finance under the authority of the President of the Court.[67] The President of the Commission shall ensure the preparation, for consideration by the Council of Ministers, of the draft consolidated budget of the Organizations of the community including the Court for the next financial calendar year not later than two months to the end of the current financial year.[68]

Pursuant to the Financial Rules and Manual of Accounting Treatment of the Institution of ECOWAS amended by Regulation C/REG. 2/12/95 the audited accounts of the Court will be approved by the Council of Ministers.[69]

2.9.2 Administration of the Court

The Community Court of Justice shall be administered by the following persons and institutions:

i. The Presidency

The Judges of the Court shall elect a President and Vice President among themselves who shall serve in those capacities for a renewable term of two years. The President will be the Head of the Community Court and shall represent the Court in its relations with other ECOWAS Institutions and third parties.

In the absence of the President the duties of his/her office shall be performed by the Vice President.

In the absence of the Vice President another judge appointed based on the Rules

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[67] Article 20(2) of the Rules of Protocol.
[68] Article 11 of the Financial Regulation of the Institutions of the Economic Community of West African States made pursuant to the REGULATION E/REG/5/05/09 Adopting the Financial Regulations of the Institutions of the Economic Community of West African States in the ECOWAS Official Journal, Volume 55 May/June 2009. p. 46.
[69] REGULATION C/REG.10/05/09 which Adopted the 2007 Audited Financial Statements of the Community Court of Justice.

of Method of the Court will act for the President.[70]

ii. The Bureau of the Court

A Bureau shall be set up within the Community Court which shall be made up of three (3) members namely the President, Vice President and the oldest and longest serving person in the ECOWAS Court.[71]

The Bureau shall elect a member to represent the Court in the Judicial Council of the community on annual basis.[72]

The Bureau shall be responsible for the following:

i. The proper orientation of the Court and for supervising its management and administration;

ii. It shall look at the draft work programme and provision of policy guidelines for the annual budget to be presented to the Council of Ministers, through the Administration and Financing Commission.

iii. It shall define the procedures relating to the internal organization of the Court in accordance with Community texts.

iv. It shall have authorization responsibility on the planning of the budget of the Court and designate this authority to the Director of Administration and Finance, in line with the Financial Regulations of the Community.[73]

iii. Judicial Council of the Community.

In order to effectively manage the process of recruiting judges on a competitive basis and also to adopt an independent disciplinary mechanism for the judges of the Court a Judicial Council of the community has been established by the

[70] Article 4(4) of the 1991 Protocol.
[71] The oldest and longest serving Judge is referred to as the "Doyen" of the Court.
[72] Article 2(2) of Decision A/DEC.2/0/6/2006.
[73] Article 3 of the Regulation C/REG.2/06/06 Approving the Organization Structure of the Community Council of Justice and Staff Recruitment Plan in the ECOWAS Official Journal Vol.49, June 2006 p. 47.

Authority of Heads of State and Government of ECOWAS.[74]

The appointment of the Chief Justices of the Member state or their representatives as members of the Judicial Council of the Community is intended to strengthen the independence of the ECOWAS Court and promote the harmonization of the legal and judicial systems of the Member States of ECOWAS. The Judicial Council shall be chaired by the President while its Bureau shall be made up of a President, Vice President and a Rapporteur who shall be elected by their peers.[75]

The Judicial Council may be assisted by other organs of the ECOWAS such as the Audit Committee, Finance Committee or Medical Council.[76]

The Judicial Council shall prepare its own rules of procedure. The rules which shall be followed by the Council of Ministers shall address frequency of meetings, types of complaints, conservative measures and sanctions, method of investigation, defense and safety of the interest of the judge concerned by the case etc. The functions of the Community Judicial Council are:[77]

i. The Judicial Council of the Community shall be responsible for the recruitment and discipline of judges of the Court of Justice. To this end, the Judicial Council shall shortlist and interview candidates for the post of Judge of the Court of Justice, and shall recommend successful applicants to the Authority for appointment;

ii. The Judicial Council shall also hear cases relating to discipline and the inability of judges to exercise their functions due to physical or mental incapacitation;

iii. The Judicial Council shall, through the Council formulate suggestions for the attention of the Authority in case of commission of the criminal offence by a

[74] See Supplementary Protocol A/So.2/06/06 Amending Article 3, 4 and 7 of the Protocol on the Community Court of Justice and Decision A/DEC.2/06/06 Establishing the Judicial Council of the Community.
[75] Rule 9 of the Procedure of the Community Judicial Council.
[76] Article 5(3) of Decision. A/DEC./2/06/06.
[77] Article 5(1) of Decision A/DEC.2/06/06.

Judge of the Court of Justice;

iv. The Judicial Council may make such recommendations as it deems necessary for improving the working of the Court of Justice;

v. The Judicial Council may further give its opinion or make suggestions on issues on which it is capable and that are submitted for its consideration by the president of the commission, the council or the Authority.[78]

iv. The Chief Registrar and other Personnel of the Court

The Community Court of Justice shall have a Chief Registrar and Deputy Chief Registrar.[79] The Court shall appoint the principal Registrar and the Deputy Registrar while other staff of the Court shall be appointed by the ECOWAS Commission.

In the absence of the Chief Registrar and the Deputy Chief Registrar, the President of the Court shall designate the official to carry out the functions of the office on a temporary basis.[80]

The office of the Chief Registrar shall serve as a link between the office of the President and all other departments including the Court registry.

The Chief Registrar shall serve as a link between the office of the President and all the departments like the Court Registry.

The Chief Registrar shall be appointed for six (6) years and could be re-appointed for another term.[81] The Chief Registrar shall take the oath of office defore the

[78] Rule 5 of the Rules of Procedure of the Community Judicial Council.
[79] Article 29(1) of the 1991 Court Protocol and Article 4 of REGULATION C/REG.2/06/06.
[80] Article 11 of the Rules of Procedure.
[81] See Protocol A/P1/7/91 Supplementary Protocol (A/Sp.1/01/05, the Rules of Procedures of the Community Court.

President of the Court.[82]

The duties of the Chief Registrar shall include the following:

i. To be accountable for the administration of the Court as well as for the acceptance, transmission and custody of documents and for effective service of processes under the power of the President.[83]
ii. To have custody of the seals and be in charge of the records and publications of the Court. [84]
iii. To keep a register initiated by the President wherein all pleadings and supporting documents are inserted.[85]
iv. To assist the President and the other judges in their official functions and attend the sittings of the Court.[86]
v. To draw up minutes of every hearing of the Court which shall be the co-signed with the President of the Court and constitute the official record of proceedings.

At their meetings held in December 2004 and January 2005, the Council of Ministers and the Authority of Heads of State and Government directed the Executive Secretary to examine, in collaboration with the Parliament and the Community Court, the current political and administrative set up of the Parliament and the Court with a view to proposing the most efficient administrative system that would ensure that the Speaker and the Judges concentrate on their core legislative and judicial functions.[87]

However, the basic duties of the Chief Registrar have been transferred to the new office of the Director of Administration and Finance. Thus, pursuant to Regulation C/REG.2/06/06 approving the Organizational Structure of the Community Court of Justice and Staff Recruitment Plan the responsibilities of the Chief Registrar have been

[82] Article 17 of the 1991 Court Protocol.
[83] Article 14(1) and 20(1) of the Rules of Procedure.
[84] Article 15 of the Rules of Procedure.
[85] Article 35 of the Rules of Procedure.
[86] Article 14(2) and 16 of the Rules of Procedure.
[87] Minutes of the meeting of Council, ECOWAS official Journal Vol. 49, June 2006.

reduced to the following:

i. Supervision, monitoring and coordination of the activities of the Court Registry and provision of services for the efficient discharge of the judicial functions of the members of the Court.

ii. Acceptance, transmission and custody of documents and supervision of the preparation of minutes and records of the Court and shall be present at all court sittings.

iii. 0Supervision of the departments and divisions placed under his/her responsibility.

v. Director of Administration and Finance

There shall be a Director of Administration and Finance whose duties shall be the following:

i Management of the day-to-day running of the administrative Secretariat of the Court including communication between the departments and the President on administrative matters.

ii. Responsibility for all procedures for the recruitment of professional and locally recruited personnel relative to relevant ECOWAS Personnel Regulations and chair the Advisory Committee responsible for recruitment for the appointment of Directors.

iii. Preparing the annual draft budget of the Court, based on the general recommendations provided by the Bureau as well as the work programme of the Court.

iv. He/She shall be the Accounting Officer of the Court and shall submit quarterly

financial statement to the Bureau through the President of the Court.[88]

iv. Membership and Composition of the Court.

The Court is made up of independent free judges who are chosen, paying little respect to their nationality, from among individuals of high good character and who have the capabilities required in their particular nations for the appointment to the most noteworthy legal office or who are *jurisconsults* of perceived skill in international laws. The Court comprise of 15 individuals, no two of whom might be nationals of a similar State. A person who is to be a member of the Court who could be viewed as a national of more than one state is considered to be a national of that State in which he commonly exercises civil and political right; in other words, if an individual from the Court claims double nationality, he will be esteemed to be a national of just the State in which he ordinarily exercises civil and political rights.[89] That is to say that no member is allow to have dual citizenship.

The General Assembly and the Security Council must choose individuals from the Court from a rundown of people named by the national Group in the Permanent Court of Arbitration by Article 44 of the Convention of the Hague of 1907 for the pacific settlement of international disputes. In the case of member of the United Nations not represented in the Permanent Court of Arbitration, national groups designated for this reason by their governments are named under an indistinguishable conditions from those for individuals from the Permanent Court of Arbitration.

A State which is a party to the present statute of the International Court of Justice however is not by any stretch of the imagination an individual from the United Nations, for example, Switzerland, may take an interest in choosing the members of the Court under extraordinary conditions endorsed by the General Assembly upon the suggestion of the Security Council, unless there is unique consent despite what might be expected

[88] REGULATION C. REG.2/06/06 in the ECOWAS official Journal, Vol. 49, June 2006 p. 48.
[89] Ibid Art 3.

(Article 4).

ii. Jurisdiction of the Court

The first important point to note is that prior to this time, States may be parties in cases before the Court. States, whether members of the United Nations or not, may take part in a case, so long as special agreements to that effect have been entered into with the United Nations.

The Court, at the mercy of and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and the Court must receive such information offered by such organizations on their own initiative. The Registrar must also notify an open public international organization concerned and communicate to it copies of all written proceedings whenever the construction of the constituent instrument of a public international firm or of the international convention adopted there under is in question in a case before the Court (Article 34).

The jurisdiction of the Court is open to the states which are parties to the present statute (Article 35), however the condition subject to which the Court will be open to them shall be as laid down by the Security Council and at the mercy of the special provisions as contained in the treaties in force; but in no case must such conditions place the parties in a position of inequality before the Court. If a state that is not a member of the United Nations is a party to a case, the Court shall fix the amount which that state should contribute towards its expenses, unless such state is already bearing a share of the expenditures of the Court.

2.9.3 The Principles Underlying the Workings of the ECOWAS Community Courts

The principal role of any court, including a regional court, is to interpret and apply the law, which faculty may be exercised in contentious and advisory issues.

In carrying out its functions, the court is guided by the sources, formal and material principles and procedures germane to it. Treaty adjudication would be treated here as a

factor promotional of the integration process envisaged under ECOWAS treaty with particular reference to article 3(1) which stipulates thus:

> Treaty rules is a major source of international law which state governments is to be an ubiquitous instrument that provides parties with the faculty of entering into all types of agreements in various areas. It has a dual character as it creates rights and obligation between subjects of international law, and it may also be legislative in character, as was the covenant of the league and is the United State Charter.

In this light, it is either constitutive or constitutional, which may in turn explain why the new law of the African Union is tagged the Constitutive Act of the African Union. Now, coming to the ECOWAS regime will show that apart from the modified treaty of ECOWAS, the members have through its agency used treaties and protocols which may be subject matter of adjudication.

The application of the convention to relations of states as between themselves under international agreements to which other subject matter of international law are also parties, of particular significance for this work is article 5 of the Vienna Convention which stipulates that:

> Convention applies to any treaty which is the constituent device of a global organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

This is because articles 92(1)[90] of the 1969 treaty stipulates that upon the entry into force of this revised treaty in accordance with article 89 the provisions of the United Nations Vienna Convention on the Law of Treaties,[91] shall apply with the determination of the rights and obligations of member states under the 1975 ECOWAS treaty and (this revised treaty) article 89 of the ECOWAS treaty assimilates protocols to the treaty, both of which shall form an integral part. As a result, for the purposes of articles 5 of the Vienna

[90] See Article of the Protocol
[91] Article 8

convention its powers are derived from:

(i) ECOWAS treaty
(ii) ECOWAS protocol
(iii) Other conventions adopted under the aegis of ECOWAS

The court has the competence to interpret and apply the provisions of the treaty. It also has the competence to resolve disputes referred to it by member states or the Authority when such disputes occur between the member state or between one or more member states or between one or more member states and the institution of the community on the interpretation and application of the treaty.[92] Furthermore a member state may, on behalf of its national, institute proceedings against another member state or organization of the community relating to with the interpretation and application of the treaty, after attempt to settle the disputes amicably have failed. The court also has the competence at the demand of the authority, or more member states of executive secretary and any other institution of the community to give a legal opinion on questions of the treaty. It thus has an advisory faculty.[93]

The supplementary protocol[94] amending the protocol on the Community Court of Justice, which adjudicate matters arising from the implementation of the treaty decisions, rules, directives while others subsidiary legal instruments that are binding on targeted bodies. Grants individuals and corporate and business bodies right of access to the courts, and expands its power in a number of areas notably action brought for failing to honour.

- An obligations[95]
- Determination of legality of regulations, directives, decision and other legal instruments adopted by ECOWAS as already indicated;
- Disputes relating to the community and its members; · The action for damages against a community organization or an official of the

[92] Article 9 of a New Article 9 is Substituted for the Old.
[93] Article 10
[94] A/sp.1/01/05
[95] Article 77 of the Treaty Under which the Authority may Impose Sanctions where a Member State Fails to Fulfill its Obligations to the Community.

community for any act or omission in the exercise of formal functions;

- Determine cases of violation of individual rights that happen in virtually any member state;
- Actions seeking reparation for damages;

A new article 10 amends the process and extends usage of the court. Article 10 provides, access to the court is available to the following:

a. Members states and unless otherwise provided in a protocol the executive secretary, where activity is brought for disappointment by a member states to satisfy a commitment.

b. Member States, the committee of ministers and executive secretary in proceeding for the determination of the legality of an action in connection to any community text.

c. Member State, the council of clergymen and official secretary in procedures for the assurance of the lawfulness of an activity with respect to any group content.
d. People and corporate bodies in procedures for the determination of an act or inaction of a community official which abuses the privileges of the people or corporate bodies;
e. People on application for alleviation for infringement of their human rights;
f. Staff of any community institution, after the staff member has exhausted all appeal procedures open to the officer under ECOWAS guidelines and directions;
g. Wherein any action before a court of a member State, an issue comes up with regard to the understanding of the provision of the bargain or other protocols or rules, the national court may without anyone else or at the demand of any of the parties to the action refer the issue to the court for elucidation.

These issues fall within domain of public international law; the ECOWAS court would in this way apply international law as legitimately rendered in article 38 of the Statute of the International Court of Justice, to be specific treaties customary international law and general principles of law recognized by edified countries. These three sources are normally referred to as law creating processes or formal sources of laws, while ECOWAS court falls within the category of law determining agencies that is subsidiary means of determining (interpreting) what the law is. This is provided in article 19 of the protocol.

As understood equitable principles form part of the corpus of international law as determined in a number of arbitration cases and affirmed by the international court. The individual opinion of *Judge Hudson* in the diversion of water from the *meuse* case is strongly supportive of this position as are other instances. In the instant case *Judge Hudson* stated:

What are widely known as principles of equity have long been known to constitute a part of international law and as such they have often been applied by international tribunals…

The court has not been expressly authorized by its statute as distinguished from law… articles 38 of the statute expressly directs the application of "general principles of laws recognized by civilized nations" and in more than one nation principles of equity have an established place in the legal system. The court's recognition of equity as part of international laws is in no way limited by the special powers conferred upon it "to divide a case (ex aequo et bono), if the parties agree thereto" it must be concluded therefore that under article 38 of the statute, if not independent of that article, the court has some freedom to consider principles of equity as part of international law which it must apply."[96]

An important principle of equity as enunciated by Judge Hudson is that where two parties have assumed an identical or reciprocal obligations one party which is engaged in a continuing nonperformance of this obligation should not be permitted to take advantage of a similar non performance of that obligation by the other party thus equitable maxims

[96] P.C.I.J. Reports, Series a/b no.77,pp 76-77

such as equity is collateral, he who goes to equity must do equity, in line with such maxims a court of equity would normally refuse a plaintiff whose conduct is improper.[97]

The international court of justice has invoked the principles of equity in such cases as the *gulf of Maine case*[98] where it stated that the principles of acquiescence and stopped derived from the fundamental principle of good faith and equity, also in dealing with diplomatic protection where consideration of equity were imported, the *Barcelona traction case*.[99] Despite the idea that the use of the principles of equity is intended to accomplish fairness in applying a legal rule, it has been the citizen who has been introducing some elements of subjectivity and uncertainty in international law.[100]

2.9.4 Issues of Rights, Legal Individuals and Citizenship before ECOWAS Court

ECOWAS, as a organization does not in a strict sense enjoy the right to confer citizenship to an individual as would by a state. One can therefore deduce who community citizens are with a careful perusal of the provisions of the treaty and the respective protocols.

The purpose of defining ECOWAS citizenship is to know or ascertain the category or persons that can avail themselves of the privileges accruing to the members of the community.

Relating to article 27(1) of the ECOWAS treaty, "citizens of member state shall be regarded as community citizens". Similarly the protocol relating to free movement of persons, residence and establishment declares that "a citizen of a community means a resident of any member state".

From the above definitions, it becomes clear that any person who is a citizen of any member state of the community is a community citizen. Citizenship of the community member state must be in accordance with the laws of the state. Each state has its criteria relative to its laws and regulations to confer citizenship on its person. There are several

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[97] Ibid
[98] ICJ Rep 1984, p. 246 at 305
[99] K.J Rep 1964, pp 61-62
[100] Judge Gross ICJ Rep. 1984, p.386

criteria for acquiring the citizenship of any given state. They include among others, citizenship by birth, by naturalization, registration, by adoption or legitimating. Citizenship by birth and by naturalization is the usual ways of acquiring citizenship. The rest forms are as a result of major events in the lives of individual's e.g a foreign woman married to a Nigerian may by registration acquire the citizenship of Nigeria.[101]

Considering however that the requirements for the acquisition, loss, or forfeiture of the citizenship of the community might not be the same in all member states, the high contracting parties of ECOWAS, in 1982 signed a protocol relating to the definition of community citizens. A cursory perusal of the protocol reveals an accepted formula where community citizenship may be acquired in the particular member state through the following ways:

(a) By descent

(b) By birth

(c) By adoption

(d) Naturalization

That is with consideration that member states would still exercise their sovereign right in conferring their citizenship on anybody.

Article 1 of the protocol states that a citizen of the community is:

1. Any person who is a national by descent, of member state and who is not a national of any non-member state of the community.[102]
2. Anybody who is a national by birth of the member state either of whose parents is a national by descent such a person must on attaining the age group of 21 decide to take up the nationality of the member state.

However, somebody who had already attained the age of 21 before coming into force of

[101] The Constitution of Federal Republic of Nigeria, 1979 Section 24(1) (a).
[102] Article 1 of the Protocol

the protocol and who is of dual nationality must denounce the nationality of the parent who is not a national by virtue of descent.

Generally, citizenship by birth falls under two principles, namely *Jus sanquinis* and *Jus soli*.

Jus sanquinis is citizenship conferred on children born of parents who are residents of the state. This means that parentage is the sole criterion for identifying the citizenship of the person. This is applied in some European countries, Asia and Africa. For example, by the France nationality code, 1973,[103] a child is a French citizen if at least one of his parents is French. A similar provision is also contained in the constitution of Nigeria 1979.[104]

Jus Soli. This is also referred to as the territorial principle. It means that citizenship is conferred on a child given birth on the territory of a state, notwithstanding the citizenship of the parents. In this case, the place of birth is the sole criterion for determining the citizenship of a person. This basic principle is employed mainly in Britain, Brazil and U.S.A under the British nationality Act,[105] the basic principle is that:

Every person born within the United Kingdom… shall be a citizen of the united Kingdom… by birth.

The United State Immigration and Nationality Act, 1952[106] state that a person given birth to in the U.S.A and subject to the jurisdiction thereof will be a national and citizen of the U.S.A at birth. This principle did not receive wide patronage from the decolonized African States. The reason may not be unconnected with the fear that the dethroned colonial masters may use that means to re-establish their domination of African people. Hence, it is not surprising that the ECOWAS protocol relating to this definition of community citizens did not incorporate any provision on acquisition of community

[103] Article 5 French National Code, 1973
[104] 1979 Section 23 of the Constitution
[105] S.4 British Nationality Act.
[106] U.S.C Sec. 140(a) (1) U.S Immigration And Nationality Act

citizenship based on the (***Jussoli***) principle.

i. The Legal ECOWAS Citizen

In Nigeria there are two groups, namely, Legal resident ECOWAS citizen and Illegal ECOWAS citizen. The requirements for the conferment of the Community citizenship. ECOWAS citizen are in Nigeria. Therefore, their Legal status within the territory of Nigeria is controlled by the Community laws and the appropriate municipal laws of Nigeria. The entry, residence and establishment of community citizens in the territory of any member state including Nigeria is thus, regulated by law.[107] A Community citizen is therefore deemed to be legal if his entry, residence establishment and any other activities of his, comply with the community laws and regulations and the laws of the host country in these respect.

ii. Illegal ECOWAS Citizen in Nigeria

ECOWAS alien is a Community citizen who enters and resides in the territory of any member State, including Nigeria, in accordance with the community laws and regulations, and the relevant municipal laws of the receiving state. Any community citizen who therefore enters and resides in Nigeria in contravention of the said rules is an illegal alien. The term unlawful alien is synonymous with illegal alien, illegal immigrant, unlawful entrant or migrant in an irregular situation.[108] ECOWAS citizens are Treaty aliens in Nigeria; consequently their legal status within the place of Nigeria is regulated by the community laws and the correct municipal laws and regulations of Nigeria.

The admittance, home and establishment of Community citizens in the territory of any member state including Nigeria is thus governed by law.[109] Under the Nigerian Immigration Act, the term illegal immigrant is not defined but it implies that a migrant who is not really a lawful immigrant is an illegal immigrant.

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[107] Gasiokwu M.O.U, *ECOWAS Problems of Citizenship and Free Movement* (Jos: Mono Expression Ltd 1998 p. 82.)
[108] See General Assembly Resolution 3449 (xxx), 1976.
[109] Immigration Act of Nigeria, 1963, now CAP 11 LFN 2004.

Section 33(1) of the U.K.

Immigration Act, 1971 stipulates that unlawful entry means a person unlawfully getting into or seeking to enter in breach of the deportation order or of the immigration laws and includes also a person who has so entered. Similarly, it is being suggested that any person including community citizen who unlawfully enters or seeks to enter Nigeria in breach of a deportation order or of the immigration laws and regulations or the community laws is an illegal immigrant. It includes also a person or individuals who have so entered.

Illegal aliens therefore poses the following characteristics: They must be aliens, they must have entered the country illegally in contravention of the immigration law or the treaty rules, or his residence is illegal and thirdly they might have been either brought or smuggled into the country against their wish in violation of immigration or the community laws either for immoral or unlawful purposes.[110]

In Nigeria, once an alien be him ordinary or treaty alien enters and resides in violation of the immigration Act of the United States or the ECOWAS protocol relating to Free Movement of persons, or a quit order by the appropriate state organ, the entrant is an unlawful alien. It does not matter whether he is ignorant of his violation of the laws.

If a person re-enters the country after he had earlier on been removed, he becomes also an illegal alien. All entering aliens into Nigeria are supposed to enter through identified or authorized entrance ports.[111]

It will therefore amount to unlawful entry if an alien entered through unauthorized ports of entry.[112]

Any alien who enters Nigeria without travel documents[113] or enters without inspection, or in breach of the deportation order, or the community regulation, falls in the group of illegal aliens. An alien who has entered the United States legally i.e whose initial entry

[110] Gasiokwu, M.O.U (Supra) p.83
[111] Ibid
[112] See SS. 14 & 51 Immigration Act, 1963
[113] S. 51 Immigration Act, 1963 & Art 1 Protocol

is lawful may become an illegal immigrant due to his subsequent activities/acts or conduct. For example the receiving state (Nigeria) lawfully may become an unlawful entrant if he exceeds the permitted period of stay or a treaty alien resides beyond 90 days allowed by the protocol without further expansion relative to Art 3 (2) of the protocol. No matter that initial entry into the country had been lawful.

This means therefore that any lawfully admitted alien who over stays or resides beyond permitted time or in contravention of the conditions or access or remains after withdrawal of resident permit[114] of citizen permit or engages in some business in contravention of law of the land becomes an illegal alien.

There have been occasions whereby young girls and women are smuggled across state boundaries by procurers under false pretences, or by threat and intimidation. Such smuggled girls and women are employed in prostitution in violation of the laws and regulations of the land.[115]

They also fall in the category of unlawful aliens.

In conclusion, it is submitted that anybody, be him a treaty alien or an ordinary alien who enters, re-enters or resides in the country (Nigeria) and engages himself in some form of employment or business in violation of the immigration Act and the community law can be referred to as an illegal alien.

[114] S. 9 (4) Immigration Act, 1963.
[115] Criminal Code SS. 223-227 are Offences against Morality see also SS. 275, 276, 281 of the Penal Code. Immigration Act, 1963 . S. 17 (3) (1)

CHAPTER THREE

DEFINITION OF SOURCES OF LAW

3.1 Definition of Sources of Law

From time immemorial, the expression "sources of law" has been a recurrent subject of dispute among jurists. However, the present discussion will be limited to a review of some of the twentieth-century literature. There is a quasi-unanimity among scholars that the expression "resources of law" is ambiguous. In that connection, Paton held that the "term sources of law has many meanings and is a frequent cause of error."[116] O'Connell was preoccupied with "the ambiguity of the word 'sources' of International law."[117] In *Greig's* view, "the question of identifying the resources of international laws and explaining where the relevant rules can be found cannot be readily answered."[118] Supporting the view that the concept of "sources of law" generates dilemma among scholars, Oppenheim sought to shed some light thereon by tracing the term "source" to its etymological root, where it denotes "spring" or "well". He interpreted "source", as signifying the natural rising of water from a certain spot on the ground. Metaphorically, he concluded:

> Just as we see streams of drinking water running over the surface of the earth, so we see, as it were streams of rules running over the area of law; and if we want to know whence these rules come, we have to follow these streams upwards until we come to their beginning. Where we find that such rules come into existence, there is the source of them. They rise from facts in the historical development of a Community.[119]

That is precisely why it will be deemed necessary to trace hereafter the sources of contemporary African law partially to the Western European legal systems, being part of

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[116] Paton G.W., *Jurisprudence,* (4t h edn), Oxford, 1972, 189.
[117] O'Connell, at 7; See also C. Parry, The Sources and Evidences of International Law, Manchester, 1965.
[118] Greig, D.W. *International Law*, London, 9.
[119] Oppenhiem, P.J op. Cit, at 25

the long term legacy of the colonialists to Africa. Fitzgerald's classification of sources of law into "formal" and "material" elicited the following comments from Paton:

> Formal source of law ... is that from which a rule of laws derives its force and validity and the materials source as that from which the matter is derived and not the validity of law. The formal source of law is the will of the state as manifested in statutes or d*ecisions of the courts.*[120]

Pound defined sources of law as:

> The factors to which legal precepts owe their content, the agencies that develop ... and formulate them as something behind which the law making and law administering authorities may put the power of the state.[121]

The factors enumerated include: usage, religion, moral philosophical ideas, adjudication, scientific discussion and legislation.[122]

Jennings held that, although article 38 of the Statute of the International Court of Justice does not specifically mention the word: "source", in effect, it provides a list of sources of law for the guidance of ICJ judges. Thus, he deemed the provisions of article 38 of the ICJ Statute as constituting authoritative sources of laws.[123]

Despite the "confusion" or the "ambiguity" engendered by the several attempts to define the sources of law, domestic or international, it has not been denied that sources of law exist.

There are two sources of the community law viz:

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[120] Saiodon Nourou Tall "Sources of ECOWAS Law, a Paper Presented at the Conference of the Court of Justice on the Rule of Law in the process of integration in West Africa held at Abuja, 12-14 November, 2007."
[121] Fitzgerald PJ, Salmond on Jurisprudence, 1966. 109-115.
[122] Paton G.W., OP, Cit., at 188-189.
[123] R. Pound., *Jurisprudence* Vol. 5, 1959, St. Paul, MN.

Major and derived sources while the major sources include the revised Treaty, protocols and conventions etc, the derived sources consist of regulations, directives, decisions, resolution and judgments etc.[124]

i. ECOWAS Treaty

While Jennings recognized "treaty as material sources of international law,"[125] other scholars regard the constitutive treaty of an Inter-Governmental Organization (IGO) as its constitution. Both views can be reconciled to formulate a proposition that the ECOWAS Treaty, being the Constitution of the Community, are first and foremost the primary sources of ECOWAS law. But it has also been argued that: Treaty are, formally, a source of obligation rather than source of law. In their contractual aspect, they are no more a way to obtain law than an ordinary private law contract; which simply creates rights and obligations.[126] A treaty is an agreement under international law entered into by actors in international law, namely sovereign states and international organization. A treaty may also be known as an (international) agreement, protocol, covenant pact, or exchange of letters, among other terms.

Indeed, ECOWAS Treaty has created rights and obligations for the member states of ECOWAS on the one hand and ECOWAS citizens on the other. For instance, ECOWAS Protocol relating to free movement of people and right of residence and establishment creates responsibilities for every member state and rights for every ECOWAS citizen. Moreover, the "Decisions" of the Authority of ECOWAS and of the "Regulations" of the ECOWAS Council of Ministers have binding force "on the member states and organizations of the community". These are contained in articles 9(4) and 12(3) of the Revised ECOWAS Treaty (1993). Article 2(a) of the Vienna Convention on the Law of Treaties defines a "treaty" as:

> An international agreement concluded between states in written form and governed by international

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[124] Ibid; at 379-388.
[125] Jennings R.Y, "*General Course on principles of International Law*" in recueil des Course, Vol. 11 1967, 329-337.
[126] Jennings, supra 338

> law, whether embodied in one instrument or in two or more related instruments[127]

As regards ECOWAS, two treaties are relevant: the original Treaty signed in Lagos in 1975, and the revised version signed in *Cotonou* in 1993. Since the member states of ECOWAS are international legal persons with full power of independent action manifested in their joint enterprise to create a common subject matter of international laws in ECOWAS, it is to be presumed that their activities are intended to be guided by international law.

A conclusive proof for that presumption is usually to be found in article 65 of the 1975 ECOWAS Treaty and article 93 of the Revised Treaty, which stipulates that the Treaty should be registered with the UN. This conforms with the provisions of article 102 of the UN Charter which oblige all member states of the UN to register every treaty and every international agreement entered by them with the UN Secretariat. According to *Greig*, compliance with article 102 of the UN Charter implies that parties to international agreements signed up with the

UN agree to be bound by international law.[128] Thus, the activities of ECOWAS are designed by the conventional rules of international law.

Umozurike has pointed out[129] that treaties diminish the importance of customary laws as a source of international law. For example, article 380 of the Treaty of Versailles of 1919 was invoked in the judgment on the *Wimbledon case*. Relating to that Treaty, "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." The Court held that:

> The conditions of article 380 are categorical and give rise to no doubt. It follows that the canal has

[127] Harris DJ, Supra 42.

[128] Harris DJ., *Case and Materials on International Law*, London, 1973, 42. 82
[129] Harris DJ., Supra 42.

> ceased to be an internal and national navigable waterway, it has become an international waterway...

Thus the laws and regulations of each state of ECOWAS will not be considered as a way to obtain ECOWAS law in this work.

ii. Protocols

O'Connell defined a protocol as a supplementary instrument to a treaty or an instrument extending its scope and interpretation.[130] This is truly so with regard to the Protocols annexed to the ECOWAS Treaty. Generally, the Protocols complement the provisions of the Treaty. Example are the Protocol on the Community Court of Justice[131] and the Protocol on the implementation of the Right of Residence and Establishment.[132]

Amendments to the ECOWAS Treaty are effected by means of Protocols, for example, those amending article 4 of the 1975 Treaty, relating to the institution of the community,[133] and article 53 of the Treaty relating to the budget of the Community.[134] Each Protocol contains a provision stipulating that it forms an integral part of the ECOWAS Treaty. Moreover, each Protocol is expected to be deposited with the Depository Federal government of the Treaty and registered with the OAU and UN in the same manner as the initial Treaty.

iii. Conventions

Articles 38 of the statute provides that the Court shall apply "international conventions, whether general or particular, establishing rules expressly acknowledged by the contesting state." The term conventions is utilized here … in a general and inclusive sense. It would seem to apply to any treaty, convention, protocol, or agreement,

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[130] Greig, Op. cit., at 460.
[131] Umozurike, U.O Op. Cit., at 17.
[132] O'Connell, Op. Cit., at 197-198.
[133] Official Journal of ECOWAS, Vol. 19, 1991, 4-11.
[134] Ibid., Vol. 17, 1990, at 9, et seq.

irrespective of its title or form. A convention may be general either because of the character of its material; it may be particular because of the limited character of its subject - matter. A special agreement (compromise) or a stipulation between contesting parties may be in this sense called convection.

The phrase establishing rules expressly recognized by the contesting states appears to place two limitations upon the conventions which the Court is to use: a limitation based upon the subject - matter of the instrument, and a limitation based on the identity of the parties to the instrument. Yet it might be doubted whether the phrase creates either of these limitations. No Precise distinction can be drawn between rule-establishing and other conventions. Any instrument which creates obligations for the State governments which are parties to it, which regulates the conduct of those States in any way, may be said to establish rules in a broad sense of the term. The rule - form may not be given to the obligation; it may be stated as a principle rather than as a rule, yet no reason exists for a limitation on the Court's application of the instrument for this reason. It was certainly not the purpose to restrict the Court to the application of what are sometimes called law - making treaties or conventions, like the Declaration of Paris of 1856 concerning maritime law. Moreover, a State may have identified a rule established by a convention. It has been observed that States have admitted formulations made by other to be proper statements of the law and as such binding for themselves. In the course of years the classification of diplomatic agents embodied in the Protocol of Vienna of March 9, 1815 was accepted by most States without any formal accession, and the rules thus established may now be said to have been integrated into customary law, and it seems to be covered by the term in Article 38 (1). To the extent that the rules laid down in an instrument must have been identified by the contesting state governments before the Court, that term is limitative, but not otherwise.

Many Conventions have been signed by the member states of ECOWAS in their bid to regulate certain matters of common interest. Examples are: Convention regulating inter-state road transportation between ECOWAS member states; Convention associated with

inter-state street transit of goods; Convention for mutual administrative assistance in customs matters.[135]

These Conventions contain specific regulations on matters provided for in general terms in the main Treaty or Protocol. These Conventions and their equipment of ratification, like the primary Treaty and Protocols, were to be deposited with the Executive Secretariat of the ECOWAS, the OAU and the UN.

iv. ECOWAS Parliament

Wade and Phillips observe that:

> When we speak of parliamentary supremacy we mean that the courts recognize that parliament has the right to legislate on every topic and that no other may legislate except with the authority of parliament.[136]

Parliamentary supremacy, wherever it exists, normally recognizes the legislative organ as the principal source of law. That is the constitutional convention, not only in the Anglo-American common law countries, but also in the civil law countries in Africa. It can be presumed, prima facie, that the ECOWAS Parliament, when operational, would constitute a primary source to obtain ECOWAS laws.

On 6 August, 1994, the Protocol relating to the community Parliament[137] was initialled in Abuja. Article 6(1) of the Protocol spells out the competence of the Parliament which "may consider any matter concerning the Community, in particular issues associated with Human Rights and Fundamental Freedoms and make recommendations to the institutions and Organs of the Community".

With regards to article 6(2) of the Protocol, "The Parliament may be consulted for its opinion on issues regarding the Community". However, in specified areas of activities of the community as stipulated in article 2(a-m) the opinion of the Parliament "shall be

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[135] Ibid Vol. 13, 1988, at 4, at 14-45.
[136] Wade .G. and Phillips E .C.S., *Constitutional Law* (8th ed.), London, 1970, 135.
[137] Official Journal of ECOWAS, Vol. 27, July/August, 1994, 4-10.

sought". Whether or not these "opinions" will attract legislative significance is a moot point. The discussion of that issue is beyond the range of this study. A comparison may be made with the European Parliament which is one of the four institutions of the European Union.

It is also one of the three policy-making organizations, fully integrated into the Community process. It is involved in the annual budgetary treatment. It gives opinion in form of resolutions indicating specific amendments. According to article 137 of the EEC Treaty the role of the Western Parliament is "supervisory and advisory". This role makes the Western european Parliament a force to be reckoned with.

The evolution of the ECOWAS Parliament will eventually reveal its character, modus operandi and legal significance. For now, any view thereon can only be speculative. Be that as it may, it can be presumed that the ECOWAS Parliament is a political institution par excellence. Through it, the citizen of ECOWAS will participate directly in the decision-making process of the organization.

Meanwhile, article 3 of the ECOWAS 1975 Treaty and article 5 of the 1993 Treaty oblige all member states to "take all steps to secure the enactment of such legislation as is necessary to give effect to" the Treaty. That is a direct appeal to the municipal parliaments or the legislative bodies of member states, not to legislate contrary to the provisions of the ECOWAS Treaty, Protocols or Conventions.

v. Subordinate Legislation of the Community Organs

Article 4 of the 1975 Treaty, as amended by a Protocol established the following institutions for the Community: the Authority of the Heads of State and Government; the Council of Ministers; the Defence Council; the Executive Secretariat; the Tribunal of the community; Technical and Specialized Commission: Trade, Customs, Immigration, Money and Payment; Industry, Agriculture and Natural Resources; Transport; Telecommunications and Energy; Social and Cultural Affairs. The list has been improved by article 6 of the revised Treaty of 1993. It now includes the Community Parliament, the Economic and Sociable Council, the community Court of Justice and the Finance for

Assistance, Compensation and Development. In 1996, the Western African Monetary Agency (WAMA) was added.

The constitutive instrument of ECOWAS is a law-making treaty. By virtue of articles 5(3) and 6(3) of the 1975 Treaty, its law-making capacity is delegated to, and exercised, by the Authority and the Council respectively.

Oppenheim argued that a law-making treaty makes general rules for the future conduct out of the signatories inter se.[138] *(Berber regards law-making treaty as traite-lois*).[139] McNair observes that:

> Generally, law-making treaties have legislative functions, for they create constitutional law which brings "a kind of public law transcending, in kind rather than merely in degree, the ordinary agreement between states, bringing into existence a new International Union[140].

The decisions of the ECOWAS Authority have legal force. Under the 1975 Treaty, these decisions only the institutions, however, not the member of the Community. However, the 1993 ECOWAS Treaty extended the direct applicability of ECOWAS decisions to the member states. Thus, according to article 9(4) of the 1993 ECOWAS Treaty, the decisions of the Authority should henceforth bind member state governments directly as well as the institutions of the community.

These decisions are not arbitrary; they may be influenced and rooted in the primary sources of ECOWAS law, namely, the Treaties, Protocols and Conventions.

The decisions and directives emanating from the ECOWAS Authority and the Council of Ministers are published in the Official Journal of ECOWAS. Furthermore, every decision is legally required to be published in the National Gazette of every Member state, the national Gazette is a secondary source of the national law in each country. Thus, the state Journal of ECOWAS and the National Gazette should belong to the secondary

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[138] Oppenheim, P.J Supra., at 27.
[139] Berber F., Lehrbuch des Voelkerrechts, Vol. 1, Beck, 1975, 63.
[140] McNair A.D., *"The Function and Differing Legal Character of Treaties*", (1930) 9 B.YI.L. 112-115.

sources of ECOWAS laws. Examples of Decisions of the Authority and Council with far-reaching significance include: Decision granting observer status to the Association of African Jurists; Decision relating to the selection and the Evaluation of the Performance of Statutory Appointees of the Community; Decision associated with the Establishment of the ECOWAS Trust Fund for Liberia; Decision on the Establishment of the Western world African Youth Union (WAYU)[141].

vi International Custom

The dynamic nature of the contemporary international community has brought about a pooling of the customary laws which have evolved to become the common customary law of mankind[142].

As observed by Arechaga that:

> Today, the simultaneous appearance of similar problems between various states, the immediate knowledge of the attitude taken by other governments, the pooling of information at plenipotentiary conferences and the whole process for codification; all account for the present acceleration of the development of customary law[143].

For a custom to acquire legal significance, as established in the *Asylum case*[144] it must reflect "constant and uniform usage". Thus in the North Sea Continental Shelf cases, the ICJ held that:

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[141] See Official Journal of ECOWAS, Vol. 19, 1991, 12-25.
[142] Jenks C.W., *The Common Law of Mankind*, London, 1958.
[143] Arechaga E.J., *"General Course in Public International Law",* (1978) Recueil des Cours2 5.
[144] Umozurike, U.O Supra, at 18.

Not only must the acts concerned amount to a settled practice, but they must also be such, ... as to be evidence of a belief that this practice is rendered

Obligatory by the existence of a rule of law requiring it…[145]

ECOWAS member states inherited individually from their former metropoles a considerable amount of international customary laws. By the same token, they came in contact with the traditions and usages of international law transcending ideological, political, economic orientations and national legal systems. Thus, the international customs of ECOWAS consist the totality of the state methods developed in the member state; the inherited international customary law from their former *metropoles*; and the practices and usages of international organizations generally. As O'Connell observed that:

> It is not deference to its own legal conscience on the part of the individual state that crystallizes a customary rule, ... it is rather deference to a common conscience by which the condition admits its subjection to a rule not exclusively of its manufacture[146].

Article 38 of the statute of general application also directs the court to apply "international custom, as law." This might have been cast more clearly as a provision for the Court's applying customary international law. It seems to emphasize the general law, as conventions accepted by law embodied in conventions accepted by the parties. It is not possible for the Court to use a custom; instead it can observe the general practice of state, and if it finds that such practice is due to a conception that law requires it, it may declare that a rule of law is available and proceed to apply it. The elements necessary are the concordance and repeating action of numerous states in the domain of international relations. The conception in each case that such action was enjoined for law, and the failure of other states to challenge that conception at the time. The appreciation of these elements is not a simple matter, and it is a task for persons trained in law.

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[145] Harris, D.J Supra, at 30.
[146] O'Connell, Supra, at 15

vii General Principles of Law

Schwarzenberger observes that the "European Public law" consisting of the Anglo-American and the Romano-Germanic legal systems inspired the overall principles of law enunciated in article 38(l)(c) of the Statute of ICJ.[147]

The two legal systems now dominate the modern world which includes Africa. Some jurists respect the two systems as a *"family of Western law"*[148] in contrast to the category of Eastern block rules under the hegemony of the defunct Soviet Union. For the reasons already discussed above, ECOWAS member state governments have been generally affected by the "family of European laws".

According to O'Connell, the general principles of law are "implicit international law."[149] Within that platform, two categories of general principles of law are distinguishable: those which are basic to legal systems generally, and those which are prolonged only by analogy or by other judicial processes from some systems of municipal law to international legislation. Types of the first category include no one may be a judge in his own cause *(nemo debet esse judex in propria causa)*, nobody can be at once suitor and judge *(nemo potest esse simul acting professional et judex)*, hear the other part *(audi alteram partem)* and the sanctity of agreements *(pacta sunt servanda)*. Examples of the second category include rules regarding unjust enrichment, jurisdictional primacy of international law over municipal law, the principles of *estoppel* and equity.

In the Diversion of Water from the Meuse case, court held that:

What are widely known as principles of equity have long been considered to constitute a part of international laws, and therefore, they have been applied by international tribunals.[150]

In the Chorzow Factory case, the Permanent Court held as follows:

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[147] Schwarzenberger G., A Manualo *International Law* (6th edn), Oxford, 1976, 6.
[148] Ibid.
[149] O'Connell, Supra., at 9-14.
[150] Harris, D.J Supra at 48.

> A party cannot take advantage of its own wrong is a principle generally accepted in the jurisprudence of international arbitration as well as by municipal courts.[151]

Similarly, the Corfu Channel case established that indirect evidence is admitted in all systems of law…[152] The general principles of law which were evolved by the ex-colonial powers and transmitted with their former African colonies are so fundamental to the practice of law in the contemporary world that their extension to ECOWAS law should almost be regarded as a foregone conclusion. They ought to constitute the sub-structure of the inherited legal systems in the sub-region.

Article 38 of the statute also directs the Court to apply "the general principles of law acknowledged by civilized countries." As all nations are civilized, as "law implies civilization," the reference to "civilized nation" can serve only to exclude from consideration primitive systems of law. Members of the 1920 Committee of Jurists expressed varying views as to the meaning of this provision when it was drafted, and the dilemma was not dissipated by the Committee's report. One of its purposes may have been, under the inspiration of the national legislation of some states, to prevent the Court's abstaining from a decision because "no positive applicable rule is present." The provision serves a useful purpose in that it emphasizes the creative role to be played by the court. It confers such a wide freedom of choice that no fixed and certain content can be assigned to the terms employed. It has been widely hailed as a refutation of the extreme positive conception of international law, and even as revolutionary; on the other hands, it has been deprecated as adding to existing confusion.

Taken out of its context, the phrase "general principles of law recognized by civilized nations" would refer primarily to the general principles of international law; following provisions in Article 38 relating to international conventions and international custom, however, it must be given a different, perhaps one may say a larger, content. It empowers the Court to go outside the field in which States have expressed their will to accept certain principles of laws as governing their relationships inter se, and to draw upon principles

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[151] Ibid, at 45.
[152] Ibid.

common to various systems of municipal law or generally agreed upon among interpreters of municipal law. It authorizes use to be made of analogies found in the national law of the various States. It makes possible the expansion of international law along lines neglected by legal thought and legal school of thought in different parts of the world. It enjoins the Court to consult a *jus gentium* before fixing limits of the *droit* des gens.

viii. Judicial Decisions

Article 38(1)(d) of the Statute of ICJ regards judicial decisions as subsidiary means for the determination of rules of law, subject to the provisions of article 59 of the same Statute which states that the decisions of the Court have no binding force, except between the parties and in respect of this particular case.

According to O'Connell, international law is so dependent because of its content on judicial formulation and judicial judgment on concrete issues of law and facts that there is now a judicial guidance in future issues. Although no international decision is binding on subsequent tribunals, the tendency towards stare *decisis* is on the increase, because there has been a natural reluctance to depart from the concepts and rules which have proved satisfactory in the past for the settlement of legal issues.[153]

Brownlie argued that advisory views in some international cases have had a decisive influence on general international laws. The Reparation case, for instance, has decisively inspired the subsequent issues of legal personality of international organizations[154]. Likewise, the decisions of the International Armed service Tribunal in Nuremberg laid down important principles relating to crimes against peace and humanity.[155]

The judicial decisions that might constitute subsidiary opportunity for the determination of ECOWAS rules of law would probably emanate from various external sources, including the decisions of the Supreme Courts of each Member State; relevant international tribunals, the European Court of Justice; the International Court of Justice

[153] O'Connell, Supra at 31-32.
[154] Brownlie I., *Principles of Public International Law*, 1971, 19-21.
[155] Umozurike, U.O Supra. at 23.

(ICJ); the decisions of the *Cour de Cassation* in *Paris* and the decision of the Judicial Committee of the Privy Council in London. They are likely to command persuasive authority in the ECOWAS Court of Justice. For instance, Decisions of the US Supreme Court in the *Paquete Habana* and the Scotia are often resorted to in order to clarify the nature of customary law.[156]

By the provision of Article 38 (1) (d) of the statute of ICJ regards the teachings of the most highly qualified publicists of various nations as subsidiary means for the determination of rules of law.

Kahn-freund emphasized that the writing of academic lawyers are not a source of authority because they do not make law.[157] However, through the medium of scholarly writing, legal ideas spread from one country to another.

ECOWAS Rules should derive tremendous motivation from the works of eminent jurists in the relevant spheres of international law, particularly the rules of international organizations.

Thus, the teachings of distinguished publicists on ECOWAS laws, national laws and regulations of the member state of the community, laws of comparable international organizations, like European Union, and international law generally, would constitute subsidiary means for determining the rule of ECOWAS Law.

Judicial decisions and the teachings of Publicists. "As subsidiary means for the perseverance of rules of law," the Court is also directed to apply "judicial decisions and the teachings of the very most highly experienced publicists of the many countries", but this direction is expressly made 'subject matter to the provisions of Article 59" that "your choice of the Court has no binding force except between your parties and in respect of that particular case." Judicial decisions and the teachings of publicists are not rules to be applied, but sources to be resorted to for finding suitable rules. What is meant by subsidiary is not clear. It may be thought to imply that these sources are to be

[156] Ibid., at 24.
[157] Kahn-Freund O, *General Problems of Private International Law*, 1976, 128.

subordinated to others mentioned in the article, i.e., to be viewed only when sufficient guidance cannot be found in international conventions, international custom and general law; the French term auxiliaries seems, however, to indicate that confirmation of rules found to exist may be sought by referring to jurisprudence and doctrine. In view of the mention of Article 59, the word judicial decisions must include decisions of the Court itself; it includes also decisions of other international tribunals and of national courts.

In its judgments and opinions, the Court has frequently referred to what it had held and what it had said in earlier judgments and opinions, and within limits it has shown itself disposed to build a consistent body case-law in its jurisprudence.

The teachings of publicist are treated less favourably at the hand of the Court. No treatise or doctrinal writing has been cited by the Court. In connection with its conclusion in the *Lotus case* that the existence of a restrictive rule of international law had not been conclusively proved, it described "teachings of publicists" without attempting to assess their value, but if failed to find in them any useful indication. Individual judges have not been so restrained in their personal references to the teachings of publicists; they never have hesitated to cite living authors, and even the published works of member of the Court itself.

ix. ECOWAS Internal Laws

Seyersted affirmed that, usually, the relationship between an inter-governmental organization (IGO) and its own officials, who in their own right are international civil servants, is not governed by the municipal law of the host state, nor by international law; rather it is governed by the internal law of the organization[158].

Moreover, any employment with an IGO is partly contractual and partially statutory. It is a contract of public law, similar to an agreement in work between a state and its civil servants. He enumerated four regions of law that may govern the relationship between an IGO and its own staff:

[158] Seyersted F., (1967) 3 Recueil des Cours4 33-443.

a. The constitution of the organization as interpreted in the light of general principles of international and municipal laws and regulations;

b. Staff regulations and rules enacted by the organization;

c. Customary law developed on the basis of administration and judicial precedents within the organization;

d. General principle of law drawn mostly from the internal laws of the international organizations.

3.2 Evolution of ECOWAS Law

Every modern community should be presumed to have its own laws, the totality of which should generate a legal system. ECOWAS, a financial community of sixteen sovereign states, cannot be an exclusion to that general rule. It is destined to have its community laws and its own legal system. Indeed, it should have a sort of sub-regional international law'[159] for the orderly integration of its peoples, economically, socially and politically. *Schwarzenberger* observed that:

> The law of the community should serve "the purpose of assisting in the maintenance and ... integration of the community and the protection of the group against exceptional aberrations of its members.

Its main function should "consist in promoting the coordination of activities in the interest of the community by the rationalization of community rules of behavior."[160]

Dworkin also observed:

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[159] Umozurike U.O., *Introduction to International Law*, Ibadan, 1993; on p. 2, he regards ECOWAS as Capable of Generating "Regional International Law.
[160] Schwarzenberger G., *Frontiers of International Law,* London, 1962, 14.

The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behaviour will be punished or coerced by the public power[161].

This is one of the reasons why law has been described as "a body of social rules prescribing external conduct considered justifiable."[162] In jurisprudence, law has been defined as "the sum total of a number of individual laws and regulations taken together". This would be in the sense of *"ius"* in *Latin; "Recht"* in German; and *"droit"* in French; while international law is: *ius* inter gents, *Voelkerrecht,* and *droit* des gens-law among sovereign states.[163]

ECOWAS law is a law among the sixteen sovereign state of the sub-region of West Africa. Writing on "International Law and Development" with particular reference to Africa in the 1980s, *Slinn* and *Allott* noticed that:

Law, first of all presupposes a community of autonomous state governments.[164]

And to achieve an effective system, there should be "a consensus on the means of regulations for the determination of the rules, for the resolution of conflicts, and for carrying into effect the decisions on those rules and conflicts."[165] ECOWAS, which is contractually bound to regulate a substantial area of the economic and political activities of the member states with a view to forging a common market, to be able to raise the living standard of its individuals,[166] would appear to offer a case study to verify what *Slinn* and *Allott* had in mind.

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[161] Dworkin R.M. *The Philosophy of Law*, (ed.), Oxford, 1977, 38.
[162] Kantorowicz H., *The Definition of Law*, Campbell and Goodhart (eds.) 1958, 79.
[163] Holland T.E., *Jurisprudence,* Oxford, 1910, 386.
[164] Slinn and A. Allott P., "*International Law and Development Perspective for the 1980s*", [1982] J.A.L. 1-2.
[165] Ibid.
[166] See Article 2 of the 1975 ECOWAS Treaty; and Arts. 3 and 56 of the 1993 Revised Version of the Treaty.

Article 60 of the 1975 ECOWAS Treaty and article 88 of the Revised Treaty stipulate that the Community is an international organization endowed with legal personality and capacity.[167]

Arguably therefore, ECOWAS is a legal community. As pointed out by *Mosler*, "international society" is a legal community to the degree that it is able to live relating to legal rule.[168] In his view, two elements are necessary for the existence of a global legal community:

The fact that a certain number of independent societies organized on a territorial basis can be found; and that all the systems are partners, being mutually bound by reciprocal, generally applicable rules, granting rights, imposing obligations and distributing compensations.[169] ECOWAS fulfils both elements: it has a defined territorial scope[170] and, since 1977, they have begun to generate legal rules and regulations applicable in all the member state. These legal rules impose privileges and responsibilities. Such rights and responsibilities are encapsulated in the aim and objectives as well as the fundamental principles of ECOWAS stipulated in articles 3-5 of the Modified Treaty.

The legal rules and other legal instruments generated by the community will constitute, *proprio vigore*, the law of ECOWAS.

Meersch mentioned that the law of international organizations is, indeed, a fundamental element of public international law.[171] However, *Oppenheim*[172] and *Brownlie*[173] described some nuances in the two systems of law. Both regard general public international laws as "common", in as far as it deals with the category of nations en bloc; and the law of international organizations as "particular international law" because it is peculiar to the constituent member countries of the respective organizations that are

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[167] For a Brief Commentary see Further, Ajulo S.B., *"ECOWAS and International Law*", (1989) 27 The Journal of Modem African Studies2 33-250.
[168] Mosler H., "*International Society as a Legal Community*", in *Recueil des Cours*, Vol. 4, 1974, 18.
[169] Ibid.
[170] Ajulo S.B., "Towards a Definition of ECOWAS Territorial Scope", (1985) 20 Journal of Asian and African Studies(JAAS)3 1-41.
[171] Meersch W.G., *L'ordre Juridique des Communautes Europeennes*, (1975) 24 *Recueil des Cours.*
[172] Oppenheim P.J, *International Law,* Vol. 1 (8th edn) London, 28-33.
[173] Brownlie I., *Principles of Public International Law,* Oxford, 1971, 2.

presumed destined by the privileges and obligations imposed by these treaties they signed to the exclusion of other nations. Considered from that standpoint, it is arguable that ECOWAS law is a specific sub-regional international law to be valid only among the ECOWAS member states which are constituents of the continent of Africa as well as members of the Organization of African Unity (OAU). Thus, ECOWAS law can only just bind ECOWAS members to the exclusion of all other African state as well as other subjects of international law.

3.3 A Comparative Analysis of the Practice and Procedure of ECOWAS Court of Justice with ICJ And EUC

The community Court of Justice, of ECOWAS was established pursuant to provisions of Article 6 and 15 of the Revised Treaty of ECOWAS. Protocol A/P1/7/91 relating to the Community Court of Justice shows that the Court is the principal legal organ of ECOWAS with the main function of resolving dispute relating to the interpretation and application of the provisions of the Revised Treaty and annexed protocols and conventions. The primary goals of the administration of justice is to render justice according to laws. The court is enjoined in article 9 (1) of its protocol to ensure the observance of law and of the concepts of equity in the interpretation and application of the provision of the Treaty. The protocol further enjoins the Court to establish its own Rules of procedure.

The Rules of Procedure of the ECOWAS Community Court of Justice have been formulated to regulate the proceedings of the Court. It really is expected that Lawyers wishing to appear before the Court should be very familiar with the provisions of the said Rules.

Article 32 of the Protocol of the community Court of Justice empowers the Court to establish its Rules of procedure to be approved by Council.[174] Pursuant to this provision, the Court formulated its Rules of Procedure, which was approved by Council.[175] The

[174] Article 32 of the 1991 Court Protocol
[175] See Regulation C/REG/04/8/02 of 28th August 2002.

approved Rule of procedure of the Community Court of Justice of the Economic Community of West African States has been published.[176]

The Procedure of the Community Court of Justice is governed by the Protocol and the Rules of Procedure of the Court. Proceedings before the Court shall consist of two parts,[177] written and oral. Written proceedings shall contain the application entered in the Court, notification of the application the defence, the reply or counter-statement, the rejoinder and every other briefs or documents in support. See Article 13(1) - (3) of the Protocol and Articles 32-51 of the Rules of Procedure.[178]

Article 12 of the Protocol of the Court provides that every party to a dispute shall be represented prior to the Court by one or more agents nominated by the party concerned, and the agencies may request the assistance of a number of Advocates or Counsel who are qualified to appear in Court in their area of jurisdiction. A lawyer acting for a party is required to lodge at the registry of the Court, a certificate showing that he is authorized to practice before a Court of a Member State or of another State which is a party to the Treaty. See Article 28(3) of the Rules.

Provision have also been made in the Rules for Agents, Advisers and Attorneys appearing before the Court to enjoy immunity in respect of words spoken or written by them concerning the case or the parties. See Articles 28, 29 and 30 of the Rules.

The Court may however exclude from the proceedings any Adviser or Lawyer whose conduct to the Court or a Judge is incompatible with the dignity of the Court. See Article 31 of the guidelines.

3.4 Commencement of Action

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[176] See volume 41, August 2002, of the Official Journal of ECOWAS.

[177] Donli H.N, "The Law, Practice and Procedure of the Community Court of Justice – Meaning and Implications at the Workshop on the Law, Practice and Procedure of the Community Court of Justice, ECOWAS Organized".

[178] Article 53(2) of the "Rules of Procedure by the West African Bar Association and West African Human Rights Forum", held at Bamako, Mali 7-9 December, 2006".

Actions may be brought before to the Court by an application addressed to the Court Registry. See Article 11 of the Protocol. By virtue of the provision of Article 33 of the Rules of Procedure, every application shall state;[179]

- 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 legislation on which the application form is based.
- the form of order wanted by the applicant
- where appropriate, the type of any evidence offered in support
- an address for service in the place where the Court has its seat and the name of the person who is authorized and has indicated willingness to simply accept service.
- In addition or instead of specifying an address for service, the application may declare that the attorney or agent agrees that service is to be effected on him by *telefax* or other complex method of communication.

Within one month after service on him of the application form, the Defendant shall lodge a defence and must specify the following"

- The name and address of the defendant
- The arguments of fact and law relied on
- The form of order sought by the Defendant
- The nature of any evidence offered by him

[179] Article 33 of The Rules of Procedure.

Under Article 36, the plaintiff must file a reply to the defense, if any, within a month of receipt of the defence and the defendant must file a rejoinder within one month of receipt of the reply.

Additionally, it is a requirement under the rules of the Court that Notice of the Registration of an Application initiating proceedings be given in the official Journal of the Community. The Notice shall state;[180]

- the date of enrollment of the Application
- the names and addresses of the parties
- the subject matter of the proceedings
- the form of order sought for by the applicant
- A summary of the pleas in law and of the primary supporting arguments. See Article 16 (6) of the Rules.

The Notices of registration is significant because it serves the goal of putting the general public on Notice, so that interested individuals who may wish to intervene in the proceedings, can achieve this. Article 21 of the Protocol empowers any interested Member state to intervene in a dispute before the Court. By virtue of the Article 89 of the Rules of Procedure of the Court, an application to intervene must be made within six weeks of the publication of the Notice of registration.[181]

i. Preparatory Inquiry

In the trial of cases before to the Court the *Judge - Rapporteur* plays an important role. The main task of the *Judge - Rapporteur* is to make a preliminary report to the court in respect of an application. The preliminary report shall contain suggestions concerning whether a preparatory inquiry or any other preparatory step should be undertaken. The

[180] Article 35 of the "Rules of Procedure".

[181] Article 21 and 59 (4) of 1991 Protocol.

measures of inquiry that the Court has ordered shall also be conducted by the *Judge - Rapporteur*. Where the Court commissions an expert's report, the expert works under the supervision of the *Judge – Rapporteur.*[182]

After the conclusion of the written proceedings, the President of the Court fixes the date on which the *Judge - Rapporteur* is to present his preliminary report to the Court. Upon his recommendation, the Court shall decide what action to take. The following measures of inquiry may be used:

- The personal appearance of the parties
- A request for information and production of documents
- Mouth testimony
- The commissioning of an expert's report
- An inspection of the place or thing in question. See Articles 39 and 41 of the Rules and Article 16 of the Process.

ii. Oral Procedure/Hearing

Following the completion of the preparatory inquiry, the President fixes the date for the opening of the oral procedure. The proceedings shall be opened and directed by the President who shall be responsible for the proper conduct of the hearing. The Court may summon a witness of its own motion or on application by a party. After the conclusion by the parties, the President shall declare oral procedure closed.[183]

Pursuant to the provisions of Article 14 (2) of the Protocol, the Quorum of the Court contains the President and at least two other Judges. The sitting of the Court shall comprise of an uneven member of its members i.e. 3, 5 or 7. The date and times of the sessions of the Court shall be fixed by the President. The Court may however choose to hold one or more sessions outside its seat of Court. Where the Court has been convened

[182] Article 39, 41 and 45 of the Rules of Procedure.
[183] Article 53an 50-57 of the Rules of Procedure.

which is found that there is no quorum, the President shall adjourn the sitting until there is a quorum. The sitting of the Court shall be open public, but the Court may sit in camera at the request of 1 of the parties for reasons, which only the court may determine. See Articles 21 and 22 of the Rules and Articles 26 (1) and 27 of the Protocol. It is submitted that it is essential to amend the provisions of Article 14 (2) of the Protocol in order to ensure that two panels of the Court can seat at the same time without the president of the court.[184]

Article 87 of the Revised Treaty makes provisions for the official and working languages of the community. The Rules of the Procedure of the Court provide that the official language of the Court will be English, French and Portuguese. The language of the case shall be chosen by the Applicant, except that where in fact the Defendant is a member State, the vocabulary of the case shall be the official language of that state. The language of a case shall be used in the written and oral pleadings of the parties, the supporting documents, and in the minutes and decisions of the Court, See Article 25 of the Rules.[185]

iii. Judgment of the Court

The Court's deliberations upon what its judgment shall be in a closed session, and only those Judges who had been present at the oral proceedings are entitled to take part in the deliberations. Every Judge taking part in the deliberations shall state his opinion and the reason.[186] The conclusions reached by the majority of the Judges after final dialogue shall determine the decision of the Court. The judgment of the Court shall be read in open Court and shall state the reasons which it is based. See Articles 23, 60, 61 and 62 of the Rules and Article 19 of the Protocol.

Article 62 of the Rules provides that the judgment shall be binding from the date of its delivery. Article 22 (3) of the Protocol enjoins all Member States and Institutions of the Community to immediately take all necessary methods to guarantee the execution of the decisions of the Court.

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[184] Article 14(2) of the Protocol.
[185] Article 87 of the Revised Treaty, 1993.
[186] Article 19 of the 1991 Court Protocol.

Realizing the inadequacy of the stipulated procedure for enforcement, the Court proposed for a more elaborate provision. As a result, the amended Protocol inserted a fresh Article 24 which provides:

1. Judgments of the Court that have financial implications for nationals of Member States or Member States are binding.

2. Execution of any decision of the Court will be in the form of a writ of execution, which shall be posted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State.

3. Upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ will be enforced.

4. All Member States shall determine the capable national authority for the purpose of receipt and processing of execution, and only the Court that can suspend its judgment."

Finally Article 15 (4) of the Revised Treaty provides that 'Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community, individuals and corporate bodies"[187]

3.5 Practice and Method of ICJ

The ICJ Statute[188] and the revised Rules of the Court[189] regulate the procedure to be adopted by the Court as well as the parties coming and having matters before it. This covers issues like the language of the Court, Provisional measures to preserve rights, representation, proceedings, service of notices; hearing, judgment, costs, among others.

[187] Article 15(4) of the Revised Treaty and Article 60 of the "Rules of Procedure".
[188] Art. 39 – 64.
[189] Contains 109 Arts and it Took Effect from 1, July 1978.

Art. 39 provides for the language of the Court, these are English and French. The parties are free to choose either of both and if the court authorizes, they can use any language other than English or French.

Cases are brought before the Court either by the notification of the special agreement or by a written application addressed to the Registrar. Whichever mode of coming before to the court, the subject of the dispute and the parties, must be indicated.[190] The Registrar shall forthwith communicate the application to all concerned and shall also inform the members of the UN through the Secretary-General.[191]

The parties to an action before the court have the right to be represented. Art 42 (1) provide that: "The parties shall be represented by agent". They may have the help of Counsel or advocates before the Court. Furthermore, this article offers the agents, Counsel and advocates to be accorded privileges and immunities necessary to the impartial exercise of their duties. The position of an agent here appears to be stronger than that of a Counsel or an advocate with legal skills, since it is only the assistance of the second that may be required. Parties have often included Political or Scientific advisers in their list of people appearing in their cases, not as offering evidence as expert witnesses but have been found to plead as Counsel. In the *Iceland Fisheries Case,*[192] a German fisheries expert, speaking from Councils podium, offered a fascinating account of methods of procreation of the various fish shares around Iceland. It must be pointed out however that the great majority of those who plead before the Court are highly qualified lawyers.

Pleadings before this Court consists of two parts; written and oral. The written proceedings shall consist of the communication to the court and also to the parties of memorials, counter-memorials, and, if necessary, replies with papers and documents in support. All these are done through the Registrar of the Court.[193] The hearing proper is under the President of the Court and in his absence, the Vice President. Where both of

[190] Art. 40(1) Statute.
[191] Paragraph (2) & (3)
[192] (1972) ICJ 12 at 16.
[193] Art. 43.

them are absent, the senior Judge will preside over the hearing.[194] That is done in public except the Court rules otherwise on its own or at the demand of the parties.

Ordinarily, parties brought before this Court are expected to appear. The Statute takes care of default under Article. 53(1) and (2) which state thus:

> (1) Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of the case. The second paragraph is however on condition regulating the power so confined in paragraph 1, it provides thus:
>
> (2) The Court must, before doing so, satisfy, not only that it has jurisdiction in accordance with Arts. 36 and 37, but also that the claim is well founded in fact and laws

In the hearing, minutes are made and signed by the Registrar and the President. The Court may also call upon the agent in a case to produce any documents or to supply any explanation even before the hearing begins.[195] At the completion of presentation, the President shall declare the hearing closed as the Court withdraws to consider the judgment. This deliberation is done in private, and remains secret.[196]

The questions presented by parties are decided by a majority of judges present and in case of equality of votes, the President has a casting vote. There is room for dissenting opinion which is also made public. The judgment of the Court must state reasons for arriving at it.[197] The Court will not rely on precedent. The judgment of this Court is final and without appeal.[198]

i. Enforcement

The decision of the Court, to be of any value need enforcement procedure. The U.N. Charter takes care of this in Art. 94 which addresses the responsibility on all members

[194] Art. 45.
[195] Art. 47 and 49.
[196] Art. 54.
[197] Art. 56(1).
[198] Art. 60.

of U.N to comply with the decisions of the Court where they are parties and in case of failure by one party what the other can do, it offers thus:

(1) Each member of the UN undertakes to adhere to the decision of the ICJ in any case to which it is a party.

(2) If any Party to a case fails to perform the obligation incumbent upon it under a judgment rendered by the Court, the other party may have recourse to Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment article 59 of the statute provides thus: the decision of the Court does not have any binding force except between the parties and in respect of this particular case.

Enforcement is therefore strictly against parties that submitted their cases to the Court for determination.

What then happens where a third party is interested in a matter and wants to intervene?[199] This raises the question as to what status an *intervene or* would have in the main proceeding. Would the *intervenor* be considered a full party, such that the decision would be binding upon it? Or would it be only a participant, without committing itself to be bound by the eventual decision of the Court in the main case. These questions emanated from the provisions of Article. 62 of the statute allow a state having interest of legal nature which may be affected by the decision in the case to submit a request to the Court to be permitted to intervene.

The Court was unable to answer such questions as asked above in a number of cases by refusing to entertain third party requests. This position however changed in 1990 where in the *CASE Concerning The Land, And Maritime Frontier Dispute (EL Salvador/Honduras)* merits,[200] Nicaragua was granted permission to intervene pursuant to Art. 62 of the Statute by an unanimous decision of the Chamber of the Court also used the opportunity to pronounce on the position of such an *intervenor* by reason only of

[199] (1993) A.J.I RCL Vol.5 pt. 1.
[200] For Example, Monetary Gold Removed from Rome I.C.T. Report (1958) p. 19, Nuclear Test Cases (1973) I.C.J. 99.

being an *invernenor* become a party to the situation.[201] This position tends to preserve the consensual jurisdiction process entrenched in the Statute.

3.6 The ICJ and Regional Courts

Going by the peculiar nature of the World Court, there is the need to look at the Western Court and the ECOWAS Community Court of Justice as examples of regional Courts, most especially as it concerns their jurisdiction. There is no doubt regarding the drawing heavily from the Statute of the ICJ in the area of procedure by the drafters of the rules of Procedure of the two Courts. However, the fundamental and distinctive distinctions come in the issue of jurisdiction, as regards the range of subjects covered and the persons.

The European Court as well as the Community Court was established based on an economic union of States in different regions. Article. 4 of the E.U.C. Agreement otherwise known as the Treaty of Rome, 1957 founded a court of Justice while Arts 11 and 2(1) of the Treaty of ECOWAS and Protocol establish the Community Court.

These two Courts are established to adjudicate upon issues arising from the Treaties of their parent organization. It is however exposed that the scope and length of operation of the Western Court is more[202] than that of the community Court. Not merely will the Treaty of the former provides for a wider subject matter, it is older and better set up with decided cases.

Parties before ICJ are restricted to States, similarly the Community Court makes provisions for dispute by Member States or the Authority, when such disputes arise between the Member State governments or between one or more Member States and the Organizations of the community[203] Apart from the States, the Authority can also be heard. Similarly where a national is aggrieved and this cannot be resolved amicably, a member state may, on his behalf institute proceeding against another member state or organization of the Community.[204] The EC can review the legality of works of the Court

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[201] For Example Arts. 178, 180 and 181.
[202] Art. 9 (2) of the Protocol on the Community Court of Justice
[203] Paragraph (3).
[204] Art.173; Plender R. *"The European Court as an International Tribunal C.L"* Nov. 1983.

and the commission at the suit of member states, or of those institutions themselves or at the suit of interested individuals or corporations.[205] By this, individual and corporations can appear before to the E.C unlike both previous mentioned. In fact, Art. 179 offers the employees of the community to come directly to the Court, and not for an administrative tribunal.

Another peculiar situation to the E.C exists in the initial rulings provision on the interpretation of acts of the organizations of the Community, when such questions are raised in the course of litigation before national courts.[206] This is significant because it attributes to the E.C a function in the resolution of disputes between private parties in national courts[207] The ICJ and Community Court are not seised with such a jurisdiction.

The E.C has more languages than the ICJ and the Community Court. You will find seven acceptable languages of E.C., they are: English, French, Dutch, Danish, German, Italian (Being Official)[208] and Irish. The ICJ and the Community Court have just English and French and Portuguese as their formal languages.

The form of judgment of the ICJ allows dissenting opinions to be made public. Decisions of the three Courts are read in public areas. However, as opposed to the ICJ, the EC and the ECOWAS Community Court do not have any provision for different or dissenting view.[209] The natural desire to accomplish unanimity will lead to compromises that are shown in the language of the judgments of the EC for example.

The ICJ and the Courts under discourse have advisory opinion jurisdiction,[210] their officers enjoy privileges and immunities identical to people enjoyed by diplomatic missions and diplomatic agents. They are International Courts which have differences in procedure but are related in certain features familiar to the Public International Law.

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[205] Vol. 42 P. 282 and *Union Laitere Normande v. French Diary.*
[206] Art. 177 Treaty and Art. 20 of the Statutes of the Court.
[207] Plander R. Op. Cit. at 280.
[208] Brown or & Jacobs F; *The Court of Justice of the European Community* (London: Sweet and Maxwell (1977)
Pp. 14-15).
[209] Art. 19 (3) Protocol for the Community Court.
[210] Art. 10 Protocol of the Community Court.

i. History of European Union Court of Justice

The Court was established in 1952, by the Treaty of paris (1951) as part of the European Coal and Steel Community. It was established with Seven Judges allowing both representation of each of the six Member States and being an unequal number of judges was appointed from each Member State and the seventh seat rotated between the ‘’large Member States’’ (West Germany, France and Italy). It became an institution of two additional communities in 1957 when the European Economic Community (E.E.C), and the European Atomic Energy Community (Euratom) were created, sharing the same courts with the European Coal and Steel Community.[211]

The Maastricht Treaty was ratified in 1993, and created the European Union. The name of the court did not change unlike the other institutions. The power of the Court reside in the Community pillar (the first pillar)

The Court gained power in 1997 with the signing of the Amsterdam Treaty. Issues from the third pillar were transferred to the first pillar. Previously these issues were settled between the Member States.

Following the entrance into force of the Treaty of Lisbon on 1 December 2009, the ECJ’s official names was changed from the ‘’court of Justice of the European Communitie’s to the Court of Justice’ although in English it is still most common to refer to the court as the European Court of Justice. The Court of first instance was renamed as the ‘’General Court’’ and the term ‘’Court of Justice of the European Union’’ will officially designates the two Courts, as along with its specialised tribunals, taken together. ‘’The European Court of Justice (ECJ) is the highest Court in the European Union in matters of European Union law… The Court was established in 1952 and is based in Luxembourg’’ The president of the Court of Justice is elected from and by the Judges for a renewable team of three years. The president presides over hearing and deliberations, directing both Judicial business and administration for example, the time table of the Court and Grand Chamber). He also assigns cases to the Chambers for examination and appoints Judges

[211] Htts://en.m.wikipedia.org

as rapporteurs (reporting Judges). The Council may also appoint assistant rapporteurs to assist the president in application for interim measure and to assist repporteurs in the performance of their duties. The name of the present president is Koen Lenaerts from Belgium his tenure will Exp 6/10/18.

i. Jurisdiction of the European Union Court of Justice

Jurisdiction simply means the power of a court to determine an action before it. The significance of jurisdiction is that a matter conducted by a court without jurisdiction is a nullity. As it is intrinsic to adjudicate the issue of jurisdiction is usually taken at the earliest opportunity by a court.

The Court has Jurisdiction to hear various types of action. The Court has competence among other things to rule on application for annulment or actions for failure to act brought by a Member State or an institution, actions against Member State for failure to fulfill obligations, references for a preliminary ruling and appeals against decisions of the General Court.

ii. Composition of the European Union Court of Justice

The Court of Justice Consists of 28 Judges who are assisted by Advocates-General. The Judges and Advocates –General are appointed by common accord of the government of the Member States and hold office for a renewable term of six years. The treaties require that they are chosen from legal experts whose independence is ‘’beyond doubt’’ and who possess the qualifications required for appointment to the highest Judicial Offices in their respective countries or who are recognised competence 37% of Judges had experience of judging appeals before they joined the ECJ. In practice each Member State nominates a Judge whose nomination is then ratified by all the other Member States.

3.7 Practice and Procedure of EU Court of Justice

The practice and procedure of the court are based on code and Rules of Procedure drawn up by the Court.[212] The procedure of the court is divided into three levels: a written stage: an instruction (inquiry) stage, and an oral stage. As soon as a compliant (a requite) is filed with the Registrar, the President appoints one of the judges as *Judge- rapporteur* (reporting- judge). The task of the *judge-rapporteur* is to prepare a preliminary report on the case for the consideration of the Court.[213]

The written stage takes the form of pleadings. The plaintiff in his request will set out his claim against the defendant and the grounds upon which it is made. The defendant will then be notified of the request and will be given the period of one month within to prepare and send to the Court a state of defence. The plaintiff may make a written reply to the defence and the defendant may then also make a final rejoinder. This exchange of submissions comprises the written stage in the proceedings. It should be pointed out that these written submissions go far significantly beyond the scope and purpose of English pleadings. The arguments of the parties are set out fully together with the nature of the evidence which reliance is placed. This has the effect of stressing the written stage at the expense of the other two stages.[214] The judge-rapporteur reports to the Court on whether an instruction is necessary and after the Court in addition has heard the advocate-general on this point it will decide whether to proceed to an instruction. If the Court decides that an instruction is necessary it can be held before the full court, before one of the chambers of the court or it could be entrusted to the judge-rapporteur himself. In any event, the instruction will take the form of a personal appearance of the parties and their witnesses for oral examination and the production and inspection of documentary evidence. This procedure of instruction is principally conducted not by lawyers representing the parties, but, by court sitting in chamber by judge-rapporeur as the situation may be. The advocate-general could also participate in the instructions. The representative of the parties may

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[212] The Rules Require the Unanimous Approval of the Council; E.E.C. Treaty, Art. 188. The Present Rules were Approved on 26 November 1974; See O.J.L.350,28 December 1974. See O.J.L. 350, 28 December 1974. for descriptions of Procedure before the Court Cohn. E.J., *"Luxembourg Days"* (1962 233 Law Times 3421, and Barber, J. and Reed, B. (Eds.) *European Community: Vision and Reality* (1973), p. 211).

[213] See Generally the Rules of Procedure of the Court, Title 2.

[214] In 1971 The Court gave Judgment in 60 Cases in which the Written Procedure Totaled 18,000 pages, Compbell, Op. Cit. Vol. 3, para. 7.23.

only question witnesses "at the mercy of the control of the President."[215] In addition to witnesses who are called at the request of the parties, the Court and the advocate-general also have the power to summon witnesses. Evidence is given on oath[216] sworn either in accordance with the laws of the state of the witness's nationality, or additionally in the form set out in the Rule of procedure. The Court has power to exempt a witness from taking the oath. At the end of instruction the Court may allow the parties to submit written observations on issues that have arisen throughout the instruction.

Following the conclusion of the instruction, or, if there has been no instruction,[217] at the end of the written proceedings, the oral stage take place before the full Court. During the oral stage the judge-rapporteur will present his report which will outline the case, summarize the arguments of the parties and make a statement on the facts of the case on the basis of the evidence presented during the written and instruction stages.

This report will be followed by oral argument on behalf of the parties. There is absolutely no hearing of witnesses or oral examination at this stage.[218] The parties must be legitimately represented through the oral stage. Members of the Court and the advocate -general may put questions to agents and counsel during the oral proceedings. The Court may also at this time order further instruction to be held either by a chamber or by the judge-rapporteur. At the conclusion of the case the parties' representatives make closing speeches to the Court: plaintiff first, followed by defendant. The advocate-general then makes his submission which brings the oral proceedings to a close.

The judges withdraw to deliberate in private. Throughout their deliberations they may re-open the oral proceedings if they so wish. There deliberations result in the Court's final result which is drafted by the judge-rapporteur. Judgment is delivered in open court. Again, following continental practice, the court renders a single collegiate judgment;

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[215] Rules of Procedure, Art.
[216] Rules of Procedure, art, 47(4).
[217] Rules of Procedure, Arts. 47 (5) and 110
[218] Member State and Community Institutions must be Represented by an Agent who may be Assisted by a Lawyer Entitled to Practise Before a Court of a Member State. Corporate Bodies and Individuals may also have an Agent but they must be Represented by a Lawyer Entitled to Practise Before a Court of a Member State. See Protocol on the Statue of the Court, art 20.CF. Jacobs F.G and Durard, A., Reference to-the European Court (1975), pp. 177, 178.

separate or dissenting opinions are not allowed. Even if the judgment is based on a majority, that fact, let alone the nature of the majority, is not disclosed.[219] It has already been pointed out that in the vast majority of cases the court accepts the conclusion of the advocate-general. But in those instances where the court has not followed the advocate-general, his submission can be regarded as a dissenting opinion.[220] The language of the Court are the official languages of the community, Viz. Danish, Dutch, English, French, German and Italian; Irish may also be used although it is not an official language.[221] All documents submitted to the Court must be translated into these languages. Only the language one used as the languages may be used as the procedural language in a given case. The basic rule is that the choice of procedural languages is made by the plaintiff where one of the communities' organizations is the defendant, on the basis that the representatives of the communities are well versed in all the official language. But where in fact the defendant is one of the Member state or the Court of a member is seeking a preliminary ruling then the procedural language must be the language of that state. The court's judgments, together with the submission of the advocate-general, are published in each of the official languages; the copy in the procedural language of a given case being regarded as the authentic and definitive version.[222] The court's judgments have binding force from the date of their delivery.

As far as the enforcement of the Court's judgments is concerned, the position varies depending on the outcome of the case and the identity of the defendant. If the Court upholds or declares invalid an act of a community institution then either that act may be implemented or not depending upon the decision of the Court; in such cases there is absolutely no question of enforcing the judgment in the strict sense. If the Court gives judgment against a Member State under the E.U.C. Treaty enforcement is achieved by enabling the commission, acting jointly with the council, to impose sanctions on the defaulting member. This procedure is not reproduced in the Treaties of Rome which

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[219] For Comment on the Practise of Single Collegiate Judgments See Bebr Op. Cit., p.24 and Feld, Op. Cit. p. 99.
[220] Rules of Procedure. Art. 29 (1)
[221] See Rules of Procedures of the Court, Title I, Chapter 6. On the Problems of Multilingual Judicial Deliberations See Feld, Op. Cit. pp. 100.
[222] Rules of the Court, Art 65.

contains no enforcement measures against Member state. The Rome Treaties simply provide that the member state in question is required to take the measure essential to execute the Court's judgment. Lastly, if the Court gives judgment against a corporate and business body or individual in the form of a fine, such judgment debts are enforceable without further formality by the national Court of the Member state.[223]

iv. Revision and Interpretation of Judgments

The Court of Justice of the Communities is a Court of first and only instance. Thus the decisions of the Court are final and are not subject to appeal; it is not available to a National Court when called upon to enforce a Judgment of the Community Court to challenge that judgment at all. The only possible course of action open to an unsuccessful litigant is to request a revision of the Court's judgment.[224] Such a demand may be made on the ground of the finding of a fact likely to prove fundamental importance which before judgment was unidentified both to the court and to the party requesting revision. Two period of limitation apply to requests for revision: the request must be made within ten years after the new fact became known to the applicant. If these conditions are satisfied, and without prejudice to the merits, the Court hears the advocate-general and considers the parties' written submission before deciding whether the alleged new fact does exist and whether it justifies revision. If the Court decides that the request is admissible then it proceeds to consider the merits of the case and this can, if required, involve a completely new trial. In *Feram v. High Expert*[225] the Court made it clear that the newly discovered truth will need to have been unknown both to the Court and also to the party which understanding of it previous to view by either Court or a party will make the demand inadmissible. In *Fonderie Aciaierie Giovanni Mandelli v. Commission*,[226] the Court refused an application for revision in a similar case when a relevant document could have been obtained by the applicant either at the time of the commencement of the original action or at the enquiry stage.

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[223] E.U.C Treaty, Art 187, 192.
[224] Protocol on the Statute of the Court, Art 41 and Rule of Procedure of the Court, Art. 98 to 100.
[225] (1959) ECJ p.1335
[226] Case 56/70:17 Rec. 1 at pp. 3, 4. Also see case 57/70: August *Josef van Eick v. Commission*, 17 Rec . 613 Adv. Gen Dutheillet de Lamithe at p.620.

The second condition regarding the practice of the court relates to the possibility, in case of difficulty as to the meaning or scope of the judgment of asking the court to interpret its judgment.[227] Such a request may be made by any of the parties to the case or by a community institution which can show it has an interest in the decision. The only part of a judgment which might be the main topic of a request for interpretation is the operative part or what we would call the ratio *decidendi.* As the court itself put it in *Assider v. High Specialist.*[228]

> The only part of a judgment which can be interpreted are those which express the judgment of the Court in the dispute which has been submitted for its final decision and those parts of the reasoning upon which this decision is based and which are, therefore, essential to it… the Court does not have to interpret those passage that are incidental and which complete or clarify that basic reasoning.

In the later case of *High Authority v. Collotti*[229] the court considered the type of the "difficulty" necessary to justify and obtain an interpretation. In the *Assider case* the Court had said that it was sufficient for the parties to give different meaning to the judgment. In the *Collotti case* the Court defined the nature of the difficulty more exactly. The Court held:

> In order to be admissible, an applicant for interpretation … must not raise the possible consequences of the judgment in question on cases other than one from the decided, but only the obscurity and ambiguity of the meaning and scope of the judgment itself In relation to the case decided by the judgment in question.

v. The Contentious Jurisdiction of the Court

The court is the creature of the community Treaties and so its jurisdiction derives exclusively from those Treaties. Any attempt to attribute other jurisdiction to the court

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[227] Case 5/55, 1 Rec 263; Valentineum Op. Cit., Vol. 2, P.55.
[228] Case 70/63 Bis; 11 Rec. 352; Brinkhorse, L.J., & Shermers, H.G., *Judicial Remedies in the European Communities* (1969). p. 259.
[229] Case 70/63: (1963) C.M.L.R. 281; 9 Rec. 173.

will fail. In the case of *Shlieker v. High Authority* the plaintiff alleged that through the inactivity of the *High Authority*[230] she had suffered loss. It was argued with respect to the *High Authority* that the right to bring proceedings before the court based on the inactivity of the community institution was limited by the treaty to member states, other Community Institutions and Associations. *Frau Schlieker* argued in reply, upon analogy with German municipal law, that the court experienced a residual jurisdiction to enable it to protect the interest of individuals where the treaty texts are silent. This view was turned down both by the advocate-general and the court. The advocate-general observed that "the treaty system … does not in a general clause guarantee legal protection without any gaps. Reference to … the Basic Law *(Grundgesetz)* of the Federal government Republic of Germany cannot lead to any other solution, for the court can define the limit of its supra-national legal protection only by using the text of the Treaty and not by following national law."[231] The court agreed with this submission and held that 'whatever may be the consequences of a factual situation of which the court might not take cognizance, the court may not depart from the judicial system set out in the Treaty'. Thus is interpreting the treaties the Court is bound to adhere strictly to the provisions of the text, and bring the creature of the Treaty, it has no power other than that conferred by the Treaty.

The jurisdictional provisions of the treaties are somewhat complex; as one commentator has noticed 'no international tribunal has ever been equipped with so assorted a jurisdictional competence as has the court of the Western European Communities.'[232] The contentious jurisdiction conferred upon the Court by the Treaties falls under two main heads which will be treated in the next order:

a. Action against member states; and

b. Actions against community institutions.

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[230] Case 70/63: (1963) C.M.L.R. 281; 9 Rec. 173.
[231] Unwritten rule of Community Law for the Protection of Fundamental Rights may, however, be derived from National Law.
[232] Bewtt, D.W., *Law of International Institutions* (3rd Edn. 1975), p.278.

vi. Action Against Member State

Actions against Member state take two forms:

i. Action by members state against member state.

ii. Actions by community organizations against member state.

iii. All the Treaties confer upon the Court a compulsory Jurisdiction to decide dispute between Member State concerning the application of the terms of the treaties and a permissive jurisdiction, based on the consent of the parties, over disputes between states related to the object and purpose of the communities in general. Thus the E.U.C. Treaty provides at Art. 170 that any member state which considers that another member state has failed to fulfill any of its obligations under this treaty may bring the matter before the Court of Justice.[233]

Secondly, the E.U.C. Treaty provides at Art. 182 that:

The Court of Justice will be competent to decide any dispute between member state connected with the subject of this treaty, if that dispute is submitted to it under a special agreement between the parties.[234]

The Court's jurisdiction over both of these types of dispute is exclusive as recourse by Member states to other means of settlement is expressly forbidden by the Treaties. Article 219 of the E.U.C Treaty provided that:

> member State governments undertake not to submit a dispute concerning the interpretation or the carrying out of the treaty to any method of settlement other than those provided therein.[235]

This insistence on referring inter-state dispute to the Court of Justice underlines one of the major purposes of the court and that it is to guarantee uniformity of interpretation and

[233] C.F. E.C.S.C. Treaty, Art, 89, and Euratom Treaty, Art. 141.
[234] C.F. E.C.S.C. Treaty, Art, 89, and Euratom Treaty, Art. 154.
[235] C.F. E.C.S.C. Treaty, Art, 87, and Euratom Treaty, Art. 193.

application of law of the communities. No proceedings under this head have so far been brought.[236]

i. By virtue of Article 88 of the E.C.S.C. Treaty, the commission is given the power to decide whether a member state has failed to comply with its obligations under the treaty. If it so decides in relation to a given member state the commission must invite that state to express its views on the matter. The commission will then record the state's wrongdoing in a reasoned opinion and present the state a limited time within which to take steps to fulfill its obligations. The purpose of this process is to enable both the commission and the member state to exchange views in the hope that the issue may therefore be settled. If it is not, it is available to the member state involved to bring proceedings before the court challenging the commissions decision. Although such litigation takes the form of a member state bringing proceedings against the commission, in substance the issue before the court is an alleged breach of Treaty obligation by a member state; the Treaty places the onus of challenging that allegation upon the member state. In the E.U.C Treaty by virtue of Art. 169 a somewhat different procedure is followed.[237] There, if the commission considers that a member state has failed to fulfill any of its obligations under the Treaties, then it shall issue a reasoned opinion after giving the state concerned the chance to submit its defence. If the member state will not adhere to the conditions of such opinion within the time laid down by the commission i.e, ten years to bring the matter before the Court of Justice. Thus, whilst in the E.C.S commission has the power to determine finally a member State's breach of obligations at the mercy of the member states to appeal to the court, in the E.U.C. and Euratom the commission can only provisionally determine the breach of responsibility and it must apply to the court for that determination to be confirmed.

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[236] One the Application of Art 170 See Case 36/62: *Van Gend en Loos v. Nerderlandse Administratie der Belastingen*, (1963) C.M.L.R. 105. Disputes Between Member States Manty be at the Root if Litigation Between, Say, the Commission and a Member State, Although the Other Member State is not a Formal Party to the Action; e.g. Case 13/63: *Italy V. E.E.C Commission*, (1963) C.M.L.R 289; Rec. 335.

[237] Also Erotom Treaty, art. 141.

Proceedings under Article. 169 of the E.U.C. Treaty throws some light on the nature of the reasoned opinion which the commission must make concerning the alleged breach of treaty obligations, including an administrative failure to implement rules.[238] With regards to Treaty provisions which have immediate effect on Art. 169 actions will lie where a member state maintains in force national legislation which is incompatible with those provision, even if in practice the national laws is not enforced.[239] Community law must apply in each member state independent of its unilateral will.

The case law on Art. 169 of the E.U.C. Treaty throws some light on the nature of the reasoned opinion which the commission must make concerning the alleged breach of treaty obligations. In *E.U.C Commission rate v. Italy*[240] the commission wrote a letter to the Italian Government, after giving the Government an opportunity to make its observations, stating that a particular Italian decree was contrary to the Treaty. The Government was asked to end the alleged infringement within a month. This letter did not contain a full review of the situation of the Italian market nor whether that situation justified the decree. Italy did not comply with the commission's request within the stated period and so the commission instituted proceedings on the ground, interalia, that the commission's letter was not a reasoned opinion within the meaning of Article. 169. The court rejected that argument and said that an opinion is considered to be reasoned "when it contains, as in the present case, a coherent statement of the reasons which convinced the commission that the state in question has failed to satisfy one of its responsibilities under the Treaty". This was also the view expressed by the advocate-general in his submissions where he said that:

> no formalism is required… because … the reasoned opinion is not an administrative act, checked by the court as far as its legal character is concerned. There is no question here of 'insufficient reasons' providing rise to a formal defect. The only purpose of the reasoned opinion is to designate the point of

[238] Case 31/69: *E.C. Commission v. Italy,* (1970) C.M.L.R. 175; 16 Rec. 25.
[239] Case 167/73: *E.C. Commission v. France*, (1974) C.E.C.R. 359; (1974) 2 C.M.L.R. 216.
[240] Case 7/61: (1962) C.M.L.R. 39:7 Rec. 633.

> view of the commission in order to inform the government and, possibly, the court.

Thus, if a purported reasoned opinion did not coherently express the Commission's view point that would be a ground on which the court might dismiss the commission's case.[241]

Another of the situations on Art. 169 is of more general interest for the reason that it clarifies the nature of the Member state obligations under the Treaties. *E.U. Commission v. Belguim & Luxembourg*.[242] By Royal and Group Ducal Decree the Belgian and Luxembourg Governments introduced a tax on licenses to import certain diary products. In the commission's view these taxes were contrary to the E.U.C. Treaty and it adopted the Article. 169 procedure culminating in action being brought by the commission against the two governments. The government authorities argued in their defence that a council Resolution of 1962 which had not been implemented would have justified these taxes. This resolution had not been applied by the deadline of 31 July, 1962. Thus the federal government argued that the commission got no authority to require the abolition of taxes which, but for the failure to implement the council resolution, would have been part of community policy. But the court held that; except for cases expressly included in the Treaty, member state are prohibited from taking justice into their own hands.

Therefore the failure of the Council to carry out its obligations could not excuse the defendants from undertaking its obligations.

According Art. 88 of the E.C.S. Treaty, if the member state does not appeal to the Court or if it losses its appeal, the commission may, subject to a concurring two-thirds majority of the council, impose on the member condition the sanctions described earlier. In the case of the E.U.C and Euratom Treaties on such sanctions are available. Both Art. 171 of the E.U.C. treaty finds that a member state has failed to fulfill any of its obligations under the Treaty, such condition shall take the measure required for the implementation

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[241] Another Essential part of the Pre-Litigation procedure under Art. 169 is the Giving of a Member State an Adequate and Realistic Opportunity to make Observations on an Alleged Breach of Treaty Obligations: Case 31/69: *E.C Commission v. Italy* (1970) C.M.L.R. 175 at p. 188; 16 Rec. 25.
[242] Case 99-91/63, (1965) C.M.L.R 58 at pp. 72; 10 Rec. 1217 at pp. 1231.

of the judgment of the court.[243] Thus in such instances the court's judgments are essentially declaratory in nature indicating that in the last analysis the success of the communities depends upon the good faith of member state governments. A member state's failure to implement a judgment given against it would also be likely to have an unfavourable political effect on its relations with its fellow members.

vii. Action Against Community Institution

We have already seen that French laws have exerted a strong influence on the procedure of the Court of Justice of the communities. This is also true of the jurisdiction of the court to exercise control over the acts of the institution of the communities. French administrative law traditionally recognizes two main types of litigation; the *recours de la legalite* and the *recours de pleine jurisdiction*. The former is a kind of judicial review of the legality of administrative acts in which the court is merely asked to annul, i.e. declare void, an administrative act on a number of specified grounds, in such a case if the court finds that a given act is unlawful on one of those grounds, it can merely give judgment to that effect; it cannot substitute its decision on the merits for that of the organization whose act has been challenged nor can it award any other remedy such as damages.[244] These two types of administrative jurisdiction are possessed by the Court of Justice of the Community and the following discussion will maintain terms of that classification.

viii. Actions Concerning Legality

Action for annulment *(Recouis en annulation)* - the acts of the institutions of the communities take a variety of forms but not all of them are susceptible to challenge. Only those acts which are binding in laws are susceptible to challenge under the E.C.S.C. Treaty, the Commission may take action in three forms: decisions, recommendations and opinions. Of these decisions and recommendations are legally binding whilst opinions have no binding force; thus Art. 33 gives the Court jurisdiction to hear actions for the

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[243] A Failure by a Member State to Execute a Previous Judgment of the Court will Constitute an Infringement of E.E.C. Treaty, Art. 171; Case 48/71: *E.C. Commission v. Italy,* (1972) C.M.L.R. 699; 8 Rec. 529.

[244] C.F. the Effect of Issuing the Prerogative Order of Certa.

annulment of such decisions and recommendations. Under the E.U.C and Euraton Treaties the act of the commission and the council may take five forms: regulations, directives, decisions, recommendations and opinions; of these the first three are legally binding and are vulnerable of the action for annulment in connection with any act which is not designed to produce binding legal effects. In *Societe des Usines a Tubes de la Sarre v. High Specialist*[245] the Court rejected an action challenging an opinion of the High Authority on ground that the opinion did not lay down a rule capable of being applied and was not therefore subject to the control of the Court. The Court is nevertheless, flexible in its approach and will look to the substance of an act rather than to its form. Thus if an act is in the form normally used for non-binding acts but in fact created binding obligations such an act would be actionable despite its apparent informality.[246]

Action may be brought not only by member states and community organizations but also by private parties. In the first place, Art. 173 (I) of the E.U.C Treaty states that the legality of actions taken by the council or by the commission may be challenged in proceedings instituted by an member State, the council or the commission.[247] In general terms, only a party which can show sufficient legal interest in a case can institute proceedings before the Court, but such is the type of the communities that all member State are deemed to have an interest in the legality of most community acts. Thus, for example, in the *Netherlands v. High Authority*[248] the Netherlands was permitted to challenge a decision of the *High Authority* which was in fact addressed to some German coal enterprises on the ground that it conflict with the terms of E.C.S.C. Treaty. Finally, both decided that the action should be rejected on the merits.

ix. Actions Against Inactivity

The next main category of actions concerning legality is the action against inactivity. Where the Treaties impose a duty to act on the Council or commission and they fail to

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[245] Cases 1 and 14/57: (1957), 3 Rec. 221; *Brinkhorst & Schermers*, (Supra)
[246] Case 22/70: Re E.R.T.A. *Commission v. E.C. Commission v. E.C. Council*, (1971) C.M.L.R. 355; 17 Rec. 263.
[247] Cf. E.C.S.C Treaty, Arts. 33 and 38, and Euratom Treaty, Art. 146.
[248] Cases 66/63, (1964) C.M.L.R. 522; 10 Rec. 1047.

act then an action may be predicated on a violation of the Treaty through inactivity.[249] The inactivity must first be brought to the attention of the institution concerned and if it has not taken reasonable steps to remedy or justify its inactivity an action may be instituted.[250] Under the E.C.S.C. Treaty such action may be brought against the commission either by Member States, or by the Council or by undertakings of organizations. Under the E.U.C and Euratom, while the Member State and the other community Institutions have a General competence to challenge the inactivity of either commission or Council, individuals and corporate bodies may only do so if indeed they can show that one of those institutions has failed to address an act (apart from a recommendation or opinion)[251] to him or it[252]. An example of this action under the E.C.S.C Treaty is *Groupement des Industries Siderurgiques Luxembourgeoises v. High Specialist.*[253] The Luxembourg Federal government imposed a levy on coal intended for industrial use for the intended purpose of subsidizing the price of household coal. The plaintiffs, who were the primary users of commercial coal, alleged that levy was contrary to the E.C.S.C. Treaty and requested the High Authority to use its powers to demand the Luxembourg Government to abolish the levy. During the two months following this request the High Authority did nothing and the plaintiffs brought an action under Article. 35 of the E.C.S.C. Treaty and the Court held that the action was admissible.

x. The Defence of Illegality

We have seen that a restrictive period of limitation is applied to actions for annulment with the overall result that if an act is not challenged within that period the act becomes unassailable. But a situation may arise in an action before the Court under some Treaty, Article other than that which provides for action for annulment where the illegality of an unchallenged act may be in issue. If the period of limitation were to be employed strictly such an issue cannot be raised beyond the period; but to overcome such a possible result, all three Treaties made it possible for such question of illegality to be raised in such

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[249] Art. 35 of the E.C.S.C. Treaty.
[250] E.C.S.C. Treaty, Art. 35; E.U.C Treaty, Art . 175; *Euratom Treaty,* Art. 148.
[251] *Borromeo Arease v. E.C. Commission,* (1970) C.M.L.R. 436.
[252] Case 103/63: *Societe Rhenania Schiffahrts-und Speditions-Gsellschaft mbH v. E.U.C. Commission*, (1965) C.M.L.R. 82 at pp. 82, 84, 87.
[253] Cases 7 and 9/54; 2 Rec. 86, Valentine, Op. Cit., Vol. 2, p. 141.

proceedings,[254] this again is form of procedure recognized by French Law. This provision can only just be relied upon as a defence; it does not of itself give rise to an independent cause of action.[255] If such a defence of illegality is successfully pleaded its technical effect will never be to declare the act in question illegal in terms of its general application but only in so far as it applies to the plaintiff. That is made clear by the case law. In *Meroni & Co. v. High Authority*[256] requested *Meroni* to pay a levy on the authority of earlier decisions of a general nature which it acquired. *Meroni* declined to pay and challenged the *High Authority's* demand on the ground that the general decisions which it was based were unlawful. The *High Authority* argued that such a plea was inadmissible since the time limit for the challenge of these decisions had expired. The question therefore arose whether *Meroni* could rely on the defence of illegality. The Court held that: he could and in its judgment considered the nature of this defence. The right of the plaintiff to claim, following the expiration of the time (of limitation) in support of an action against an individual decision the irregularity of general decisions upon which the individual decision has been based cannot lead to the annulment of the overall decision but only that of the individual decision based thereon.

Because of the limited right which individual and corporate bodies have to sue for the annulment of general decisions this defence of illegality is important since it completes the legal security of such parties.

Articles 184 of the E.U.C. Treaty refers to *"any party"* being able to plead this defence and the question has been raised whether this expression includes Community Organizations, Member state as well as individuals and corporate bodies. So far as Community Institutions are concerned, it is generally agreed that the defence is not available on both legal and practical grounds. To begin with, the defence is designed to protect the private interests of party which may be affected by an illegal general act, but

[254] E.C.S.C. Treaty, Art. 36; *E.U.C. Treaty*, Art. 184: *Euratom Treaty*, Art. 156.
[255] Cases 31 and 33/62: *Milchwerke Hinz Wohrmann and Sohn K.G. v. E.E.G. Commission* (1963) C.M.L.R. 152 at p. 158.
[256] 9/56, June 1958; 4 Rec. 9; Valentine, (supra) Vol. 2, p.457.

a Community Institution does not have any private interest only a share in the general interest of the communities.

xi. Plenary Jurisdiction

In addition to its jurisdiction to declare actions of Community Institutions to be null and void, the Court has plenary jurisdiction in certain cases. Thus enables the Court in those instances to go into the merit of the parties' cases and to substitute its own judgments for those of the communities' Institutions. We have in fact already dealt with one example of the plenary jurisdiction connection with the violations of the Treaties by Member States. In addition there are other instances of plenary jurisdiction.

Generally the liability of the communities in agreement falls under the jurisdiction of municipal Courts, unless in accordance with Art. 181 of the E.U.C Treaty the contracting parties consent to the contrary. Article 183 of the E.U.C. Treaty provides that:

> subject to the capabilities of the Court of Justice, there is nothing to avoid a case to which the Community is a party from being determined by the domestic Courts of the members States.

But jurisdiction over non-contractual liability on the other hand has been conferred upon the Court of the community. Under Article 34 of the E.C.S.C. Treaty, an action for damages will lie where the Commission fails to comply within a reasonable time with a judgment declaring a decision or recommendation to be void. Article 40 of the E.C.S.C. Treaty provides for liability for wrongful administrative acts in terms that an action will lie in respect of damages resulting from acts or omissions on the part of the Community or its servants. Euratom Treaties do not expressly distinguish between legislative and administrative wrongdoing as grounds for seeking damages but provides generally for non-contractual liability in the context of damage caused by the institution or servants of the communities in the performance of their responsibilities, relative to the overall principles common to the laws and regulations of the Member states.[257]

[257] E.U.C. Treaty, Art 215 and Euratom Treaty, Art. 188.

Under all three Treaties, the extent of this non-contractual liability is in practice in terms of the distinction known to French law as that between *faute de service* and *faute personnelle*[258]. A *faute de service* occurs where damages results from the mal-functioning of Community Institutions or Community Servants; there is said to be *faute personelle* when the damage results from some personal wrongdoing on the part of a community official which is in no way linked with his official position. In case of a *faute de service* the communities are liable; in the case of a *faute personnel* the individual wrongdoer alone is personally liable. This distinction is comparable, although not identical, with the distinction well known to English law between a servant acting in the course of his employment and a servant on the frolic of his own. Within those limits actual responsibility under E.U.C. Treaty is in accordance with the general principles common to the laws of the Member State governments.

This involves the Court in a comparative study of the relevant national laws to be able to pick out the decisive elements which may reflect a trend.[259]

The relationship between the action for damages and the actions for annulment and inactivity has caused the court some difficulty. When first confronted with this question the Court expressed the view that the action for damages was quite distinct both by reason of its object and the lands upon which it can be brought.[260] But when, later an action for damages arose out of the allegedly unlawful act which had been not annulled, the court changed its mind and held that:

> an administrative act which has not been annulled cannot be itself constitute a wrong causing damages to those at the mercy of that administration. Such people cannot therefore claim damages merely on account of the act.[261]

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[258] Brown, L.N. and Garner, J.F., (supra) p. 99.
[259] *S.A. Metallurgique d'Esperance-Longdoz v. High authority*, (1966) C.M.L.R. 146, per Adv. Gen. Roemer at p. 154 and Case 63-69/73*: Werhahn Hansamuhle v. E.C. Council*, (1973) E.C.R. 1229, per Adv. Gen. Roemer at pp. 1259, 1260.
[260] Cases 9 and 12/60: *Societe Commerciale Antoine Vloeberghs S.A. v. High Authority* (1960), 7 Rec. 391 at p. 424.
[261] Case 25/62: *Plaumann & Co. v. E.U.C. Commission,* (1964) C.M.L.R. 29 at p. 48.

More recently, against the background of strong criticism,[262] the court has reverted to its original view. In *Alfons Lutticke GmbH v. Commission*[263] rate it observed that: *the action for damages is an independent action having its own special purpose and subject to conditions that have been made for that purpose.*

It would be contrary to the independence of this right of action if its excise was made subject to other Treaty provisions designed for different purposes. This view has been reiterated in a series of subsequent situations which appears now to represent the jurisprudence
of the Court.[264] Where an action for damages is brought in respect of an illegal legislative act the Community will only be liable if the average person plaintiff can verify that there has been a breach of a superior rule of laws protecting him.[265] Such a rule could, presumably, be either a rule in the Treaty such as the prohibition on discrimination or one of the unwritten rules of Community law which the Court draws from the rules of the constitutions of the Member States which are designed to protect individual rights. The plaintiff in an action for damages must, of course, establish a causal connection between the injury and the act or omission of the part of the community and the quantum of damages must be ascertainable rather than speculative.[266]

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[262] E.g. Adv. Gen. Roemer's Submission in Case 5/71: *Aktien-Zuckerfabrik Schoppenstedt v. E.C. Council*, 17 Rec. 975.
[263] Cases 4/69! (1971), 17 Rec. 325 at p. 337
[264] *Akiten-Zuckerfabrick Schoppenstedt. v. E.C. Council* (1971), 17 Rec. 975.
[265] E.g. Case 153/73: *Firma Holts and Willemsen v. E.C. Council and Commission*. (1974) E.C.R. 675 at p. 692
[266] See, Cases 5, 7, and 13-24/66: *Firma E. Kampffmeyer v. E.U.C. Commission*, (1967), 317 and Case 30/66: *Kurt A. Becher v. E.C. Commission*, C.M.L.R. 169.

CHAPTER FOUR

PROBLEMS OF JURISDICTION AND SCOPE OF BINDING AUTHORITY

4.1 Jurisdiction of The Community Court

Jurisdiction simply means the power of the Court to determine an action before it. The significant of jurisdiction is that a matter conducted by a court without jurisdiction is a nullity.

As it is intrinsic to adjudicate the issue of jurisdiction is usually taken at the earliest opportunity by a court. In Akpo. V. G77 south Heath care delivery programme & Anors, the court held thus: It is relevant to determine it at the first opportunity whether there is jurisdiction because it will be manifestly absurd to suggest that the court proceeds with the taking of lengthy evidence of the parties to a suit where it appeared that the whole suit would be a nullity and the prerequisites of the subject matter of the case would not be within the jurisdiction of this court.[267]

By virtue of Article 9 of the 2005 supplementary protocol the Community Court is skillful to settle on the following cases and matters: for the jurisdiction of the Court in Articles 9 and 10, while article 10 enables the Court to give advisory legal opinion on questions of the Treaty and the causes and matters: The court shall guarantee the recognition of laws and of the standards of value in the translation and use of the provision of the Treaty.

The court shall have the ability to manage disputes refer to it as per the provision of the Article 56 of the treaty, by member State or the Authority when such question emerge between the member State or between at least one member State and the association of the community on the elucidation or utilization of the provision of the treaty.

1. The Court shall have the ability to decide any non-authoritative obligation of the community and may order the community to pay harms or make reparation for official acts or exclusions of any group organization or community authorities in

[267] (unreported) sui ECW/CCJ/APP/01/07 of 16th October, 2008

the execution of official obligations or functions.

2. . The court has jurisdiction to decide matter of infringement of individual rights that happen in any member state.
3. The court shall have jurisdiction over any issue provided for in an agreement where the parties provide that the court shall settle disputes emerging from the agreement.
4. A Member State may, for the benefit of its national's institute proceedings against another Member State or Organization of the Community, identifying with elucidation and use of the provision of the Treaty, after initiatives to settle the question agreeably have fizzled.
5. The Court shall have jurisdiction in respect of matters relating to Arbitration for purposes of Article 16 of the Treaty of ECOWA, pending the establishment of the arbitration tribunal. The problem of the provision of the Article is to rob citizens access to the Court.

The effect of lack of direct access to the Court by individuals was of great concern to the Court because it had multiplication effect on its functions. It is imperative to note that no Member State or Institution of ECOWAS within the said period filed any case before the Court or even asked for an advisory opinion. It was therefore obvious that individuals must be granted access to the Court for it to become fully operational. The court thus made a proposal for its amendment between 2001 and January 19th 2005 when protocol A/PI/7/91 was finally amended only two cases were filed before the court and both were filed by individuals directly. The demand received favourable consideration from the council of ministers which recommended the amendment of the 1991 court protocol to enable the court to exercise jurisdiction with respect to the conditions of service of the ECOWAS staff and the enforcement of human rights by individual and corporate bodies. Thus, at the 28th session of the ECOWAS[268] which held in Accra, Ghana on January 19th, 2005 the supplementary protocol was adopted by the authority of Heads of State and Government of the members State of ECOAWS only two cases were filed before the Court and both were submitted by individuals directly. In view of a breach of Articles 9

[268] Supplementary protocol A/SP 1/ 105 Amending the protocol on the Community Court of Justice

(3) of the Protocol of the Court, which provides thus:

> A member state may, with respect to its nations institute proceedings against another member State or organization of the community, associated with the inter pretention and application of the provision of the Treaty, after attempts to settle the dispute amicable have failed.

In *Afolabi Olajide v Federal Republic of Nigeria*[269], the court on the examination of the said Protocol, noted that the applicant cannot bring proceedings other than as provided in Article 9 (3) of the Protocol. Likewise the Court struck out the plaintiffs case: Also in *Frank Ukor v. Rachad Laleye*[270] the same conclusion was reached. The plaintiff, Chief *Frank Ukor* who resides in Nigeria; transacting business between Nigeria and Benin Republic has lodged a claim against the defendant/respondent in the ECOWAS Court of Justice aimed at quashing an order for seizure of his pickup truck with registration number XG.796JJJ as well as his goods found on board the vehicle, such order having been issued by Cotonou Court of first instance on 8th January 2004.

Article 9 of the Supplementary Protocol brought about the desired development of the community Legal Order therefore becomes necessary to analyse it for proper understanding.

Article 9: of the Amended protocol on the Jurisdiction of the Court, the Court has competence to adjudicate on any dispute relating to the following:

The interpretation and application of the Treaty, Conventions and Protocols of the Community. The elucidation and translation, of the regulation, directives, decisions and other instruments received by ECOWAS:

The failure by member state to honour their auxiliary legal instruments embraced by ECOWAS.The disappointment by Member State to respect their commitments under the Treaty, Conventions, and Protocols, Rules, Directives or Decisions of ECOWAS.

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[269] (2007) 1CCJLR (PT1)1

[270] (2009) 2 CCJLR

The provision of the Treaty, Conventions and Protocols: Regulations, Directives or Decisions of ECOWAS Member State. The Community and its authorities: and

The action for damages against a Community, Institution or an official of the community for any action or exclusion in the exercise of official function. The Court shall have the ability to decide any non legally binding risk of the Community to pay harms or make reparation for official acts or oversights of any Community Institution or Community authorities in the execution of official obligations or function.

Any action by or against a Community Corporation or any Member of the Community shall be statute barred after three (3) years from the day when the privilege of action emerged.

The Court has jurisdiction to decide case of infringement of individual rights that happen in for all intents and purposes any Member State.

Pending the establishment of the Arbitration Tribunal provide under Article 16 of the Treaty. The Court shall have jurisdiction over matter provided for within an agreement where the parties provide that the court should settle dispute emerging from the agreement of article 16 of the Treaty.

The court shall have all the powers conferred upon it by the provisions of this protocol as well as any other powers that may be conferred by subsequent protocols and decisions of the community. Court shall settle dispute emerging from the agreement.

The Court shall have all the powers conferred upon it by the provisions of this Protocol and additionally whatever other power that may be presented by consequent Protocols and decision of the community.

The Authority of Heads of State and Government shall have the ability to give the Court power to settle on a particular question that it might refer to the Court other than those particular in this Article.

However, the provision under Article 9 are wide: the provisions of Article 10 limited the parties to particular issues. Article 10 provides for Access to the court as follows:

Member States, and unless generally gave in Protocol, the Executive Secretary where

action is brought for disappointment by a member State to satisfy a commitment: Member State, the Council of Ministers and the Executive Secretary in proceeding for the determination Community text:

Individuals and corporate bodies in the legality proceeding for determination of an act or in action of the community official which disregards the benefits of the people or corporate bodies.

People on application for alleviation for infringement of their human rights: the submission of application for which shall:

Not be anonymous; nor

Be made while a similar issue has been initiated before of another international Court for adjudication. Staff of any Community Organization after the staff Member has depleted all interest forms accessible to the officers under the ECOWAS staff Rules and Regulations.

Where in any action under the watchful eye of a Court of a member State, an issue emerges with regards to the understanding of the Treaty, or alternate Protocols or Regulations, the National Court may without anyone else or at the demand of any of the parties to the action allude the issue to the Court for translation.

Where in for all intents and purposes any action under the watchful eye of a Court of member State, an issue emerges with respect to the elucidation of the provision of the Treaty, or the other Protocol or Regulations the National Court may alone or at the demand of the parties to the action refer the issue to the Court for interpretation.

i. Advisory Jurisdiction

The Court has jurisdiction to give advisory opinion in regard of legal inquiries sent to it. In the article expressed underneath the method for the proceedings with clarity. Article 10 in regard of Advisory Opinion provides the following:[271]

[271] See Article 10 of the Supplementary Protocol

1. The Court may, at the demand of the Authority, Council, one or more member of States, or the Executive Secretary, and some other institution of the Community, express, in an advisory capacity, a legal opinion on questions of the Treaty.
2. Request for advisory opinion as contained in section 1 of this Article shall be made in writing and shall incorporate a statement of the inquiries whereupon counseling supposition is required. They should be trailed by every single significant archive prone to throw light upon the inquiry.

The advisory opinion is given in broad daylight and in the action of its consultative capacities, the Court might be represented by the provision of this Protocol which apply in combative cases, where the court perceives these to be applicable. Advisory opinions are not binding, but must be taken into consideration, when the court is considering any legal question.

By virtue of article 11 of the 1991 protocol as amended by the 2005 supplementary protocol empowered the court to express in an advisory capacity, a legal opinion on the questions of the Revised Treaty at the request of the Authority, the council, one or more member state or the president of the commission and every other institution of the community.

In the *Advisory opinion by ECOWAS Executive Secretary*,[272] it was the opinion of the court that Rule 23(1) pursuant to the Rules of procedure of the community parliament is in agreement with the provisions of Article 7(2) and 14(2)(f) of the protocol associated with the parliament of the Community. Accordingly, the court advised that the Bureau of the parliament should continue to run the affairs of the parliament pending the first sitting of the new parliament.

Also in respect of arbitration, it is an established principle of law that in cases where there is an arbitration clause in an agreement the settlement of such a dispute arising from such agreement has to be resolved by arbitration. For quite some time now, arbitration has developed as an alternative to litigation in commercial transactions.

The Community Court has jurisdiction in respect of Arbitration matters. Pursuant to Article 9 (5) of the Protocol as amended, it provides that the Court shall have power to

[272] (2010) CCJLR (pt.3)

become arbitrator for the purposes of Article 16 of the Treaty of ECOWAS.

Pursuant to Article 16 of the Treaty which provided: that there shall be established an Arbitration Tribunal of the community and the status, composition, powers, procedure and other issues concerning the Arbitration Tribunal shall be set out in its Protocol relating thereto.[273]

As an alternative to dispute resolution, arbitration has derived its recent rapid growth from the apparent relief which it affords from the complexity and other problems which litigants have to cope with in litigation. Like litigation, arbitration is adjudicatory, but the procedure is usually less formal and is quicker.[274]

In view of the complex nature of international commercial transactions involving nations, organizations of diverse legal, social and financial backgrounds, the United Nations General Assembly has recommended arbitration as a mechanism for resolving disputes arising there from.[275] Indeed, the United Nations Commission on Trade Laws Arbitration (UNCTRAL) Rules are deliberately made flexible to promote alternative dispute resolution.

ii **African Court on Individual and People's Rights**

The African Court on human being and people's Rights (African Court) was founded through a protocol to the African charter on Human being and People Rights. The Protocol on the Establishment of the African Court on Individual and people's Rights was adopted in the Ouagadougou, Burkina Faso, 9th June 1998 and entered into force on the 25 of January, 2004.[276] The Court was established in order to complement the Protective mandate of the commission. Its decisions are final and binding on state parties of 11 judges elected by the AU Assembly from a list of candidates nominated by member State of the AU.

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[273] See Article 9(5) of the Amended Protocol
[274] Olakunle Orojo, J. and ayoade Ajomo .M. "Law and Practice of arbitration and conciliation in Nigeria" Mbeyi & Associates (Nigeria) Ltd 1999 p. 41.
[275] See Resolution 31/98 of December 15, 1976 which adopted the UNCTRAL Rules
[276] See Web-site:www.achpr.org

The judges are elected in their personal capacity but no two serving judges shall be nationals of the same state. Due consideration is also given to gender and geographical representation. The judges are elected for a period of six years and are eligible for re-election only once. Only the president of the court retains office on full time basis.

The other 10 judges work part-time. The first judges of the court were sworn in on 1July 2006. The seat of the Court is *Arusha, Tanzania*.

iii. Jurisdiction of the ECOWAS Court of Justice

Jurisdiction of the Court The court's jurisdiction applies only to state that have ratified the court's protocol. As at 30 October 2016, states have ratified the Protocol. The court may entertain cases and disputes regarding the interpretation and application of the African charter, the court's protocol and any other individual privileges treaty ratified by the state concerned.

The court could also render advisory opinion on any matter within its jurisdiction. The advisory opinion of the court may be requested by the AU, member state governments of AU, AU organs and any African organization recognized by the member states of AU. The court is also empowered to promote amicable settlement of cases pending before it. The court can also interpret its own judgment. The temporal jurisdiction of the court extends to the time the court protocol entered into force in respect of a particular State except in cases of continuing violations. The following entities are capable to submit case to the Court: the African commission, state parties to the court's Protocol, African inter-governmental Organizations, NGOs with Observer status before the commission and individual.

The prerequisites for invoking the jurisdiction of the Community Court on an individual rights cases were stated in *Alhaji Hammani Tidjani v. Federal Government Republic of Nigeria*.[277] The court held:

The combined effect of article 9(4) of the Protocol of the court as amended, article 4(g)

[277] (2008) CCJLR (pt. 1) 171 at 185

of the revised Treaty and Article 6 of the African charter on Human and Peoples Rights is that the plaintiff must invoke the court's jurisdiction by:

i. Establishing that there is a right recognized by Article 6 of the African Charter on Human and Individuals Privileges;

ii. That this right has been violated by the defendants or any of them;

iii. That there is no action pending before another international court in respect of the alleged breach of his right; and

iv. That there was no previously laid down laws that led to the alleged breach or misuse of his rights.

In addition to the aforesaid conditions the application form should neither be anonymous nor manufactured in respect of a matter which has been determined by another court or tribunal.

In order to re-open matters which have been judicially settled the Community Court has repeatedly stated that it lacks the jurisdiction to entertain any matter which has been determined by on another competent court or tribunal in any of the member State of the ECOWAS in the case of *Keita v. Government of Mali,*[278] the plaintiff who had obtained reparation in the Supreme Court of Mali filed the action at the ECOWAS Court complaining of various wrongs done to him by the accused. In declaring the application inadmissible the court held:

Unlike other International Courts of Justice such as the European Court of Individual Rights, the Community Court of Justice, ECOWAS, does not possess, among others, the competences to revise decisions made by the domestic courts of member states, it is neither a court of appeal nor a court of cassation (our de cassation) Vis-à-vis the National Courts, and as such the action of the applicant cannot thrive.

i. Territorial Jurisdiction

The human rights jurisdiction of the ECOWAS Court of Justice covers violations of

[278] Keita case (supra)

human rights 'that occurs in virtually any Member State' of the Community.[279]

The choice of Member State as against state party suggests that the jurisdiction is not limited even if a member state of ECOWAS is not a party to the court's protocol.[280] However, considering that all Member State of ECOWAS are also parties to the court, there is very little significance in the couching of the provision.

Accordingly, the human rights complaints mechanism of the ECCJ is applicable in the territories of the 15 States that are currently parties to the ECOWAS Treaty and the Court Protocol (as amended by the 2005 supplementary protocol).[281] As the amended articles 9 (4) currently stands in the supplementary Protocol, there is nothing to restrict the jurisdiction of the court over a Member State of ECOWAS about any right violation that such an associate State allegedly holds out against any community citizen in the territory of any other Member State.

As national courts (each in their states), the African Commission and the African Court on Human Right (with respect to all the states) all have jurisdiction over Human Rights issues, the potential for forum shopping is high. Notwithstanding this, the only provisions open to regulate jurisdictional conflicts and inconsistencies are article 56 (7) of the African[282] Charter and article 10(d) (11) of the 2005 Supplementary Protocol of the ECCJ, both of which apply at international but not in national courts. An additional complication would be that the ECCJ will not consider itself as bound by the secondary rules in the African Charter and thus, wouldn't normally apply the procedures of article 56(7) of the African Charter which provides thus:

To regulate jurisdictional issues and inconsistencies in the African Charter.

ii. Personal Jurisdiction

[279] Amended Art 9(4) as Containe in Art 3 of the 2005 Supplementary Protocol. See also Para 28 of the Court's Judgment in the Ugokwe case.
[280] Art 1 of Protocol A/P1/7/91 Defines Member State to Mean a Member of the ECOWAS.
[281] See the Amended Art 9 in the Supplementary Protocol.
[282] See the Dictrum of the ECCJ in the *Koraou v. republic of Nigeria* (2010) CCJLR (PT 3)1

By virtue of the new article 10 in the supplementary Protocol, access to ECCJ is open to Member States, the Executive Secretary, the president of the ECOWAS Commission since January 2000, the Council of Ministers, individuals, corporate bodies and staff of any Community institution.[283] In terms of access to bring cases of the human right nature. On the basis of the earlier debate regarding actions for failing to fulfill Community responsibilities, it may appear that any Member State or the president of the ECOWAS commission is competent to bring an individual rights case against a Member State.[284] Since the obligation contained in the revised treaty and the relevant Protocols is to guarantee promotion and protection of privileges set-out in the African Charter and therefore, would not apply the provisions of article 56(7) of the African Charter which provides thus: To modify Jurisdictional conflicts and inconsistencies in the African Charter.

Accordingly, access to the court against any Member State under this provision need not be only where the victim of the violation is a citizen of the offending state. Up till now, no action has come before the ECCJ under this proceeding.

i. Locus Standi of State

Another aspect of the jurisdiction of the Court is in respect of locus standi or who can bring an action before the Court.

Locus Standi denotes legal capacity to institute a case in a court of law. It is the same as standing or title to sue. It is the right of a party to appear and be heard on the question before any court or tribunal. Member State and the executive Secretary are named as parties to an action brought for failure by a member State to satisfy a responsibility. The question is whether institutions not described therein can institute proceedings for illegality by an organization in the application of the Community text message? A deep thought or reflection on the problem reveals that it could fall under the realm of general concepts of law.

Locus Standi is conferred by the Treaty or Protocol and parties must show sufficient

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[283] Art 4 of the 2005 Supplementary Protocol.

[284] Art 9 (3) of Protocol A/P1/7/91 and the New Art 10(a) in Art 4 of the 2005 Supplementary Protocol. It is Important to Note that by Art 10 of the Supplementary Protocol, only Provisions of Protocol (A/P1/7/91) that are Inconsistent with the Supplementary Protocol are Null and Void to the Extent of the Inconsistency. However, Art of Protocol A/P1/7/91 is no Longer useful as it has been Expressly Repealed, Art 3 of the 2005 Supplementary Protoco).

interest to be permitted to gain access to the Court.

However, the Council, and Member state all have standing by right as they are considered to have direct interest in any act under review. These privileged applicants do not have to establish a particular interest in the action[285]

In Article 76 of the Treaty, it is given that any dispute in regarding to the translation or the use of the provision of this Treaty shall be genially settled through direct agreement without partiality to the provision of the Treaty and important Protocols.

The second part of the provision expresses that, where parties neglect to settle, either party or some other Member States or the Authority may refer the issue to the Court of the Community whose choice will be last and might not be liable to appeal. The restriction gave in section (1) of Article 76 of the Treaty, that 'parties shall be agreeably settled through direct agreement should be satisfied before parties may institute action in the Court.

The law on satisfying a condition of reference is essential and the parties shall consent under the watchful eye of the court can assume jurisdiction in the case.

It is expressed that a condition of reference must be satisfied before the Treaty winds up noticeably operational.[286] Notwithstanding that conditions of reference must be satisfied, it must be demonstrated that the condition of reference has been fulfilled before filing the action, together with the agreement report that there is no consent to settle out of Court.

ii. Article 38 Of Statutes Of International Court

In each lawful framework, the written source of law do not give the response to each issue which shows up under the watchful eye of the Courts. The Protocol of the court gives that the court should analyze the disputes before it in accordance with the provision of the treaty and its own rule of procedure.

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[285] See the case of *community parliament v. Council of Ministers of ECOWAS* (2009) CCJLR (PT2)23.
[286] Nair Mc A.D *''The Function and Differing Legal Character of Treaties''*. (1930) 436.

It might likewise apply, as essential, the body of laws as contained in Article 38 of the statutes of the International Court of Justice".[287] Article 38 of the Statute of International Court of Justice expresses: The Court, whose function is to decide in accordance with international law such dispute are submitted to it, shall apply: an) International traditions, regardless of whether general or specific, building up rules explicitly perceived by the challenging states; b) International Custom, as evidence a general practice acknowledged as law; c) the general standards of laws perceived by socialized countries; d) Subject to the provisions of Article 59, judicial decisions and the lessons of the most high qualified of specialists of the different nations, as auxiliary means for the determination of guidelines of law." By Article 38(c) of the Statute of the International Court of Justice, it is given in this way: Wherein the court is enabled to apply the general standards of law perceived by humanized countries. In this way, on account of Aegean Ocean Continental Shelf, the court applied the provision of Article 38(1) (c) of the Statute of the International Court of Justice to ensure the privileges of a person in the meantime where in certainty the rights are encroached upon with respect to the principle of law perceived in municipal system, and law of the court.

Applying the above principle by the application of Article 38(1) (c) and (d) of the said statute and upon the examination of the provision of section 36 of the 1999 Constitution of the Federal Republic of Nigeria, as amended wherein the municipal law is granted the protection to the right to fair hearing to a person and so on.

iii. Interpretation and Application of Community Law

Article 9 (6) of the Amended Protocol of the Court offers a reference to be made either by the

National Court, or a party to the ECOWAS Court for interpretation of a Community text.

The reason behind this may be the desire for a consistent interpretation of the many Community texts for an eventual emergence of the Community legal Order. This will be of tremendous benefit to the lawyers and Community Citizens and at the same time allow

[287] See Article 19 (1) of Protocol A/P1/7/91

for relationship between the ECOWAS Court and the National Courts.

The Community Court has a duty to give preliminary ruling as to the interpretation or validity of the Treaty Provision or Community Act. The National Courts shall apply the ruling to the reality of the situation. In other words, the Court's role is to interpret, while the National Court's role is to apply.

Where the Court rule on a preliminary reference is binding on the National Court which referred the question for interpretation. If the same issue comes up again in a latter case, then under the doctrine of ante clair, there is no need to make a further reference and if the National Court is aggrieved with the previous ruling, it can make an additional reference, even if the matter is ante clair. In the case of Costa VENEL.[288]

This "Ante clair" principle originated from France, where the ordinary Courts were required to request a ruling from the Ministry of Foreign Affairs on a question of Treaty interpretation unless the point was regarded as clear. The National Courts decision of whether or not to produce a reference is by choice.

The National Court still remains completely at liberty to make reference or not if it wishes. In the UK, the House of Lords, adopted the approach, making reference where the question raised is relevant and has not been interpreted nor the correct application of Community law is not so obvious as to leave no gap for any reasonable doubt.

The Article 177 of the Treaty of Community Court provides:

Any Court or Tribunal of Member State is entitled to make reference to the Court when it considers an initial ruling on the question of interpretation or validity relating to Community law necessary to allow it give judgment.[289] The question is: which of the National Court can make such reference to the Court of Justice?

The Statute stipulate[290] that a Court or Tribunal against whose decision, there is no

[288] (1964) ECR 585 (6/64) p.49
[289] Article 177 of The Treaty
[290] See art 234 (3) of the Statute

judicial remedy is obliged to make a reference to the European Court.[291] In consideration of the above mentioned views, two essential conditions become apparent in respect of which Court can make the reference. The House of Lords, per Lord Denning offered the answer for obligation to make a reference of which Court and which procedure to be followed for such guide under two theories Abstract theory which specifies that prelim nary reference of the Court of Justice should be from the highest National Court in the land. It stated that in the U.K, this would be by House of Lords only.

Another condition is what was described as 'concrete theory', and interpret to include the Courts that are judging in last instance in that particular case. For example, in order to be capable to appeal from the Court of Appeal to the House of Lords or Supreme Court, in Ghana or Nigeria, it is important to obtain leave and when leave is not forthcoming, then the Court of Appeal becomes the highest Court for the reason that particular case. (In the case of *COSTA V. ENEL.*[292] It may be further stated that on the problem concerning whether to make a guide or not, Lord Denning in the case of Bulmer v. Bollinger mentioned that:[293]

(a) The facts of the case before the national court must be decided first, so that the question of whether it was necessary could be settled;

(b) the reference to European Court will cause delay and therefore add to the costs of the parties, so the lower court should deal with the situation and leave it for an appeal court to decide if to make a reference;

(c) the difficulty and of the question;

(d) the wishes of the parties should be taken into account although it was the Court's decision whether to make a reference or not;

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[291] Article 177 of the Treaty
[292] Costa V ENEL (Supra) 49
[27] (1964) ECR 585 (6/64) p.65
[293] See the Ugokwe's case (supra)

(e) the need to prevent the overloading the ECJ

The court has consistently refused to constitute itself into an appellate organ to review the decisions of National Courts of Member State governments of the community. In the case of *UGOKWE.V.THE Government REPUBLIC OF NIGERIA*[294] the plaintiff filed an action at the Community Court after he had lost his election case both at the Governorship/legislative Election petition Tribunal and the Court of Appeal in Nigeria. In a bid to preserve the rest of the case an order exparte was granted by the court. But the court later declined jurisdiction to entertain the substantive suit.

In dismissing the action the court held:

Research demonstrates in the current stage of legal text's applicable by ECOWAS, no provision, whether general or specific, gives the court powers to adjudicate on electoral matter or issues arising thereof. However, a dispute possessing a bearing on other privileges of the parties may be referred to in virtually any internal or related dispute associated with electoral issues like the present one.

In such an instance the ECOWAS Court of Justice, in accordance with article 19(1) of the initial Protocol and particularly with reference to article 38(1)(c) of the Statute of the International Court of Justice. The last mentioned enables us to apply the general principle of law acknowledged by civilized nations.

4.2 Locus of Individual and Corporate Organizations

Locus standi is the legal right of a party to appear before any court or tribunal. It follows therefore that it is the cause of action brought before the court that is critically analyzed to ascertain whether there is certainly disclosed a locus standi or position to sue which inures in favour of the plaintiff. Although non-Governmental Organizations are not specifically mentioned in Article 10 of the 2005 supplementary protocol. It has been contended that "a corporate body (whether this includes NGOS or not) may only instigate

[294] See the Ugokwe's case (supra)

a case based "on an alleged violation of this body's rights, not based on the alleged violations of the privileges of others, and only predicated on a violations by the action or inaction of an ECOWAS official.

With regard to access to applicants other than Member States and the President of the ECOWAS commission, access is available to individuals vis-a-vis corporate[295] bodies by Article 10 (c), access is for proceedings for the determination of the act or inaction of a community official which violates the right of the individual or corporate body. With respect, such contention is not correct.

In so far as NGOS may be appointed as advisers and agents to represent parties before the court it is submitted that they are not limited to the enforcement of their own human right as corporate bodies. This is a very limited access as it must only be against ECOWAS (as an institution) for the rights-violating act or inaction of the community official.

In addition it must be by the individual or corporate body alleging that their right has been violated. Hence, anybody, group or institution above can be a plaintiff (or applicant) before to the court as far as the act or omission allegedly violates their right. That is one area where no other court (national or international) can claim jurisdiction. Hence, it is a rare area in which the ECCJ can claim exclusive jurisdiction. Thus, this provision guarantees effective remedy in this area.

One conspicuous omission from the supplementary protocol of the court relates to the competence of non-governmental organizations (NGOs) to bring action before the court. It could be argued that the term "corporate bodies" as used in the inserted Article 10 (as contained in Article 4 of the 2005, supplementary protocol) is wide enough to accommodate actions by NGOs.

However, the couching of the provision, to the extent that such action should be in determination of act or inactions of a community official which violates the rights of individual or corporate bodies, given the impression that any action brought upon facts that do not allege a violation of the privileges of the organization body may fail.[296] While

[295] (2008) CCJLR (pt 2) 483

[296] See the Inserted Art 10 (c) in Art 4 of the 2005 Supplementary Protocol. The Court has not Been Asked to Make a Decision of the Competence of NGOS to Access the Court.

both the 1991 Protocol and the 2005 supplementary protocol are silent on the idea, it appears from a combined reading of the amended (and inserted) articles 9 and 10 of the court protocol that Member States, the community, community organizations and community officials can be defendants before the court.[297] The most obvious respondents however, are Member Sate of ECOWAS in action for failure to fulfill human rights commitments due to the ECOWAS Treaty, Protocols, conventions and other legal instruments. Further as argued above, paragraph (c) in the amended Article 10 pertains to rights-violating Acts or inactions of community officials.

In other words, either ECOWAS itself (as the community) or the official of ECOWAS in his official capacity may be considered a respondent.[298]

In relation to paragraph (d) the protocol does not say against whom the individual right of access can be exercised. This leaves room for the exercise of discretion by the court in its interpretation and application of the supplementary protocol. In practice, there is hardly any discretion as most of the case already treated by the court are against Member States of ECOWAS.

A curious development in respect of the exercise of the ECCJ's human rights competence is the introduction of individuals as respondents. While the provisions relating to individual right as within the ECOWAS instruments point to a state duty, the imprecise couching of Article 9(4) and 10 (d) of the 2005 supplementary Protocol leaves the door open for situations where human rights actions can be brought against non-state actors before the court.[299]

In granting jurisdiction to the court for the determination of cases of human being right violations that occurs in member states and access to individuals for applications for relief for such violation, the supplementary protocol seems to have issued a 'blank

[297] See Art 3 and 4 of the 2005 Supplementary Protocol.
[298] In 2005, Action brought by a Dismissed Staff Member of ECOWAS was Against the Executive Secretary of ECOWAS in that Capacity and Two Staff Member of the Community in their Personal Names. Part of the Action Touched on a violation of the Right of Fair Hearing.
[299] See Amerasinhe (2005) for a Discourse on Interpretation of Treaty

cheque' for individual rights realization. In the case of *Ukor v. Laleye,*[300] all the parties were non-state actors, yet the court went on to exercise jurisdiction over the problem. This practice holds a risk for character of the ECCJ as an International Court. There is also provision for intervention by parties who consider that their interest may be affected by proceedings taking place before the court.[301] As the provision is as originally targeted at State, since the supplementary Protocol came into force, individuals have relied on it to apply to join proceedings as co respondents with a state or an individual,[302] it is apparent from the discourse that the ECCJ has jurisdiction with regards to human rights within the territories citizens and establishments of ECOWAS members states as much as it has over ECOWAS Community Establishments.

While this is important for judicial safety of human being right within the ECOWAS Community framework, it evokes concerns on the performance and efficiency of the mandate Vis-a-vis Member States and their institutions on the one hand and other Continental Judicial Mechanisms for the security of rights in Africa. The ECOWAS Community might need to make mindful reactions to these concerns in the near future. Within the positive aspect, the actual fact that the African Commission lacks the power to make binding decisions increases the effectiveness of the ECCJ as a Community Forum for Human Rights litigation. This is especially as the African Human being Rights Court, though inaugurated, had not received any case as at July 2009 (three years after its inauguration in 2006). Even if the African Human Rights Court begins to function fully, the limitation on individual and NGO gain access to possibly reduces its usefulness. All of these facts favour the continued operation of the ECCJ as a Forum for Human Rights litigation.

In fact, the emergence of the ECCJ's Individual Rights competence will not seem to have affected the submission of cases to the African Commission[303] However, the reality of

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[300] (2009) 2 CCJLR p.5

[301] Art 21 of the 1991 Protocol (Renumbered Art 22 by Art 5 of the 2005 Supplementary Protocol). Art 89 of the Rules of Procedure Deals with the Procedure for Intervention.

[302] Eg in the Ugikwe case ( ) There Were interveners Who Joined as Co-respondent with Nigeria and in the Ukor Case

[303] Interview with staff of the African Commission July 2009 Indicates that the Commission Continues to Receive Communications from NGOs and Individual from and against West African State.

the risk of conflicting jurisdiction and conflicting decisions requires some, that there should be some form of cooperation and coordination with one other for that is currently lacking in the ECOWAS practice.

4.3 Total vs. Restrictive Immunity: The Nigeria Approach

It truly is intended here to highlight the Nigeria Position. Rules and practice in Relation to State Immunity practice.

It is Necessary to State at once that in Nigeria all the classes of immunities are accorded foreign sovereigns and diplomats representing the Sovereigns without limitation. Section 1 (1) of the Nigerian Diplomatic, Immunities and Privileges Act, 1990 Stipulates that:

Every foreign envoy and every foreign Consular Officer, the members of the families of those persons, the members of their official or domestic Staff, and members of the family of their official staff will be accorded immunity from suit and legal process and inviolability of residence and official archives to the extent to which they were respectively so entitled under law in force in Nigeria immediately prior to the coming into force of this Act.

Subsection (12) State thus:

A foreign envoy or foreign Consular officer with the consent of the Federal Government may waive any immunity or inviolability conferred under this Act on himself and without the necessity for such Consent may waive Immunity or inviolability so conferred on an associate of his official or home Employees or on a member of his official staff.

Through the above methods, it is clear that Nigeria law does not contain any restrictive elements in State immunities, and there is absolutely no rules yet to this writer's knowledge in existence to that effect. Judicial pronouncements have also bring in accord with the law as shown in *Africa Reinsurance Corporation v. Fantate*[304] *and Italo limited v. Government of Belgium*[305] while others.

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[304] (1986) PT 3 NWLR p. 811
[305] Suit NO CA/L/244/47

This is despite the British decision in the case of *Trendtex Trading Company*. *Central Bank of Nigeria*[306] where the UK Court upheld the doctrine of restrictive immunity against the Central Bank of Nigeria.

With the *Trendtex Case British* sealed the restrictive rule on Nigeria. The Nigerian position is hereby examined. *In African Re-insurance Company. v. Fantate.*[307]

The Court held as follows:

1. Where in fact the evidence before the Court implies that the Appellant is a Decision of the sovereign Condition, albeit itself a corporation and business body, then your action is one between the Plaintiff (in the first instance) and the foreign State, or the area of the international sovereign State symbolized by the departmental body concerned.
2. The immunities under the first Plan to the Diplomatic Immunities and Privileges take action 1962 include Immunity from suit and legal process.
3. Under the Principles of Customary international laws, a foreign sovereign cannot impleaded in the Court of another sovereign in virtually any legal proceedings either against his person or for the recovery of specific property or damage neither can his property or property of his possession be seized or detained by legal process.
4. In the instant case, the actual fact that the appellant deals in mercantile transactions will not mean that it cannot claim immunity because the cause the reason for action before to the Court is based on wrongful termination of employment.
5. It is an established rule of international law that action in personam cannot be brought against a international sovereign Condition or section, even when it is involved in a Commercial Business.
6. Where in a Sovereign or international firm likes immunity from suit and legal

[306] (1977) QB. 529
[307] Supra

process. Waiver of such invulnerability is not to be assumed against it. Without a doubt, the assumption is that there is no waiver until the point that opposite is built up.

In this manner, from the Pronouncement of the Supreme Court, there is positively presumably that Nigeria favors outright Sovereign invulnerability run the show.

4.4 Matters Over Which Court Can Act

The court shall have the ability to decide any non-contractual risk of the community may order the community to pay harms or make reparation for official acts or exclusions of any community establishment or community officials in the execution of official obligations or functions.

Any issue by or against a community association or any individual from the community shall be statute barred after three (3) years from the time when the privilege of action emerged.

The court has jurisdiction to determine cases of infringement of human rights that happen in any member state.

Pending the creation of the Arbitration tribunal provided at under Article 16 of the treaty, the court shall be able to act as arbitrator for the proposed purpose of Article 16 of the Treaty.

The court shall have jurisdiction over any issue provided for within an agreement where in reality the parties give that the Court shall settle disputes emerging from the agreement.

The court should have every abilities gave upon it by the provisions of this convention and additionally whatever other power which might be presented by ensuing conventions and choices of the community.

The Authority of Heads of state and Government shall have the ability to grant the court the ability to mediate on a particular issue that it could make reference to the court other than those predetermined in this particular article.

In accordance with Article 29 of the ECOWAS convention on little Arms and Light weapons, The Ammunition and other Related Materials the court has been enabled to arbitrate on any disputes emerging out of the elucidation and use of the convention which cannot be settled by way of negotiation or by response to the ECOWAS intervention and security council.

4.5 Ability to Litigants to Attend Access

The protocol of the Community Court of Justice recommended its jurisdiction. Protocol A/P1/7/91 models out the ability of the court in Article 9. The court was also empowered under Article 10 to provide Advisory Opinion to Member State, the President of the ECOWAS commission and organizations of ECOWAS on their request. The competence of the court under Protocol A/P1/7/91 was very slim. Community residents or nationals of Member State, Private Individuals and corporate bodies did not have immediate access to the court. It had been only so long as a member state may on behalf of its nations, institute proceedings against another Member state or institution of the community, associated with interpretation and application of the provision of the Treaty after efforts to settle the dispute amicably have failed. Therefore, only Member State and establishments of ECOWAS got direct access to the court under Protocol.

But today by the provision of article 9(4) of the 2005 supplementary protocol as amended, individuals and corporate business bodies have access to the court. The inability of individual to access the court was the main issue for consideration in the judgment of the court in *Olajide Afolabi V. Government Republic of Nigeria*.[308]

The applicant, *Mr. Olajide Afolabi,* a community resident and business man submitted an application before the court challenging the closure by Nigeria of its common border with Benin Republic on 9th August, 2003. He allegedly experienced some loss due to the closure. Since it is crystal clear, that judges do not make laws, but only interpret or apply law as it is the only option the court had was to uphold the preliminary objection of Nigeria by striking out the suit for lack of Jurisdiction. That really was a landmark case,

[308] (2004)52 WRNI, (2007) ICCJLR (PR1)1.

because it defined clearly, the competence of the court under Article 9 (3) of its protocol.

Between 2001 and January 19th 2005 when protocol A/P1/7/91 was finally amended only two cases were filed before to the court and both were filed by individuals directly. Of course, the court had no jurisdiction to deal with the matters. Therefore, the issue of lack of immediate access to the court by individuals was of great concern to the court because it had an adverse influence on its operation.

It was apparent that individuals must be granted access to the court for it to be operational. The adoption in January 2005 of the supplementary Protocol A/SP.1/01/05 greatly expanded the jurisdiction of the court while at exactly the same time granting individuals direct access (in specific causes of action) to the court.

Article 3 of that supplementary Protocol A/SP.1/01/05 deflected Article 9 of Protocol A/P1/7/91 and substituted same with a new article 9 while creating a fresh article 10 which provides the following: Usage of the court is available to the following:

Access to the court is available to the following:

a. Member States, and unless in some other cases gave in a Protocol, the Executive Secretary, where action is brought for disappointment by a Member State to fulfill a commitment;

b. Member State; the Council of Ministers, and the executive Secretary in proceeding for the determination of the legality of an action in connection to any Community text.

c. People and corporate bodies in proceedings for the determination of an action or inaction of the Community official which, violates the benefits of the individual or corporate body.

d. People on application for help for infringement of their individual rights; the submission of application for which shall not be mysterious; nor be made while a similar issue has been founded under the watchful eye of another International Court for mediation; Staff of any Community Institution, after the Staff Member has depleted all appeal processes open to the officer under the ECOWAS staff

Rules and Regulation.

The Economic Community of Western African State (ECOWAS) has since inception of its ECOWAS Community Court of Justice in 2001 lodged a total number of 175 cases, the chief Registrar of the court *Mr. Tony Anene-Maidoh* provided these statistics during valedictory court session in honour of the six retiring member of the ECOWAS Community Court of Justice on the 12th day of June 2014.[309]

The court has had 525 sessions and delivered of 177 decisions comprising 82 rulings, 80 judgments, 12 review decisions and three advisory opinions. There are also 32 pending cases before the court.

Therefore, the adoption of the supplementary protocol has already established a positive impact on the judicial activities of the court.

4.6 Strategies for Effective Access to the ECOWAS Court through the Registry

1. Devotion of the functions of the registry of the court to enhance usage of the ECCJ by community people in Member State.

2. The format being proposed for such devotion of function is really as follows: Appoint 3 Deputy Key Registry to man 3 Bureaus in (a). Dakar for Senegal, Gambia, Guinea, Guniea-Bissau, b).Accra (for Ghana, Sierra- Lone, Liberia, Togo and Benin Republics) and, c).Bamako (for Mali, Niger, Burkina Faso and Cote D'ivoire) while Nigeria and Cape Verde remain under the Chief Registrar in Abuja.[310]

1. Rationale behind the format:

a. Proximity of Members State governments to the suggested respective bureaus;

b. Cost efficiency in manning the bureau by the court;

c. Effective management of registry offices in Member States by the D.C.Rs and;

d. Cheaper and easier communication and supervision of the DCRs by the Principal

[309] The Guardian Newspaper, Friday 13th June 2014 p.7

[310] Ladon, M.T, '' Strategies for the Strengthening of the effectiveness of the ECOWAS Court of Justice, a paper presented at the conference of the ECOWAS Court of Justices Abuja, 21-25 February, 2011''

registry.

e. Legal basis for the proposed devolution/ DCRs/Bureau.

The cumulative effect of Article II, 17(13) and 29 of the ECOWAS Process A/P1/7/91 on the Community Court of Justice, chapter 3, section 1, Article 9-20; Article 26 (1), 43(6) and (11-12), 47 and 49, 61 (5), 65, 74(1-2) of the guidelines of the community Court of Justice provide for the legal base for the above mentioned proposal.

The above Articles relates to the appointment, status, nature and scope of functions of the Principal Registrar and other registrars of the ECOWAS Court in the procedure and conduct of the proceedings of the court in the interest of justice.

Hence National Registry Staff and the proposed DCRs will be appointed, supervised and expected to reform any of the functions of the Chief Registrar and Registrars of the Court consistent with the protocol and guidelines of the court outlined above through a devolutionary process.

4. 7 Referred Jurisdiction from National Courts

Another aspect of the jurisdiction of the court is in respect of disputes referred to it in relations to the provisions of Article 56 of the Treaty, by Member States of the authority when such disputes comes up between the Member State or between one or more Member States and the institutions of the Community on the Interpretation or Application of the provisions of the Treaty. [311]

The primary role of any court including a regional court is to interpret and apply the law, which faculty may be exercised in contentious and advisory issues. In carrying out its functions, the court is guided by the sources, formal and material principles and techniques germane to it.

ECOWAS regime has however shown that apart from the revised Treaty of ECOWAS, ECOWAS members have through its agency adopted treaties and protocols which may

[311] See Article 56 of the Revised Treaty

be subject of adjudication.

The application of the convention to relations of States as between themselves under International agreements to which other subject matter of International laws are also parties of particular significance for this work, Article 5 of the Vienna Convention which stipulates thus:

Convention applies to any treaty which is the Constituent Instrument of International Organization and to any treaty adopted within an international corporation without prejudice to any relevant rules of the Organization.

This is because Article 92(1)[312] of the Treaty stipulates thus:

Upon the admittance into force of (this revised) Treaty in accordance with Article 89 the provisions of the United Nations Vienna convention on the laws of Treaties adopted on 23rd May, 1969, shall apply to the determination of the rights and obligation of Member States under Treaty and (this Revised Treaty).

The court has the competence to interpret and apply the provisions of the Treaty. It has also the competence to cope with dispute referred to it by Member States Government or the Power when such disputes occur between the Member States or between one or more Member Areas and the Institutions of the Community on the interpretation and applications of the Treaty. Furthermore, a Member State may with respect to its National Institute proceedings against another Member State, or Institution of the Community relating to the Interpretation and Application of the Treaty after attempts to settle the dispute amicably have failed.[313] The court in addition has the competence, at the demand of the Authority, Council, one or more Member State of Executive Secretary and every other Organization of the Community to give a legal opinion on questions of the Treaty. It thus has an advisory faculty.[314]

The Supplementary Protocol[315] amending the protocol on the Community Court of

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[312] See Article 1 of the protocol
[313] Article 9 of the New Article 9 is Substituted for the Old.
[314] See Article 10
[315] A/sp.1/01/05

Justice consolidates at the competence of the court making explicit what would have been inferred from the protocol of the competence to adjudicate matters due to the implementation of the Treaty, decision, regulations, directives and other Subsidiary legal Instruments which are binding on targeted bodies.

The above Protocol grants individuals and corporate bodies right of access to the court and increase its power in several areas notably action brought for failure to honour an obligation.[316]

The action for damages against a Community Institution or an Official of the Community for any act or omission in the exercise of official functions. Determine case of violation of human being legal rights that occurs in any Member State.

A new Article 10 amends the protocol and extends access to the court, as it is open to the following:

Member State and unless in some other case gave in a Protocol, the Executive Secretary, where action is brought for disappointment by a Member State to satisfy a commitment.

Member State Governments, the Council of Individuals and Executive Secretary in continuing for the determination of the legality of the action with regard to any text. Individual and Corporate bodies in proceeding for the determination of an act or inaction of a Community Official which abuses the privileges of the normal Individual or Corporate and business bodies. Individual on application for help for process of integration in West Africa. In Mali, Staff of Community Organization Right was damaged and after depleted out all appeal process accessible to the officer under ECOWAS Rules and Regulations.

Where action under the watchful eye of a Court of a member State, if an issue emerges in that in regards to the Interpretation of the Provision of the Treaty or different

[316] Article 77 of the Treaty Under which the Authority Man Impose sanctions where a member State Fails to Fulfil its Objection to the community.

conventions or directions the National Court may[317] without anyone else or at the demand of the parties to the action allude the issue to the court for translation. These issues fall inside the territory of general public international law, which that ECOWAS Court would in this manner apply International law as authoritatively rendered in Article 38 of the Statute of the International Court of Justice to be specific settlements, Customary International law and General Principles of law perceived by Civilized Nations. These three sources are normally referred to as laws creating procedures or formal sources of law, while ECOWAS Courts falls within the category of law determining firms that is subsidiary means of determining (interpreting) what the law is.[318]

[317]Osita C.E. "The Role of Regional Court in Treaty Adjudication". A paper Presented at The conference of the Court of Justice on the Law in the process of integration in West Africa, Held at Abuja 12-14 November 2007.
[318] See Article 19 of the protocol.

CHAPTER FIVE

ENFORCEMENT OF JUDGMENTS OF THE ECOWAS COURT OF JUSTICE

Article 24 of the Protocol, relies on the Institution of the Community State in line with the National Court Civil Procedure Rules for the Enforcement of its Judgment. In this regard the relevant Institution of Community must be obliged by their municipal laws to receive and enforce the judgment of a non-forum court. This underscores, the enactment of legislations permitting the recognition and enforcement of foreign judgments to give legal backing to forum courts to recognize and enforce same.[319]

Acts and Judgments of the Community Court, are to all intent and purposes in a less enviable position than those of foreign courts. If its existence is not integrated into the municipal realm of Community States by municipal legislations.

It is this integration of the protocol in the municipal sphere that will constitute the individual member of Community State into Common Citizen of ECOWAS, albeit for the jurisdictional competence of the Community Court. Given the foregoing, the question is how receptive are the Constitutions of Community member State Governments to the novelty of the Community Court within the framework of the administration of Justice. Or rather how willing are the Community states to lift the veil of nationality to enable their citizens explore the window of transnational jurisdiction presented by the Community Court in practical terms? To pursue this inquiry further, this chapter has examined the Constitution of each Community State with a view to highlighting the possible areas of conflict. Accordingly, National Courts have no choice but to accord legitimacy to municipal laws even when it conflicts with International law. This is ascribed to the fact that the municipal courts are the organs of municipal law and are bound by it in all circumstances. Even in this progressive era of the developmental law, the truth remains that, individuals can never be directly affected by the terms of an International engagement, any duty imposed upon them flows directly from the law of

[319] Foreign Judgments (Reciprocal enforcement) Act. Cap. F. 35 Laws of Federation of Nigeria, 2004. Under Section 4 of the Act, a Foreign Judgment must be registered in a Superior Court in Nigeria before it is recognized for enforcement.

their State.[320] That … is only part of the wider truth that within the state, in general, International law is applicable only as far as is permitted by municipal law and, therefore, by implication, subject to the limitations imposed upon that operation by municipal legislative organs.

Therefore National Courts have no choice but to accord legitimacy to municipal law even when it conflicts with International law. That is ascribed to be fact that the municipal courts are the organs of municipal laws and are bound by it in every circumstance. Even in this progressive period of the development of International law, the truth remains that individual can never be directly affected by the terms of an International engagement, any duty imposed upon them flows directly from law of their state.

The first legal hurdle for the ECOWAS Community Court Protocol is for it to be passed into law by the legislative organs of the dualist Community States (Which are in the majority) for this to take effect domestically. This is important because the Community Court depends on the courts and the law enforcement providers of Community State[321] for the enforcement of its decision. A person or an Institution against which the Judgment or any other process of the court is sought to be enforced in the territory of these Community State[322] can plead the non domestication of the court protocol by the legislature to evade the Judgment of the Court or any of its processes. For instance the court, as it stands, lacks the legal carriage to compel the appearance of anyone before it and enforce same through the law enforcement agencies of the dualist Community State.[323] Therefore, the state is in turn required by Article 24(4) to determine the competent National authority to execute the Judgment. It is desirable that the highest National Court of member state that should be this authority. In Nigeria for example, it is the Supreme Court of Nigeria that is the competent authority. The civil procedure law including the practice and procedure of the Supreme Court execution of the judgment of a foreign court does not ordinarily turn that judgment of a foreign court to the judgment

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[320] Jones, J.W *"The Pure Theory of International Law"* 16 Brit Y.B. Int'L. 16, 16-17.
[321] Ibid.
[322] (Supra).
[323] Barney, N.P., *"Reflection on the African court on Human and peoples Rights,"* 4Afr. Hum. Rts. L.J 121, 126 (2004), (pityana, "Reflections on the African court").

of the Supreme Court. However, it ought to be observed that the ECOWAS Court is unique and its judgment is not that of a foreign court.

It really is a court whose judgment is immediately binding on Member State. Accordingly execution of its judgment by the highest court of member state reinforces the fact that the judgment becomes automatically part of the National law and of the highest Precedential value. To understand the extent to which a judgment of the ECOWAS Court can influence matters before National Courts, it is important to refer to the mandate of the court. This mandate is defined by Article 76(2) of the Revised Treaty and by the two Protocols the 1991 Protocols which established the court and a 2005 Supplementary Protocol Amending same. Whereas under dualist constitutions and indeed the separation of power posture of modern Constitutions, it is only the legislature that has powers to make laws for the country and incidentally, the power to surrender the citizenry to the ebb and flow of International legislations. In the case of *Medellin v. Texas,*[324] it was that:

While a treaty may constitute an International commitment, it is not binding domestic rules unless congress has enacted statutes implementing it… the president's authority to act as with the exercise of any Government Power, must stem either from an act of congress or from the Constitution itself.

Given that National Judges are to interpret and apply National laws,[325] also in *A.G Abia State v. A.G Federation* which to all intent and purposes do not include international laws in a dualist country, National Judges are precluded from taking cognizance of International law except these are so empowered by the legislature.

The problem of enforcement deserves serious attention given the fact that Africa has a long list of both judicial and quasi judicial human rights enforcement institutions but a

[324] U.S. Supreme Court, 25 March, 2008 Paragraph 1(a) and 3.
[325] (2006)16 NWLR (PT 1005)265.

bad history of compliance to meet the spirit and purpose of the institutions.[326] Using the guide provided by *posner* and *yoo*[327] when they observed that:

Whether or not a new tribunal can be used or is more often a jump in trade flows after…. (Its emergences would be a good indication of an effective court).

The existence of International Human Right mechanisms in Africa does not reflect on better human rights protection for the African people. The widespread internal arm conflict over Africa today is a direct product of failure of these organizations to uphold the rights of the poor and the oppressed.

It is not difficult to see that the Community Court is not immune from the inefficiencies of the other such institutions. The simple question to ask is has the safety of human privileges improved after the adoption of protocol?

The answer is clearly in the negative in view of the fact that the emergence of the community court has not improved the deplorable state of human being rights in the sub-region,[328] unless a strong regime of enforcement mechanism anchored on municipal law, and having international consequences for violating countries is fashioned out, the community Court like its sister courts in Africa, will exist only in name and structure without any effective contribution to individual well-being within the sub-region. In this wise, it is important for Community State Governments to take a cue using their European Communities (EC) and Council of Europe Counterparts in respective of creating a court that will drive the desired integration, as did the Western Court of Justice (ECJ) and one provides an effective mechanism for human rights enforcements as the Western European Court of Human Rights (ECHR).

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[326] John, C.M, *"Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in African*: The pains and the Gains"6 Afr. Hum. Rts. LJ. 146, 159 (2006) (Noting, with examples, that human rights abuse are often at the centre of wars in Africa).

[327] Eric .A. P & John C.Y, *"Judicial Independence in International Tribunals"* 93, cal. L. Rev. 3, 29 (2005).

[328] See Amnesty International Report 2009, online http://thereport.amnesty.org. (accessed on 5 November, 2009).

As against what obtains in the EC the relationship between the ECOWAS Community Court and National Courts is rough and complicated, the first difficulty is the failure of the Supplementary Protocol to provide for the requirement of exhaustion of local remedies before cases alleging human rights violations could be instituted at the Community Court. In *Etim Essien. v. The Republic of the Gambia* and *The University of Gambia.*[329]

The court held that:

It has jurisdiction to determine complaints of the violations of the plaintiff's suit based on economic exploitation and a claim for equal salary for equivalent work identified by Article 5 and 15 of the African Charter on Human being and People's Rights. However, the case was dismissed as the court did not find the facts, elements amounting to the financial exploitation of the plaintiff.

The Community Court stressed that the issue of Article 50 of the African Charter has no bearing with cases under the premise of article 10(d) of the supplementary protocol. This seems a deviation of states in matters of this nature. In order to avoid a political tension between an International institution and the Organization of member State, International Organizations having jurisdiction over individuals usually require as a prerequisite to the invocation of their jurisdiction that all local remedies are exhausted by the applicant.[330]

Local remedies in the context of individual legal rights enforcement necessarily include seeking redress in the appropriate court of the realm and exhausting all means of appeal in respect of the issue sought to be litigated before an International institution. That is fundamental because each of the Community States has its own internal judicial means, albeit ineffectual, for obtaining remedies for human rights abuses.

In Nigeria, for instance, the courts have been enforcing the African Charter on Human being and Peoples Rights even during the military era - the most difficult period of human being rights enforcement in the United States, when the fundamental individual legal

[329] (2009) CCJLR (Pt.2) 1
[330] See Article 50 and 55 of the African Charter on Human and Peoples Right 1981.

rights provisions of the Constitution were suspended by the military.[331] Senegal, Liberia, Niger, Guinea and the Republic of Benin, Togo affirmed their commitment to the African Charter in the respective Constitution in addition to their Constitution bill of rights. The difficult question, given the actual fact that the Community Court and the National Courts have jurisdiction over the same subjects concurrently, is what is the place of the Community Court in the hierarchical order of municipal courts? Will it now sit on appeal on the apex and final Courts of Community members? Or will it sit as a court of first and last instance but also over the apex Courts of Community States, it also means that it will have jurisdiction over any case brought before it not withstanding that the applicant has not exhausted all the provisions of appeals envisaged by the Constitution of his country, to which that individual is primarily and inextricably bound. This will create room for jurisdictional abuse and community forum shopping,[332] it will also pitch the Community Court against municipal courts, which of course are known to guard their jurisdiction very jealously. For the avoidance of doubt, section 235 of the 1999 Constitution of Federal Republic of Nigeria, as amended, article 131 of the Constitution of the Republic of Benin, Article 129(1) and (2) of the Constitution of Ghana, Article 126(1) of the Constitution of the Gambia, Article 140 of the Constitution of Togo prohibit appeals from their apex courts. The common practice of state operating written Constitution is that a right of appeal must be obviously conferred by the constitution or any other statute which is not in conflict with the provisions of the Constitution on the same subject matter.

In *Okonkwo v. Ngige,*[333] the appellant, who had contested and lost election to the Governorship seat of Anambra State, filed an action in the Governorship Election Tribunal, where he also lost. He then appealed to the Court of Appeal having lost at the Court of Appeal, which by virtue of section 246 of the 1999 Constitution of the Federal Republic of Nigeria, as amended, is the final court in Governorship Election petitions, he appealed to the Supreme Court.

Declining jurisdiction, the Supreme Court per Mohammed J.S.C, held:

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[331] Director of state security service and Anor. vs
[332] See Laurence H. *Forum Shopping for Human rights.* 148 U. PA. L Rev. 285, 289 (1999).
[333] (2007)12 NWLR (PT 1047) 194.

> The relevant provision of section 246 of the constitution … are quite clear and unambiguous … the decision which is now on appeal in this court, concerned a matter arising from election petitions within the scope of subsection (3) of section 246 of the constitution the determination of the rights of the appellant in respect of the matter therefore terminates at the court of appeal with the constitution leaving no room whatsoever for such proceedings spilling over to the supreme court[334] ….

It thus follows that the apex courts of those countries and even all other courts below, which are bound by the jurisprudence of the apex courts by the principle of stare decisis will not recognize a right to litigate before the ECOWAS Court, a matter which had been determined with finality by the highest court of the realm, while the above Constitutional Provisions are extent. Not even can the court function as a court of first and final instance when it is not one of the Constitutionally designated courts of the first instance on matters arising from human rights violations.[335]

A more serious concern however is the relationship of the African Human Rights Court to the domestic situation. There is concern that the court will undermine domestic courts and as such would be unconstitutional, viewed from the home perspective. The introduction of extra-territorial jurisdiction is a concept that has not yet received wide acceptance in Africa.[336]

> Against this background, the judiciary being… the ultimate bulwark against fundamental revisions of the constitution outside the amendment process,[337] will ensure that separation of powers is protected and that no competences necessary for the judiciary and the legislature to perform their constitutional assignments are delegated.[338] National courts will stand on the side

[334] Ibid at 208.
[335] By the Fundamental Rights Enforcement Rules made by the Chief Justice of Nigeria Pursuant to section 46(3) the High Court have Original Jurisdiction in Respect of both the constitutional bill of Rights and the African Charter on Human and Peoples Rights (Ratification and enforcement). Act Chapter of the Constitution of Cape Verde.
[336] Barney. N.P., *"Reflections on the African Court, on Human and Peoples Right"*, (supra) p. 124
[337] Patrick Tangney *"The new Internationalism: The Cession of Sovereign Competences To Supranational Organization and Constitutional Change in the United States and Germany"* 21 Yale J. Int'l L395, 397 (1996)
[338] Ibid.

> of the constitution and uphold its sanctity in the event of undue erosion by any other rule or legal order.

This opens up another it emphasizes that what is required in the national realm of the Community State is not only a ratification of the protocol.

Apart from the supremacy clause in the Constitution of some Community States such as Ghana and Nigeria[339] it is expressly provided in some others that a treaty which is inconsistent with the Constitution cannot be domesticated until the Constitution is amended or revised.[340]

Thus the Constitutional provisions relating to the finality of Apex Courts, and originality of courts of first instance, being in direct conflict with the Community Court protocol must first be amended for any meaningful and effective domestication of the protocol to be achieved. Otherwise the supplementary protocol shall remain inchoate and hence ineffective within the municipality of Community state governments. By the same token the Community Court cannot hijack a case mid way before it gets to the apex court and then expect the same court to enforce its judgment, when the channel of appeal from the lowest Court to the apex court is systematically organized by the constitution or an Act of parliament.[341]

It should also be pointed out that the African commission accepts communications from individuals who are dissatisfied with the decisions of the apex courts or any other organ of their countries. Also, the commission is a politics qua administrative body and not a judicial body. It does not sit in a judicial character let alone in an appellate capacity. Most of the recommendations[342] of the commission have been seen more in breach than in obedience by African countries; they are mere non binding recommendations. The Continental Human Rights regime created under the Charter and the regional regime created by ECOWAS rest on International enforcement that is theoretically weak and

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[339] The Protocol is Inconsistent with Article 129 of Ghana and 235 of Nigeria.
[340] See Article 86 of the Constitution of Cote d'Ivoire, Article 78 of the Fundamental Law of Guinea, Article 97 of the Constitution of Senegal, P.T.O.
[341] See Article 147 of the Constitution of Benin; Article 116 of the Constitution of Mali, Article so of the Constitution of Mauritania; Article 151 of the Constitution of Burkina Faso, Article 98 of the Constitution of Senegal and Article 132 of the Constitution of Niger.
[342] Frans Viljoen, *A Human rights Court for Africa, and Africans*, 30(1) Brook j. Int'L L.1.13. (2004).

practically nonexistent. The same situation is replicated in the municipal realm of member states, the result of the lack of International commitment to enforcement, which is invariably reflected in the municipal legal system, is that the Governments of members states are less likely to respect their substantive obligations towards their citizen under the instruments.[343]

5.1 Provision on Enforcement of Judgment of the Community Court of Justice

The nature of court judgment and modes of implementation are two aspects that are very important as they give teeth to decisions of ECOWAS Court. In the case of *Manneh v. Republic of Gambia*[344] the court ordered officials of the Gambia Authorities to give evidence concerning their alleged involvement in the arrest and detention of the plaintiff. The Defendant and its own officials overlooked the order. Their refusal to honour the court's order was noted in the judgment wherein it was held:

> The Defendant refused to appear to defend this claim since the Defendant has failed to establish that the arrest and detention of the plaintiff was in accord with the provisions of any previously laid down law, the plaintiff is entitled to the restoration of his personal liberty and the security of his person.

The ECOWAS Court shall be final and immediately enforceable. Under the new article 23 (3) members states and institution of the community shall take immediately all necessary measures to ensure execution of your decision of the court.

To facilitate the implementation of decisions of the court, the amendment to the protocol makes provisions for methods of execution under article 24.

The new article 24 of the (Supplementary) Protocol of the court provides thus:

1. Judgments of the court that have financial implications for nationals of member states or member states are binding.

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[343] Oona Hathaway, Between Power and Principle: An Integrated Theory of International Law; 72 Chicago law Review 469 (2005).
[344] (2009) CCJLR (PT2) 116.

2. Execution of any judgment of the court will be in the form of a writ of execution, which shall be submitted by the registrar of the court to the relevant member state for execution according to the rules of civil procedure of that member state.

3. Upon the verification by the appointed authority of recipient member state that the writ is from the court, the writ will be enforced.

4. All member states shall determine the competent national authority for the purpose of receipt and processing of execution and notify the court accordingly.

5. The writ of execution issued by the Community Court may be suspended only on the authority of the decision of the Community Court of Justice on parties and in the instant case or where the doctrine of precedent is envisaged[345].

In the absence of a clear exclusion of stare *decisis*, as under article 59 of the ICJ statute, the court has the flexibility to move in the direction of the doctrine of stare *decisis*, even given that membership of ECOWAS comprises state of both civil law and common law traditions, the former not practicing the idea of stare *decisis*.

Even then it might be stated that in the latter case, the practice of both domestic courts of civil law tradition and the ICJ citing their own previous judgments, approximates to the former.

In the same vein the practice in the common law tradition of differentiating and reviewing in given circumstances, previous decisions, mediates the rigidity of stare *decisis*. In any event what is important is that decisions of the court can serve in a reasonably predictable way as guide for the conduct of member state and persons affected.

This way they created a stable regime that can assist a progressive motion on the attainment of the aims and objects of ECOWAS.

[345] Osita C.E, "The Role of Regional Courts in Treaty Adjudicating process being a paper presented at the conference of the Court of Justice. The Law in the process of Integration in West Africa held at Abuja Nigeria, from 12-14 Nov. 2007".

There are however some grey areas with respect to the final destination of decisions of the ECOWAS Court. From the provision of article 23(1) which provides thus:

> No disputes regarding or application of the provisions of the treaty may be referred to any other form of settlement except that which is as provided for by the treaty or this protocol.

The said article of the treaty provides for the finality of the decision of the Community Court. This raises the issue of its relation with other jurisdiction such as the African commission and the African Court on Human Rights to which members states of ECOWAS are parties and the Charter where they adjudicate may guarantee more or less rights than National Constitutions. It could be inferred from these provisions that citizens of ECOWAS might have their rights affected ordinarily, the rules of interpretation will require that where all parties to a treaty are parties to a subsequent treaty which contradicts the earlier one unless there is a contrary indication that the earlier one is modified . Therefore, ECOWAS citizens might have their rights affected the rules of interpretation to require that where all parties to a treaty are parties to a subsequent treaty which contradicts the earlier one unless there is a contrary indication that the earlier one is modified. But parties to the African Charter, who are not members of ECOWAS have the right to insist on the full implementation of the Charter. In the instant case, however, the limitation is made explicit. Pursuant to the provision of article 62 of the Rules of the court, this provides that judgment shall be binding from the date of its delivery.

By the provision of Article 22(3) of the protocol enjoins all member states and institutions of the community to immediately take all necessary steps to ensure the execution of the decisions of the court. Finally, article 15(4) of the revised protocol provides that judgments of the Court of Justice shall be binding on the member State Governments, the Institutions of the Community, Individuals and Corporate and business bodies.

It has been observed that the above provisions are not adequate for the enforcement of the decisions of the court. Therefore, more elaborate provisions have been made in the proposed draft of the supplementary protocol of the court.

The brand new article 24 of the (Supplementary) Protocol of the court provides thus:

6. Judgments of the court which have financial implications for nationals of member states or member states are binding.

7. Execution of any judgment of the court shall be in the form of a writ of execution, which shall be submitted by the registrar of the court to the relevant member state for execution according to the rules of civil procedure of that member state.

8. Upon the confirmation by the appointed authority of recipient member state that the writ is from the court, the writ shall be enforced.

9. All member state shall determine the Competent National Authority for the purpose of receipt and processing of execution and notify the court appropriately.

10. The writ of execution issued by the Community Court may be suspended only on the authority of a decision of the Community Court of Justice.

Although the court does not have an efficient method of coercion to enforce its decisions but member states are required to have them registered and executed.

The presidents of the commission and every other member state have the right to seize the court of justice to request for sanction against a member state that does not fulfill its obligations.[346]

The refusal of a member state to implement the decision of the court is a failure to fulfill its obligations which may attract the following sanctions:

1. Suspension of new community loans or assistance

2. Suspension of disbursement for on-going community projects or assistance;

3. Exclusion from presenting candidate for statutory and professional posts;

4. Suspension of voting rights, and

[346] Sidibe S.D. "The Enforcement of the Decisions of the ECOWAS Court of justice, a Paper Presented at the Conference of the Court of Justice on the Rule of Law in the Integration Process in West Africa, Abuja, 13 -14 November, 2006".

5. Suspension from participating in the activities of the community.

An individual or corporate body may embark on measures to ensure compliance with the decision of the court.

Suspension is a common method that International Organizations adopt to ensure compliance with their decisions. Several International Organizations include it in their constituent instrument. For example, the World Meteorological organization denies voting right to any member that fails to fulfil its responsibilities under its conventions Suspension carries with it loss of other privileges enjoyed as a result of membership of the community. The nature of the decision to be enforced will determine the type of the suspension that may be employed by the community. Military sanctions are also provide for under other relevant protocols. Good examples of military sanctions are the enforcement measures contemplated Assistance on Defence and the one relating to the Mechanism for conflict Prevention, Management, Resolution, Conflict Prevention, Management, Resolution, Peacekeeping and Security. Under these Protocols each member state undertakes to make a specially trained unit of its armed force at the disposal of the cease-fire Monitory.[347]

Group (ECOMOG). Under the Protocol relating to the Mutual Assistance on Defence, any case of an armed attack on any member state shall immediately inform the chairman of the authority in writing and copying other member states where the conflict is between two member states, the authority shall urgently meet and review the situation and necessary steps for mediation.

In such a situation, the Allied Armed Forces shall be interposed between the troops that are engaged in the conflict. In the case of an internal conflict, the authority shall decide on the expediency of a Military action and confer its enforcement on the force Commander of the Allied armed forces.

The work of the Monitory group is, to ensure through Military enforcement measures that any cease-fire that is declared is respected. Under the Mechanism, the mandate and

[347] Osita. C.E. (Supra) p. 12 – 14 Nov. 2007.

the mission of the units shall vary depending on the evolving situation on the ground. The force Commander of the cease-fire Monitoring Group, (ECOMOG) shall ensure the application of the decisions taken by the Authority and Regulations of the Council determine under what circumstances it can impose sanctions on defaulting members.

In case of *West Africa .v. the Republic of Gambia,*[348] the applicant, a Non-Governmental Organization has filed an application before the Community Court for payment of aggravated damages to the parents of *Ebrimah Manneh* who was alleged to have disappeared in the custody of the defendant. The Plaintiff, a Gambia journalist with the Daily *Observer* Newspaper based in the Gambia was arrested in the premises of the *Daily Observer* Newspaper and taken into custody by two men purported to be security agents of the defendant. The reason behind the arrest was not disclosed by the Defendant and he was never charged to court for any wrong doing.

He was detained at the National Intelligence Agency where he was tortured and kept under inhumane living conditions.

Whereupon the plaintiff brought an action against the Defendant for the violation of his human rights. The Defendant however did not lodge a defence despite repeated demands.

The Court held that the arrest and detention of the plaintiff was contrary to Article 6 of the African Charter on Human and people's Rights. The court also held that the plaintiff was entitled to have his dignity, personal liberty and freedom of movement restored by virtue of Article 7 of the ACHPR.

Also in respect of compensation the court held thus:

> That the object of human right litigation was to vindicate the victim and to restore his personal liberty. Punitive damages should not be the objective. However, the court held that the plaintiff was entitled to compensation for his detention and harm to his person. Consequently the court awarded him $100,000.00 as damages for compensation.

[348] (Un reported) suit No ECW/CCJ/APP/15/2010

5.2 Streamlining National Laws through the legislative process

The decision to introduce the principle of supra nationality into the ECOWAS structure and operations was taken by the Heads of State and Government during the review of the ECOWAS Treaty, with a view to removing the numerous impediments to effective implementation of the many community programmes. The idea was to overcome the national understanding whereby the state stuck to the concept of sovereignty in decision making and conduct out of their activities. It was a matter of actually uniting efforts at regional level and exercising sovereignty mutually. Supra nationality has consequently been naturally concretized through the creation of national institutions invested with powers to initiate and developed common policies, defined and managed by the community. At the time of the creation of ECOWAS and during the long years thereafter, inter-state relations in the region were often characterized by deep suspicions fermented by different polices and ideologies. The state were overly cautious of supra nationality and ECOWAS, as an invested with the power to take decisions that could be enforced by the sovereign Member state either generally or in specific areas of state activities. Under those conditions the harmonization of policies became the principal ambition of ECOWAS.[349]

The legal implications here are those of supra nationality which corresponds to the present state of development of our community or it is obvious that ECOWAS supra nationality will become more pronounced and more visible as and when our organization evolves from a community of independent states towards a union of states with federal competence.

The ECOWAS Treaty of 28 May 1975 did not provide the creation of supra National Institutions to superintend the regional integration process for the prevailing tread then was for the states to consolidated their independence and preserve and strengthen their national sovereignty. In the desire to rectify this weakness and omission which contributed to impeding progress towards the accelerated integration of the region, the

[349] Ladan T.M. "Access to Justice as a Human Right Under the ECOWAS Community Law, a Paper Presented at The Common Wealth Regional Conference On the Theme: The 21st Century Lawyer: Present Challenges and Future Skills."

ECOWAS Treaty as revised created organizations to which it entrusted supra national functions.

Thus, the authority of Heads of States and Government defined by the Revised Treaty as being the supreme Institution of the Community "shall be responsible for determining the general policy and control of the Community and shall take all necessary measures to ensure its progressive development and the realization of its objectives."[350]

Other details in the definition of the functions of the authority leave no doubt as to the will of the Heads of State and Government to confer a supra National Character on the Authority.

As a matter of fact, the Revised Treaty empowered the Authority to determine the general policy and major guidelines of the Community, give directive, harmonize and co-ordinate the economic scientific, technical, cultural and social policies of Member States.

Similarly, the Council of Ministers which, under the Sovereign Authority of the Treaty of 28 May, 1975, had either its own power or the power of delegation to issue directives to the Member States, has now been granted, by the authority appropriate powers in some cases, to "issue directives on matters concerning co-ordination and harmonization of economic integration policies.[351]

The ECOWAS Commission, which replaced the Executive Secretariat on 14 June 2006, has become the prime mover of the Community, the pivot around which all activities revolve. The Revised Treaty conferred on the commission the power to undertake initiatives and activities to monitor the application of Community texts and, generally, achieve Community Objectives through the formulation of programmes of activity.[352] To these obligations, the Revised Treaty added that of "convening" as and when necessary,

[350] Article 7, (2) of the Treaty as revised.
[351] See Article 7(3) (a) of the Revised Treaty.
[352] See article 10(3) (c) of the Revised Treaty.

meeting of Sectorial Ministries to examine sectoral issues which promote the achievement of the goals of the community.[353]

The competence of the Court of Justice pursuant to the provision of Article 6 and 15 of the Revised Treaty of ECOWAS as regional authority to ensure the respect of law and of the principles of equity in the interpretation and application of the provision of the Treaty, has been broadened to include the interpretation and application of convention and Protocols, Decisions, Regulations, Directives and all the subsidiary legal instruments adopted in the framework of ECOWAS. The competence of the court has equally been broadened to add appraisal of the legality of the text consideration of the Member state breaches of their obligation to the Community and consideration of cases of human privileges violations in any Member State.[354]

Similarly, the idea of ensuring grass roots involvement in the Community development process which was the main factor in the creation of the Community parliament by the Treaty of 28 May, 1975, led to the involvement of the parliament in the ECOWAS decision-making process and also to the conferment of the supra National Character on it. The supra-national character of the ECOWAS parliament was confirmed by decision 13 January 2006 on the procedures for effective execution of Article 6 of the Protocol on the Community parliament which henceforth gives the institution the power of legislative initiative through which it may propose draft Community texts.[355]

The Revised Treaty and its subsequent amendments have endowed the ECOWAS supra-national powers to meet up with the principal political, economic and social challenges which the Minister of States are unable to meet individually.

It should be pointed out that the decisions of the Authority of Head of State and Governments have for several years, co-existed with the protocol and conventions which could not enter into force unless rectified by nine (9) Member State Governments. Keeping the protocols and conventions locally until recently has unfortunately entailed

[353] See Article 19 (3)(c) of the Revised Treaty.
[354] See Article 19 (3) (c) of the Revised Treaty
[355] See Article 3 of Supplementary Protocol A/SP/01/05 of 19 January 2005

substantial delays in the implementation of these instrument thereby limiting the scope of the decisions which under the Revised Treaty are binding on the Member States.

Indeed, most often, Community texts adopted in the so-called areas of sovereignty were in form of protocols and there was considerable delay in their application owing to the slow pace of protocol ratification. Not withstanding the repeated appeals and decisions of the authority of Heads of State and Federal Government prescribing deadlines for the Member State to do so, there has not been any significant improvement in the level of ratification improvement in the amount of ratifications, as can be seen, until quite recently, the legal status of Community Acts bore the seeds of paralysis of the implementation of ECOWAS text.

Under such conditions, it is understandable that the Community decision-making bodies availed themselves of the opportunity of the transformation of the Executive Secretariat into a Commission to adopt, on 14 June, 2006, a fresh legal position that is consistent with that of Regional Integration Organizations that have adopted a Commission-type Organizational structure.

5.3 The Nomination Exercise and Control of Judges

The Court is composed of Seven Judges appointed by the Authority of Heads of State and Government from a list of two persons nominated by each member state. The Judges are persons of high moral character and who posses the qualification required in their respective countries for appointment to the Highest Judicial Offices, or are Jurisconsults of recognized competence in International law particularly in the areas of commonly law or regional integration law[356]

An applicant for the post of a judge of the court shall not be below the age of 40 years and above the age of 60 years and shall have acquired post qualification experience of not less than 20 years[357] No two Judges of the Court shall be Nationals of the same member state of the Community at the same time[358] member of the court shall be

[356] Front Page Africa: Report: ECOWAS Court Puts Liberia on Hold O…
[357] Article 3(1) of 2006 Supplementary protocol
[358] Article 3 of the1991 protocol

appointed for a non-renewable term of four(4) years with effect from the date of assumption of duty of each person appointed to the post[359].

The term of the office of judges of the court shall commence on the date laid down in the instrument of their appointment[360]. Judges of the Court cannot exercise any political or administrative function or engage in any other occupation of a professional nature.

In January 2005, the Community adopted the additional protocol to permit persons to bring suits against member states. Beyond this monumental change, the council took the opportunity to revise the jurisdiction of the court to include overview of violation of human rights in all member states. This language made clear that the sources of laws to be applied by the court under its original protocol would include not only general principles of International law but also those in relation to human being rights. Additional protocol also adds jurisdiction over any disputes arising under agreements, other than the treaty between member state that so provide. The additional protocol also gave national courts of member states the right to seise the ECOWAS Court for a ruling on the interpretation of Community law. Previously, the language in the protocol was unclear as to whether a member state court could only seise court of a matter through the *uspices* of the National Governments. Further changes are expected with the court having been previously scheduled to add an appellate decision Mission in January, 2007.

Since the adoption of the additional protocol the court has received cases from individuals and even election cases. In October, 2017 the ECOWAS Community Court of Justice has delivered 249 verdicts consisting of judgment and rulings since its inception in 2001[361]

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[359] Supra 3 (1) 2006 Sup. protocol

[360] Supra Art 3 (1) 2006 Sup. Protocol which allowed retired judges to remain in office until the appointment of their successors has been amended by Article 2 of the supplementary Act A/SP.8/12/08 which provides for a four year non-renewable appointment for judges of the community Court. See ECOWAS Official Journal, vol.54.2008 pg 58.

[361] https.//www.premium timesng

The court's handling of these cases has been controversial in Nigeria, as some in the Nigeria legal Community believed that the court should have rejected them immediately, without issuing interim orders.

While this increase in the case load of the court is encouraging, the court's future as an engine for integration across the Community remains in question due to the fact that the cases that are being brought are from Nigeria alone rather than other member states.

Further, the president of the court has noted that:

> The accessibility and cost of bringing cases to the court continue to be a barrier to the court's success, in addition to its inadequate human, financial and material sources.

Nonetheless, between January 2006 and June 2007, the court received 26 applications and kept 63 sessions.

However following an additional protocol, the number of cases decided in the court increased as follows;[362]

2011 = Fifteen cases was decided;

2012 = Eighteen cases was decided;

2013 = Eighteen cases was decided;

2015 = Ten cases was decided;

2016 = Twenty seven cases was decided;

In 2017 = Ten cases was decided;

The court under went further changes to its position within the community. In June 2006, the Authority of Heads of State and Government decided to established a Judicial Council of the Community with responsibility for recruiting Judges for the Community Court and handling judicial matters, including a restructuring of the Court.[363]

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[362] https: //www.globallegalinsights.com
[363] A/sp.1/01/05

The appointment of the Chief Justice of the Member States or their representatives as members of the judicial council of the Community is intended to improve the independence of the ECOWAS Court and promote the harmonization of the legal and judicial systems of the member states ECOWAS.

The Judicial Council shall be chaired by the president while its Bureau shall be composed of the president, vice president and Rapporteur who shall be elected by their peers.[364]

The Judicial Council may be assisted by other organs of the ECOWAS like the audit committee, finance committee or medical council.

The Judicial Council shall prepare its own rules of procedure. The rules which shall be adopted by the council of ministers shall address frequency of meetings, types of complaints, conservative measures and sanctions, method of investigation, defence and protection of the interest of the judge concerned by the case etc.

The functions of the Community Judicial Council are:

i. The Judicial Council of the Community shall be responsible for the recruitment and discipline of judges of the Court of Justice. To this end, the Judicial Council shall list and interview candidates for the post of judge of the Court of Justice and shall recommend successful applicants to the authority for appointments;

ii. The Judicial Council shall also hear cases associated with discipline and the inability of judges to exercise their functions due to physical or mental incapacitation;

iii. The Judicial Council shall through the council formulate recommendations for the attention of the authority in case of commission of the criminal offence by a judge of the Court of Justice;

[364] Supplementary protocol A/sp.2/06/06.

iv. The Judicial Council may make such suggestions as it deems essential for improving the functioning of the Court of Justice;

v. The Judicial Council may further give its opinion or make recommendations on issues on which it is competent and that are submitted for its consideration by the president of the commission the council or the authority.[365]

5.4 Discord of Authority, ECOWAS v. National Courts

There are apparent challenges the court faces in the bid to achieving its integration objectives. This work will examine one of the greatest challenges that has yet to get the required attention from policy makers, not having manifested in practical terms.

This is the challenge posed by the Constitutions of Community States which are predominantly dualist in nature. This is significant given the need for a complete synergy between the Constitutions of Community State and the Community Court treaty, for the individual citizen of member state to be able to approach the court and enforce its judgment.

The Community Court found Niger in breach of failing to protect 24year-old Hadijatou Mani from slavery and ordered damages of ten million CFA to be paid to Hadijatou Mani. Also the court declared the arrest and detention of Ebrima illegal and ordered the Gambia authorities to immediately release him, while problems of one hundred thousand US dollars was adverted in his favour. Having handed down these historic rulings, the challenge now is that of enforcement; the affected Community State have yet to comply.[366]

One plausible reason may be because the court's ruling are hanging on no municipal legislations, which the judgment creditors can invoke to enforce the judgments, coupled with the fact that the court does not have the legal where withal to enforce the same.

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[365] Article 5(1) of Decision A/DEC. 2/06/06
[366] (2009) CCJLR P.1

That is acutely so in Hadijatou, where she was simultaneously before municipal courts in Niger and the Community Court; it is on record that the Court of Appeal in Niamey acquired already partially intervened in the problem.

The cases decided by the court so far are caught in the problem associated with the differences between the ECOWAS treaty and the domestic law of Community States, and between the Community Court and the National Courts.

These differences manifest in the lack of synergy between the treaty and domestic law, and between the jurisprudence of the Court and that of National Courts.

First the protocol gives the Community Court Jurisdiction to interfere with the constitutionally and statutorily settled competence of municipal courts, without amending pre-existing municipal law to accommodate and define the competence of the new Court.

Second, this is tied to the first, the lack of a statutorily defined limit of competence and the concomitant lack of the power to bind National Courts on matters of competence, as does the European Court of Justice (ECJ), leaves the court to battle for oxygen in the ocean of diverse legal traditions of Community State. Even while claiming relevance in human rights issues the court is largely yet to discover whether it has to function as a court of first and final instance or as a residual court which jurisdiction is contingent upon the exhaustion of local remedies in the national realm.

The prevailing situation as exemplified by the situation of Hadijatou,[367] where the Community Court assumed jurisdiction over a matter and delivered judgment while the same matter was at all material time pending before domestic courts under the same provisions of the African Charter on Human and Peoples' Rights (African Charter)[368] applied by the Community Court - is bound to foster a political conflict between the Community Court and domestic courts and multiply the possibilities for competing

[367] Rules 5 of The Rules of Procedure of the Community Judicial Council.
[368] Enabulele A.O, Refection on the ECOWAS Community Court Protocol and the Constitution of Member States

influences on the interpretation of the rights,[369] contained therein. This is an unhealthy start for a court, which, in the absence of permissive legislative action in the domestic sphere, must rely on the goodwill of National Courts for the integration of its jurisprudence into the domestic legal system.

Although National Courts cannot defer to the Community Court, without legislative approval, the latter can gather a systemic relevance through the gradual process for the integration of its jurisprudence into the jurisprudence of National Courts, and thus creating the needed impetus in the citizens and Non-Governmental Organizations (NGOs) to compel the Community States to take the needed legislative actions towards implementing the protocol of the court.

That is so not withstanding that National Courts, under the prevailing state of the law of Community States, cannot regard the jurisprudence of the court as binding, the courts can at least, rely on its persuasive character in the interpretation and enforcement of the African Charter, which is already being applied in the domestic realm of member states, as domestic law. The Community Court has acknowledged this fact.

In the words of the president of the Court, when having earlier acknowledged the importance of an uniform interpretation of the various Community texts for an eventual emergence of a Community legal order through the vehicle of reference to the Community Court by national Courts under article 9(6) of the supplementary protocol, agreed that for the Community Court, to achieve this, the spirit of cooperation must prevail in preliminary ruling proceedings which requires the National Court to have respect to the functions entrusted to the Court of Justice which is to contribute to the administration of justice in member states rather than to provide opinion generally or hypothetical question.

In deed for the Community Court to accomplish its objectives, conflicts and harmful rivalry between it and National Courts is not an option in the lack of a definite legislative

[369] (2009) CCJLR (pt.2) 116 (No.2)

provision to the contrary, National Courts will naturally withhold cooperation with an International Court that unlawfully invades their jealously guarded jurisdiction.

It is therefore important that these legal impediments to the effectiveness of the court are addressed in order to create the enabling environment, not just for jurisdiction over individuals within the sovereign enclave of Community State Governments, but also for the enforcement of judgments delivered by the court in exercise of that jurisdiction, with a view to the ultimate goal of Community Citizenship envisioned in the ECOWAS Treaties.

We examines the extent to which the court can function in practical terms, without municipal implementation of its protocol and or a clear definition of its status vis a vis the Courts of Community States, either in the treaty or in the implementing legislations of Community States. This made it impossible for the court to function effectively if Community State do not make the necessary legal modifications towards developing a synergy between the ECOWAS treaty and municipal law. A jurisdictional link between local Courts and the Community Court with a view to creating an unitary system in the areas of competence of the court.

Although the expansion of the jurisdiction of the court was timely and necessary, the procedural right of individuals before it, albeit in human right issues, however highlights an inevitable conflict between the protocol of the court and the Constitution of Community States. This is particularly so because human being privileges abuses and in cases where the misuse has already taken place, restoration of the rights in question. Compensation is awarded in order to ensure just justification and no more.

The Community Court use this principle in the case of *Chief Manneh v. The Republic of The Gambia.*[370]

This is remarkable considering the fact that all the Community State have their internal framework for the protection and enforcement of individual rights within their territories. This is more so that the Community Court invariably applies the African Charter which

[370] See. Hadijatu (Supra)

has been domesticated by Community States and applied by each forum Court. From this backdrop, the Community Court must sit as a court of first and last instance in which case citizens will have the choice of suing either in the forum court or the Community Court.

5.5 An Analysis of the Factors Affecting the Effectiveness of the Court

The need for Justice systems for improving the lives of vulnerable groups/poor people by ensuring that everybody has access to systems which dispense Justice fairly, speedily and without discrimination cannot be over emphasized.

Failure of states to provide citizens with protection from crime and access to Justice impedes sustainable development. All people have the right to go about their lives in peace, free to make the majority of their opportunities. They can only do this if the Institution of Justice and laws and order protect them in their daily lives.

But claims with poorly working legal systems and poor crime control mechanism are unattractive to investors, so economic growth also suffers Access to Justice and Enhancing Access to Justice.

The term access to justice means that people in need of help, funding effective solutions available from systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly speedily and without decrimation fear or favour and a greater role for alternative dispute resolution. The term access to justice refers to judicial and administrative remedies and procedures available to a person (national or juristic) aggrieved or likely to be aggrieved by an issue. It refers also to a fair and equitable legal framework that protects human rights and ensures delivery of justice.

Without effective access to justice there is no effective legal security of human rights. That is why the legislatures or parliaments, governments and courts of every country

have a positive responsibility to translate the idea of effective access to justice into practical reality.

Effective access is not just an optional extra or a luxury of affluent and economically advanced societies. Everyone, everywhere, should enjoy the similar protection of law if there is to be justice for everyone. Woolf, identified a number of concepts which the system should meet in order to ensure access to justice.[371]

These are as follows:

a. Be just in the result it delivers;

b. Be fair in the way it treats litigants;

c. Offer appropriate procedures at a reasonable cost;

d. Deal with cases with realistic speed;

e. Understandable to the people who use it;

f. Be responsive to the needs of those who utilize it;

g. Provide as much certainty as the nature of the particular case allows;

h. And be effective, adequately resourced and organized

Those principles of access of justice are of general application to all systems of justice, civil and criminal. The term "Enhancing Access to justice" is used here to refer to initiatives that seek to improve on the safety and promotion of the legal rights of all persons, especially those suspected and accused of crime, vulnerable groups who often experience all types of discrimination, marginalization, exclusion or are disadvantaged or victims of criminal offense and abuse of power. The term relates also to initiatives that seek to boost on access to court for justice, access to law and information about legal

[371] (Supra)

rights and duties through a just or equitable, responsive affordable and accessible legal regime for the administration of criminal justice.

A right of access to justice is meaningless if it cannot be promptly indicated by recourse or access of court. It is clearly incongruous to recognize such a right and deny access to the court for its actualization or legal remedies. Access to the court is not just predicated on the notion of equality before the law but also on the absence of unwarranted delay and unaffordable cost of litigation.

i. Access to the ECOWAS Community Court for Justice and Human being Rights Safety

The protocol of the Community Court of Justice has the competence to adjudicate on any dispute relating to the following.

The interpretation and application of the Treaty, Conventions and Protocols of the Community.

The interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;

The legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS.

The failure by Member state to honour their obligations under the Treaty, Conventions, and Protocols, Regulations, Directives or Decisions of ECOWAS.

The provisions of the Treaty, Conventions and Protocols; Regulations, Directives or Decisions of ECOWAS Member State governments.

The Community and its own officials: and

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 shall have the power to determine any non contractual liability of the Community to pay damages or make reparation for official acts or omissions of any Community Institution or Community officials in the performance of official duties or functions.

Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the day when the right of action arose.

The Court has jurisdiction to determine cases of violation of human being rights that occur in virtually any Member State.

The Community Court of Justice (CCJ) of the Economic Community of West African States (ECOWAS) has indicated its readiness to extend its jurisdiction towards arbitration as already provided for under Article 9(5) of its protocol. The president of the Court Justice Jerome Traore said this in his speech during the opening ceremony of the 2017/18 legal year of the court, adding that the court arbitral power play the role of five International Courts. He said the court has powers which enables it to be described variously as a classical International Court mandated to settle interstate disputes, or as a Community Court of integration, or as the administrative court of an International Organisation or as Human Rights Court of the sub-region[372]

Pending the establishment of the Arbitration Tribunal provided at under Article 16 of the Treaty, the Court shall have power to act as arbitrator for the purpose of article 16 of the Treaty.

The court shall have jurisdiction over matters provided for within an agreement where the parties agreed that the Court shall settle dispute arising from the agreement.

The Court shall have all the powers conferred upon it by the provisions of the Protocol as well as any other powers that may be conferred by subsequent Protocols and decisions of the Community.

[372] http:/www.corutecowas.org/site2012

The Authority of Heads of State and Government shall have the power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specific in this Article.

The Court was also empowered under article 10 to give Advisory opinion to Member States, the president of the ECOWAS Commission and Institutions of ECOWAS on their request. The competence of the court under the old protocol was very narrow. Community citizen or Nationals of member states private individuals and cooperate bodies did not have direct access to the court. It had been only provided that Member State may on behalf of its nations, Institute proceedings against another state or Institution of the Community, relating to the interpretation and application of the provision of the treaty, after attempt to settle the dispute amicably have failed. Therefore, only Member State and Institutions of ECOWAS had immediate access to the Court.

The lack of direct access to the court by individuals was the main issue for consideration in the judgment of the court in *Afolabi v. Federal Republic of Nigeria*.[373] The applicant, a Community Citizen and businessman, filed an application before the court challenging the closure by Nigeria of its common border with Benin Republic on 9th August, 2003. He allegedly suffered some losses credited to that closure. Since it is crystal clear, that judges do not make law, but only interpret or apply the law as it is, the only option the court had was to uphold the initial objection of Nigeria by striking out the suit for lack of jurisdiction. It really is a land mark case, because it defined clearly, the competence of the court under Article 9(3) of its protocol.

Between 2001 and January 19th 2005 when the old protocol was finally amended only two cases were filed before the court and both were filled by individuals directly, of course, the court had no jurisdiction to entertain the matters.

Therefore the issue of lack of immediate access to the court by individuals was of great concern to the court because it had an adverse effect on its operations. It was obvious that individuals must be granted access of the court for it to become operational

[373] (2007) ICCJLR (PT1) 1 Supra

The adoption in January 2005 of the supplementary protocol[374] greatly expanded the jurisdiction of the court, while at the same time granting individuals direct access (in specific causes of action) to the court. Article 3 of this supplementary protocol deleted Article 9 of the old protocol and substituted same with a new Article 9 while creating a fresh Article 10 which gives the following:

Access to the court is open to the following:

a. Member States, and unless otherwise provided in a protocol, the executive secretary, where action is brought for failure by a member state to fulfill an obligation;

b. Member State Governments, the council of Ministers and the Executive Secretary in proceeding for the determination of the legality of the action in relation to any community text;

c. Individuals and corporate bodies in proceedings for the determination of an act or inaction of the Community official which violates the rights of the individuals or corporate and business bodies;

d. Individuals on application for relief for violation of their individual rights; the submission of application for which shall;

(i) Not be anonymous, nor

(ii) Be made whilst the same matter has been instituted before another International Court for adjudication;

e. Staff of any Community Organization, after the Community member has exhausted all appeal processes open to the officer under the ECOWAS staff Rules and Regulations;

[374] Access to Justice "Interim Report to the Lord Chancellor on the civil justice System in England & Wales" (1995), p. 119.

Where in any action before a court of a Member State, a issue arises regarding the interpretation of a provision of the treaty, or the other protocols or regulations, the nation court may on its own or at the request of any of the parties to the action refer the issues to the court for interpretation.

The court now by virtue of Article 9(4) and 10(d) above has jurisdiction to hear Human Rights cases provided that such application is not anonymous and not made while same matter is pending before another International Court for adjunction.

The Economic Community of Western African State (ECOWAS) has since inception of its ECOWAS Community Court of Justice in 2014 lodged a total number of 175 cases, the Chief Registrar of the court *Mr. Tony Anene-Maidoh* gave these numbers during valedictory court session in honour of the six retiring members of the ECOWAS Community Court of Justice on the 12th day of June 2014.[375]

The court has had 525 sessions and delivered a total of 177 decisions comprising 82 rulings, 80 judgments, 12 review decisions and three advisory opinions. There are also 32 pending cases prior to the court as at 2014. But yet, in Octorber 2017 the president of the court said the court has delivered 249 verdicts consisting of Judgments and rulings since its inception in 2001[376]

Therefore, the adoption of the supplementary protocol has had a positive impact on the judicial activities of the court.

5.6 Strategies for Effective Access to the ECOWAS Court through the Registry

[375] See the Gurdian Newspaper, Friday 13th June 2014 p. 7.
[376] http.//www.courtsecowas.org/site 2012 (Supra)

As a basic public service, Community Citizens must have access to conflict resolution and rule enforcement mechanisms. The most common approach to improve access is to introduce subsidized legal service.

In some national jurisdictions, to promote access of justice, some International Organizations such as the World Bank, have targeted legal aid funding specifically at poor women and their children, who face particularly high obstacle to legal and judicial services. Successful legal aid service for poor women have been shown to boost the probability of obtaining favourable judgments in child support cases, increase the chances of actually obtaining child support payments, and decrease the probability of severe physical violence from ex-spouses or partners.

Poor people are particularly vulnerable to human rights violations and abuses by Governmental authorizes and private individuals. The most important tool to defend themselves against these abuses is court protection. Usually, for financial or other reasons, poor people lack the capability to obtain court protection.

Even if free legal aid is available they may lack the required information and self-confidence to seek redress through the courts. Thus, ECOWAS States should actively promote the free access of the poor individual to the courts and other dispute quality systems as a remedy against human rights violations.

i. Pro Bono Services

It is the responsibility or duty of lawyers to provide legal services to poor, marginalized and indigent individuals, Organizations, or Communities, without a fee or expectation of payment, in order to enhance access to justice. ECOWAS countries need to examine legal and useful conditions that facilitate the provision of pro bono work and the experience of various developed and developing countries in creating and managing a Pro Bono application for the Community Court.

ii. Public Interest Work

General public interest litigation (P1L) identifies the practice of attorneys seeking to precipitate cultural change through court -ordered decree that reform legal rules, enforce existing laws, and articulate general public norms. Sometimes taking advantage of procedures that allow a single law suit to resolve a large number of claims these public law cases can involve the restructuring of important Federal Government Institutions, including public schools, mental private hospitals, welfare companies, and prisons and that can affect many thousands of people although public interest litigation originated in the United States, it is currently part of the legal landscaping of many nations. ECOWAS Countries can facilitate the provision of P1L through the Bar. Associations in the Community.

iii. Legal Information

The complexity, scope and sheer number of legal rules had long since outweighed the capacity of individuals to master them. In addition poor people are rarely literate in legal matters. Generally, court costs are too high for people to get a remedy, lack of clarity in the normative framework on the justice dimensions of social economic and cultural rights, restrictive rules of standing become a hurdle to accessing justice, complex regulations and procedures alien and off-putting to the majority of the people, geographical and physical barriers, cultural and linguistic barriers. However, the protection of rights requires access of legal information and this in turn enhances their performance.

iv. General public Awareness

Very little is known about the ECOWAS Community Court, which indicates a need for the court and their personnel to develop and conduct outreach programs. There is the necessity for ECOWAS nations to keep working on general public awareness campaigns and partner with civil society organizations in taking steps to adequately sensitize Community citizens on their privileges and responsibilities under ECOWAS Laws and regulations.

CHAPTER SIX

CONCLUSION

6.1 Summary

Establishment of the ECOWAS Court of Justice has brought to an end over a Century-long effort to establish a Community Court. From the provision of Article 76 of the Revised Treaty, the Court is competent to deal with disputes referred to it regarding the interpretation, the application and the provisions of the modified Treaty, after attempt by the parties to amicably settle the dispute through direct agreement has failed. It is also important to note that Article 10(f) of the Supplementary Protocol provides as follows:

> Where in any action before a Court of a member state, an issue arises as to the interpretation of a provision of the Treaty, or the other protocol or Regulations, the National Court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.

The Court of Justice of the European Communities exercises a similar jurisdiction under the concept of Preliminary Ruling.

Although the problem of referral is discretionary as stipulated above, it is obligatory in the case of the Court of Justice of the Western Communities.

There is therefore the need to amend this provision to give the ECOWAS Court of Justice exclusive Jurisdiction in the interpretation of Community texts in order to ensure uniformity.

Looking at the ECOWAS integration process at this stage, there is obvious need to strengthen the Organization so as to make it more effective for furthering the integration process.

6.2 Observations

It is observed that the extension of the jurisdiction of the Court was timely and necessary the procedural right of individuals, before it albeit in individual rights matters, however highlights an inevitable conflict between the protocol of the court and the Constitution of Community states. This is particularly so because the protection of human rights is basically, a matter of domestic concern, irrespective of the international law into human rights issues, International Human Rights norms complement and not municipal laws norms. That is remarkable considering the fact that all the Community States have their internal structure for the safety and enforcement of individual rights within their territories. This is more so that the Community Court invariably applies the Africa Charter, which has been domesticed by Community state and applied by each community forum court.

It is observed that human rights by the court will make a meaning only if decisions of the court are implemented by the parties involved.

Against this backdrop, the Community Court must sit as a court of first and final instance- in which case citizens will have the choice of suing either in the forum court or the Community Court. With this position there are no ways unhealthy rivalries between the Community Court and the courts of Member state can be ruled on. On the other hand the most plausible is that the Community Court can only sit as a residual court predicating its jurisdiction upon exhaustion of home remedies which involves the exhaustion of all rights of appeal within the forum. For this to be, the court must operate as a separate court not as an appellate court over Municipal courts, in which case judgments of local courts will form part of the factual basis upon which the court would decide whether the state in question is in breach of its International obligation towards the applicant. The snag is that neither of these alternatives is contemplated by the municipal laws of member state. The case of *Ugokwe v. Federal government Republic of Nigeria*,[377] a matter arising from the 2003 National Assembly election, over which the court of Appeal is the final court in Nigeria, illuminates this point.

[377] Supra.

1. Article 62 of the Rules provides that the judgment shall be binding from the day of its delivery. Article 22(3) of the protocol enjoins all Member State and Organizations of the Community to immediately take all necessary measures to ensure the execution of the decisions of the court.

Finally Article 15(4) of the Revised Treaty provides that judgment of the Court of Justice shall be binding on the Member State, Institutions individuals and Corporate bodies.

2. It has been further observed that the provisions are not adequate for the enforcement of the decisions of the Court. More elaborate provisions have been made in the proposed draft supplementary protocol of the court. The suggested new Article 24 which provides thus:

I. Judgments of the court that have financial implications for Nationals of Member state are binding.

II. Execution of any judgment of the court shall be in the form of a writ of execution which shall be submitted by the Registrar of the Court to the relevant member state for execution according to the rules of civil procedure of that member state.

III. Upon the verification by the appointed authority of recipient Member State that the writ is from the court writ shall be enforced.

IV. All Member State Governments shall determine the capable national authority for the purpose of receipt and processing of execution and notify the court accordingly.

V. The writ of execution issued by the Community Court may be suspended only on the authority of the decision of the Community Court of Justice.

VI. In relation to the EUC Court of Justice, it is noticed that the French Laws exerts a very strong influence on the procedure of the court.

VII. For the ICJ, it is also observed that the Courts Membership has remained at fifteen judges without any review.

VIII. It is further noticed that Article 2 of the statute of the ICJ has not been ahead to especially in terms of qualification of members (4) Equally disturbing is the problems of flouting the orders of the Court by Member state.

6.3 Recommendations

Arising from the above observations the researcher recommends the following recipes as antidote to the Council of State and Government of ECOWAS Court of Justice.

i. That for the ECOWAS Court to be able to contribute its own quota to addressing the long term objectives of jurisdictional problems, substantial attention should continue to be focused on creating an Appeal Court where litigants who are not satisfied with the decision of the ECOWAS Court can further ventilate their grievances.

ii. This study has shown that creating greater awareness of ECOWAS Court through effective legislation is paramount.

iii. Enforcement of the decision of the Court should not only be completely reliant on the National Courts only but also put a structure or Special Task Drive to monitor its enforcement.

iv. That article 76 of the Revised Treaty be reviewed so that it will give ECOWAS Court of Justice exclusive jurisdiction for the interpretation of the treaty to be able to ensure uniformity with the European Court of Justice.

v. That the composition of the court is acknowledged but it should not be mandatory that the president of the court must be among any of the panel that is sitting at any given time.

vi. That the number of the judges should be reviewed to twenty judges for effective administration of justice.

vii. The exhaustion of local remedies with evidence must be made a prerequisite to the invocation of the jurisdiction of the Community Court.

With the above recommendations needed, the researcher envisages a brighter prospect for the ECOWAS Court of Justice.

6.4 Contribution to Knowledge

This study contributes to knowledge in the following:

i. This study has shown that intelligible judicial administrations are requisite tool for effective adjudication.

ii. This study has shown that there is need for amendment of some provision of the selected legislation to enable the court to seat even in the absence of the President of the court.

iii. This study has demonstrated that the writ of execution released by the Community Court which includes financial implications for nationals of Member states or Member states are binding.

iv. This study has shown that creating greater awareness of ECOWAS Court through effective legislation is paramount.

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