

A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice

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Summary

In 2005, the Economic Community of West African States adopted an additional protocol to complement the 1991 Protocol establishing its Community Court of Justice. One of the high points of the 2005 Additional Protocol was the conferment of a human rights mandate on the Court. Since then, the Court has entertained some cases of a human rights nature. Basis on an analysis of the documents and jurisprudence of the Court, this article examines certain issues relating to the human rights competence of the Court and addresses the question of access to the Court.

1 Introduction

State security and the 'exploitation of ... human and material resources', rather than the realisation of human rights, were the motivations of some African leaders when the idea of a united Africa was conceived in the days immediately following the attainment of flag

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independence.¹ Hence, it was not surprising that human rights did not feature prominently in the scheme of things when the Organization of African Unity (OAU) was founded in 1963.² As human rights began to gain momentum, becoming a central issue in international law discourse, African leaders reacted by adopting the African Charter on Human and Peoples' Rights (African Charter) as Africa's first comprehensive human rights instrument.³ By the time the OAU transformed itself into the African Union (AU), human rights had been entrenched sufficiently to take centre stage along with the more popular goals of political and socio-economic integration.⁴ Thus, while the pursuit of socio-economic integration remains paramount, the link between human rights and socio-economic well-being has become so well-established that it requires deliberate action in both directions.⁵

In contrast to the political agenda of integration at the regional level, sub-regional integration in Africa has mostly been built around regional economic communities (RECs) which have clear economic objectives.⁶ As a result of the nationalist fervour that raged immediately after independence, protection of sovereignty and territorial integrity reigned over other considerations so that human rights issues were relegated to the background in sub-regional fora. Years after they were founded, RECs record little or no success in the realisation of the objective of economic integration.⁷ This failure is amplified by the fact that RECs were previously seen as potential building blocks in the attainment of the ultimate goal of a politically and socio-economically united Africa.⁸ It became obvious that the ideal of economic integration and prosperity would remain elusive if the socio-political environment remained one of strife, conflicts, exclusion and human rights abuses. In reaction to these and other factors, some African RECs began a process of self-reconstruction, which (in some cases) included a revision of their constitutive

¹ See K Nkrumah *Africa must unite* (1963) 163.

² See GJ Naldi *The Organization of African Unity* (1999) 2 for a discussion of the objectives of the OAU.

³ The African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 Rev 5 was adopted in June 1981 and entered into force in October 1986. Reprinted in (1982) 21 *International Legal Materials* 59.

⁴ In art 3 of the AU Constitutive Act, the promotion and protection of human rights are listed below other issues such as political and socio-economic integration as objectives of the AU.

⁵ See generally P Alston & M Robinson (eds) *Human rights and development towards mutual reinforcement* (2005).

⁶ See eg the ECOWAS Treaty of 1975 and the South African Development Community (SADC) Treaty.

⁷ See eg R Robert 'The social dimension of integration in ECOWAS' International Labour Organisation working paper No 49 http://www.ilo.org/public/english/bureau/integration/download/publicat/4_3_310_wp-49.pdf (accessed 23 February 2007) 3.

⁸ The 1991 OAU Treaty establishing the African Economic Community gives a central role to the RECs. See SKB Asante *Towards an African economic community* (2001) African Institute Research Paper No 64 3.

instrument. This process of reconstruction opened a window for the inclusion of human rights concerns in the agenda of African RECs. To the extent that closer links at the sub-regional level held the promise for greater commitment by African states to common goals, this may be considered a significant development for human rights realisation in the region.⁹

Prominent among those RECs that passed through a reconstruction involving treaty revision is the Economic Community of West African States (ECOWAS). Beginning with the appointment of a Committee of Eminent Persons in 1992 to review the 1975 ECOWAS Treaty, the process of institutional re-organisation in ECOWAS led to the adoption of a revised Treaty in 1993. With the inclusion of the promotion and protection of human rights as one of its fundamental principles, the stage was set for building an ECOWAS human rights realisation regime in the West African region. Since then, several significant events have occurred, including the expansion of the jurisdiction of the ECOWAS Community Court of Justice (ECOWAS Court) to include a human rights competence. In the view of its prospects for human rights realisation in West Africa, this article focuses on the scope of the Court's human rights competence in the exercise of its contentious jurisdiction and examines the conditions for admissibility of human rights cases before the Court. The paper starts with a brief introductory overview of the Court.

2 The ECOWAS Community Court of Justice

Fifteen West African states founded ECOWAS on 28 May 1975 with the signing of the Treaty of Lagos.¹⁰ At its inception, ECOWAS was aimed at 'collective self-sufficiency' through the advancement of economic integration in West Africa, intended to ultimately lead to a large trading block and a single monetary union. Various described as 'a regional zone of preference allowed under article XXIV of the General Agreement on Trade and Tariffs'¹¹ or an envisioned 'economic community similar to the European Community',¹² ECOWAS was founded with an

⁹ F Viljoen *International human rights law in Africa* (2007) 479-526.

¹⁰ See the Treaty of the Economic Community of West African States, 1010 UNTS 17, [1975], 14 *International Legal Materials* 1200. In 1975, when ECOWAS was founded, 15 West African states were signatories to its Treaty. These were Benin, Burkina Faso (formerly Upper Volta), Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde acceded to the ECOWAS Treaty in 1977. In 1999/2000, Mauritania withdrew its membership of ECOWAS, bringing the membership to 15.

¹¹ CA Odinkalu 'Economic Community of West African States' in CH Heyns (ed) *Human Rights Law in Africa* (2004) 644.

¹² K Nowrot & EW Schabacker 'The use of force to restore democracy: International legal implications of the intervention of ECOWAS in Sierra Leone' (1998-1999) 14 *American University International Law Review* 321.

essentially economic focus, leading to the adoption of a 'largely market integration approach' in the 1975 Treaty.¹³ In a bid to achieve its goals, several protocols were subsequently drafted and annexed to the original Treaty.¹⁴ From a human rights perspective, the most important of these were those relating to non-aggression,¹⁵ free movement of persons¹⁶ and mutual assistance on defence.¹⁷ These provided the closest link ECOWAS had to human rights at the time.

Recognising the need to 'adjust to the dramatic changes that were taking place in West Africa, the African Continent and in other parts of the world since the Treaty was adopted in May 1975',¹⁸ the Authority of Heads of State and Government in May 1990 authorised the establishment of a Committee of Eminent Persons to review the 1975 Treaty of ECOWAS.¹⁹ The outcome of the Committee's work was a draft treaty which significantly amended the original 1975 Treaty and which paid special attention to human rights in the West African sub-region. On 24 July 1993, the 16 state parties to the 1975 Treaty adopted the 1993 revised Treaty of ECOWAS. Under the revised Treaty, the institutions of ECOWAS are the Authority of Heads of State and Government (Authority), the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, the Executive Secretariat, the Fund for Co-operation, Compensation and Development, the Specialised Technical Commissions and any other institutions that may be established by the Authority.²⁰ This structure has been altered slightly because, in June 2006, the Authority approved the transformation of the Executive Secretariat into a nine-member Commission with a President, a Vice-President and seven commissioners.²¹ The

¹³ See eg ch V of the final report by the Committee of Eminent Persons appointed in 1992 to review the 1975 ECOWAS Treaty. This report is available at the ECOWAS Commission, Abuja, Nigeria.

¹⁴ As at 1998, about 29 protocols and supplementary protocols had been drafted. A compendium of these protocols is available at the ECOWAS Commission in Abuja, Nigeria. Some of these protocols are available on the ECOWAS website, <http://www.ecowas.int>.

¹⁵ Protocol on Non-Aggression (adopted and entered into force in April 1978).

¹⁶ Protocol Relating to Free Movement of Persons, Residence and Establishment (adopted and entered into force in May 1979).

¹⁷ Protocol Relating to Mutual Assistance on Defence (adopted and entered into force in May 1981).

¹⁸ Ch 1 of the final report of the Committee of Eminent Persons (n 13 above).

¹⁹ See Authority Decision A/DEC10/5/90 of 30 May 1990.

²⁰ Art 6 of the revised ECOWAS Treaty of 1993.

²¹ See the ECOWAS Newsletter (Issue 1) of October 2006. With effect from January 2007, the former ECOWAS Secretariat has been transformed into a Commission with the last Executive Secretary emerging as the President of the ECOWAS Commission.

Authority also approved a slight restructuring of the Court and the establishment of an Appeals Chamber for the ECOWAS Court.²²

According to article 3 of the 1993 revised Treaty, the aims and objectives of ECOWAS are to

promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples and to maintain and enhance economic stability, foster relations among member states and contribute to the progress and development of the African continent.

In pursuit of these objectives, the state parties affirmed and declared adherence to certain fundamental principles. These fundamental principles include 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter'²³ and the 'promotion and consolidation of a democratic system of governance in each member state as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July 1991'.²⁴ Together with the relevant protocols and supplementary protocols, the revised ECOWAS Treaty of 1993 forms the legal basis of the ECOWAS human rights complaints mechanism.

The ECOWAS Court is established by article 15 of the 1993 revised Treaty of ECOWAS as one of the institutions of ECOWAS.²⁵ The human rights complaints mechanism of the ECOWAS system is embedded in the Community Court. Although the original ECOWAS Treaty of 1975 did not contemplate a Community Court, article 4(e) of the Treaty made provision for the establishment of the 'Tribunal of the Community'. On the basis of articles 4(e) and 11 of the 1975 ECOWAS Treaty, the Authority of Heads of State and Government of ECOWAS first established the Community Court in 1991 through a protocol.²⁶ However, a Supplementary Protocol was drafted in 2005 to amend the 1991 Protocol of the Community Court.²⁷ Together, the 1991 Protocol and the Supplementary Protocol set out the jurisdictional competence of the

²² With the restructuring, the administration of the Court now lies with a bureau of three judges. However, as of May 2007, the Appeals Chamber of the Court had not taken off.

²³ Art 4(g) of the revised ECOWAS Treaty.

²⁴ Art 4(j) of the revised ECOWAS Treaty.

²⁵ See art 6 of the 1993 revised ECOWAS Treaty.

²⁶ Protocol A/P/1/7/91 of 6 July 1991 on the Community Court of Justice (1991 Protocol) adopted and provisionally entered into force in 1991. Reproduced in the official Journal of ECOWAS of July 1991. The ECOWAS Court began to function in January 2001 when the first set of judges was appointed and it now takes the place of the originally proposed Tribunal of the Community.

²⁷ Supplementary Protocol A/SP1/01/05 amending the Preamble and arts 1, 2, 9, 22 & 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and art 4 para 1 of the English version of the said Protocol (Supplementary Protocol) (adopted in 2005 and provisionally came into force upon signature in 2005). In some cases, the Supplementary Protocol merely complimented the 1991 Protocol.

Court.²⁸ A reading that combines article 4(g) of the 1993 revised ECOWAS Treaty, the 1991 Protocol and the Supplementary Protocol, provides the legal basis for the human rights complaints mechanism of the ECOWAS Community Court of Justice.

The ECOWAS Court is composed of seven members who sit as full-time judges. The members of the Court are independent judges appointed by the Authority from nationals of the member states.²⁹ These judges are required to be persons of high moral character between the ages of 40 and 60 years, and either to possess sufficient qualifications to be appointed to the highest judicial offices in their various states or to be competent and recognised international lawyers.³⁰ According to article 4 of the 1991 Protocol of the Court, the judges are appointed for a renewable term of five years, and are authorised to elect a President and a Vice-President. However, the new regime approved by the Authority fixes a single four-year term for the judges 'so as to be in harmony with the tenures of the statutory appointees of the other institutions'.³¹ The President and Vice-President are allowed to hold office for terms of three years.³² Originally, the President of the Court (and in his absence, the Vice-President of the Court) was responsible for the administration of the Court and presides at sittings and deliberations of the Court, but the reforms have created a bureau of three judges taking responsibility for the administration of the Court.³³ Currently, a Court Registry, made up of a Chief Registrar and Registrars, assists the President and judges in their functions.³⁴

3 Human rights competence of the ECOWAS Community Court of Justice

As already noted, the ECOWAS Court was not established primarily as a forum for human rights litigation. However, having incrementally introduced a human rights regime into the ECOWAS agenda, the member states of ECOWAS realised the need to create a forum for human rights litigation. Accordingly, the member states agreed to review the 1991

²⁸ *Ukor v Laleye* (2005) (*Ukor* case) unreported Suit ECW/CCJ/APP/01/04 7 para 23.

²⁹ FD Art 3 1991 Protocol of the Court.

³⁰ Art 3(1)(7) 1991 Protocol of the Court.

³¹ See the ECOWAS Newsletter (n 21 above) 4.

³² See art 3(2) of the 1991 Protocol of the Court. According to art 4(1) of the 1991 Protocol, four members of the first bench of the Court were required to serve a term of three years.

³³ See arts 7 & 8 of the Rules of Procedure of the Court. However, in the new regime, the administration of the Court is under review to give room for the judges to concentrate on their judicial functions. See the ECOWAS Newsletter (n 21 above).

³⁴ Art 29 of the 1991 Protocol empowers the Court to set out the duties of the Registry in the Rules of Procedure. Accordingly, ch III of the Rules of Procedure deals with the Court's Registry.

Protocol of the ECOWAS Court to empower the Court to hear cases relating to human rights violations.³⁵ This agreement was put into effect with the adoption of the 2005 Supplementary Court Protocol. The human rights competence of the ECOWAS Court, as introduced by the 2005 Supplementary Protocol, will be examined in terms of its material, territorial, temporal and personal jurisdictions.

3.1 Material jurisdiction

Generally, both the 1991 Protocol and the 2005 Supplementary Protocol empower the ECOWAS Court to adjudicate on disputes relating to the interpretation and application of the Treaty of ECOWAS, the Protocols and Conventions and all other legal instruments of the Community.³⁶ The amended article 9 goes further and gives the Court jurisdiction on matters relating to the legality of regulations, directives, decisions and other subsidiary legal instruments of the Community,³⁷ the failure of member states to honour their obligations contained in the Treaty, Protocols, Conventions and other legal instruments of ECOWAS³⁸ and on cases of human rights violations that occur in member states.³⁹

The first point to note is the Court's competence to hear cases relating to the 'failure of member states to honour obligations' under the Treaty, Protocols, Conventions and other legal instruments of ECOWAS. In view of the obligations member states take on under ECOWAS instruments to guarantee human rights in their states, a human rights adjudication competence may be found in this provision. However, an obstacle lies in the fact that only other member states and (unless specifically excluded by a protocol) the Executive Secretary (now President of the ECOWAS Commission) have access to the Court in this

³⁵ See art 39 of Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (ECOWAS Democracy Protocol). This Supplementary Protocol was adopted in 2001 and entered into force in 2005. As of July 2005, Niger and Togo ratified the Supplementary Protocol, satisfying the requirement that nine states must ratify it for it to enter into effect. Efforts by this author to confirm the current status of ratification have been unsuccessful. However, the Supplementary Protocol has been the basis of action by ECOWAS in the area of election monitoring. The judges of the ECOWAS Court took an active part in opening up access to the Court, especially at the 2004 ECOWAS Ministers of Justice meeting in Abuja, Nigeria.

³⁶ See art 9 of the 1991 Protocol of the Court. Also see the amended art 9(1) in art 3 of the 2005 Supplementary Protocol. The ECOWAS Court interprets art 89 of the revised Treaty to mean that Protocols made pursuant to the Treaty form an integral part of it. See para 21 of the Court's judgment in the *Ukor* case (n 28 above).

³⁷ Amended art 9(1)(c) Court Protocol.

³⁸ Amended art 9(1)(d) Court Protocol.

³⁹ Amended art 9(4) Court Protocol. Other areas of competence of the Court include actions against the Community, Community institutions and officials of the Community and its institutions.

regard.⁴⁰ Hence, it is comparable to the inter-state communications provisions in the African Charter. It also creates a novel situation where the ECOWAS Commission acquires access to bring human rights case against a member state where the state fails to perform its human rights obligations under the ECOWAS legal regime. Unfortunately, to date, there has not been any attempt to use these possibilities.⁴¹

From an individual human rights complaints perspective, the jurisdiction of the ECOWAS Court extends, without any limitations, to all cases of human rights violations that occur in member states. Something that strikes one immediately is the fact that there is no mention of the applicable human rights instrument on the basis of which the Court should adjudicate. This is not exactly strange, as ECOWAS does not have any single human rights instrument over which the Court can claim competence. Instead, reference to human rights promotion and protection under instruments of ECOWAS appears to refer to the African Charter and, to a lesser extent, the Universal Declaration of Human Rights (Universal Declaration).⁴² Considering that there are a plethora of rights scattered across the revised Treaty, Conventions and Protocols of the Community, the rights contained in any of those instruments of ECOWAS would be the basis for an individual action for the violation of rights.⁴³

With respect to rights contained in a single instrument as a source of a human rights demand, the situation becomes less straightforward and reference has to be to the African Charter and the Universal Declaration. As the Universal Declaration is not a legally binding instrument, despite

⁴⁰ Revised art 10(a) in art 4 of the 2005 Supplementary Protocol is clear on this point.

⁴¹ In view of the very rare use of the equivalent inter-state communications mechanism under the African Charter, it is doubtful if this provision will be used to the advantage of human rights victims in West Africa. Under the 1991 Protocol, member states had a right to bring actions before the ECOWAS Court on behalf of their nationals, but this never happened. See the case of *Olajide v Federal Republic of Nigeria* 2004/ECW/CCJ/04 (*Olajide* case) in this regard.

⁴² Para 4 of the Preamble to the revised Treaty links to the African Charter, as does art 4(g). The latter provision makes 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' a fundamental principle of ECOWAS. In art 2 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Peace and Security Protocol), one of the basic principles upon which ECOWAS places its Peace and Security Mechanism is a re-affirmation of the commitment of member states to the principles contained in the African Charter and the Universal Declaration. Art 1(h) of the ECOWAS Democracy Protocol goes even further, as it states that the guarantee by ECOWAS member states of rights set out in the African Charter and other international instruments is one of the constitutional convergence principles upon which the Protocol is based.

⁴³ Eg, arts 59 (right of entry, residence and establishment) and 66(c) (rights of journalists) in the revised Treaty. See also the various conventions and protocols of the Community. In some cases, provisions of certain instruments of the Community are couched as state duties rather than individual rights; art 22 Democracy Protocol. It is to be doubted if such provisions can be the basis of actions before the Court.

the fact that some of its provisions have acquired the force of customary international law, it may be argued that it may serve only as an interpretative guide, rather than a source of human rights demands before the Court.⁴⁴ The African Charter, on the other hand, is a legally binding human rights instrument to which all member states of ECOWAS are parties.⁴⁵ In addition to the fact that nearly all references to human rights in the legal instruments of ECOWAS relate to the African Charter, it is the only human rights instrument specifically mentioned in the 1993 revised constitutive instrument of ECOWAS.⁴⁶ Taken together, these facts suggest that the African Charter is the most comprehensive material source of rights before the ECOWAS Court. This is made possible because the African Charter does not grant exclusive supervisory competence to any institution.⁴⁷ In any event, the African Charter is gaining ground as 'the basis of a common regional human rights standard', so that most RECs in Africa have made reference to it as a fundamental principle in their constitutive instrument.⁴⁸

More importantly, the jurisprudence of the ECOWAS Court indicates that the Court itself recognises the African Charter as the material source for the exercise of its human rights competence.⁴⁹ Most of the

⁴⁴ See eg J Dugard *International law* (2005) 314 on this point.

⁴⁵ The ratification status of the African Charter is reproduced in (2003) 3 *African Human Rights Law Journal*.

⁴⁶ By art 19 of the 1991 Protocol, the Court is required to examine disputes in accordance with the provisions of the Treaty and the Court's Rules of Procedure. Where necessary, the Court may also apply international law as contained in art 38 of the Statute of the International Court of Justice.

⁴⁷ Part II of the African Charter creates the African Commission and sets out its mandate, but does not confer exclusive competence of implementation on the Commission. Similarly, the African Court on Human and Peoples' Rights does not have exclusive competence over the African Charter as the Protocol establishing the Court is also silent on this point. See F Ouguergouz *The African Charter on Human and Peoples' Rights* (2003) 710. Ouguergouz notes that 'there is nothing in the Protocol to limit the freedom of state parties in the choice of methods for monitoring implementation of the African Charter . . . There is nothing to prevent them from submitting disputes of this sort to another African body . . .' In what appears to be a contrary opinion, GJ Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16/4 *Netherlands Quarterly of Human Rights* 436 suggest that the African Court of Human and Peoples' Rights 'seems to be the only competent judicial authority' for the interpretation of the African Charter. Seeing that they do not state the basis of this opinion, one can respectfully say that the more valid opinion may be that expressed by Ouguergouz.

⁴⁸ See Viljoen (n 9 above) 500-502. Viljoen cites art 4(g) of the ECOWAS Treaty, art 6(d) of the 1999 East African Commission Treaty and art 6A of the IGAD Agreement. He points out that the African Charter is the only international human rights instrument ratified by nearly all African states. Morocco is the only African state that is neither a member of the AU nor a state party to the African Charter.

⁴⁹ See para 29 of the judgment in *Ugokwe v The Federal Republic of Nigeria* (2005) (unreported) Case ECW/CCJ/APP/02/05 (*Ugokwe* case). This is significant from the perspective of art 31(3)(b) of the Vienna Convention of the Law of Treaties, which gives subsequent practice a place in the interpretation of treaties. In the *Ugokwe* case,

human rights-related cases already brought before the Court, however, have been on the basis of both the African Charter and the Universal Declaration. While the ECOWAS Democracy Protocol also makes reference to 'other international instruments', the Court has not yet invoked any such 'other international instrument'. Rather, where it felt a need to go outside the African Charter, the Court has had resort to 'general principles of law' as contained in art 38(1)(c) of the ICJ Statute.⁵⁰

The failure to create an ECOWAS-specific human rights instrument over which the Court has competence is similar to the position of most other RECs in Africa.⁵¹ Not surprisingly, it stands in contrast to the constitutive instruments of all the main human rights supervisory bodies, as those clearly state the relevant instruments to be applied.⁵² The European Court of Human Rights (European Court) and the Inter-American Court of Human Rights (Inter-American Court) restrict the mandate of the supervisory bodies to the interpretation and application of the European Convention on Human Rights (European Convention) and the Inter-American Convention of Human Rights (Inter-American Convention) respectively.⁵³ Similarly, the mandate of the African Commission is restricted to the interpretation and application of the African Charter.⁵⁴ With regard to the possibility of applying sources other than the African Charter, the ECOWAS regime (if it gets to that stage) may be comparable only to the African Court on Human and Peoples' Rights (African Court), because that Court is competent to apply instruments other than the African Charter.⁵⁵

A final point to be raised on the material jurisdiction of the ECOWAS Court is that, as the African Charter makes no distinction between different generations of rights, the Court may very well be positioned to adjudicate on all generations of rights contained in the Charter.⁵⁶

in addition to the Nigerian Constitution, the African Charter and the Universal Declaration formed the basis of the applicant's case. The African Charter was also one of the bases for the complaint in the case of *Lijadu-Oyemade v Executive Secretary of ECOWAS & 2 Others* (2005) (unreported) Suit ECW/CCJ/APP/01/05 (*Oyemade case*).

⁵⁰ Para 31 of the *Ugokwe* case (n 49 above).

⁵¹ See eg Viljoen (n 9 above) ch 12.

⁵² See eg art 45 of the African Charter on the mandate of the African Commission; art 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol to the African Court) for the mandate of the African Court, arts 32, 33 & 34 of the European Convention on Human Rights for the mandate of the European Court of Human Rights and art 62(1) of the Inter-American Convention on Human Rights for the mandate of the Inter-American Court of Human Rights.

⁵³ However, the advisory jurisdiction of the Inter-American Court of Human Rights is broader than its contentious jurisdiction.

⁵⁴ However, note arts 60 & 61 which allow the African Commission to draw inspiration from outside the African Charter.

⁵⁵ Art 3 of the Protocol of the African Court of Human Rights is instructive on this point.

⁵⁶ See Ouguergouz (n 47 above) 550.

This is significant to the extent that it provides the opportunity for direct application of the African Charter where domestic constitutional principles require domestication before the African Charter becomes applicable within the legal system of a state or where socio-economic rights are constitutionally non-justiciable in a state.

3.2 Territorial jurisdiction

The human rights jurisdiction of the ECOWAS Court covers violations of human rights 'that occur in any member state' of the Community.⁵⁷ The choice of 'member state' as against 'state party' indicates that the jurisdiction is not limited even if a member state of ECOWAS is not a party to the Court's Protocol.⁵⁸ Compared to the African regime, which lends the African Court competence over state parties to that Court's Protocol, the ECOWAS regime is more liberal in terms of human rights realisation. However, considering that all member states of ECOWAS are also parties to the ECOWAS Court, there is very little significance in the provision. As of 6 July 1991, when Protocol A/P1/7/91 was adopted, 16 member states of ECOWAS signed as 'high contracting parties' to the Protocol. With the withdrawal of Mauritania from the Community in 2000, 15 member states remained as parties to the ECOWAS Court and also signed the 2005 Supplementary Protocol.⁵⁹ Accordingly, the human rights complaints mechanism of the ECOWAS Community Court 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).⁶⁰

As the amended article 9(4) currently stands in the Supplementary Protocol, there is nothing to restrict the jurisdiction of the Court over a member state of ECOWAS for any rights violation that such a member state allegedly carries out against any community citizen in the territory of any other member state. In analysing the less specific provisions of the African Charter that created the African Commission, Ouguergouz makes a similar argument and draws inspiration from the jurisprudence of the European Commission.⁶¹ This is significant as, in cases where a victim is forced to flee the violating state for any reason, he still has the

⁵⁷ Revised art 9(4) as contained in art 3 of the Supplementary Protocol. See also para 28 of the Court's judgment in the *Ugokwe* case (n 49 above). The term 'territory' may very well include embassy premises of member states.

⁵⁸ Art 1 of the 1991 Protocol defines member state to mean a member of ECOWAS.

⁵⁹ See the signatures reflected on the 2005 Supplementary Protocol.

⁶⁰ See the amended art 9 in the Supplementary Protocol.

⁶¹ Ouguergouz (n 47 above) 554, where he cites the European Commission's decision in *Cyprus v Turkey* European Commission of Human Rights Application 8007/77. In *Drozdz & Janousek v France & Spain* Judgments and Decisions of the European Court of Human Rights, Series A, Vol 240 (also cited by Ouguergouz), the European Court of Human Rights affirmed this position.

chance to bring an action for violation of his African Charter-protected right.

3.3 Temporal jurisdiction

The temporal jurisdiction of the ECOWAS Court needs to be examined from the procedural and substantive perspectives of both the Court's Protocols and the African Charter. While both the 1991 Protocol and the 2005 Supplementary Protocol contain provisions relating to their entry into force, they both are silent on the temporal competence of the Court.⁶² It is important to note that both Protocols entered into force provisionally as soon as the Heads of State and Government of member states signed them.⁶³ As the 1991 Protocol did not endow the Court with human rights jurisdiction, the relevant provision from a human rights perspective is art 11 of the Supplementary Protocol by which the Protocol provisionally came into force on 19 January 2005. In the absence of anything to the contrary, the Court can only entertain cases of violations that occur after that date. The ECOWAS Court has lent judicial backing to this position as it declined jurisdiction on this ground in the case of *Ukor v Laleye (Ukor case)*.⁶⁴

What is not clear from the texts of the two Protocols is whether they come into force at the same time for all member states, regardless of whether a particular state has individually signed or ratified the Protocol. This has not come before the Court, as all the early cases touching on human rights brought before it were in respect of a single member state.⁶⁵ However, considering that all member states of ECOWAS had signed the Supplementary Protocol as of January 2005, this point is also now moot.

With respect to its substantive temporal competence, where the claim is based on the African Charter, reference has to be made to the position under the African Charter. As noted elsewhere, 'the texts are silent' on the temporal jurisdiction of the African Charter.⁶⁶ However, it goes without saying that the Charter becomes applicable upon its coming into force in respect of the state party concerned. Hence, Viljoen notes that during the early days of the African Commission's

⁶² See, generally, art 34 of the 1991 Protocol and art 11 of the Supplementary Protocol.

⁶³ As above.

⁶⁴ n 24 above. Upon the facts of that case, the Court emphasised that there was nothing in the Supplementary Protocol to suggest that the Protocol could be given a retrospective effect. In this regard, the Court relied copiously on the jurisprudence of the ICJ. See especially paras 13 to 20 of the Court's judgment. Also see art of the Vienna Convention on the Law of Treaties.

⁶⁵ As at January 2007, most of the cases already decided by the Court were against the Federal Republic of Nigeria. However, cases against a few other member states were already filed at the Court's registry in January 2007 when the author visited the Court's Registry.

⁶⁶ Oguergouz (n 47 above) 555.

work, some communications against member states of the OAU were declared inadmissible on the grounds that such states were not then parties to the African Charter.⁶⁷ As all member states of ECOWAS ratified the African Charter long before 2005, when the Supplementary Protocol came into force, the question of substantive temporal competence is merely academic and serves no significant purpose.

If a claim is based on the rights contained in the revised ECOWAS Treaty or any of the Community's other instruments, it would appear that the date of entry into force (with respect to the particular state) of the given instrument should be the determining consideration. With regard to 'other international instruments', as contemplated in the ECOWAS Democracy Protocol, should the Court decide to apply them in exercise of its human rights competence, the question of ratification ought to be taken into consideration. The Court needs to first satisfy itself that the instrument in question has been ratified by the state and has come into effect in respect of the state concerned before it can apply the provisions of such an instrument.

It is essential to note that, under the ECOWAS system, there is a limitation provision that prohibits actions against Community institutions and any members of the Community statute after three years from the date the right arose.⁶⁸

3.4 Personal jurisdiction

3.4.1 Plaintiff/applicant⁶⁹

By virtue of the new article 10 in the Supplementary Protocol, depending on the facts, access to the ECOWAS Court is open to member states, the Executive Secretary (now the President of the ECOWAS Commission since January 2007), the Council of Ministers, individuals, corporate bodies and staff of any Community institution.⁷⁰ In terms of access to bring cases of a human rights nature, on the basis of the earlier argument with respect to actions for failure to fulfil a Community obligation, it may be argued that any member state or the President of the ECOWAS Commission is competent to bring a human rights-related case against a member state.⁷¹ Since the obligation contained in the revised

⁶⁷ See F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2003) 72.

⁶⁸ Art 9(3) in art 3 of the Supplementary Protocol.

⁶⁹ In most of the cases already treated by the Court, applicants have been referred to as 'plaintiffs', which is the term used in domestic jurisdictions.

⁷⁰ See art 4 of the 2005 Supplementary Protocol.

⁷¹ See art 9(3) of the 1991 Protocol and the new art 10(a) in art 4 of the Supplementary Protocol. It is important to note that by art 10 of the Supplementary Protocol, only provisions of the 1991 Protocol that are inconsistent with the Supplementary Protocol are null and void to the extent of the inconsistency. However, art 9 of the 1991 Protocol is no longer useful as it has been expressly repealed by art 3 of the Supplementary Protocol.

Treaty and the relevant protocols is to guarantee the promotion and protection of rights set out in the African Charter in ECOWAS member states, there is nothing to suggest that the obligation is restricted to a guarantee of those rights to citizens of the state concerned. Accordingly, access to the Court against any member state under this provision need not be enforceable only where the victim(s) of the failure to fulfil come from the offending state.

With regard to access to applicants other than state members and the President of the ECOWAS Commission, access is available to individuals and corporate bodies.⁷² By virtue of article 10(c), access is for 'proceedings for the determination of an act or inaction of a Community official which violates the rights of the individual or corporate body'. This is a limited access, as it must only be against ECOWAS (as an institution) for the rights-violating act or inaction of a Community official and it must be claimed by the individual or corporate body alleging that their right has been violated. Hence, any body, group or institution mentioned above may be a plaintiff (or applicant) before the Court so far as the act or omission allegedly violates their right.

The provision in article 10(d) is both more and less restricted when compared to article 10(c). It is more restricted in the sense that it is only available to individuals and not to corporate bodies. It is less restrictive, as it gives access to the individual for application for relief in the event of human rights violation and does not state against whom the application should be brought. The right of access may be exercised widely. One conspicuous omission from the Supplementary Protocol of the Court relates to the competence of non-governmental organisations (NGOs) to bring actions before the Court. While 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, the couching of the provision to the extent that such actions should be in determination of acts or inactions of a Community official which 'violates the rights of the individual or corporate bodies' gives the impression that any action brought on facts that do not allege a violation of the rights of the corporate body may fail.⁷³

⁷² Arts 10(c) & (d) Supplementary Protocol.

⁷³ See the inserted art 10(c) in art 4 of the Supplementary Protocol. The Court has not been asked to decide on the competence of NGOs to access the Court. An interview conducted with Mr CA Odinkalu of the Open Society Initiative for West Africa (OSIWA) suggests that that organisation will soon conclude the filing of a human rights action on behalf of some Community citizens against Côte d'Ivoire. It is anticipated that if this comes to pass, it will create the opportunity to test the position of the Court on this point. The importance lies in the fact that the economic realities of West Africa may make it impossible for some prospective litigants to pursue actions at the CCJ on their own. The experience of the African Commission is instructive on this point. See eg the communications filed by NGOs before the African Commission.

3.4.2 Defendant/respondent⁷⁴

While both the 1991 Protocol and the 2005 Supplementary Protocol are silent on the point, it appears from a reading of the amended (and inserted) articles 9 and 10 of the Court Protocol that member states, the Community, Community institutions and Community officials may be defendants before the Court.⁷⁵ The most obvious respondents are member states of ECOWAS in actions for failure to fulfil human rights obligations arising from the ECOWAS Treaty, Protocols, Conventions and other legal instruments. Further, as argued above, paragraph (c) in the amended article 10 relates to rights-violating acts or inactions of Community officials. In other words, either ECOWAS itself (as the Community) or an official of ECOWAS in his official capacity may be a respondent.⁷⁶ In relation to paragraph (d), the question becomes more complicated as the provision does not indicate against whom the individual right of access may be exercised. This leaves room for the exercise of discretion by the Court in its interpretation and application of the Supplementary Protocol. Generally, in accordance with the African Charter and the practice and procedure of the African Commission, it may be argued conclusively that member states of ECOWAS who are parties to the African Charter are prospective respondents.⁷⁷ This is supported by the provisions which impose the duty on state parties to guarantee African Charter-protected rights. Naturally, such states would also be parties to the Protocol creating the ECOWAS Court. In fact, the jurisprudence of the ECOWAS Court also points to this as most of the cases already treated by the Court are against states.

A curious development in respect of the exercise of the ECOWAS Court's human rights competence is the emergence of individuals as respondents before the Court. While those provisions relating to human rights promotion and protection, as contained in the ECOWAS instruments, point to a state duty, the imprecise couching of articles 9(4) and 10(d) of the Supplementary Protocol leaves the door open for situations such as human rights action against non-state actors before the Court.⁷⁸ Complications arise immediately the possibility of a non-state respondent is contemplated, as the usual practice is that only states

⁷⁴ The term 'defendant' seems to be more popular amongst lawyers before the ECOWAS Court.

⁷⁵ See arts 3 & 4 of the 2005 Supplementary Protocol.

⁷⁶ In 2005, the action brought by a dismissed staff member of ECOWAS, was against the Executive Secretary of ECOWAS in that capacity and two staff members of the Community in their personal names. Part of the action touched on a violation of the right to a fair hearing.

⁷⁷ Eg see arts 47, 49 & 55 of the African Charter, where reference is clearly to state parties. Rule 102(2) of the African Commission's Rules of Procedure is also very instructive in this regard.

⁷⁸ See CF Amerasinghe *Principles of the institutional law of international organisations* (2005) for a discussion on interpretation of treaties.

and, to some extent, international organisations (as subjects of international law) are entitled to be parties before international courts other than international tribunals exercising criminal jurisdiction. In granting jurisdiction to the Court for the determination of cases of human rights violations that occur in member states, and access to individuals for applications for relief for such violations, the Supplementary Protocol seems to have 'issued a blank cheque' for human rights realisation. If there were expectations that the Rules of Procedure and the practice of the Court would be used to limit the provisions, the contrary has occurred so far, as the Court has entertained an action brought by a non-state applicant against a non-state respondent. In the *Ukor* case, all the parties were non-state actors, yet the Court went on to exercise jurisdiction over the matter.⁷⁹ If this practice continues, it may well be logical to expect non-state actors other than individuals to be brought before the Court. Although this situation could be a human rights advocate's dream, the long-term implications could be interesting. It is hoped that the opportunity will arise in the near future for the Court to make a clear statement on the issue.

There is also provision for intervention by parties who consider that their interest may be affected by proceedings going on before the Court.⁸⁰ While the provision was originally aimed at states, 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.⁸¹

4 Admissibility of human rights complaints

The importance of admissibility considerations in international human rights litigation cannot be overemphasised. Viljoen captures the relevance of admissibility considerations as a screening or 'filtering' mechanism between national and international institutions.⁸² He adds that the admissibility requirement places a divide between states in their sovereign capacity, and international supervision of those states.⁸³ In including these requirements in international instruments, it is expected that a possible overburdening of international instruments will be

⁷⁹ The *Ukor* case (n 28 above) was declared 'inadmissible for lack of merit' on grounds that the Supplementary Protocol did not apply retrospectively.

⁸⁰ Art 21 of the 1991 Protocol (renumbered art 22 by art 5 of the Supplementary Protocol). Art 89 of the Rules of Procedure deals with the procedure for intervention.

⁸¹ Eg in the *Ugokwe* case (n 49 above), there were interveners who joined as co-respondents with Nigeria and in the *Ukor* case, there was an application to join as intervener which failed (*inter alia*) on grounds of non-observance of the time limit.

⁸² Viljoen (n 67 above) 62. It appears his reference here relates more to the requirement to exhaust local remedies.

⁸³ As above.

avoided.⁸⁴ It is not surprising, therefore, that all human rights instruments contain some form of admissibility requirement. Neither the 1991 Protocol nor the Supplementary Protocol contains express provisions dealing with the question of admissibility. However, the provisions dealing with access in both Protocols contain certain conditions necessary for a party to fulfil before the right of access to the Court may be exercised.⁸⁵ Notwithstanding that there are no provisions on the question of admissibility, chapter II of the Rules provides for preliminary procedures, which include preliminary objections.⁸⁶

The Court is allowed to hear oral arguments after the documentary procedure for the preliminary objection has been concluded. The Court may either make a decision on the objection or reserve its decision pending the final judgment.⁸⁷ Under the Rules, a member of the Court is appointed as Judge Rapporteur for each case filed before the Court and such a judge has a major role to play in the preliminary procedure of the Court.⁸⁸ Although the existing jurisprudence of the Court does not contain enough to permit a proper analysis of the admissibility procedure, it is safe to say that the Court makes some form of admissibility finding and this is sometimes based on the filing of a preliminary objection by the respondent in the case.⁸⁹

Unlike the practice in most other human rights protection and supervisory mechanisms, there seems to be very few conditions precedent to bringing a human rights action in the ECOWAS Community Court. The inserted article 10 (in article 4 of the 2005 Protocol) sets out only two conditions for individuals who intend to access the Court on application for relief for a human rights violation. These conditions are that the application should not be anonymous; nor be made while the same matter is pending before any other international court for adjudication.⁹⁰

⁸⁴ As above.

⁸⁵ See art 9(3) of the 1991 Protocol and the inserted art 10(d) in art 4 of the Supplementary Protocol.

⁸⁶ There is also reference to admissibility in the Rules which relates to admissibility of new pleas raised during proceedings before the Court. See art 37(4) of the Rules.

⁸⁷ Art 87 of the Rules.

⁸⁸ See eg arts 1, 33 37, 39 & 41(3) of the Rules on various roles of the Judge Rapporteur.

⁸⁹ Eg, the Court's decision in the *Olajide* case (n 41 above), in which it declared that individuals lacked access to the Court under the 1991 Protocol, was upon the preliminary objection of the respondent. The decision in which it declined jurisdiction in the *Ugokwe* case (n 49 above) was also prompted by the preliminary objection of the defendant/respondent. See para 8 of the judgment in the *Ugokwe* case. However, the consideration in the *Ukor* case (n 28 above) was made in the absence of the defendant/respondent.

⁹⁰ See the inserted art 10(d) in art 4 of the Supplementary Protocol. In a recent ruling in the case of *Professor Etim Moses Essien v The Republic of The Gambia & Another* (unreported) Suit ECW/CCJ/APP/05/05 (delivered on 14/3/07), the ECOWAS Court interpreted art 10(d)(ii) as *lis pendens* in another international court. See para 27 of the ruling.

The condition of non-anonymity compares to the requirement under the African Charter that 'other communications' under article 55 of the Charter should indicate the author even if the author requests anonymity.⁹¹ This provision is closer to article 27(1)(a) of the European Convention, which simply requires that an application must not be anonymous. The European Convention is similarly silent on the issue of a request for anonymity by an applicant. In relation to the European Convention, it is suggested that the condition exists in order to bar applications that are lodged for purely political or propaganda reasons.⁹² The practice of the European Convention shows that a complainant may request anonymity notwithstanding this provision. It is yet to be seen if a request for anonymity will be allowed under the procedures of the ECOWAS Court, even though it seems possible. Although the Rules precede the Supplementary Protocol (and therefore the provisions under consideration), it may be noted that the rule requires an application for commencing a case before the Court to include the name and address of the applicant.⁹³ By article 33(6) of the Rules, failure to comply with the conditions set out in the preceding paragraphs of article 33 could lead to a formal declaration of inadmissibility after the Court has heard the opinion of the Judge Rapporteur. In other words, non-compliance with the requirement that an application should not be anonymous would lead to a decision declaring a case admissible.

The second condition for individual access to the human rights jurisdiction of the ECOWAS Court prohibits prospective applicants from filing cases if the same matter is already before another international court for adjudication.⁹⁴ This provision seems to differ slightly from the equivalent provision under the African Charter. Under article 56(7) of the Charter a case is inadmissible if it has been *settled by* the states concerned in accordance with the principles of the Charter of the United Nations (UN) or the Charter of the OAU (read AU) or by the provisions of the African Charter itself. Gumedze interprets article 56(7) to mean that, as a means of stopping people from seeking the protection of more than one international system, a case already heard and decided by the dispute settlement mechanisms of the UN or the AU cannot come before the African Commission.⁹⁵ Viljoen sees the provision as one aimed at preventing a state from being found in violation twice on the same facts (in the case of another AU mechanism) and to prevent the undesirable conflict that could arise from the concurrent

⁹¹ Art 56(1) African Charter.

⁹² P van Dijk & GJH van Hoof (eds) *Theory and practice of the European Court of Human Rights* (1998) 109.

⁹³ Art 33(1)(a) of the Rules. The address required under this paragraph is different from the address for service required under para 2 of art 33.

⁹⁴ See n 85 above.

⁹⁵ S Gumedze 'Bringing communications before the African Commission' (2003) 3 *African Human Rights Law Journal* 118 134.

exercise of jurisdiction by different systems (in the case of exercise of jurisdiction by a competent UN mechanism).⁹⁶ Viljoen's interpretation is that the African Charter allows for simultaneous submission of cases to mechanisms of both the AU and the UN, but that the applicant would be required to abide by the first ruling on the matter. This, he argues, is to prevent the possibility of 'divergent conclusions'.⁹⁷

The first point to be made is that the provisions of article 56(7) do not preclude a case from being entertained by the African mechanisms, even if such a matter had been *settled by* sub-regional mechanisms. There are two possible interpretations for this situation. On the one hand, it can be argued that, at the time of drafting of the Charter, it was not contemplated that RECs in Africa would go beyond their economic focus to rely on the African Charter as a standard for human rights protection and so there was no need to cater for that eventuality. On the other hand, it can be argued the provision keeps the door open for the African mechanisms to take the role of appellate tribunals over the possible decisions of the sub-regional mechanisms.⁹⁸ Whatever interpretation is adopted, article 56(7) gives an allowance that article 10(d)(ii) does not. The provision in the Supplementary Protocol does not require that a matter be settled by another international court before it becomes inadmissible. It precludes a matter in so far as the matter has been instituted before another international court. However, the wording used in the second condition appears to suggest that, if a matter is pending before a 'friendly solution' mechanism, that fact does not preclude the plaintiff (applicant) from bringing the same matter before the ECOWAS Court. Similarly, as the provision specifically refers to 'another international court', an elastic interpretation could exclude quasi-judicial mechanisms such as the African Commission. This is subject to the interpretation of the Court and it is expected that the opportunity will arise to test this point.

Although other admissibility requirements in the African Charter are also not replicated in the two Protocols of the ECOWAS Court, the most conspicuous omission seems to be the requirement of exhaustion of local remedies.⁹⁹ It is generally agreed that the principle of exhaustion of local remedies is a vital part of international law, and especially international human rights law, as it provides a compromise between state sovereignty and international supervisory mechanisms.¹⁰⁰ It is also arguable that the requirement of exhaustion of local remedies is essential to prevent the international systems from being flooded with

⁹⁶ Viljoen (n 67 above) 92.

⁹⁷ As above.

⁹⁸ This latter view would support the argument that the African Court is the only competent judicial authority for interpretation of the African Charter.

⁹⁹ Cf Amerasinghe *Local remedies in international law* (2004) provides an excellent analysis of the principle of exhaustion of local remedies.

¹⁰⁰ See generally Viljoen (n 67 above) and Gumedze (n 95 above).

human rights complaints.¹⁰¹ Odinkalu describes the principle as the 'cornerstone of the adjudicatory and protective mandate' of the African Charter, upon which the 'linkage between domestic remedies and regional human rights mechanisms' is processed.¹⁰² The principle is so important that Viljoen notes that it is part of the admissibility requirements of all international human rights systems.¹⁰³ In the face of its overwhelming importance, it is not clear why the ECOWAS system does not include a requirement relating to the exhaustion of local remedies for access to the human rights jurisdiction of the ECOWAS Court. Without the benefit of background materials such as the *travaux préparatoires* of the Supplementary Protocol, one can only make a speculative analysis as to the reasons for its omission.¹⁰⁴ The point must be made that, whereas the principle of exhaustion of local remedies is recognised as 'a well established rule of customary international law',¹⁰⁵ the view has been expressed that this may well be so only in the area of diplomatic protection of aliens and it may not be applicable to the same degree in respect of other forms of international adjudication.¹⁰⁶ Placing reliance on the *Iran — US Claims Tribunal (in American International Group v Iran)*, Amerasinghe suggests that the rule of exhaustion of local remedies may be made inapplicable by reason of explicit exclusion.¹⁰⁷

If the opinion above is anything to go by, it could be argued that, while the principle of exhausting local remedies is desirable, it may not be compulsory. By all indications the principle was contemplated with respect to the human rights competence of the ECOWAS Court. In article 39 of the ECOWAS Democracy Protocol, it was proposed by the contracting parties that Protocol A/P1/7/91 on the Community Court of ECOWAS 'shall be reviewed so as to give the Court the power to hear ... cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed'.¹⁰⁸ This provision seems to imply the requirement to exhaust remedies at the domestic level. However, the final text of the 2005 Supplementary Protocol on the Court does not contain any requirement for the exhaustion of local remedies before seizing the Court. In the absence of evidence to the contrary, it can only be assumed that the requirement was deliberately dropped. Some experienced commentators have suggested that there is no need for the requirement to exhaust local reme-

¹⁰¹ See Viljoen (n 67 above) 62.

¹⁰² CA Odinkalu 'The role of the complaints procedure in the reform of the African human rights system' (2001) 2 *African Human Rights Law Journal* 225 227.

¹⁰³ Viljoen (n 67 above) 81.

¹⁰⁴ Attempts by the author to have access to the *travaux préparatoires* on the Supplementary Protocol have been unsuccessful.

¹⁰⁵ See the *Interhandel* case, 1959 ICJ Reports.

¹⁰⁶ Amerasinghe (n 99 above) 4-5 37.

¹⁰⁷ As above.

¹⁰⁸ My emphasis.

dies because ECOWAS as a community can be seen as one territory.¹⁰⁹ However, there is some danger in such a view because, as Ajulo points out, ECOWAS is not a 'super state' for the simple reason that national sovereignty remains intact.¹¹⁰ If national sovereignty remains, then it is desirable that states be given the first opportunity to address the alleged wrongs.¹¹¹ In any case, the system is yet to develop into the European Union model for decisions and acts of the community to apply directly in member states without the need for treaties, conventions or protocols, which require ratifications and incorporations.

Whatever arguments there may be, the drafters failed to add a requirement to exhaust local remedies under the ECOWAS system. Although there seems to be a 'silent' view that the *Ugokwe* case suggests that there is no requirement to exhaust local remedies, the present author respectfully disagrees with that view.¹¹² The facts of the *Ugokwe* case indicate that the matter was brought before the ECOWAS Court after it had failed at the Nigerian Court of Appeal.¹¹³ If these facts are true, then the issue of non-exhaustion of local remedies does not arise, as the Court of Appeal is the final court in Nigeria with respect to the election matter over which the ECOWAS Court was invited to adjudicate.¹¹⁴ Apart from factual arguments, paragraph 32 of the Court's judgment in the *Ugokwe* case, in which the Court described the ECOWAS legal order as a 'judicial monism', seems to have also fuelled the argument that the case provides jurisprudential support for the non-existence of the requirement under the ECOWAS system. With respect, it has to be pointed out that the reference to a 'judicial monism' appears to have been in relation to the Court's decision that it was not a court of appeal against the decisions of the national courts of member states.¹¹⁵ The Court's decision in declining to see itself as a court of appeal over national courts does not necessarily mean that it was making a pronouncement on the question of exhaustion of local remedies.

¹⁰⁹ Eg Ibrahim Kane of Interights, London, during lectures at the LLM (Human Rights and Democratisation in Africa) programme in May 2007.

¹¹⁰ SB Ajulo 'The Economic Community of West African States and international law' (1989) 27 *The Journal of Modern African Studies* 233 245.

¹¹¹ Van Dijk & Van Hoof (n 92 above) quote the European Court of Human Rights in respect of this point to say that the rule is based on the assumption reflected in art 13 of the European Convention, that there is an effective remedy available for breaches in the domestic systems of member states. See also Amerasinghe (n 99 above).

¹¹² West African lawyers interviewed by the author during the research for this article have expressed the view. While transcripts of the interview are on file with the author, the request of the interviewees to remain anonymous is being respected.

¹¹³ See para 26 of the judgment of the ECOWAS Court in the *Ugokwe* case (n 49 above).

¹¹⁴ As above. Also see sec 246 of the 1999 Constitution of Nigeria and the 2001 Electoral Act of Nigeria.

¹¹⁵ This is the logical interpretation if the entire para 32 is read together the second part of para 23, taking into consideration the nature the relief sought by the applicant.

The above analysis notwithstanding, it is safe to say that there is currently no requirement to exhaust local remedies under the ECOWAS system, as the Court has now made a definite pronouncement on the issue. In its ruling on the preliminary objection filed by the defendants in the case of *Professor Etim Moses Essien v The Republic of The Gambia and the University of The Gambia*,¹¹⁶ the Court stressed that 'the issue of local remedy (*sic*) as mentioned in article 50 of the said Charter has no bearing with cases under the premise of article 10(d) of the Supplementary Protocol'.¹¹⁷ While the existing regime has not led to the Court being flooded with cases, there is a real danger of such an outcome in the future, especially if lawyers become familiar with the working and potential of the ECOWAS Court. Further, considering the fact that the ECOWAS Community Court is a supra-national court, this position seems to hold the potential for a disruptive conflict with the legal systems of member states.¹¹⁸

With respect to actions by member states or the President of the ECOWAS Commission aimed at enforcing the human rights obligations of any member states, there may well still be a requirement to first attempt friendly settlement before the Court is seized of the matter.¹¹⁹

5 Conclusion

The realisation of human rights in Africa suffers from several factors, including the poor economic situation of the vast majority of people on the continent. Owing to the various conflicts that have raged in countries of that sub-region, West Africa seems to be worse off in terms of economic woes and the attendant violations of human rights. Against the backdrop of domestic legal systems that have not lived up to the expectations of human rights advocates and the African mechanisms that are too far away and expensive for the majority of victims of human rights violations, the emergence of a viable sub-regional human rights system should be applauded. This is even more so where the legal framework for human rights realisation under the system holds so much promise if used effectively. With its unrestrictive requirements, the ECOWAS human rights system may well be a gold mine for rights realisation. However, there is a need for caution in the process of developing

¹¹⁶ n 90 above.

¹¹⁷ See para 27 of the ruling.

¹¹⁸ Interviews conducted indicate that the lawyers familiar with the system recognise this danger, but argue that it makes the system attractive over other human rights complaints mechanisms.

¹¹⁹ This is because art 76 of the revised ECOWAS Treaty still applies to such actions. See the Court's judgment in the case of *Parliament of the Economic Community of West African States represented by Chief FO Offia v The Council of Ministers of the Economic Community of West African States & Another Suit ECW/CCJ/APP/03/05* paras 9, 10 & 11.

the system if the lurking dangers to the system are to be avoided. Despite the fact that some states in the region have legal and constitutional traditions that create room for the partial transfer of sovereignty in deference to international treaties they have ratified, other states do not have such constitutional allowances.¹²⁰ Thus, overzealous provisions likely to ignite tension between the ECOWAS mechanism and the domestic systems of member states may turn out to be the Achilles heel of the system if such provisions are applied in a manner that develops into a tension that threatens the sovereignty of member states. Such a situation could lead to an eruption that destroys the system as states still cherish their sovereignty and have not dismantled legal obstacles to total integration under ECOWAS. Be that as it may, only constant use of the mechanism will expose the 'landmines' that line its path. It is hoped that West African lawyers and human rights advocates will take advantage of the system and, in the process, give the Court the opportunity to iron out and perfect grey areas in the system.

¹²⁰ Eg, Mali and Senegal as 'monist' states have such constitutional space which is lacking in other states such as Nigeria. However, it has to be noted that, in 2006, the Authority of Heads of State adopted institutional reforms which include the adoption of a new legal regime that allows for the use of Supplementary Acts (instead of treaties) as the main law-making instruments in ECOWAS. The intention is that such Acts may become directly applicable in member states upon signature by the Authority. As at the time of writing, the new regime had not come into effect.