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ENFORCING ECOWAS LAW IN WEST AFRICAN NATIONAL COURTS

BY

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I. INTRODUCTION

One of the constitutional challenges of regional integration is how to manage the limitation of national judicial sovereignty of Member States to ensure that community law is recognized as superior to national law and accordingly applied and interpreted by national courts at the instance of community citizens. This challenge arises from the national ordering of legal systems and the fact that States are the primary parties to agreements wherein they limit their sovereignty in favour of the community for its success. It appears natural that community judicial institutions should be entrusted with the responsibility of enforcing the intent of Member States who are assumed to be eager ready and willing to bring their actions inactions understandings and disagreements over community law to Community citizens so that consistency can support the integration efforts. But integration takes place in Member States and is always an interaction between Member States and Community citizens including non nationals. It is fundamental to allow these citizens to approach community judicial institutions about how the measures that constitute them as community citizens are being implemented. It is also fundamental to allow them to approach national courts over how national institutions including in some cases Community Citizens have acted or not acted with respect to community law. It is because these national courts are likely to give diverse interpretation to community law that there must be a hierarchical relationship between community and national courts to ensure consistent interpretation. National courts represent another critical layer of community institutional structure to enforce Community law. They enable citizens to ensure that as the primary beneficiaries of the integration process they are able to engage the community when they have issues about implementation or otherwise. It is important to realize that national courts provide potentially better access to Community citizens. It is also important to understand that enforcing community law in national courts also breeds its own problems because of the deep constitutional diversity of member States.

Thirty Four (34) years after the formation of the Economic Community of West African States (ECOWAS) as a regional economic and social community, not much has been achieved in
realising the lofty objectives for the community. One of the reasons that are not very well discussed in this regard is the involvement of national courts of members States. In this paper I examine how ECOWAS Law can be enforced in West African national courts for the simple reason that enforcing such laws in national courts would have made such considerable difference in the realisation of the objectives of the community. The scope of this paper covers potential and real instances when a West African national court recognizes and applies ECOWAS law in a matter before it. One interesting fact about West Africa is that there exists the Organisation for the Harmonization in Africa of Business Law (OHADA) where the OHADA treaty is applicable national courts of the member States. This fact presents an instructive lesson that the issue which this paper is concerned is already in operation in West Africa. It also presents a challenge in the interaction of the OHADA and ECOWAS communities.

I have organized this paper as follows. In part II I examine the nature of the economic and social integration that West African States have embarked upon. In part III I explore the sources and applicability of ECOWAS Law before West African national courts. In part IV I discuss briefly the OHADA system in West Africa as an example of the application of a Community law in West African national courts. I make concluding remarks in part V.

II. THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES

The Economic Community of West African States (ECOWAS) was formed on 28 May 1975, in Lagos where Nigeria and sixteen (16) other West African countries – Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania,¹ Niger, Nigeria, Senegal, Sierra Leone and Togo – created the community² as a regional body with the aim of the economic integration of its member states. This is evident in Article 2 of the ECOWAS Treaty which provides that the Community’s aim is to promote cooperation and development in all fields of economic activity. To achieve this, the Community was to ensure

¹ Mauritania ceased to be a member state in 2002.
the following in stages such as the elimination between member states of customs duties; the abolition of quantitative and administrative restrictions; the establishment of a common customs tariff and a common commercial policy towards third parties; the abolition of obstacles to the free movement of persons, services and capital; the harmonisation of agricultural policies; the implementation of schemes of joint development; the harmonisation of the economic and industrial policies of member states, and the establishment of a Fund for Cooperation Compensation and Development.

The ECOWAS Treaty envisioned a free trade area as a step towards an economically integrated West Africa. In 1993, ECOWAS member states revised the ECOWAS Treaty\(^3\), essentially to move towards deeper integration and to recognise, promote and protect a political and social dimension to its economic objectives. The incorporation of political objectives to the ECOWAS mandate can be traced specifically to the Liberian crisis\(^4\) and to 1990, when a Standing Mediating Committee was set up by the Authority of Heads of State and Government\(^5\) and charged with the task of finding a lasting solution to the crisis. A ceasefire agreement was signed and a civilian regime established. To monitor the ceasefire, a military force – the ECOWAS Ceasefire Monitoring Group (ECOMOG) – was established.

By article 3 of the Revised Treaty member States dedicate themselves to achieving an economic union. In order to achieve this union the community shall by stages ensure:

a) the harmonization and coordination of national policies and the promotion of integration programmes, projects and activities particularly in food, agriculture and natural resources; industry; transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters;

(b) the harmonisation and coordination of policies for the protection of the environment;

c) the promotion of the establishment of joint production enterprises;

\(^3\) Hereafter the Revised Treaty. The revised treaty, which is the current treaty, was accepted in July 1993 in Cotonou Benin. And entered into force in 1993. Text of the Treaty is available at [www.ecowas.int](http://www.ecowas.int); last accessed 7 April 2009.


\(^5\) Hereafter the Authority.
d) the establishment of a common market through the establishment of free trade area, the adoption of a common external tariff and common trade policy, and the removal of obstacles to the free movement of persons, goods, services and capital as well as the right of residence and establishment;

(e) the establishment of an economic union through the adoption of common policies in the economic, social and cultural sectors and the creation of a monetary union;

(f) the promotion of joint ventures by private sector enterprises including the adoption of a regional agreement on cross-border investments;

(g) the adoption of measures for the integration of the private sector including the creation of an enabling environment to promote small and medium scale enterprises;

(h) the establishment of an enabling legal environment;

(i) the harmonization of national investment codes leading to the adoption of a single investment codes;

(j) the harmonization of standards and measures;

(k) the promotion of a balanced development of the region;

(l) the encouragement and strengthening of relations and the promotion of the flow of information amongst rural populations, women and youth organizations and socio-professional organizations such as associations of media business men and women, workers and trade unions;

(m) the adoption of a common population policy;

(n) the establishment of a fund for co-operation, compensation and development.

That the Revised Treaty forms an ECOWAS Legal system is evident from article 88 of the Revised Treaty which states that the Community shall have an international legal personality. Furthermore, the aims and objectives of ECOWAS envision a community legal system which is evident from the objectives which create norms or provide for the creation of norms by a number of bodies which represent a broad spectrum of executive legislative and judicial functionalities. The organs of ECOWAS are set out in Article 6 of the Revised Treaty to be the Authority; the Council of Ministers; the Community Parliament; the Economic and Social Council; the Community Court of Justice; the Commission; the Fund for Co-operation, Compensation and Development; Specialised Technical Commissions; and any other institution established by the Authority. The requirement that an enabling legal environment should be established; that there is right of residence and establishment; that there should be the
harmonisation of national investment codes leading to a single Community investment code and the harmonization of standards and measures point to the work of community institutions. It also persuasively and arguably involves national institutions and especially the national judicial institutions of member States. The ECOWAS Community legal system is a product of the limitation of the sovereignty of Member States. This is recognized in the preamble to the Revised Treaty where they affirm that:

`..the integration of Member States into a viable regional community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will.’

It is the question of whether this statement is true and if so the extent that this is possible that this article explores. Application and enforcement in national courts refers to the ability of a citizen of an ECOWAS state to invoke ECOWAS law in a matter before that court and for that court to be bound to follow that law. This is the so called direct effect of community law. The principle emerged from the case of Van Gend en Loos v Nederlandse Administratie der Belastingen\(^6\) where the European Court of Justice established an important principle that provisions of the Treaty Establishing the European Economic Community were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Community's member states. In that case the ECJ adopted the criteria for establishing direct effect of the Treaty: The provision must be sufficiently clear and precisely stated; it must be unconditional or non-dependant; and it must confer a specific right for the citizen to base his or her claim on. The concept of direct effect has been extended to legislation adopted pursuant to the Treaty in the form of directives and regulations from the European Commission. It ought to be noted that the concept of direct effect is not found in the European Union Treaty but a creation of the ECJ. Applied to the ECOWAS Community Legal system direct effect would entail determining part of the provisions of treaties protocols decisions and regulations would have direct effect in ECOWAS national courts. Whether direct effect is incumbent on the ECOWAS Community legal system cannot be assumed but should be proved.

\(^6\) [1963] ECR 1.
Direct effect is to be differentiated from direct applicability by which a country determines how its treaties become part of the national legal system and therefore binding on the national courts. When a treaty is directly applicable it is enforced as a national law.

III THE SOURCES OF ECOWAS LAW AND THEIR APPLICATION IN NATIONAL COURTS

In this part I shall explore the nature of the sources of ECOWAS Law in order to determine if and how they may be applicable in national courts

(a) The Revised ECOWAS Treaty

The Revised Treaty is not directly applicable in member States but depends on its applicability on the manner in which it is incorporated into national legislation of States. In this regard Article 5(2) of the Revised Treaty provides that:

‘Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty.’

It means that it is to the constitutional measures for incorporation that I shall now turn to. The English speaking countries like Nigeria, Ghana, Sierra Leone, Gambia and Liberia are generally regarded as dualist. International law does not have force of law within their territory unless it has been promulgated as a national legislation. Without such a national act the treaty will not have the force of law in the country. I am not aware that any of the English speaking

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7 See s. 12 of the 1999 Constitution of the Federal Republic of Nigeria.
8 Section 75.(1) of the 1992 Ghana Constitution provides that the President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana. (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by- (a) Act of Parliament; or (b) a resolution of Parliament supported by the votes of more than on-half of all the members of Parliament. See E.O Dankwa ‘Implementation of international human rights: Ghana as an Illustration’ (1991) 3 ASICL Proc. 57.
9 See article 40(4)i of the 1991 Sierra Leone Constitution.
10 Section 79(1)c of the 1997 Gambia Constitution.
11 Section 57 of the Liberian Constitution.
countries have domesticated the Revised Treaty. Accordingly the Revised Treaty is not applicable within these countries and less likely to have direct effect in the national courts.

Assuming the Revised Treaty is domesticated, it is also important to determine the status of the treaty. Shall it be superior to the Constitution or inferior to it. It is unlikely that the Revised Treaty is superior to the Constitutions of these English speaking countries since their Constitutions declare their supremacy.\textsuperscript{12} If this is the case, there is little doubt that Revised Treaty shall be subordinate to the Constitution. The Nigerian Supreme Court in \textit{Abacha v Fawehinmi}\textsuperscript{13} examined the status of the African Charter on Human and Peoples’ Rights which was domesticated in Nigeria by legislation.\textsuperscript{14} The Court held that the Nigerian Constitution is superior to the Charter. Numerous other decisions have however held that the African Charter is superior to national legislation.\textsuperscript{15} It is important to point to a practice by the Ghanaian Supreme Court to apply the African Charter on Human and Peoples’ Rights even when it has not been domesticated. In \textit{New Patriotic Party v Inspector General of Police}\textsuperscript{16}, Archer J said: ‘Ghana is signatory to this African Charter and Member States of the Organisation of African Unity and parties to the Charter are expected to recognize the rights and duties enshrined in the Charter... I do not think that the fact that Ghana has not passed specific legislation to give effect to the Charter, the Charter cannot be relied upon.’\textsuperscript{17} In \textit{Abacha v Fawehinmi}, one of the judges- Achike JSC\textsuperscript{18} stated that it was a doctrine of Nigerian law that an incorporated treaty may have an indirect effect on the construction of statutes or give rise to legitimate expectation by citizens that the government in its acts will abide by the terms of the unincorporated treaty. The Revised ECOWAS Treaty and its equivalent including Protocols will

\textsuperscript{12} See s. 1(1) of the 1999 Nigerian Constitution. See also section 1(2) of the Constitution of Ghana: ‘The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution should, to the extent of the inconsistency, be void.’

\textsuperscript{13} (2000) 6 NWLR (Pt 660) 228.

\textsuperscript{14} See the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap A9 Laws of the Federal Republic of Nigeria.

\textsuperscript{15} See the case of

\textsuperscript{16} [1993] N.L.P.R 73

\textsuperscript{17} At p. 82.

\textsuperscript{18} At p.
certainly qualify as capable of indirect effect. How this can and will play out is not yet a subject of judicial deliberation.

For the French speaking West African countries there is a difference in the manner in which international law is received because they are monist in orientation. As soon as international law is made it becomes part of the national laws of that state subject to the reciprocal enforcement of international law by other States. Two examples- Senegal and Benin Republic-will suffice. Article 147 of the Constitution of the Republic of Benin 1990 provides that Treaties or agreements lawfully ratified shall have, upon their publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other party. Article 146 of the Constitution provides that if the Constitutional Court, upon a submission by the President of the Republic or by the President of the National Assembly, shall have decided that an international obligation allows a clause contrary to the Constitution, the authorisation to ratify it may occur only after the revision of the Constitution. In the same light Article 98 of the Senegalese Constitution 2001 provides that Treaties or agreements duly ratified shall, upon their publication, have an authority superior to that of the laws, subject, for each treaty and agreement, to its application by the other party. Article 97 further provides that If the Constitutional Court has declared that an international agreement contains a clause contrary to the Constitution, that if authorisation to ratify it or approve it shall only be given after revision of the Constitution. These two examples reveal that two conditions must be satisfied before the treaties have effect. The first condition requires that the judiciary to review the Constitution and the treaty to enable a revision of the Constitution before the treaty is applicable. There is also a requirement for a reciprocal application of the treaty by another State before it is applicable. The reciprocal application of the Revised Treaty must surely refer to national application. If that is the case it is open to interpretation whether it means that the Revised Treaty is applicable in all other ECOWAS States or that the Revised Treaty is applicable in at least one other State.

The Lusophone countries generally follow the monist tradition. Article 11(2) of the Cape Verde Constitution 1992 provides that:
‘The international treaties and agreements, validly approved or ratified, shall be in force in the Capeverdean legal order after their official publication and their entry into force in the international legal order, and for the time that they are internationally binding on the State of Cape Verde.’

A treaty such as the Revised Treaty is superior to the national laws. Thus article 11(4) of the Constitution of Cape Verde provides that the rules and principles of general or common international law and of conventional international law, validly approved or ratified, shall prevail, after their entry into force in the international and domestic legal orders, over all legislative and domestic normative acts of an infra-constitutional value.

Our discussions of the nature of incorporation of the Revised Treaty reveal one reason why ECOWAS has been of limited effectiveness. If the Revised Treaty is not applicable in Member States, it is difficult to imagine national legislation and other measures that undermine the objectives and the norms which are contained in the Revised Treaty. If the Community Laws are not part of a national legal system, national courts cannot invoke them as a matter of duty in the issues before them. It can be argued that the limitation of sovereignty implicit in becoming a member of the ECOWAS includes a rethink of the structure of national legal systems. By creating a Community legal system it seems obvious that the Community legal system will become part of and take precedence over national laws. Alternatively, it is important to wonder why the majority of ECOWAS Member States have taken no national action to domesticate the Revised Treaty.

b. The Treaties and Protocols Made by the Authority of Heads of State and Government Pursuant to the Revised Treaty

The authority which is the supreme institution of ECOWAS established by Article 7 is enabled by Article 9(1) to act by decisions. Decisions of the Authority can be reached as a Protocol which is the equivalent of a treaty.¹⁹ In order to discharge its responsibilities the Authority has made a

¹⁹ See Article 1 of the Revised Treaty.
number of Protocols dealing with all kinds of subject matter. Article 9(4) of the Revised Treaty provides that ‘Decisions of the Authority shall be binding on Member States and Institutions of the Community.’ Such decisions shall automatically enter into force within sixty days of their publication in the official journal of the Community and shall also be published in

the National Gazette of member States.\textsuperscript{21} What is the effect of the provisions of Article 9(4)? On one hand, since the Protocol is regarded as a treaty our discussion above on the manner of incorporation will also apply to it. On the other hand the provisions of Article 9(4) can be relied on in stating that the decisions of the Authority including the Protocols are directly applicable in Member States. It is for this reason that it may be said that the constitutional requirement for incorporation wherever and however it exists are not applicable to decisions of the Authority.

With regard to Cape Verde, it is important to refer to Article 11(3) of the Constitution of Cape Verde which provides for the direct effect of Community Legislation. The said section provides that the legal acts emanated from the relevant organs of the supranational organizations of which Cape Verde is a member, shall enter directly into force in the domestic legal order, provided that, that is so established in the respective constitutive instruments. There is no doubt that Decisions and Protocol will fall under the rubric of community acts.

\textit{An Example of Direct Effect Of ECOWAS Community Law- The Right of Entry Residence and Establishment of ECOWAS Citizens.}

A close study of the Revised Treaties and the Protocols made by the Authority reveal many areas of Community Law which have direct effect. I shall now examine one example of Community law – the right of entry residence and establishment- that in my opinion confers rights on ECOWAS citizens which can be enforced in their national courts.

Article 59 of the Revised Treaty provides that:

\textquote{(1) Citizens\textsuperscript{22} of the Community shall have the right of entry, residence and establishment and Member States undertake to recognize these rights of Community Citizens in their territories in accordance with the provisions of Protocols relating thereto.}

\textquote{(2) Member States undertake to adopt all appropriate measures to ensure that Community citizens enjoy fully the rights referred to in paragraph 1 of this Article.}

\textquote{(3) Member States undertake to adopt, at national level, all measures necessary for the effective implementation of the provisions of this Article.}'

\textsuperscript{21} See Article 9(5) & (6) of the Revised Treaty.

\textsuperscript{22} Protocol A7P.3/5/82 Relating to the Definition of Community Citizen defines the criteria of ECOWAS citizenship.
A similar provision had appeared in Article 27 of the ECOWAS Treaty\textsuperscript{23} and led to the adoption of a Protocol Relating to the Free Movement of Persons Residence and Establishment.\textsuperscript{24} Article 2 of the Free Movement Protocol provides that:

1. The Community citizens have the right to enter, reside and establish in the territory of Member States.
2. The right of entry, residence and establishment referred to in paragraph 1 above shall be progressively established in the course of a maximum transitional period of fifteen (15) years from the definitive entry into force of this Protocol by abolishing all other obstacles to free movement of persons and the right of residence and establishment.
3. The right of entry, residence and establishment which shall be established in the course of a transitional period shall be accomplished in three phases, namely: Phase I - Right of Entry and Abolition of Visa Phase II - Right of Residence Phase II - Right of Establishment.

Article 3 of the Protocol implemented the first phase. It provided that:

1. Any citizen of the Community who wishes to enter the territory of any other Member State shall be required to possess a valid travel document and an international health certificate.
2. A citizen of the Community visiting any Member State for a period not exceeding ninety (90) days shall enter the territory of that Member State through the official entry point free of visa requirements. Such citizen shall, however, be required to obtain permission for an extension of stay from the appropriate authority if after such entry that citizen has cause to stay for more than ninety (90) days.

It is important to note the provisions of Article 4 of the Protocol which permits Member States to refuse admission into their territory to any Community citizen who comes within the category of inadmissible immigrant under its laws. The second phase of the Free Movement Protocol...
Protocol is implemented by a Supplementary Protocol\textsuperscript{25} grants to `citizens of the Community the right of residence in its territory for the purpose of seeking and carrying out income earning employment.` Article 3 provides that the right of residence include the right - subject to restrictions by reasons of public order, public security and public health- to (i) apply for jobs effectively offered; (ii) to travel form this purpose freely in the territory of a Member State; (iii) to reside in one of the Member States in order to take up employment in accordance with the legislative and administrative provisions governing employment of national workers; and (iv) to live in the territory of a Member State according to the conditions defined by the legislative and administrative provisions of the host Member State, after having held employment there.\textsuperscript{26} The third phase of the Free Movement Protocol is implemented by a Supplementary Protocol\textsuperscript{27} and in article 2 grants a right to a Community citizen who is a national of a Member State to settle or establish in another Member State other than his State of origin, and to have access to economic activities, to carry out these activities as well as to set up and manage enterprises, and in particular companies under the same conditions as defined by the legislation of host Member State for its own nationals.

The implementation of the Free Movement Protocol has been ridden with allegations of abuse.\textsuperscript{28} In particular Agyei and Clottey state that:


\textsuperscript{26} Article 4 of the Right of Residence Protocol exempts the civil service of a Member State unless the national laws provide otherwise.


In spite of ratifying the protocol which ushered in the free movement of persons in the sub-region impeded by the colonial powers; several border checks continue to exist. This has resulted in severe harassment and extortion of money from travelers by security personnel at the numerous checkpoints. Free movement is also hampered by different official languages at border posts. There are reports of torture and killings by security personnel in countries like Senegal and Gambia. The killing of 44 Ghanaians in The Gambia by security agencies in 2005 constitutes an example of harassments and difficulties faced by citizens of member states in exercising their right to free movement within the sub-region.29

Continuing the Authors point out that:

It has been argued that implementation of the protocol coincided with a period of economic recession in many member states; and this resulted in large influx of nationals of West Africa to Nigeria. When the economic situation became unbearable for the government of Nigeria, it revoked article 4 and 27 of the protocol and expelled 0.9 and 1.3 million non-national residents most of them Ghanaians in 1983 and 1985 respectively. ... Besides Nigeria, other member states which have expelled immigrants of West African origin since the operationalisation of the protocol include the Cote d’Ivoire (1999); Senegal (1990); Liberia (1983) and Benin (1998).30

In effect Community Citizens have alleged that their rights of entry residence and establishment have been breached and of course that Member States have breached obligations which were undertaken under the Free Movement, the Right of Residence and Right of Establishment Protocols. It is my contention that these citizens can proceed to the appropriate national court to lodge a complaint and that the Free Movement Protocols which are directly applicable in the Member States are enforceable in these courts.

c. Regulations Made by the Council of Ministers

Article 10 of the Revised Treaty establishes the Council of Ministers31 and Article 12 provides that the Council of Ministers shall act by regulations. Regulations of the Council shall be binding

30 Ibid (Footnotes omitted).
31 The functions of the Council of Ministers include making recommendation to the Authority on any action aimed at attaining the objectives of the Community; by the powers delegated to it by the Authority issue on matters concerning co-ordination and harmonization of economic integration policies; and request the Community Court of Justice to give advisory opinion on any legal question.
on the Institutions under its Authority which will include the Executive Secretary of the Community and other staff, the Economic and Social Council, the Fund for Co-operation Compensation and Development, and technical Commissions established by Article 22 of the Revised Treaty. If the regulations made by the Council of Ministers are approved by the Authority they become binding Member States. It is clear that regulations are not directly applicable or have direct effect until that have become decisions of the Authority.

d. Judgments of the ECOWAS Court of Community Justice

Article 15 of the Revised Treaty establishes the Community Court of Justice. The ECOWAS Court as the judicial organ of the Community has a significant part in the enforcement of ECOWAS law in national courts through the enforcement of its judgments in these courts. In particular Article 15(4) states that the judgments of the Court shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies. It appears that Member States will include the judicial bodies in these States. It will further mean that decisions of the ECOWAS will be of precedential value in these countries. The nature of judicial power in modern constitutions is essentially territorial with each Constitution creating a hierarchy of courts with a final appellate court beyond which there is no appeal. To limit the authority of the highest national court by treaty would entail the surrender of judicial sovereignty in clear words. Where the Revised Treaty is directly applicable in a State as in the French speaking countries and Cape Verde, it is clear that the ECOWAS Court is superior to the appellate courts of these countries and its judgment is of precedential value. Where as in the English speaking countries the Revised Treaty is not directly applicable, it is not very certain that the decisions of the ECOWAS Court is applicable in that country and if applicable is superior to judgments of highest national courts. Just like the Decisions of the Authority it may well be urged that the decisions of the ECOWAS Court should be directly applicable in Member States and because its basis is Community Law is of superior weight to decisions of national courts. If

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32 Established by Article 14 of the Revised Treaty.
33 Established by Article 21 of the Revised Treaty
the ECOWAS Law is directly applicable it may subsequently confer on ECOWAS citizens who bring actions before national courts a direct effect since they can rely directly on the law which is declared or clarified by the judgment. This fact seems to be strengthened by the fact that national courts are the means by which judgments of the ECOWAS court are enforced. Article 19(2) of the 1991 ECOWAS Court Protocol makes the decisions of the Court immediately binding and Article 22(3) requires both Member States and Institutions of ECOWAS to take all measures necessary to ensure execution of the Court’s judgment. Article 24 of the 1991 ECOWAS Court Protocol requires that the execution of the judgment of the ECOWAS Court to be in the form of a Writ of Execution which the Chief Registrar is required to submit to the relevant Member States who is then required to execute the judgment according to the civil procedure of that State. That 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 States that should be this authority. In Nigeria it is the Supreme Court of Nigeria that is the competent authority. In Nigeria’s 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 to the judgment of the Supreme Court. However it ought to be noted that the ECOWAS Court is unique and its judgment is not that of a foreign court. It is a Court whose judgment is immediately binding on Member States. Accordingly execution of its judgment by the highest courts of Member States 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 two protocols - the 1991 Protocol34 which established the Court and a 2005 Supplementary Protocol amending the ECOWAS 1991 Protocol.35 Article 9 of the 2005 ECOWAS Protocol lists the mandate of the Court thus:

`  (1) The Court has competence to adjudicate on any dispute relating to the following:

a. The interpretation and application of the Treaty, Conventions and Protocols of the Community:
b. The interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;
c. The legality of regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS.
d. The failure by Member States to honor their obligations under the Treaty, Conventions, and Protocols, regulations, directives or decisions of ECOWAS.
e. The provisions of the Treaty, Conventions and Protocols; regulations; directives or decisions of ECOWAS Member States;
f. The Community and its officials;” and
g. 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.

2. 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
3. Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose.’
4. The Court has jurisdiction to determine cases of violation of human rights that occur in 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 arbitrator for the purpose of Article 16 of the Treaty
6. The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement
7. 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,
8. 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.’

One important area in the mandate of the Court is the question of direct effect of Community Laws and the fact that it is open to Court to recognize the principle of direct effect. It is plausible that given the nature of its mandate and the Protocols and decisions of the Authority, that the Court can assert that Community Law has authority which can be invoked in national courts. It ought to be remembered that direct effect is not part of the European Community treaty but a principle of the European Court of Justice. Since the decision of the ECOWAS Court
is immediately binding, it would follow that ECOWAS citizens may invoke Community Law in their national courts. The importance of a recognition of the principle of direct effect lies in the nature of issues for which individuals\textsuperscript{36} can raise before the CEOWAS Court. By the provisions of Article 10(c) of the 2005 ECOWAS Court Protocol individuals and corporate bodies can bring proceedings for a determination of act or inaction of a Community official which violates their rights. By Article 10(d) of the same protocol they can also bring an application for relief for the violation of their human rights.

When it is remembered that some of the ECOWAS Protocols such as the Free Movement Protocol confer rights on ECOWAS citizens, there is no doubt that an ECOWAS citizen can bring a complaint on the implementation of the Free Movement Protocol to the ECOWAS Court. This had already occurred in \textit{Olajide v Federal Republic of Nigeria}\textsuperscript{37} where Mr Olajide, a Nigerian businessman complained of a breach of the Free Movement Protocol. Even though a preliminary objection of a lack of individual access to the ECOWAS Court was upheld, it is now a fact that the ECOWAS Court will hear the matter. The question is whether such a person can proceed to a Nigerian court and allege that the Nigerian Government by an act or inaction has breached the Free Movement Protocol. Will the Court recognize that as a Community citizen such a right exists and apply the Free Movement Protocol? To answer in the affirmative would mean that the principle of direct effect exists. It is our contention that the answer should be in the affirmative.

To further illustrate our contention that there is direct effect of ECOWAS Community law on Member States let us examine the nature of the access granted to national Courts. Article 10(f) of the ECOWAS Court Protocol provides that:

\textquote{Where in any action before a Court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations the national Court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.}

\textsuperscript{36} It is generally acknowledged that it was the denial of access to Mr Afolabi in \textit{Olajide Afolabi v. Federal Republic of Nigeria 2004 ECW/CCJ/04} (Judgment delivered in April 2004) that precipitated the review that led to the 2005 ECOWAS Court Protocol and the grant of individual access to the Court.

\textsuperscript{37} Ibid
The intention of this provision has been interpreted thus:

`Article 9 (6) [sic] of the Amended Protocol of the Court provides for 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 uniform interpretation of the various Community texts for an eventual emergence of a Community legal order. This will be of immense benefit to the lawyers and community citizens and at the same time allow for relationship between the ECOWAS Court and the national courts. The ECOWAS Courts’ role here is to give preliminary ruling as to the interpretation or validity of the Treaty provision or community Act, while the National Courts shall apply the ruling to the facts of the case. In other words, the Court’s role is to interpret, while the National Court’s role is to apply. Where the Court rules on a preliminary reference it is binding on the National Court which referred the question for consideration. If the same issue arises 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 unhappy with the previous ruling, it can make an additional reference, even if the matter is ante clair.38

The preliminary reference procedure enables a uniform interpretation of Community Law and may also imply that Community law can be raised in a national court. A national court may prefer to rely on Community law even if it is not bound by the law. The fact that the duty to make the preliminary reference is optional and a national court may deal with a matter without seeking a reference goes to show, it can be argued, that the relationship between the ECOWAS Court and the national court is not hierarchical but cooperative.39 On the other hand, Article 10(f) of the 2005 ECOWAS Court Protocol can also be additionally invoked to recognize the

39 See Danish Institute for Human Rights, 2008, African Human Rights Complaints Handling Mechanism 112. Available at www.humanrights/files/importerede%20filer/hr/pdf/Dokumenter%20til20Nyhesarkiv/African_HR_Complaints_Handling_Mechanisms.pdf (last accessed 24th July 2009): `The legal framework of the ECOWAS Court is silent on the question of cooperation. Art 10(f), as inserted by the 2005 ECOWAS Court Protocol, allos some form of relationship with national courts in the sense that it allows national courts to refer questions on the interpretation or application of the ECOWAS Treaty and other legal instruments to the national courts, whenever such questions arise in cases before national courts.`
principle of direct effect. Article 177 of the EU Treaty – similar to Article 10(f) - was enough to enable the ECJ to state in *van Geed en Loos* that:

‘the task assigned to the Court under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the States have acknowledged that Community Law has an authority which can be invoked by their nationals before their courts or tribunals.’

The essence of Article 10(f) of the 2005 ECOWAS Court Protocol is to ensure uniform interpretation which can take place before the ECOWAS Court or before national courts. It is my contention that the Free Movement Protocol has authority before national courts, because of the nature of its clear provisions endowing rights on ECOWAS citizens. While national measures inimical to the realization of the Protocol can be brought before the ECOWAS Court, an ECOWAS citizen can also bring an action before her national court seeking for example to invalidate such a law. It is also important to note that the national courts should be open to Community Citizens who are nationals of any of the Member States. Recognising direct effect of Community Law will oblige- rather than the present optional position-, national courts seized of a matter involving Community law to suspend the matter in order to seek interpretation from the ECOWAS Court, where there is none. In this way the ECOWAS Court will ensure uniform interpretation. It has been urged that it is the highest court of the land in the Member State that should seek an interpretation. This is a correct interpretation because when such an interpretation is handed down, it becomes part of the decision of the highest court of the land and therefore becomes of highest precedential value within the Member State.

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40 Note 6.
41 The nature of the judicial power of West African States do not seem to limit actions before them to nationals of their State. See for example section 6(6)b of the 1999 Constitution of the Federal republic of Nigeria. See also Gunme v Attorney General of the Federal Republic of Nigeria Suit No. FHC/ABJ/CS/30/2002 which upheld the contention that citizens other countries take out an action in Nigeria courts. See N. Enonchong `Foreign State Assistance in Enforcing the Right to Self-Determination under the African Charter: Gunme & Ors v Nigeria’46 (2002) *Journal of African Law* 246
42 See note 38.
The involvement of national courts in the integration process engages the citizens of Member States. The importance of national courts in the integration process cannot be overstated and is directly related to the ability of her citizens to be able to invoke community law before her. It is plausible that national acts or inaction can be impugned on the basis of inconsistency with Community law. Given the fact that a significant part of ECOWAS Community Law could be said to have direct effect it is easy to imagine how this may fundamentally change the legal system of Member States including well settled constitutional law and practices. Direct effect could be of monumental import and may serve to finally kick start the real business of integration in the ECOWAS.

Can the ECOWAS Court rise up to the challenge of recognizing the principle of direct effect or shall it lie with the Authority? If the activities of the Authority in the over three decades of the existence of ECOWAS is anything to go by, it is clear that not much can be done except the Authority recognizes that enforcing ECOWAS law by their citizens in their national courts is crucial in the integration process.

IV. DIRECT APPLICABILITY AND DIRECT EFFECT IN WEST AFRICAN NATIONAL COURTS - THE EXAMPLE OF ORGANISATION FOR THE HARMONIZATION IN AFRICA OF BUSINESSES LAW (OHADA)

OHADA was constituted by the OHADA Treaty signed at Port Louis Mauritius on 17 October 1993. Of the sixteen Member States of OHADA nine are also Member States of ECOWAS and

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46 The Charter members of OHADA are Benin, Burkina Faso, Central Africa Republic, Chad, Cameroon, Comores, Congo, Cote d’Ivire, Equatorial Guinea, Gabon, Mali, Niger, Senegal, and Togo. Guinea and Guinea Bissau joined later.
47 Benin, Burkina Faso, Cote d’Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.
it is to be noted that OHADA is open to all African States. OHADA has established uniform business laws for Member States that are applicable in the national courts of OHADA States as national laws. The OHADA Laws have direct effect as citizens of OHADA member States can invoke OHADA Laws- which override contrary provisions of a previous or subsequent national law- in their national courts.

Even though OHADA is not a regional economic community its activities resemble that of such a community and can become a fundamental building block of ECOWAS if the other Member States of ECOWAS join the organization. The organs of OHADA include the Conference of Heads of State and Government; a Council of Ministers; the Common Court of Justice and Arbitration and the Permanent Secretariat.

OHADA operates by issuing Uniform Acts. Preliminary Uniform Acts are prepared by the Permanent Secretariat which forwards same to Governments of Contracting States who have 90 days to make written comments on the draft. The preliminary Uniform Act, together with the observations of the Contracting States and a report of by the Preliminary Secretary is then forwarded to the Community Court of Arbitration and Justice which has to reach a determination and recommendation within 30 days. The Final text is adopted by a unanimous decision of the Council of Ministers. The Uniform Acts enter into force 90 days after their adoption by the Council of Ministers. They must be published in the Official gazettes of OHADA and Member States.

Article 14 of the OHADA Treaty endows the OHADA court with the jurisdiction to ensure the uniform interpretation and application of the OHADA Treaty, the regulations promulgated to further the treaty, the Uniform Acts. The national courts of Member States as well as parties to a case before a national court may refer a matter to the Court. The decision of the OHADA Court is binding and enforceable without more in Member States. In addition to referrals Article

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48 See Article 13 of the OHADA Treaty.
49 See Article 3 of the OHADA Treaty.
50 To date the following Uniform Acts have been issues- Uniform Act relating to general Commercial Law; Uniform Act relating to Commercial Companies and Economic Interest Groups; Uniform Act Relating to Organizing Securities; Uniform Act organizing Simplified Recovery Procedures and Measures of Execution and Uniform Act Organizing Collective Proceedings for Wiping off Debts
56 of the Rules of Procedure\textsuperscript{51} permits national courts to seek advisory opinions of the matters before the national court to enable her reach a decision.

There are still a number of considerable problems- the nature of the jurisdiction of the OHADA Court; the reluctance of national courts in referring cases to the OHADA Court, the practical difficulties for citizens of OHADA States to use the Court because of its location in Abidjan; and the execution of judgments\textsuperscript{52}- with the OHADA system but it represents a signpost of what is possible within ECOWAS.

\section*{V CONCLUDING REMARKS}

It will appear that the direct access which Community citizens have to the ECOWAS Court has the deceptive reality that Community citizens are involved in the integration process and are thus able to ensure the implementation of ECOWAS law. Even if this is so and that the ECOWAS Court is able to function at an optimal level, there will still be need for the direct applicability and direct effect of ECOWAS law in national courts. The deepening of the integration in the region depends partly on these principles. It appears that ECOWAS Member States understand the constitutional challenges posed by regional integration. It appears even further that the monist countries have a track record – because of the OHADA system- ion this regard. It is the English speaking countries whose constitutional order presents relatively heavier obstacles. It is hoped that the ECOWAS Court will facilitate the integration process by recognizing the direct applicability and direct effect of ECOWAS Laws.

\textsuperscript{51} See Rules of Procedure of the Joint Court of Justice and Arbitration. Available at \url{www.juriscope.org} (last accessed 27\textsuperscript{th} July 2009)
