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The ECOWAS Community Court of Justice and the horizontal application of human rights

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Summary

In three cases, Peter David v Ambassador Ralph Uwechue, The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria *and* Tandja v Djibo and Another*, the ECOWAS Community Court of Justice (ECCJ) has ruled that only ECOWAS member states and community institutions may be sued before it. This article reviews the conclusions of the ECCJ against the background of its dual mandate as a court of integration and human rights as it pertains to the articulation of community freedoms and human rights, and argues for a more integrated approach in the elaboration of the dual mandate of the ECCJ, which should recognise the horizontal application of human rights in the protection of community freedoms such as the free movement of goods, services, persons and capital.*

1 Introduction

In three cases, *Peter David v Ambassador Ralph Uwechue,*[1] *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria*[2] and *Tandja v Djibo and Another,*[3] the ECOWAS Community Court of

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1 (ECW/CCJ/RUL/03/10) (*Uwechue*).

2 (ECW/CCJ/APP/07/10) (*SERAP*).

3 (ECW/CCJ/05/10) (*Tandja*).

Justice (ECCJ)[4] has ruled that only Economic Community of West African States (ECOWAS) member states and community institutions can be sued before it. In *Uwechue* and *SERAP*, the ECCJ held that, in the event of a dispute between individuals on an alleged violation of human rights enshrined in the African Charter on Human and Peoples' Rights (African Charter), it is only when there is no appropriate and effective national forum for seeking redress against individuals that the victim of such offences may bring an action before the ECCJ, not against the individual, but against an ECOWAS member state for failure to ensure protection and respect for the human rights allegedly violated. These three cases have brought, at least from the Court, an emphatic resolution of the ambiguity which has trailed the adoption of article 9(4) of the 2005 Supplementary Protocol,[5] regarding who can be a defendant in a human rights case before the Court. In effect, the ECCJ reached significant conclusions on the horizontal application of human rights, important not just for ECOWAS but for other regional economic communities (RECs) in Africa and elsewhere.

The article reviews the conclusions of the ECCJ against the background of the dual mandate of the ECCJ as a court of integration and human rights as it pertains to the articulation of community freedoms and human rights, and argues for a more integrated approach in the elaboration of the dual mandate of the ECCJ, which should recognise the horizontal application of human rights in the protection of community economic freedoms, such as the free movement of goods, services, persons and capital that undergird common markets and economic unions. It is inevitable, as will be demonstrated later in this article, that certain human rights are directly implicated and often intertwined with the protection of economic freedoms as the reverse is also the case. Accordingly, since individuals can bring actions against ECOWAS member states for human rights abuses that are directly or indirectly connected to economic freedoms, there is no justifiable reason why they should not be able to do so against other individuals. Such actions invite regional judiciaries such as the ECCJ to curtail or remove obstacles to the attainment of common markets and economic unions. Consequently, it is clear that the capacity of individuals to proceed against other individuals in the protection of their economic freedoms flows from

4 The ECCJ is the judicial organ of ECOWAS. ECOWAS is a 15-member (Benin; Burkina Faso; Cape Verde; Côte d'Ivoire; The Gambia; Ghana; Guinea; Guinea Bissau; Liberia; Mali; Niger; Nigeria; Senegal; Sierra Leone; and Togo) regional economic community whose principal aim is to promote co-operation and integration leading to the establishment of a West African Economic Union. See art 3(1) of the Revised Treaty Establishing the Economic Community of West African States 1993 (Revised ECOWAS Treaty).

5 The 2005 Supplementary Protocol of ECOWAS (2005 Supplementary Protocol) amends the 1991 ECOWAS Community Court of Justice Protocol by granting direct access to individuals to the ECCJ for 'the violation of human rights that occur in any member state'.

the integration mandate of the ECCJ. Unfortunately it is doubtful if the cast and interpretation of the human rights jurisdiction of the ECCJ contemplate individual defendants. It will be contended that the human rights jurisdiction of the ECCJ is not a stand-alone jurisdiction, but is facilitative and intricately tied to the ECOWAS integration mandate and that the horizontal application of human rights by the ECCJ is crucial to substantive integration efforts in West Africa. Furthermore, it will be demonstrated that, unless individual complaints of a breach of human rights by other individuals are cognisable before the ECCJ, at least as they relate to integration issues, it will be impossible to holistically address issues and obstacles to the attainment of the integration objectives of ECOWAS.

The horizontal application of human rights refers to instances where individuals are parties to a case before a court and should not be confused with the enforcement of the positive treaty obligations of states that have a horizontal effect on individuals.[6] In such a circumstance, a state is the defendant before an international tribunal that is alleged to have breached positive treaty obligations in terms of the duty of the state to take all measures to ensure the effective enjoyment of a fundamental right different from negative obligations where the state abstains from human rights violations. The use of horizontal application in this article contemplates individual defendants before the ECCJ. Individuals can be defendants in at least two ways before a community court. The first way is by virtue of a treaty provision, whereby the state parties in manifestation of a consensus recognise the possibility that individual defendants can be sued before an international court. While it is not the usual practice, there are international courts that recognise individual defendants, an example of which is the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea (ITLOS).[7] The second way is through a referral procedure whereby national courts refer cases involving individual parties to the community court. The individual parties thereby become parties before the community court. The notion of the horizontal application of human rights proceeds from the belief that individuals, just like the state, are capable of human rights abuses. The recognition of individual defendants in national and international adjudication is a conceptual matter that affirms a legal system's belief that individuals are capable of human rights abuses. Whether particular individuals and other non-state actors, such as

6 See JH Knox 'Horizontal human rights law' (2008) 108 *American Journal of International Law* 1.

7 See art 37 of Annex VI (Statute of the International Tribunal for the Law of the Sea) to the United Nations Convention on the Law of the Sea 1982. See also FO Vicuña 'Individuals and non-state entities before international courts and tribunals' (2001) 5 *Max Planck Yearbook of United Nations Law* 53.

corporations, should be proceeded against is a procedural matter which is often a matter of evidence.

The article proceeds as follows. In the next section follows an overview of the ECCJ jurisprudence on the horizontal application of human rights. In part three, the nature of the human rights jurisdiction of the ECCJ is considered to provide a context for the view that the integration mandate of ECOWAS is not properly articulated, while part four explores the ramifications of human rights and economic freedoms in the horizontal application of human rights in the ECCJ.

2 Overview of the ECCJ jurisprudence on the horizontal application of human rights

This section reviews the ruling and judgments of the ECCJ in three cases – *SERAP*, *Uwechue* and *Tandja* – where the ECCJ held that it would not entertain suits against individual defendants for human rights abuses. All three cases were instituted pursuant to the human rights jurisdiction of the ECCJ, which is found in the amended article 9(4) of the 1991 Protocol[8] of the ECCJ,[9] which provides that the Court has jurisdiction to determine cases of violations of human rights

8 Art 3 of the 2005 Supplementary Protocol A/SP.1/01/2005 amended Protocol A/P.1/7/91 relating to the Community Court of Justice by deleting and substituting art 9 of the 1991 Protocol.

9 The jurisdiction of the ECCJ is as follows: '(1) The interpretation and application 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 legal instruments adopted by ECOWAS; (d) the failure by member states to honour 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; (g) the action for damages against a Community institution or an official of the Community for any action or omission in exercise of its official functions. (2) The Court shall have the power to determine any non-contractual liability of the Community and may order 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 3 (three) years from the date when the action arose. (4) The Court has jurisdiction to determine cases of violations 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 the 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 the powers conferred on it by this Protocol as well as any other powers that may be conferred by subsequent protocols and decisions of the Community. (8) The Authority of the 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 specified in this article.'

that occur in any member state.[10] It is important to make the tentative point that the provisions of the amended article 9(4) are ambiguous with respect to whether both states and individuals can be defendants in human rights cases,[11] since there is no clear indication that only states can be defendants in suits of human rights abuses. Since all that is required is that there is an allegation of human rights abuse in an ECOWAS state, it can be argued that the cast of article 9(4) contemplates suits against individual defendants. While this position may appear contrary to the practice of international courts and tribunals that permit only states as defendants, it is to an enabling treaty that recourse should be had in determining whether individuals can be defendants in an international tribunal or court. Where a treaty, such as the Revised ECOWAS Treaty, suggests that individuals can be defendants before the ECCJ, it must be taken to be a conscious decision to break from normal practice.

As stated above, in the *SERAP* case, the *Uwechue* case and the *Tandja* case, the Court ruled emphatically that only states and community institutions could be defendants in suits before the ECCJ involving claims of human rights abuses. The *SERAP* case involved the question of the jurisdiction of the ECCJ over complaints of human of rights abuses against the Nigerian government and five Nigerian oil companies concerning pollution and associated human rights violations in Nigeria's Niger Delta. The Socio-Economic Rights and Accountability Project had in its suit complained that the defendants had violated

> the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment, and to economic and social development … as a consequence of the impact of oil-related pollution and environmental damage on agriculture and fisheries, oil spills and waste materials polluting used for drinking and other domestic purposes, failure to secure the underlying determinants of health, including a healthy environment, and failure to enforce laws and regulations to protect the environment and prevent pollution.

One of the preliminary objections by the oil companies was that the jurisdiction of the ECCJ did not extend to disputes between individuals. In *Uwechue*, a Nigerian police officer brought an action against a former special representative of the Executive Secretary of ECOWAS, claiming a breach of his right to property, his right to work under equitable and satisfactory conditions, and his right to respect and freedom from discrimination pursuant to articles 1, 14, 15 and 28 of the African Charter. *Tandja* involved an action brought by the

10 All references to art 9(4) should be construed to mean the text as substituted by the 2005 Protocol.

11 See ST Ebobrah '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' (2007) 7 *African Human Rights Law Journal* 307 322, who also contends that 'the imprecise couching of article 9(4) and article 10(d) of the Supplementary Protocol leaves the door open for situations such as human rights actions against non-state actors before the Court'.

former President of Niger, Mamadou Tandja, against General Salou Djibo subsequent to his detention without trial following his removal from office by a *coup* mounted by a military junta led by General Djibo in 2010. Tandja alleged violations of articles 4 and 5 of the 1993 Revised ECOWAS Treaty; articles 1, 2, 3, 5, 6 and 18 of the African Charter; articles 2, 3, 8 and 26 of the International Covenant on Civil and Political Rights (ICCPR); and articles 5, 7, 8, 9, 13 and 25 of the Universal Declaration of Human Rights (Universal Declaration). In all three cases,[12] the ECCJ declined to assume jurisdiction over the individuals sued as defendants for human rights abuses.[13]

It is in *Uwechue* that the ECCJ sets out a detailed reasoning for declining the horizontal application of human rights. Two broad issues can be distilled from *Uwechue* as forming the crux of the Court's position. The first is that an unrestricted reading of article 9(4) would lead to a situation where the ECCJ replaces domestic courts in human rights cases[14] and will be overwhelmed by a flood of cases.[15] The second issue is the lack of evidence of a similar jurisdiction over individual defendants by any international or regional body whose jurisdiction is limited to states. The ECCJ further stated that in the event of a dispute between individuals on an alleged violation of human rights, the natural and proper venue is the domestic court of the state party where the violation occurred and that it is only when there is no appropriate and effective forum at the national level for seeking redress against individuals, that an action may be brought before an international court, not against the individuals, but against the signatory state for failure to ensure the protection and respect for the human rights allegedly violated.[16] The Court also stated that within the ECOWAS community, apart from member states, other entities that can be brought before the ECCJ for alleged violations of human rights are the institutions of the community because, since they cannot, as a rule, be sued before domestic jurisdiction, the only avenue left to the victims for seeking redress for grievances against those institutions is the Community Court of Justice.[17]

It is important that the ECCJ and other African REC courts of justice tilt towards a nuanced and contextual evolution of the horizontal application of human rights rather than an emphatic finality on the question of individual defendants. The principal reason canvassed in the ensuing paragraphs for a change in the jurisprudence of the ECCJ

12 It is important to note the earlier 2005 case of *Ukor v Layale* unreported Case CW/CCJ/APP/01/04, where the ECCJ adjudicated on a case involving an individual. No question of horizontal jurisdiction of the Court was raised before the Court, whose decisions were based on other grounds.

13 It is worth noting that the importance attached to this issue is such that the ECCJ *suo motu* raises this point. This is what happened in *Uwechue* (n 1 above) and again in *Tandja* (n 3 above).

14 See para 37 of *Uwechue* (n 1 above).

15 As above.

16 See paras 41-43 of *Uwechue* (n 1 above).

17 As above.

is the nature and extent of the human rights jurisdiction of the ECCJ in view of its dual mandate as a court of integration and a human rights court. It is argued that, at least, the human rights jurisdiction should be facilitative of the integration jurisdiction of the ECCJ and that, since individuals may proceed against member states for breaches of integration obligations, there is no reason why individuals should not proceed against other individuals for breaches of integration obligations. Thus, while acknowledging that *Uwechue*, *Tandja* and *SERAP* were reasoned correctly in view of their peculiar facts, it is the objective of this article to point out that there are circumstances related to the attainment of integration objectives that warrant individual defendants against whom human rights abuses may be alleged before the ECCJ. As stated above, the text of the Revised ECOWAS Treaty supports the view that there can be individual defendants before the ECCJ. In addition, the objective of a West African Economic Union requires that individuals who obstruct the attainment of this objective are challenged before the ECCJ.

It is important at this point to further consider how individual defendants may be brought before the ECCJ. As stated above, treaty provisions would be enough, even though the practice of international courts and tribunals indicates that this is not a common practice. Another way is through a referral procedure from a national court to a community court. It is therefore important to consider the relationship between the ECCJ and West African national courts within the context of the ECOWAS legal system. The role of the ECCJ is to ensure the uniform interpretation and application of ECOWAS law which is important, given the fact that were it otherwise, there could be as many as 15 national interpretations of ECOWAS law. Such interpretations could create obstacles to the attainment of a West African Economic Union because of the practical effect of different but confusing interpretations on a single subject matter.[18] National courts are allowed a margin of appreciation in implementing ECOWAS law as courts nearer to the people,[19] but in accordance with the application and interpretation of the ECCJ. While the principle of subsidiarity affirms the rights of national courts to deal with local issues, it also recognises that regional courts can in appropriate circumstances intervene to address shortcomings of national courts. To ensure the uniformity of community law, it is usual for regional courts to develop a preliminary ruling procedure that requires national courts to seek the interpretation of regional courts to enable her to discharge her adjudicative function. Such preliminary rulings bind and guide national courts. The ECOWAS legal system is no different. Article 10(f)

18 See generally ES Nwauche 'Enforcing ECOWAS law in West African national courts' (2011) 55 *Journal of African Law* 181.

19 See generally PG Carroza 'Subsidiarity as a structural principle of international human rights law' (2003) 97 *American Journal of International Law* 38.

of the Protocol of the Community Court of Justice[20] envisages a situation

> where in an action before a national court of a member state, an issue arises as to the interpretation of a provision of a treaty, or 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.

Since the decisions of the ECCJ are declared to be final and conclusive by articles 15(4) and 76(2) of the Revised ECOWAS Treaty, it follows that such an ECCJ ruling binds all ECOWAS national courts on that subject. The problem with the ECOWAS preliminary ruling procedure is that it is optional,[21] and an ECOWAS national court may refuse to seek such clarification from the ECCJ. What is worrisome is that there is no evidence that any West African national court has engaged with the preliminary reference procedure and referred any case to the ECCJ. It is not clear whether individual parties before the national court in the referred case would become parties before the ECCJ given the bare text of article 10(f) of the Revised ECOWAS Treaty. Would they be allowed to attend and argue their case before the ECCJ or would the ECCJ merely deal with appropriate documentation? It is important to note that individual defendants are able to participate in the reference proceedings at the European Court of Justice (ECJ) once a national court makes a reference in accordance with article 96 of the Rules of Procedure of the Court of Justice.[22] Accordingly, it is recommended that the ECCJ preliminary reference procedure recognises the parties (including individual defendants) in the main proceedings as participants. Other relevant questions include whether the reference is limited to cases of 'human rights abuses' which govern individual access to the ECCJ, or would cases also cover integration issues? The text of article 10(f) supports the contention that national cases could deal with all issues derivable from ECOWAS treaties, protocols and regulations. In sum, the ECCJ preliminary reference procedure is not in use and we are left without the benefit of how the procedure would have assisted the horizontal application of human rights. The glaring lack of a functional and effective preliminary ruling procedure of the ECCJ strongly underscores the importance of a horizontal application of human rights by the ECCJ so that the deficiencies of national courts in addressing individual obstacles to ECOWAS integration objectives can be effectively addressed. It is also important to draw attention to the uncertainty about the possibility of the horizontal application of human rights in

20 Inserted by the 2005 Supplementary Protocol.

21 See R Virzo 'The preliminary ruling procedures at international regional courts and tribunals' (2011) 10 *The Law and Practice of International Courts and Tribunals* 285 297.

22 See also Court of Justice of the European Union *The Court of Justice composition, jurisdiction and procedures* http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_2_kurumlar/Court_of_Justice.pdf (accessed 22 April 2013).

West African national courts.[23] What would national courts refer to the ECCJ if they do not permit individual defendants?

3 Nature and extent of the human rights jurisdiction of the ECCJ in comparative perspective

This section of the article critically examines the nature of the human rights jurisdiction of the ECCJ and it will be demonstrated that this jurisdiction is a stand-alone regime and not complementary to the integration objectives of ECOWAS. Accordingly, a declaration by courts like the ECCJ that there can be no individual defendants before it is an intuitive manifestation and furtherance of the conviction that their human rights jurisdiction is a stand-alone regional review of member states' human rights abuses. This conviction is oblivious of the interconnectedness of human rights and integration in their human rights jurisdiction.

A key issue to consider is whether the ECCJ human rights jurisdiction is stand-alone or is intimately connected with the integration mandate of the ECCJ. It is plausible to contend that, since the judicial enforcement of the ECOWAS human rights mandate is granted to the ECCJ which is a regional court exercising judicial competence over integration matters, it should follow that the human rights jurisdiction of the ECCJ is facilitative, at the least, of the ECOWAS integration mandate.[24] On the other hand, it is also possible to argue the opposite by contending that, even though the jurisdiction of the ECCJ potentially covers integration matters, the ECCJ has articulated and developed a significant competence over national human rights abuses in terms of its docket of human rights cases. To understand which position reflects reality it is important to dwell in some detail on the nature of the human rights jurisdiction of the ECCJ.

To begin with, it is important to refer to the aims and objectives of ECOWAS as contained in article 3(1) of the 1993 Revised ECOWAS Treaty,[25] which is to

23 Even though some doubt existed as to the horizontal application of human rights in Nigeria, this was erased in *Uzoukwu v Ezeonu II* (1991) 6 NWLR (pt 200) 708 and *Onwo v Oko* (1996) 6 NWLR (pt 456) 584. Subsequent cases, such as *Anigboro v Sea Trucks Ltd* (1995) 6 NWLR (pt 399) 35, applied sec 37 of the 1999 Constitution, and in *Salubi v Nwariakwu* (1997) 5 NWLR (pt 505) 35, the Court of Appeal interpreted sec 39(2) of the 1979 Constitution. However, the extent of the horizontal application of human rights remains uncertain. Eg, Nigerian courts have continued to hold that the right to a fair hearing is not available to an employee in a private contract of employment. See E Chianu 'Fair hearing for all Nigerian workers' (2007) 1 *CALS Review of Nigerian Law and Practice* 28.

24 See RF Oppong *Legal aspects of economic integration in Africa* (2011) 126, who clearly prefers an ECCJ of insignificant human rights jurisdiction.

25 The 1993 Revised ECOWAS Treaty reviewed the Treaty Establishing the Economic Community of West Africa States 1975 (ECOWAS Treaty).

> 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 to contribute to the progress and development of the African continent.

Another objective of ECOWAS is 'the removal, between member states, of obstacles to the free movement of persons, goods, services and capital and the right to residence and establishment'.[26] It is therefore clear from the Revised ECOWAS Treaty that ECOWAS is a regional economic community that is gradually evolving a human rights protection and promotion competence.[27]

If decisions of the ECCJ in *Ukor*[28] and *Jerry Ugokwe v Federal Republic of Nigeria,*[29] that the ECOWAS Treaty is supreme law, are followed, it is the objectives in the ECOWAS Treaty that should define her nature. In this regard, the relevance of human rights to the objective of the West African Economic Union is found in article 4(g) of the Revised ECOWAS Treaty, which declares 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' as one of the fundamental principles in the pursuit of the ECOWAS objective, which is the formation of a West African Economic Union. In this regard, an important provision of the Revised ECOWAS Treaty, which defines relevant human rights that facilitate the formation of an economic union, is found in article 59 which declares that ECOWAS citizens have a right of entry residence and establishment which had been recognised long before the Revised ECOWAS Treaty in a 1979 Protocol on the Free Movement of Persons, Residence and Establishment. Clearly, the Revised ECOWAS Treaty affirmed a long-standing economic integration objective of ECOWAS. This should ordinarily mean that the protection and promotion of human rights are directly tied to the attainment of a West African Economic Union. Accordingly, it can be concluded that the ECCJ human rights jurisdiction, by the text of the Revised ECOWAS Treaty, is facilitative of the objectives of a West African Economic Union.

This is the point to ask if the ECCJ agrees in its jurisprudence that its human rights competence is facilitative of the integration objectives of ECOWAS. The following brief narrative seeks to answer this question.

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26 See art 3(2)(d)(iii) of the Revised ECOWAS Treaty. See also art 2(1)(d) of the ECOWAS Treaty.

27 In this regard, it is to be noted that that the express mandate for human rights in the 2005 Supplementary Protocol appeared as the culmination of an increased focus on human rights democracy and good governance by ECOWAS by a number of protocols. See the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security; the 2001 Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

28 n 12 above, 21.

29 Suit ECW/CCJ/APP/02/05.

The first decision of the ECCJ in *Afolabi v Nigeria*[30] revealed the complexity of the nature and extent of the ECOWAS human rights regime. By the time *Afolabi* was decided under the 1991 Protocol of the ECCJ, there were contentious issues whether individuals could proceed against ECOWAS member states over human rights issues and/or economic freedoms. Article 9(1) of the 1991 Protocol had endowed the ECCJ with jurisdiction to 'ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the treaty'. Mr Afolabi complained to the ECCJ that Nigeria's unilateral closure of her borders with the Benin Republic was a violation of the Revised ECOWAS Treaty, the 1979 Protocol on the Free Movement of Persons, and article 12 of the African Charter.[31] The ECCJ struck out the complaint on the grounds that under the 1991 Protocol of the ECCJ, individuals had no standing and access to the Court. There is throughout the decision an implicit acceptance that with an express endowment of direct access, individuals could bring suits of human rights abuses against member states because this implicates economic freedoms. In the aftermath of and a direct response to the denial of individual access in *Afolabi* and other jurisdictional issues, the 2005 Supplementary Protocol of the ECCJ was adopted.[32] At first blush, the 2005 Supplementary Protocol provides the juridical basis that the ECCJ is a stand-alone human rights court. A closer reading of the Protocol indicates the contrary as there appears to be little textual support for this position. First, the Preamble to the Protocol recounts the 'role that the Court of Justice can play in eliminating obstacles to the realisation of community objectives and accelerating the integration process' as well as 'the need to empower the Community Court of Justice to play their part in effectively ensuring that member states fulfil their obligations'. It is clear that the Preamble envisages a court of complementary dual mandate. Secondly, the cast of the human rights jurisdiction in the 2005 Supplementary Protocol is not emphatic that the ECCJ is a stand-alone human rights court. Closely related to the status of the Court is the possibility of individual defendants because a stand-alone human rights court is unlikely to recognise individual defendants. Articles 3 and 4 of the Protocol are important because of the changes they brought to individual access and human rights provisions. Article 3 of the 2005 Supplementary Protocol inserts a new article 9 into the 1991 Protocol and grants the ECCJ additional competence to 'determine cases of violations of human rights that occur in any member state',[33] in addition to the normal jurisdiction of the ECCJ to 'interpret and

30 ECW/CCJ/JUD/01/04.

31 While the 1991 Protocol of the ECCJ made no mention of the African Charter, we have seen that the Revised ECOWAS Treaty refers to the African Charter.

32 See F Viljoen *International human rights law in Africa* (2010) 488; see also Ebobrah (n 11 above).

33 Para 9(4) of the 1991 Protocol as inserted by art 3 of the 2005 Supplementary Protocol.

apply the Treaty, Convention and Protocol'[34] and the 'interpretation and application of the regulations, directives, decisions and other subsidiary legal instrument adopted by ECOWAS',[35] amongst others. In addition, article 4 of the 2005 Supplementary Protocol inserted a new article 10 into the 1991 Protocol defining access to the ECCJ. The new paragraph 10(d) grants access to 'individuals on application for relief for violation of their human rights'. There is neither a qualification nor a definition of the nature and extent of this human rights competence. The first reaction of the ECCJ to the 2005 Supplementary Protocol is the decision in *Ukor v Layele,*[36] decided in 2005, which had an individual defendant.[37] Even though the case was decided on technical grounds, it is indicative of the belief that the ECCJ would entertain individual defendants. While the ECCJ has subsequently demonstrated that it would not entertain individual defendants, the initial indication of the ECCJ should not be surprising since the 2005 Supplementary Protocol encouraged the belief that individuals could be defendants in human rights suits brought before the ECCJ. If the ECCJ has in post-2005 cases excluded individual defendants, it is because of an imprecise understanding of the nature and extent of human rights and their relationship to economic freedoms and integration. While it is true that the express mandate for human rights in the 2005 Supplementary Protocol appeared as the culmination of an increased focus on human rights democracy and good governance by ECOWAS,[38] there is nothing, as discussed above, in the 2005 Supplementary Protocol that characterises the ECCJ as a stand-alone human rights court. The post-2005 cases reveal, on the contrary, that the ECCJ has become a *regional human rights court* with little or no reference to economic integration. This point is supported by a contextual reading of the decided or pending cases before the ECCJ. There is, it would appear from the cases, no evidence of allegations of human rights abuses in connection with integration objectives. For example, none of the cases so far adjudicated by the ECCJ concerns the 'rights of entry residence and establishment'. On the other hand, many of the pending cases before the ECCJ support the contention that the jurisdiction over non-integration national

34 Para (9)(1)(a) 1991 Protocol of the Court.

35 See para 9(1)(b) 1991 Protocol of the Court.

36 n 12 above.

37 See Ebobrah (n 11 above) 322, who contends that 'the imprecise couching of article 9(4) and article 10(d) of the Supplementary Protocol leaves the door open for situations such as human rights actions against non-state actors before the Court'.

38 See, generally, the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security; the 2001 Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. See especially art 39 of the 2001 Protocol which promised that the jurisdiction of the ECCJ 'shall be reviewed so as to give to the Court the power to hear, *inter alia,* cases relating to the violation of human rights after all attempts to resolve the matter at the national level'.

human rights abuses is the primary concern of the ECCJ. Thus, in *The Incorporated Trustees of the Miyettiallakautal Hore Socio-Cultural Association v Federal Republic of Nigeria,*[39] the applicants allege a violation of their right of life and property due to the unlawful killing of the Fulani population in communal crisis in the Jos Plateau State of Nigeria. Similarly, in *Alade v Federal Republic of Nigeria,*[40] the plaintiff alleged a violation of the right to liberty by his arrest and continued detention. In *Aminu v Government of Jigawa State,*[41] the applicant relied on sections 34, 35 and 36 of the 1999 Constitution of the Federal Republic of Nigeria to allege a breach of the right to dignity, life and fair trial over abuses emanating from an allegation that the plaintiff posted an insulting message about Governor Lamido of the Jigawa State of Nigeria. Similarly, article 2 of the Constitution of Liberia 1986 is the principal basis of a complaint of a breach of the right to property and due process of the law in *Ayika v Republic of Liberia.*[42]

Assuming, without conceding that the ECCJ is an exclusive human rights court, it is the content and meaning of human rights that determine the nature and scope of the ECCJ's human rights jurisdiction. Since the Revised ECOWAS Treaty does not catalogue the human rights applicable before the ECCJ, it appears potentially possible for the Court to conceive of a wide corpus of human rights, including economic freedoms, and make it easier to recognise individual defendants. Of all the normative sources of human rights in ECOWAS, it is settled that the African Charter is considered as a fundamental catalogue of human rights applicable in the ECCJ. It is not clear, however, whether the African Charter is regarded as exclusive. If it is exclusive, it would mean that the ECCJ will not look to other normative sources but only to the African Charter. If it were not, the ECCJ could rightly turn to other sources, even recognising rights that are outside the African Charter, but in other normative sources which could include the constitutive norms in the Revised ECOWAS Treaty. *Dicta* from ECCJ cases clearly show that, while early cases such as *Keita v Mali*[43] referred to ECOWAS primary and secondary legislation as the basis of the human rights jurisdiction of the Court, subsequent cases have shown a preference for the African Charter by reason of the Revised ECOWAS Treaty. In *Ugokwe v Federal Republic of Nigeria*,[44] the ECCJ recognised that, even though there are no catalogued rights which ECOWAS individuals or citizens may apply, the inclusion of the African Charter in article 4 of the Revised Treaty allowed the Court to turn to the African Charter. In *Bayi v Nigeria*,[45] in

39 Suit ECW/CCJ/APP/03/11.
40 Suit ECW/CCJ/APP/05/11.
41 Suit ECW/CCJ/APP/02/11.
42 Suit ECW/CCJ/APP/07/11.
43 Suit ECW/CCJ/APP/05/06.
44 n 29 above.
45 Suit ECW/CCJ/APP/10/06.

issue was the application of article 6 of the African Charter. In *SERAP v Nigeria*,[46] the ECCJ stated that it had competence to implement the African Charter in ECOWAS member states. In *Saidykiian v The Gambia*,[47] articles 1, 2, 5, 6 and 7(b) and (d) of the African Charter were in contention. In *SERAP 1*, the ECCJ stated that the ECOWAS Protocol on Democracy and Good Governance imposed on state parties an obligation to apply the African Charter.[48] However, while the cases discussed above reveal a preference for the African Charter, there is evidence to indicate that the ECCJ does not regard the African Charter as exclusive.[49] Accordingly, in a number of cases, other international human rights instruments have been applied. Thus, in *Bayi,* it was article 9 of the Universal Declaration. In *SERAP 1*, the ECCJ relied on the International Covenant on Economic, Social and Cultural Rights (ICESCR), while in *Amouzou v Côte d'Ivoire*,[50] ICCPR was applied by the ECCJ. Finally, in *SERAP 1*, the ECCJ further suggested that it would adhere to any international treaty which is evidence of the codification of the principle that individuals and corporations can be sued before international courts for human rights violations.[51] If the ECCJ is inclined to exercise some measure of discretion in the choice of the normative source of applicable human rights, it is easy to imagine that the Revised ECOWAS Treaty should be considered a credible source. If *Keita* and like cases are followed, article 59 of the Revised ECOWAS Treaty should be interpreted as conferring a human right on ECOWAS citizens, which should be sufficient to recognise individual defendants. While it is conceded that an article 59 right can be enforced against ECOWAS member states, it is important to make the point again that individual defendants can be as disruptive as states in the exercise of economic freedoms.

One consequence of the absence of a horizontal application of human rights before the ECCJ is the dual human rights regime which the ECCJ has recognised in its recent jurisprudence relating to the hierarchy between ECOWAS and West African national human rights regimes. The challenge which has confronted the ECCJ is whether the ECOWAS human rights regime is superior to national human rights regimes or the other way round. A number of examples indicate that the ECCJ prefers to ignore or sidestep this challenge. First, it would appear from *SERAP 1* that the ECCJ recognises a dual human rights order within ECOWAS. The first order is constituted by the human rights provisions of national constitutions, while the second order is the community order constituted by member states who have ratified

46 Suit ECW/CCJ/APP/08 (Preliminary Objection) (*SERAP 1*).
47 ECW.CCJ.JUD/08/10.
48 *SERAP 1* (n 46 above) para 63.
49 See ST Ebobrah 'Subregional mechanisms for the protection of socio-economic rights in Africa: Reflections on the budding jurisprudence of the ECOWAS Court' (2010) 11 3 *ESR Review* 9-11.
50 Suit ECW/CCJ/APP/01/09.
51 n 46 above, para 69.

the African Charter and other international human rights instruments which the ECCJ has expressly stated are the sources of the human rights applicable in the ECOWAS region. The dual human rights legal order recognised in *SERAP 1* appears to be a reaction to the argument that allegations of a breach of socio-economic rights cannot be entertained by the ECCJ because chapter 2 of the 1999 Nigerian Constitution does not permit the justiciability of socio-economic rights. While a dual legal order appears suitable to a stand-alone human rights mandate, as interpreted by the ECCJ, it is clearly antithetical to an integration objective of an economic union where it is important that the community legal system is superior to the national legal system within an integrated economic legal order.

It would appear that a dual human rights legal order makes it easier to reject the horizontal application of human rights because the ECCJ would have to reach into member states' legal systems to enforce decisions concerning individuals. It should be remembered that one of the bases of rejecting horizontal application, as articulated by the ECCJ in *SERAP*, *Uwechue* and *Tandja*, is that the ECCJ is wary of replacing national courts in human rights cases which ultimately could lead to an avalanche of cases before the ECCJ. It is important to wonder whether the objective of a West African economic union can be realised without a clear hierarchical relationship between the ECOWAS legal order, on the one hand, and national human rights regimes on the other, with the former as the superior. Such a relationship, which is inevitable and crucial in the integration process, is facilitated by a preliminary reference procedure. In addition, permitting individual defendants direct access to the ECCJ would clarify the contours of ECOWAS law which national courts are bound to apply. Recognising the horizontal application of human rights requires a determination of this relationship which facilitates the integration process. It would be strange to imagine that a vertical application of human rights would demand any less of this hierarchical relationship.

For comparative purposes, this section of the article now turns to a consideration of the nature of the human rights jurisdiction of the East African Community Court of Justice (EACJ) and the suspended Southern African Development Community Tribunal (SADC Tribunal). Even though the EACJ and the SADC Tribunal were not endowed with a human rights jurisdiction by their enabling treaties, they developed and claimed a human rights jurisdiction indirectly. Whether they recognise the horizontal application of human rights is intricately tied to the issue of whether they are dual mandate courts or stand-alone human rights courts.

The jurisdiction of the EACJ includes the interpretation and application of the EAC treaty[52] and 'such other original, appellate, human rights and other jurisdiction as will be determined by the

52 See art 27(1) of the EAC Treaty.

Council at a subsequent date'. EAC partner states are to 'conclude a protocol to operationalise the extended jurisdiction'.[53] There is still no protocol to deal with the human rights jurisdiction of the EACJ, even though a draft protocol exists which is a basis of ongoing negotiations.[54] The fact that there is no express jurisdiction over human rights has not stopped the possibility of an EACJ human rights jurisdiction. The hint of a treaty-based human rights jurisdiction appeared in *Katabazi and Others v Secretary-General of the East African Community and Another*,[55] where the Court stated that '[w]hile the Court will not assume jurisdiction to adjudicate human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violations'. This point was reaffirmed in *Attorney-General of Kenya v Independent Medical Legal Unit*[56] and in *Attorney-General of Republic of Rwanda v Rugumba*,[57] where the EACJ held that a breach of the fundamental objectives of the EAC in articles 6(d)[58] and 7(2)[59] of the EAC Treaty conferred jurisdiction on the EACJ.

Since it is now beyond doubt that the EACJ has indirectly claimed a human rights jurisdiction, it is important to point out that in the articulation of the much-awaited EACJ human rights protocol, care should be taken to ensure that some of the pitfalls that have befallen the ECCJ are avoided so that the EACJ does not by default become a stand-alone human rights court, but a dual mandate court which in due course will recognise individual defendants. For now, only state

53 See art 27(2) of the EAC Treaty.

54 See *Sebalu v The Secretary-General of the East African Community* (Reference 1 of 2010) judgment delivered on 30 June 2012. In this case, the EACJ held, *inter alia*, that the Secretary-General of the East African Community and other respondents had not discharged their obligations regarding the conclusion of a protocol to operationalise the extended jurisdiction of the EACJ.

55 (2007) AHRLR 119 (EAC 2007).

56 Appeal 1 of 2011, judgment delivered on 15 March 2012, http://www.eacj.org/docs/judgements/Attorney_Gen_of_Kenya_IMLU-15_03_2012.pdf (accessed 18 October 2012): 'In these circumstances, we are of the view that the decision taken by the First Instance Division that it would not abdicate its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violations was sound, because the EACJ is the institution mandated to determine whether a partner state has or has not breached, infringed, violated or otherwise offended the provisions of the Treaty.'

57 Appeal 1 of 2012, http://www.eacj.org/docs/judgements/AG_Republic-of_Rwanda_Vs_Plaxeda-Ruguma.pdf (accessed 18 October 2012).

58 'Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equity, as well as the recognition, promotion of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights'.

59 'The partner states undertake to abide by the principles of good governance, including adherence to the principle of democracy, the rule of law, social justice and the maintenance of universally-accepted standards of human rights.'

parties or institutions of the Community and not individuals or natural persons are envisaged as defendants before the Court.[60]

Like the EACJ, the absence of an express human rights jurisdiction did not stop the SADC Tribunal before suspension of the Tribunal[61] from holding in *Mike Campbell (Pvt) Limited v Zimbabwe*[62] that it is competent to hear human rights cases because of its competence to apply and interpret the treaty establishing the Southern African Development Community (SADC). The Court stated that article 4(c) of the SADC Treaty enjoins the SADC and its member states to act in accordance with 'human rights democracy and the rule of law'.[63] Before the suspension, it would appear that the horizontal application of human rights was not contemplated by the SADC Tribunal as a result of the combined reading of articles 14 and 15 of the 2000 Protocol on the Tribunal and Rules of Procedure (SADC Protocol). It would appear, on a general note, that the prospects of the horizontal application of human rights before the SADC Tribunal was not different from the position of the ECCJ and EACJ explored above. The possibility that the situation will be different in a future SADC Tribunal appears to have been considerably diminished because of the decision of the SADC Heads of State and Government to negotiate a new Protocol on the Tribunal whose mandate should be confined to the interpretation of the SADC Treaty and Protocols relating to disputes between member states.[64]

4 Human rights and economic freedoms in the horizontal application of human rights in the ECOWAS Community Court of Justice

This section argues that the dual mandate of the ECCJ as a court of integration and human rights, with the latter in a more facilitative character, is a fundamental reason why the conclusive determination by the ECCJ that individual defendants cannot be sued before the court is not sustainable. The intricate relationship between human rights and economic freedoms in ECOWAS requires that individuals

60 See *Nyongo v Attorney-General of Kenya & Others* [2007] EACJ 6*; Modern Holdings v Kenya Ports Authority* (Reference 1 of 2008) ruling delivered on 12 February 2009 http://www.eacj.org/docs/final%20%20MODERN%20HOLDINGSVS%20KENYA%20PORTS%20AUTHORITY%202.pdf (accessed 30 April 2013).

61 The SADC Tribunal was suspended first for one year in 2010, and in 2011, the Heads of State and Government of the SADC decided to continue with the suspension. In 2012, the Summit decided to review the jurisdiction of the Tribunal.

62 [2008] SADCT 2.

63 See also arts 5, 6 & 33 of the SADC Treaty.

64 See para 24 of the Final Communiqué of the 32nd Summit of SADC Heads of State and Government held in Maputo, Mozambique, on 18 August 2012, http://www.sadc.int/files/3413/4513/9049/final_32nd_Summit_Communique_at-August_18_2012.pdf (accessed 18 October 2012).

should be defendants in appropriate cases in the protection of their human rights and economic freedoms. Rather than imagine that the 2005 Supplementary Protocol turns the ECCJ into an exclusive human rights court, it is plausible that it contemplates individual defendants just as it assists individuals to proceed against member states who breach their human rights in the exercise of their economic freedoms.

There is a close relationship between human rights and integration because of the fact that ordinary citizens who are beneficiaries of and participants in regional integration are also bearers of human rights. It can be argued that human rights issues are implicated when individuals complain that their economic freedoms have been curtailed by REC member states or individuals. The reverse is not the case, since there are many cases of allegations of the abuse of human rights that do not implicate economic freedoms and integration. Thus, an REC court of justice such as the escape aligning questions of human rights and economic freedom when individuals are involved. In a regional economic grouping with the objective of a customs or economic union, it is often the case that economic freedoms should trump many human rights, just as the reverse is also true. In shutting out individual defendants from its jurisdiction, the ECCJ has demonstrated a less than wholesome understanding that in seeking to ensure that the West African Economic Union is achieved, the removal of obstacles to the free movement of people, goods, services and capital significantly affects the human rights of ECOWAS citizens and that it is important that these citizens should have an opportunity to obtain redress against other citizens whose activities either create obstacles to their enjoyment of the economic union or whose activities infringe their human rights in the course of their enjoyment of their economic freedoms. A fundamental human right can define the scope of an economic freedom just as an economic freedom can also constrain the exercise of human rights. To illustrate this point, it is important to note that national peculiarities require that there are exceptions to the uniform application of economic freedoms. Thus, all ECOWAS economic freedoms underpinning the economic integration of ECOWAS contain derogation clauses which have to be justified, at least on the grounds of public policy.[65] Justification often requires a balancing of the economic freedom and objective of the derogation (restriction).

Such justification often involves an evaluation to determine whether the restriction serves an overall general interest, is suitable for securing the attainment of the objective which it seeks and does not go further than is necessary in order to attain its objective. It is often the case that implementing a fundamental human right is the objective which restricts an economic freedom. For example, national children's rights

65 See eg art 3(4) of the ECOWAS Supplementary Protocol A//SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on the Free Movement of Persons, Right of Residence and Establishment.

can be a barrier to the free movement of goods with the former put forward as a basis of restricting the movement of goods in a member state, while the same goods move freely in another member state that has no such restriction. Again, the nature of public policy in terms of national security that can be used to deny a community citizen a right of residence varies from state to state, since the national articulation of human rights is not uniform in RECs and therefore can serve as barriers to the free movement of goods, services and capital. For example, even though all ECOWAS member states are state parties to the African Charter, the manner in which the African Charter is domesticated is different and could give rise to national interpretations which affect how the ECOWAS economic freedoms are interpreted. Of equal, if not more, importance is the manner in which national constitutions and judiciaries articulate fundamental human rights. For example, while the 1999 Constitution of the Federal Republic of Nigeria does not protect socio-economic and cultural rights, the 1992 Constitution of the Republic of Ghana protects certain socio-economic rights. It is apparent, therefore, that national judiciaries are likely to interpret ECOWAS legal instruments differently were they to be regarded as having a final say on the matter.

To ensure a uniform application of economic freedoms in a common market or economic union, it is important that certain human rights underlying restrictions or defining the exercise of economic freedoms are evaluated and justified. The ECCJ is therefore a critical institution in ensuring a uniform application of economic freedoms which otherwise would be different and could thereby constitute an obstacle to the exercise of economic freedoms. If an individual complains about the breach by another individual of a national law pursuant to a nationally-protected fundamental human right but which conflicts with an economic freedom, it is crucial that the ECCJ reviews such questions of compatibility. A good example of a clash between an economic freedom and a human right in ECOWAS is provided by the facts of *Garba v Benin,*[66] where the applicant alleged that his right to free movement, as protected by the ECOWAS Protocol on Free Movement of Persons, Right to Establishment and Establishment, as well as his right to dignity as protected by article 5 of the African Charter, were violated because of the demand by Benin officials for gratification and physical assault respectively which could also justify a personal action against these officials who may have been acting outside the scope of their employment. Again, just like in *Afolabi*, the ECCJ shrank from a frontal resolution of the clash between the enforcement of economic freedoms and human rights in clarifying the nature of the article 59 rights with respect to actions of ECOWAS member states. The ECCJ decided the case on a technical ground of the inability of the applicant to prove the incident and to link particular police officers to the event. It may have been possible to

66 ECW/CCJ/APP/03/09, judgment delivered on 17 February 2009.

hold such police officers personally liable for their actions. Furthermore, a reasoned judgment on the merits of the case would have been catalytic to the objective of a West African Economic Union because it would have drawn attention to state and non-state obstacles that impede the economic integration of West Africa. In this way, the understanding of the enforceability of the Free Movement Protocol would have greatly assisted the enforcement of such freedoms against individuals.

For comparative purposes, this part of the article turns to the EAC where a number of protocols are designed to facilitate the integration of the EAC which also implicates human rights issues. These protocols include the Protocol on the Establishment of the East African Community Common Market,[67] which provides for the establishment of an East African Community Common Market pursuant to articles 2(2) and 5(2) of the EAC treaty, which in turn envisages the East African Community Common Market as an integral part of and a transitional stage to the East African Community.[68] The Protocol provides in annexes for the free movement of goods, persons, labour, services and capital as well as the right of establishment and residence. These freedoms and rights appear to create obligations which EAC citizens could use as a basis of actions before the EACJ without an express human rights jurisdiction. For example, article 13(8) of the EAC Common Market Protocol provides that the right of establishment 'shall entitle ...' Furthermore, article 13(7) provides that the right of establishment shall be subject 'to limitations imposed by the host partner state on grounds of public policy, public security or public health'. Even though the possibility of the horizontal application of human rights in the EACJ appears remote, as argued above, a recent reference before the EACJ has brought to the fore the fact that resolving issues of integration involves the horizontal application of human rights. In *Alcon International Limited v Standard Chartered Bank and Others,*[69] Alcon sought orders to the effect that articles 27(2) and 151 of the Treaty for the Establishment of the East

67 EAC Common Market Protocol.

68 The East African Community Common Market commenced on 1 July 2010.

69 Ref 6 of 2010, ruling delivered on 24 August 2011. See also *Alcon International Limited v The Standard Chartered Bank of Uganda* Appeal 2 of 2011, judgment delivered on 16 March 2012, where the Appeals Division of the EACJ remitted the matter back to the First Instance Division of the Court for a hearing on the merits of the case. The judgment is available at http://www.eacj.org/docs/judgments/Judgements_on_Alcon_16_03_12.pdf (accessed 18 October 2012).

African Community together with articles 29(2)[70] and 54(2)(b)[71] of the Protocol on the Establishment of the East African Community Common Market endow an enhanced jurisdiction of the EACJ as a competent judicial authority with regard to the enforcement of and enhancement of trade and settlement of disputes for the protection of cross-border investments and that the EACJ is a competent judicial authority for the determination of cross-border trade disputes between persons from the partner states of the East African Community; that the EACJ has the jurisdiction to enforce a statutory/ legal duty owed to a person from a different partner state where a public official in the home state fails to honour such duty. A number of preliminary points of law were raised on behalf of the respondents, including the fact that under article 30 of the Treaty, references must be brought only against an EAC state party or an institution of the EAC, the settlement of disputes under the Protocol is by competent institutions in the partner states, and that no protocol has been passed, as is required, to operationalise the extended jurisdiction of the EACJ to provide for original, appellate, human rights and other jurisdictions pursuant to article 27(2) of the EAC Treaty. The EACJ made no finding on the question as to whether Standard Chartered Bank, as a private party, could be a party to a reference before the EACJ and whether the Common Market Protocol could possibly enhance the jurisdiction of the EACJ without an enabling instrument. Since previous decisions of the EACJ have held that individual defendants are not recognised before the EACJ, it is likely that the Court will hold that Standard Chartered Bank cannot be a party to the case. In *Modern Holdings v Kenya Port Authority,*[72] the EACJ ruled that a reference concerning the Kenya Ports Authority was not properly before her because the KPA is not one of the institutions envisaged by article 30 of the EAC Treaty. Earlier, in *Professor Peter Nyongo v*

70 Art 29(2) of the East African Common Market Protocol provides that '[f]or the purposes of complying with the undertaking by member states to protect cross-border investments and returns of investors of other state parties within their territories, state parties shall ensure (a) protection and security of cross-border investments of investors of other partner states; (b) non-discrimination of the investors of the other partner states by, according to these investors, treatment no less favourable than that accorded in like circumstances to the nationals of that partner state or to third parties; (c) that in case of expropriation, any measures taken are for a public purpose, non-discriminatory, and in accordance with due process of law, accompanied by prompt payment of reasonable and effective compensation'.

71 Art 54(1) of the Common Market Protocol provides that '[a]ny dispute between the partner states arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the EAC Treaty'. Art 54(2) further provides that state parties guarantee that '(a) any person whose rights and liberties as recognised by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and (b) the competent judicial, administrative or legislative authority or any other competent authority shall rule on the rights of the person who is seeking redress'.

72 Reference 1 of 2008 (ruling 12 February 2009). See also *East African Law Society & Others v Attorney-General of the Republic of Kenya & Others* (Reference 3 of 2008).

Attorney-General of Kenya and Others,[73] the Court struck out a reference against three individuals for lack of capacity. Given this jurisprudence, it is plausible that the EACJ is likely to hold that it will not entertain the horizontal application of human rights. It is clear, however, from *Alcon* that the notion that the integration protocols confer rights on private individuals *qua* other individuals is a strong one.

Even though highly unlikely, let us assume that the human rights jurisdiction of the SADC Tribunal is transferred to another body in the SADC leaving the SADC Tribunal seized only of integration matters. It is contended that such a tribunal will naturally gravitate towards recognising the intricate relationships between human rights and integration and address issues of the horizontal application of human rights. It is important to sketch how such a relationship arises in the SADC, and we shall proceed from the fact that the SADC is a free trade area and that the Protocol on Trade[74] is a key vehicle of implementation. In addition, it is envisaged that the SADC will become a customs union by 2010 and an economic union by 2018.[75] The Protocol on Trade contains numerous norms and standards dealing with the elimination of import and export duties, non-tariff barriers, tariff barriers, standards, quantitative import restrictions, and anti-dumping measures, to mention just a few. One potential basis of a trade dispute can be found in article 9 of the Trade Protocol which permits member states to take measures that derogate from the provisions on quantitative import and export restrictions, to the extent that such measures do not constitute a means of arbitrary or unjustifiable discrimination between member states, or a disguised restriction on intra-SADC trade. The measures must be:

(a) necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws and regulations which are consistent with the provisions of the WTO;

(d) necessary to protect intellectual property rights, or to prevent deceptive trade practices;

(e) relating to transfer of gold, silver, precious and semi-precious stones, including precious and strategic metals;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

73 Reference 1 of 2006 (ruling 30 February 2007).

74 The Protocol on Trade entered into force on 25 January 2000. The implementation phase of the Protocol began on 1 September 2000 and the implementation of the tariff phase-out is supposed to lead to a free trade area in 2008. See in this regard the Communiqué of the 28th Summit of the SADC Heads of State and Government held on 16-17 August 2008, http://www.sadc.int/fta (accessed 13 February 2012).

75 See the SADC Regional Indicative Strategic Development Plan (RISDP) of 2003.

(g) necessary to prevent or relieve critical shortages of foodstuffs in any exporting member state;

(h) relating to the conservation of exhaustible natural resources and the environment; or

(i) necessary to ensure compliance with existing obligations under international agreements.

It is evident that many human rights issues are implicated in the interpretation of this derogation clause and that the omission or acts of individuals, even if in reliance on national laws and constitutional provisions of fundamental human rights of SADC states, can be a challenge as norms and standards of the Trade Protocol are implemented. There is no reason why individuals should not be the subject of suits of allegations of breaches of human rights on the basis of the provisions of the Trade Protocol or breaches of the freedoms contained in the Trade Protocol on the basis of a number of nationally-protected human rights. Given the fact that the SADC dispute settlement mechanism does not contemplate individuals, it is possible that the lack of trade disputes is partly because it is perceived that trade disputes are inter-state disputes and not for private parties.[76] But for the recent suspension of the SADC Tribunal, it is a reasonable proposition that suits implicating compliance with the Trade Protocol and the exercise of human rights by individuals would have been brought before the Tribunal through the dispute settlement procedure found in Annex VI to the Protocol on Trade which provides for the settlement of disputes through a panel procedure similar to the WTO dispute settlement mechanism.[77] Article 20A(1)[78] of the Protocol on the Tribunal confers appellate jurisdiction on the SADC Tribunal with respect to any dispute relating to legal findings and conclusions established under any Protocol. Only parties to a dispute may appeal from the findings of a panel, even though a third party may appeal a panel report if they have substantial interest pursuant to the Rules.[79] Even though the dispute settlement procedure has not been tested because of deficiencies in the content and structure of the procedures outlined in Annex VI,[80] the fact remains that the panel procedure envisaged under Annex VI is not open to individuals against individuals. The likelihood that this will change could be at the instance of the SADC Tribunal. There is ample latitude for the SADC Tribunal to develop jurisprudence permitting horizontal application when it is remembered that the recognition of a human rights jurisdiction was absent in any express human rights

76 n 75 above, 31.

77 See generally C Ng'ong'ola 'Replication of the WTO dispute settlement processes in SADC' (2011) 1 *SADC Law Journal* 35-62.

78 This provision was inserted by art 5 of the Agreement Amending the Protocol of the Tribunal of 17 August 2007.

79 Art 20A(2) of the Protocol on the Tribunal.

80 See G Erasmus 'Is the SADC trade regime a rules-based system' (2011) 1 *SADC Law Journal* 17.

jurisdiction in the SADC Treaty. In this regard, article 21(b) of the Protocol on the Tribunal allows the SADC Tribunal to develop its own community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of member states. It is hoped that issues such as the horizontal application of human rights will be one of the objectives of the revision of the mandate of the SADC so that, as Erasmus notes, private parties will be protected when involved in trade and doing business in the SADC region.[81]

Before ending this section, the article turns briefly to the experience of the European Court of Justice in the horizontal application of human rights. First, the fact that the ECJ will recognise the horizontal effect of human rights has been recognised with respect to directives issued by the European parliament. In *Kukudeveci v Swedex GmbH & Co KG*,[82] the European Court of Justice held that a European Union citizen could rely on general principles of European law as given expression in directives in a dispute against another European Union citizen. In this case, a German national, Mrs Kukudeveci, was able to rely on the general principle of non-discrimination on the ground of age as given expression in Council Directive 2000/78/EC.[83] In this case, the fundamental right in question was freedom from discrimination on grounds of age.[84] While academic commentary on the effect of *Kukudeveci* recognises the controversial but limited effect of the *Kukudeveci* judgment,[85] it represents the possibility that the ECJ could in appropriate circumstances recognise more grounds for the horizontal effect of fundamental human rights in the European Union. In this regard, the recent decision of the ECJ in *Maribel Dominquez v Centre Ouest Atlantique and Prefet de la Region Centre*[86] affirms the application of European Union fundamental rights in disputes between private parties.[87] Secondly, there is conclusive jurisprudence that the EU economic freedoms are capable of horizontal application before the European Court of Justice as it ensures the uniform interpretation of the scope of these freedoms that facilitate the goals

81 See G Erasmus 'What future now for the SADC Tribunal? A plea for a constructive response to regional needs' http://www.tralac.org/2012/08/22/what-future-now-for-the-SADC-Tribunal-plea-for-a-constructive-response-to-regional-needs/ (accessed 18 October 2012).

82 Case C-555/07.

83 Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation.

84 See previous related cases such as *Werner Mangold v Rudiger Helm* [2005] ECR I-9981.

85 See eg J Krzeminska-Vamvaka 'Horizontal effect of fundamental rights and freedoms: Much ado about nothing? German, Polish and EU theories compared after *Viking Line*' Jean Monnet Working Paper 11/09 (2009). See generally G Brüggmeir *et al* (eds) *Human rights and private law in the European Union: A comparative overview* (2010).

86 Case C-282/10 judgment of 24 January 2012.

87 See M de Mol 'Dominquez: A deafening silence' (2012) 8 *European Constitutional Law Review* 280.

of the European Union. For example, in *BNO Walrave and LJN Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*[88] the Court stated:[89]

> The abolition, as between member states, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of state barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by pubic law, of their legal autonomy.

Again, in *International Transport Workers Federation and Finnish Seaman's Union v Viking Line*,[90] the ECJ entertained an action by a Finnish Line alleging a breach of its freedom of establishment by a trade union.

The lessons of the enforcement of economic freedoms by the ECJ fly in the face of the jurisprudence of the ECCJ that similar international bodies do not admit individual defendants. It is, however, a fact that the horizontal application of human rights is crucial in Africa's integration schemes that is of overwhelming importance.

5 Conclusion

It is inevitable that the horizontal application of human rights will continue to challenge the ECCJ and other African REC courts of justice because of the nature of regional integration, which often requires ordinary citizens to seek redress against other citizens on the basis of a human rights claim. The reluctance of the First Instance Division of the East African Court of Justice in *Alcon* in addressing issues of the enforcement of common market freedoms hints at some recognition that ultimately ordinary citizens will have their day in court against other citizens as the process of integration deepens. It is hoped that the ECCJ and other African REC courts of justice will quickly recognise that economic freedoms can be subverted by governments and individuals. The process of aligning their human rights and integration mandates is overdue if the ECCJ and African REC courts of justice as courts of integration and human rights are to make significant contributions to deepening regional integration which is still, decades later, at an embarrassingly low level. The elaboration of the ECCJ preliminary reference procedure should, at the very least, assist in this regard.

88 [1974] ECR 1405 para 18.
89 See also *Union Royale Belge des Societas de Football Association & Others v Bosman & Others* [1995] ECR I-4921.
90 [2007] ECR I-10799.