



Jurisdictional Competence of Courts and Contradictions in the ECOWAS Legal Order: Seeking Broader Access and Rights of Establishment

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Abstract

A fundamental contradiction within the ECOWAS legal order is that individuals, who are key drivers of regional integration, lack the legal standing to access the ECOWAS Court of Justice to enforce their establishment rights. But as it currently stands, and by implication, a corporate body cannot rely on the provisions of the ECOWAS Supplementary Protocol, particularly article 10(d), to litigate any violation against its right of establishment. Although the ECOWAS Court's jurisdiction was expanded in 2005, individuals still lack the means to enforce their establishment rights. Against this background, however, this study challenges the position of ECOWAS in this regard by investigating whether any other means of protection are available to ECOWAS citizens (including corporations) who may venture into another ECOWAS State for establishment. This study adopts a comparative approach to examine the East African Community framework's stance on the protection of individuals' economic rights within its jurisdiction. The study concludes that Community citizens should have broader access to the ECOWAS Court to enforce establishment rights.

Keywords

ECOWAS;
Establishment;
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1. Introduction

The ECOWAS Community Court of Justice (ECCTJ) was established in 1991 by Protocol A/P. I/7/91 on the Community Court of Justice.¹ The Court was opened to individuals by a Supplementary Protocol A/SP.1/01/05 in 2005.² It cannot be overemphasised that individuals do not have the competence to seize the jurisdiction of the ECCTJ to challenge the violation of their rights of establishment before the ECCTJ. This right of establishment is the third phase of the Protocol on Free Movement of Persons, Residence and Establishment. It grants citizens who are nationals of an ECOWAS member State the right to settle, work, and operate businesses in another member State other than their own. In a similar vein, the right of establishment, as part of the ECOWAS legal instrument, also aims to foster economic integration by promoting investment and enabling citizens to contribute to regional prosperity.

Accordingly, the individual may rely on the domestic laws of the violating State and/or on the ECOWAS instruments for the protection of their rights as a foreign investor in a member State. By so doing, such an individual is expected to utilise such legal means as afforded by the Community instruments in ensuring the safety and protection of their investment(s) from the wrongful act of the host State in which such investments are made. This rests on the firm conviction that free movement of persons, goods, services, and capital not only constitutes the fundamental basis for enhancing and consolidating the dividends of economic integration under the ECOWAS mechanism but also is capable of influencing the harmonious development of socio-economic and cultural activities within the sub-region.³ Thus, Article 59 of the ECOWAS Revised Treaty provides that:

Citizens of the Community shall have the right of entry, residence, and establishment, and Member States undertake to recognise these rights of Community Citizens in their territories in accordance with

¹ Protocol A/P.1/7/91.

² Supplementary Protocol A/SP.1/01/05 Amending the Preamble and articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice.

³ [J. O. Bolarinwa](https://journals.sagepub.com/doi/abs/10.1177/0975087815580731), “The ECOWAS Free Movement Protocol: Obstacle or Driver of Regional Integration?”, available at <https://journals.sagepub.com/doi/abs/10.1177/0975087815580731>. Accessed 28 May, 2025. Also see J. Agyei and E. Clotey, “Operationalising ECOWAS Protocol on Free Movement of People among the Member States: Issues of Convergence, Divergence and Prospects for Sub-Regional Integration”, (2013), available at http://www.imi.ox.ac.uk/pdfs/rese_arch. Accessed 28 May, 2025.

the provisions of the Protocols relating thereto; and 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.

This was reaffirmed in Article 2 of the ECOWAS Protocol on Free Movement of Persons, Residence and Establishment, which afforded Community citizens the right to enter, reside, and establish in the territory of member States.

Despite these provisions, some instances show that the implementation of the rights under the Protocol has been riddled with allegations of abuses by members of the Community.⁴ Furthermore, despite the protocol's entry into force, the Community has faced several challenges, including border checks, inadequate means of judicial remedies, particularly when individual rights are violated, and these challenges continue to exist.⁵ This has resulted in severe harassment and extortion of money from travellers by security personnel at the numerous checkpoints.⁶ The perennial allegations by ECOWAS citizens who engage in business activities are that host States have not complied with the intent of the ECOWAS instruments, thereby subjecting their investments to various abuses. At the moment, the situation is such that, except for claims of human rights, such individuals are prevented from pursuing their claims under the judicial mechanism of ECOWAS. An example of these allegations was clearly tested in the case of *Chude Mba v. Republic of Ghana*,⁷ where the applicant had sought an order from the High Court of Ghana to enforce a default judgment obtained from the ECOWAS Court of Justice, seeking \$800,000 award as damages and N500,000 as costs after successfully suing the Government of Ghana for alleged violations of his fundamental human rights. The main issue for determination was whether the Court could recognise and enforce the order or judgment of the ECOWAS Court. The Ghana

⁴ E.S. Nwauche, "Enforcing ECOWAS Law in West African National Courts", *Journal of African Law*, 55, 2, (2011), 181-202. Also see R. I. Onwuka, "The ECOWAS Protocol on the Free Movement of Persons: A Threat to Nigerian Security?", *African Affairs*, 81, (1982), 193; A. A. Afolayan, "Immigration and Expulsion of ECOWAS Aliens in Nigeria", *International Immigration Review*, 22, (1988), 4; M. L. Brown, "Nigeria and the ECOWAS Protocol on Free Movement and Residence", *The Journal of Modern African Studies*, 27, (1989), 251.

⁵ J. Agyei and E. Clottey, "Operationalising ECOWAS Protocol on Free Movement of People among the Member States: Issues of Convergence, Divergence and Prospects for Sub-Regional Integration", available at: <http://www.imi.ox.ac.uk/pdfs/CLOTTEY%20and%20AGYEI.pdf>. Accessed 30 May, 2025

⁶ *Ibid.*

⁷ An application was brought to enforce the judgment of the Community Court of Justice of the ECOWAS against the Republic of Ghana; High Court unreported suit No. HRCM/ 376/15,2/2/2016

High Court held that the statutory regime for enforcing foreign judgments in Ghana operates based on reciprocity and that the ECOWAS Court is not stated as one of the courts to which the legislation applies.

The individuals' lack of competence before the ECOWAS Court in holding member States accountable for their treaty obligations is really worrisome, given the fundamental role of the right of individuals in this regard in the effective actualisation or fulfilment of the integration objectives as envisaged by the ECOWAS laws. However, having eliminated the possibility of individuals taking advantage of ECOWAS legal instruments, the next ambit of this study shall discuss in detail the possible means of redress of violations of their ECOWAS instruments' rights by a member State that are available to individuals. These may include: assertion of the ECOWAS Treaty Rights of the Individual before the ECOWAS Court; the Scope of the Jurisdiction of the ECOWAS Court under the Supplementary Act on Investment and/or through the means of diplomatic protection.

2. Assertion of the ECOWAS Treaty Rights of the Individual before the ECOWAS Court

At the moment, as experiences and practice have shown, of all the institutional frameworks of ECOWAS, only the ECtJ has direct contact with the pains and grievances of ECOWAS citizens, notwithstanding those certain roles, such as that of enforcement of judgment, that have been assigned to other institutions of ECOWAS.

2.1 ECOWAS Community Court of Justice

Suffice to mention that some institutions of ECOWAS (like the Authority of Heads of State and Government (AHSG), ECOWAS Council of Ministers (the Council), the ECOWAS Secretariat) all play peripheral roles in the protection of the rights of the individual; however, none provides direct judicial access like the court.

Under the ECOWAS, as already mentioned above, the protocol of the Court recognises only a limited jurisdiction in favour of individuals in that the right of individuals to seize the jurisdiction of the Court is limited to human rights cases. Incidentally, though human rights are recognised in Article 4(g) of the Revised Treaty, the catalogue of rights relied upon is external to ECOWAS, and it has no bill of rights of its own. The Court thus basically relies on the African Charter and the International Covenant on Human Rights cases, which are the only sphere of the court's

jurisdiction in which individuals can directly participate. It is thus obvious from the provisions of Article 9(3) of the Court's Protocol that only States can litigate ECOWAS treaties, even those treaty provisions that were crafted to benefit individuals.⁸

About the appropriate plaintiff in rights action before the ECOWAS Community Court of Justice (ECCtJ), the Court has repeatedly held that only natural persons can institute actions for human rights violations, to the exclusion of artificial beings such as companies; though Non-Governmental Organisations (NGOs) may sue, but they can only make human rights claims on behalf of natural persons.⁹ It is, however, unlikely that this line of reasoning would be adopted by the Court to exclude an artificial entity seeking to implement treaty rights or protect its investments from expropriation. For instance, there have been a few cases in which the treaty rights of a company have been couched as human rights to bring the same within the restrictive jurisdiction of the Court respecting the litigation of treaty rights. A good example of this is the case of *Ocean King (Nigeria) Ltd v. Republic of Senegal*.¹⁰ In this case, the plaintiff (Ocean King) is a corporate entity registered under the laws of the Federal Republic of Nigeria, while the defendant (Republic of Senegal) is a member State of ECOWAS. The major issue before the Court was the determination of the plaintiff's *locus standi* before the Court against an act or inaction of a community official (Senegal) which violates the right of individuals or corporate bodies as encapsulated in article 9 of the Protocol relating to the Community Court of Justice, 1991, as amended by article 3 of the Supplementary Protocol of 2005. It was also contended that the provisions of Article 10(c) of the Protocol, as amended, granted the right of access to individuals and corporate bodies to approach the Community Court for the determination of an act or inaction of a community official which violates the rights of individuals or corporate bodies.

The ECCtJ, in its judgment, held that the acts of officials of the defendant are not subject to Article 10(c) of the Protocol as amended. The Court further held that Article 10(d) of the amended Protocol is not open to corporate bodies as victims of rights abuse and that it is only open to natural persons. The ECCtJ took a similar view in *Ebrimah Menneh v. Republic of the Gambia*.¹¹ and

⁸ *Ibid*, article 59.

⁹ See *Social-Economic rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*, Suit No: ECW/CCJ/APP/08/09; Judgment No: ECW/CCJ/APP/07/10.

¹⁰ Suit No. ECW/CCJ/APP/05/08; Judgment No: ECW/CCJ/JUD/07/11.

¹¹ Suit No. ECW/CCJ/APP/04/07.

Hadijatou Mani v. Republic of Niger.¹² It affirmed that it is only individuals who can approach the Court in matters of rights abuses, to the exclusion of corporate bodies. In consequence, it is imperative to argue that the word “individuals” as used in the Supplementary Protocol can be given a flexible interpretation to include artificial legal persons. As it currently stands, and by implication, a corporate body cannot therefore rely on the provisions of Article 10(d) of the Supplementary Protocol.

Nwoke has, however, criticised this interpretation of the Court on the ground that it is a “narrow interpretation of the provisions of the said article”.¹³ Thus, the argument in this study is also in tandem with Nwoke’s submission in that most of the corporate entities registered in member States’ territories fall into the scope of individuals, albeit artificial beings. After all, in corporate law, a company takes the nationality of its place of registration.

In addition, one may not agree that, within ECOWAS, corporations can never utilise ECOWAS legal instruments to assert their rights when they are violated. Thus, by virtue of the provisions of Article 9(6) of the ECOWAS Protocol (as amended), the Court has jurisdiction “over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement.” The plain meaning of this provision was further clarified in *Petrostar (Nigeria) Ltd v. Blackberry (Nigeria) Ltd*,¹⁴ where the ECOWAS Court was willing to determine a contractual dispute between two private parties based on a forum-selection clause in their agreement, as envisaged by the ECOWAS legal order. It is apt to state that the ECtJ, through its Protocol, provides a forum for the settlement of investors’ (corporate entities) contractual disputes against any violation. It is therefore our argument that, relying on the ECOWAS law’s provisions, these individuals who are also Community citizens should be afforded avenues for the protection of their establishments, and this can only be possible if corporate entities are given the necessary access before the ECOWAS Court to litigate against the violation of their establishments.

¹² Suit No. ECW/CCJ/APP/08/07.

¹³ F. C. Nwoke, “Alternative Platform for the Protection of Human Rights in the West African Sub-region: ECOWAS Court in Perspective”, Being a Paper Delivered at the 17th Justice Idigbe Memorial Lecture, University of Benin, Nigeria, on 18th June, 2019.

¹⁴ ECW/CCJ/JUD/05/11.

3. The Scope of the Jurisdiction of the ECOWAS Court under the Supplementary Act on Investment

The jurisdiction granted to the ECtJ under article 9 of the Court's Protocol, however, should not be read in isolation; rather, it should be read in conjunction with article 10 of the Protocol, which specifically sets out who can bring claims before the ECOWAS Court. Thus, it provides that access to the Court is only granted to individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official who violates the rights of the individuals or corporate bodies, and to individuals on application for relief for the violation of their human rights.¹⁵ In other cases, ECOWAS member States and organs of the Community can bring claims, and officials of the Community have access to the ECOWAS Court in employment disputes.¹⁶ However, individuals and corporations otherwise lack such power, except that member States' national courts can request preliminary rulings from the ECOWAS Court on the interpretation of the ECOWAS legal instruments.¹⁷

It is obvious from the provisions of Article 9 of the Protocol Relating to the Community Court of Justice¹⁸ that the ECtJ has the exclusive competence of interpreting the provisions of the Revised Treaty and other Protocols or Regulations of the Community. On this score, the ECtJ, in the determination of disputes before it, defines the clear meaning of Community law of ECOWAS to the exclusion of any other court or tribunal. In other words, the drafters of the ECOWAS Treaty, in their own wisdom, envisaged that issues of Community law may arise in suits pending before a national court of a member State, and where that occurs, the national court may *suo moto* or on an application of any of the parties refer the provisions of the Community law to be interpreted to the ECtJ.¹⁹ Therefore, it appears that the essence of the said provision is to ensure uniformity in the interpretation and application of Community law.

¹⁵ *Ibid*, article 10(d).

¹⁶ *Ibid*, article 10(e).

¹⁷ *Ibid*, article 10(f).

¹⁸ A/P.1/7/91 as amended by the Supplementary Protocol A/SP.1/01/05.

¹⁹ *Ibid*, Article 10(h).

3.1 The ECOWAS Referral Procedure

The referral procedure is contained in Article 10(f) of the 1991 Protocol relating to the Court of Justice as amended by the Supplementary Protocol, 2005²⁰ (relating to access to the Court), which, by implication, arguably defines the relationship between the Court of Justice and the national courts of member States. Accordingly, article 10(f) provides thus:

...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 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.

In effect, this provision can presumably mean that Community laws can have direct application before national courts of member States and that the rules of the Community Court are directly applicable to national courts in utilising the power of preliminary reference. It has thus been argued that the power of reference in article 10(f) of the Court's Protocol is an interlocutory request from a national court of a member State of ECOWAS to the Community Court, which has been created under ECOWAS law to give an authoritative interpretation of ECOWAS legal instruments.²¹ The preliminary reference procedure (Referral Procedure) was introduced into the legal text of ECOWAS in 2005, when the 1991 Protocol²² that established the ECOWAS Court was amended.²³

Thus, while the expansion of the jurisdiction of the ECOWAS Court to cover complaints of human rights violations has contributed in no small measure to increasing the docket of the Court since 2005, the preliminary ruling procedure has remained unutilised.²⁴ For instance, as of August 2025, no single referral has been received by the Court from any member State's national court. The implication of this is that the ECOWAS Court has been forced to shift its focus from the economic

²⁰ Supplementary Protocol A/SP.1/01/05.

²¹ Enabulele and Bazuaye, *Basic Topics in Public International Law*, 436, (arguing that 'Article 10(f) does not entitle a national court to refer an interpretation of national law to the Court..., a national court may make a reference where the application of a particularly national law is likely to be incompatible with laws of the Community').

²² Protocol A/P.1/7/91 on the Community Court of Justice (Adopted on 6 July, 1991).

²³ Article 10(f) of the 2005 Supplementary Protocol A/SP.1/01/05 Amending the preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and paragraph 4 of the English Version of the said Protocol (2005 Supplementary Protocol).

²⁴ *Ibid.*

integration agenda as envisaged by ECOWAS to the field of human rights, and has thus earned a reputation as a formidable human rights Court in the West African Sub-region.²⁵

In consequence, the ECOWAS, as a Sub-regional organisation, should be appreciated for not only giving effect to the establishment of the ECtJ, but also moving from State-centric postures by giving Community citizens direct access to the human rights mandate. In the same vein, notwithstanding this obvious fact, it is unfortunate that the ECtJ's competence over human rights cases is too restrictive, particularly as it fails to recognise and protect individuals' rights of establishment. This was exemplified in the case of *Afolabi v. Federal Republic of Nigeria*.²⁶ Obviously, it appears on its surface that the Supplementary Protocol has cured the actual problem that bedevilled this case of 2005; however, the fact remains that the plaintiff in the case was denied access to the court and consequently the justice he deserved. This typifies the extent to which the rights of citizens of the Community to entry, residence, and establishment in the territories of member States, as made possible by ECOWAS laws, are still threatened, including issues pertinent to the jurisdiction of the Court to hear cases bordering on the violation of rights created in ECOWAS Treaties as against those created in human rights forms.²⁷ However, the inability of the individuals to have direct access to the ECtJ to litigate their economic rights when violated by member States remains a major bane within the Sub-region.

3.2 The ECOWAS Referral Procedure Juxtaposed with the European Union

By way of a Comparative approach, the preliminary reference procedure in the European Union (EU) has been a tremendous success, earning it the label of the “keystone” of the EU legal system.²⁸ It is indisputable that it is through the preliminary referral procedure and the willingness of national courts to bring cases before the Court of Justice of the European Union (CJEU) that the legal and political content of the European Community has gradually, but fundamentally, been

²⁵ *Ibid.*

²⁶ ECW/CCJ/JUD/01/04 of April 27, 2004.

²⁷ This gap and its consequences are addressed in details in chapter four.

²⁸ J. Krommendijk, “The Preliminary Reference Dance Between the Court of Justice of the European Union (CJEU) and the Dutch Court in the Field of Migration,” *European Journal of Legal Studies* (2018), 101, 103.

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transformed.²⁹ In this guise, Krommendijk posits that the success of the procedure and the consequent impact that the CJEU has made is “as a result of the cooperation of national courts.”³⁰

It suffices that, on one hand, the import of this has given the ECOWAS Court an exclusive role to give a preliminary ruling as to the interpretation or validity of the Treaty provisions or Community Acts, while the national courts, on the other hand, shall apply the ruling to the facts of the case(s) presented. In other words, the ECOWAS Court’s role is to interpret, while the national court’s role is to apply what has been interpreted.

The problems identified above, specifically the lack of application of ECOWAS laws in the municipal realm of member States and by municipal courts, highlight the inability of ECOWAS citizens to employ municipal mechanisms for the protection of their ECOWAS rights, including the right to freely move without hindrances, right to reside in any member State of their choice as Community citizens, and fundamentally, the right to establish businesses. This obviously renders Community citizens, who are supposedly the prime movers of integration, incapable of enforcing their rights against violations and abuses, particularly by host member States where their businesses are situated. In consequence, it would appear that individuals must look up to general international law and ECOWAS laws for protection in the event of a violation of their ECOWAS treaty rights. Against this backdrop, this study now turns to the relevant international mechanisms in the following parts.

4. International Law Mechanisms against Violation of Treaty Rights

In ECOWAS, apart from the important obligations undertaken by member States to respect the provisions of the Treaty by implementing the same in their municipal realm and also respecting the judgments or decisions of any of the organs of ECOWAS, they have a responsibility towards their nationals to protect them from the failure of any other member State in which they reside and do business to uphold the Treaty towards them. As shall be discussed in this study, this obligation towards nationals is expressly recognised in the Protocol of the Court. One of the ways a State

²⁹ M. Wind, D.F. Martisen and G.P. Rotger, “The uneven Legal Push for Europe: Questioning Variation When National Courts go to Europe”, *European Union Politics* (2009), 10, 64.

³⁰ Krommendijk, “The Preliminary Reference Dance Between the CJEU and Dutch Courts”, 103.

fulfils this obligation to its nationals, and indeed the one that is of interest to us here, is diplomatic protection, to which we now turn.

4.1 Diplomatic Protection

Historically, despite the fact that individuals hold a unique position within the framework of the municipal legal system, under the traditional international law theory, the roles of individuals were not contemplated.³¹ Thus, international law was originally a system of rules governing the relationship between sovereign States only.³² The individuals were not regarded as subjects³³ of international law, and as such, could not institute international claims or actions.³⁴ There was no particular need to consider the legal consequences of injury to aliens at that time.³⁵ Aliens (individuals) had no means of addressing injuries they sustained in host States and had little or no alternative to turning to their States of nationality for protection.³⁶

However, the contention that individuals were not regarded as subjects of international law was later subjected to scrutiny and was opposed on the ground that the individuals under the international law theory should rather be seen as “beneficiaries” of international law policies rather than as objects.³⁷ It is further argued that the individuals should be referred to as “participants or non-State actors” in international law.³⁸

Under diplomatic protection, it is believed that the defaulting State is expected to incur responsibilities because it fails to treat the foreign national in accordance with the minimum

³¹ A. Cassese, *International Law*, 2nd Edition, (Oxford: Oxford University Press, 2005), 78.

³² *Ibid.*

³³ The term “legal subject” means any being that can have rights, duties and status in law. A legal subject is any entity recognized by law as possessing such status. See for details, D.S.P. Conje and J. Heaton, *The South African Law of Persons*, 2nd ed. (United Kingdom: LexisNexis Butterworths, 2003), 1.

³⁴ *Ibid.*

³⁵ See H. Lauterpacht, “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens”, *Camb. L.J.* (1945-47), 330 at 334. Each would acknowledge the domestic structures and religious vocations of its fellow states and refrain from challenging their existence”. However, the most recent trend in the transformation of world order is often depicted as a shift from Westphalia to Post-Westphalia.

³⁶ E. Borchard, “Protection of Citizens Abroad and Change of Original Nationality,” *Yale Law Journal* 43, No. 4 (1934), 359-393.

³⁷ D.P. O’Connell, *International Law*, 2nd ed. (United Kingdom: Stevens, 1970), 106, at 107.

³⁸ N. Gal-Or, “Desirability of enhanced Legal position of Non-State Actors,” available at https://ghum.kuleuven.be/ggs/events/2009/03_2009/seminar_nsa_26_28March2009.pdf. Accessed 16 December, 2019.

standard of justice required for the treatment of aliens.³⁹ The corollary of this is that a State exercising diplomatic protection is actually exercising its own right, “the right to ensure in the person of its nationals respect for international law.”⁴⁰ This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.⁴¹

Under customary international law, for an action of diplomatic protection to succeed, the foreign State is required to prove that: (1) the injured person is its national;⁴² (2) all local remedies have been exhausted in the respondent State (this is not required in ECOWAS);⁴³ (3) The conduct of the host State violates the rules of international law relating to the treatment of aliens⁴⁴ And (4) the claim by a State on behalf of its national may be dismissed or declared inadmissible if there is no effective and genuine link between the national concerned and the State that seeks to protect him.⁴⁵

Consequently, Article 4 of the Draft Articles further states that:

For diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalisation, succession of States, or in any other manner, not inconsistent with international law.

Article 7 deals with a situation where a State of nationality of a dual national seeks to exercise diplomatic protection against the other State of nationality. Under the article, such exercise of diplomatic protection is possible only where the claiming State was predominant both at the time of the injury and at the time of the official presentation of the claim.”⁴⁶ This appears to emphasise

³⁹ The minimum international standard of justice was the standard of treatment recognized by the international community to be acceptable for the treatment of foreigners.

⁴⁰ *Panevezys-Saldutiskis Railway Case, Estonia v. Lithuania*, Series A/B, No. 76, (1939), 65.

⁴¹ *Ibid.*

⁴² ILC’s Draft Articles on Diplomatic Protection, 2006, article 3.

⁴³ *Ibid*, article 14.

⁴⁴ *Ibid*, article 1.

⁴⁵ See *Nottebohm Case (Liechtenstein v. Guatemala)*, I. C. J. Judgment of April 6, 1955.

⁴⁶ See Article 7 of the ILC Draft Articles on Diplomatic Protection – Multiple nationality and claim against a State of nationality.

a point where the requirement of the bond of nationality meets or conflicts with the genuine link principle as exemplified in the case of *Liechtenstein v. Guatemala*⁴⁷ (the *Nottebohm* case).

In ECOWAS, the provisions of Article 9(3) of the Protocol of the Court (as amended) give strong impetus to the exploration of the diplomatic protection angle, given that only States can litigate the ECOWAS instruments for and on behalf of their citizens, either before the ECOWAS Court or the International Court of Justice. The usefulness of diplomatic protection under the current legal setup of ECOWAS lies in the fact that it is increasingly becoming commonplace that investors in States other than their own are at the receiving end of attacks by the governments and private individuals and/or groups. It is the reluctance of member States to honour this Treaty limitation that has created a situation where such victims are left without a remedy and exacerbates the risk of venturing under the ECOWAS Treaty regime.

This is particularly so as the concept of diplomatic protection does not impose a duty on their home States to seek the diplomatic protection of their injured nationals. Instead, the State has the discretion to use this tool. As was also reiterated by the International Law Commission in articles 2 and 19 of its Draft Articles on Diplomatic Protection,⁴⁸ Only the State has the choice whether to seek redress for the wrong against the offending State, and the State has the international right to protect its citizens, whether by espousing a claim for monetary compensation or by making diplomatic submissions to ensure its citizens' physical safety or repatriation.

4.2 Summary of Some Selected Judicial Decisions on Diplomatic Protection of Individuals' Right of Establishment

The position of diplomatic protection on the rights of aliens in the host State territory has been judicially tested in cases such as the *Nottebohm Case*.⁴⁹ The *Barcelona Traction, Light and Power Company, Limited*,⁵⁰ and the *Ahmadou Sadio Diallo*⁵¹, which concerned the issues of investments or other economic activities.

⁴⁷ I. C. J. Judgment of April 6, 1955.

⁴⁸ Draft Article 2 is founded on the notion that diplomatic protection involves an invocation—at the State level—by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State.

⁴⁹ I.C.J. 1955, I.C.J., 4 (1955).

⁵⁰ I.C.J. Reports (1964).

⁵¹ I.C.J. Reports (2007).

a. The Ahmadou Sadio Diallo's Case

In the case of the *Republic of Guinea v. The Democratic Republic of Congo (DRC)*,⁵² the Republic of Guinea brought a claim against the Democratic Republic of Congo (DRC) in an exercise of diplomatic protection on behalf of Mr Diallo, a Guinean national, who moved to the DRC between 1960 and 1971. Ten years later, in 1974, Mr Diallo established an import-export company, Africom Zaire. In 1979, Mr Diallo also took part in the founding of Africontainers-Zaire, a private limited liability company specialising in the containerised transport of goods. Mr Diallo was a shareholder in both Companies.

On 31 October 1995, the DRC Prime Minister issued an expulsion decree against Mr Diallo on the allegation that his presence and personal conduct have breached the DRC public order, especially in the economic, financial, and monetary areas, and continues to do so. With a view to the implementation of the said decree, Mr Diallo was arrested and detained on two occasions for 72 days before he was expelled to Guinea.

Consequently, Guinea instituted proceedings against the DRC before the International Court of Justice (ICJ) and sought to exercise diplomatic protection on behalf of Mr Diallo in the following respects: his rights as an individual; his direct rights as a shareholder in the Companies; and the rights of the Companies by “substitution” (as a shareholder in a foreign “victim” company). Thereafter, Guinea submitted that the Court, relying on its previous decision in the *Barcelona Traction* case, held that the right of diplomatic protection of a company belongs to its national State, which allows for the protection of shareholders by their own national State through “substitution”.

The ICJ upheld the DRC's objection to admissibility and held that Guinea was without standing to offer Mr Diallo diplomatic protection regarding the alleged unlawful acts of the DRC against the rights of the Companies by “substitution”. Notwithstanding, the Court held further that Guinea's claim was admissible as regards the protection of Mr Diallo's rights as an individual, and his direct rights as a shareholder in the Companies.⁵³ The Court declared Diallo's claims based on violation of his rights, including loss of property, admissible in part and eventually rejected

⁵² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J Reports 2007.

⁵³ *Ibid*, (Judgment on the merit of 30 November, 2010)

Guinea's claim on the merits mainly because the claims were not sufficiently substantiated on the ground that only States of the nationality of the corporation could exercise diplomatic protection over the rights of the corporation.

b. The Barcelona Traction's Case

On the protection of corporations, *Barcelona Traction* came to the fore.⁵⁴ In its judgment, the ICJ rejected the request of the Belgian government and declared Belgium as having no legal standing to exercise diplomatic protection of shareholders in a Canadian company in respect of measures taken against that company in Spain, and as such, has no recognised rights to exercise diplomatic protection for its nationals. Moreover, the Court stated that Belgium couldn't sue Spain by itself as the Barcelona Company was ruled by Canadian law and there was no legal interest in the matter for Belgium to bring a claim. The Court accordingly rejected Belgium's claim.

Regrettably, flowing from the facts of the above cases, it is argued that the issue as to whether the individuals have any right to diplomatic protection from their States of nationality depends almost entirely on national State discretion. Thus, under the domestic law of most States, individuals or enterprises had no more than a legitimate expectation that the State of nationality would take up a claim on their behalf.

c. The Nottebohm Case

In addition, *the Nottebohm* case deals with the principle of effective nationality. The ICJ in this case asserts diplomatic protection in respect of Nottebohm on the ground that the bond of attachment with Liechtenstein and naturalisation were not based on any genuine connection (GENUINE LINK) with the country. The Court proceeded that it is a well-known principle that nationality is within the jurisdiction of the State which confers it; a State cannot claim that the rules it has laid down are entitled to be recognised by another State, unless it has acted in conformity with the general aim of making the nationality granted in accordance with an effective link between the State and the individual. For these reasons, the Court held that Liechtenstein's claim was inadmissible for failure to prove any genuine link with Nottebohm and the judgment was given in favour of Guatemala.

⁵⁴ I.C.J. Reports, (1964).

4.3 The Implication of the Nationality of Claims on the Rights of Individuals

The power to admit an individual by a State, thereby granting it the nationality, rests upon that State, and obviously creates a link between the individual and the State concerned. Although there must exist some requirements upon which nationality could be granted, such conditions or requirements rest on the granting State. Also, its admissibility must align with the rule of customary international law, which has constantly been that the applicant's State must establish a legal interest in instituting the claim, and that the said legal interest is fundamentally provided by the allegedly injured individual(s) being a national of the applicant's State. This is encapsulated in the well-established legal doctrine usually applied by international courts and tribunals that the bond of nationality is the basis of diplomatic protection.⁵⁵

By implication, it therefore means that if a State in principle has the exclusive competence to regulate questions of nationality by its own legislation without interference by other States, it is difficult to see on what ground its interpretation and application of this same legislation could be open to challenge by other States. However, such a challenge is possible in theory if that legislation or the application thereof is inconsistent with any international law standard. For instance, for that to succeed, it would have also been proved beyond any doubt whether the authorities granting it have applied their local laws in a manner consistent with the provisions of that same local law.⁵⁶ In the *Nottebohm* case, for instance, although the Respondent (Guatemala) contested the invalidity of the legal act of naturalisation by Nottebohm under the Liechtenstein national law, it is, however, our argument that the burden of proving whether the said naturalisation was genuine or not should have been shifted to Guatemala in proving non-compliance with the Liechtenstein national law. This argument is also supported by the express provision of Article 1 of the *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 1930, in the following words:

It is for each State to determine under its law who are its nationals.

Other States shall recognise this law in so far as it is consistent with

⁵⁵ See *Nottebohm Case (Liechtenstein v. Guatemala)*, I. C. J. Judgment of April 6, 1955; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J Reports 2007; the *Barcelona Traction, Light and Power Company, Limited*, I.C.J. Reports, (1964).

⁵⁶ See the dissenting Opinions of Judge Klaestad and Judge Read.

international conventions, international custom, and the principles of law, generally recognised about nationality.⁵⁷

In applying the above rule, it would result that Liechtenstein had the exclusive right to determine under its own law that Mr Nottebohm was its national and that Guatemala must also recognise the Liechtenstein law in this regard, in so far as it is consistent with international conventions and the principle of law generally recognised, about nationality.⁵⁸ Better still, the above argument further implies that diplomatic protection is rarely suitable for affording adequate protection of rights and interests involving international economic activities, and it is, therefore, our view that there is a need to assess alternative models.

In the same vein, under ECOWAS, article 9(3) of the Protocol of the ECOWAS Court (as amended) gives member States the right to litigate the provisions of the Treaty only on behalf of their nationals. Thus, article 9(3) of the 1991 Protocol (as amended) states that:

Member States may, on behalf of their nationals, institute proceedings against another Member State or an institution of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably have failed.

Thus, an important element of the Supplementary Protocol is that it took into cognisance the recognition that the ECOWAS integration was not possible without a strong protection of human rights. The integration policies envisaged by the Community emphasise the need for Community citizens to have access to redress their rights when violated by member States. As one of the core objectives of the ECOWAS, Article 4(g) of the Revised Treaty emphasises the “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”. This commitment to the enforcement of human rights was fulfilled in the Supplementary Protocol of the ECtJ, by reason of which individuals can now enforce their rights before the ECtJ by direct action.⁵⁹ However, despite the above

⁵⁷ The Convention on Certain Questions Relating to the Conflict of Nationalist Law was a League of Nations’ Convention adopted during the League of Nations Codification Conference, 1930 in The Hague.

⁵⁸ See generally, the Dissenting Opinion of Judge Read in the Nottebohm Case.

⁵⁹ See Enabulele, “Supranationality of ECOWAS and the Community Legal Order”, 11.

provision, it appears that the challenges in enforcing ECOWAS Court decisions remain a bane to the actualisation of the ECOWAS mandate. Thus, the ECCTJ was established to perform adjudicatory purposes assigned to it, irrespective of the member States and the institutions of the Community.⁶⁰ More to this, decisions of the Court are in the real sense not directly enforceable in member States national courts. This was clearly tested in the case of *Chude Mba v. Republic of Ghana*,⁶¹ where the Ghanaian High Court held that the statutory regime for enforcing foreign judgments in Ghana operates based on reciprocity and that the ECOWAS Court is not stated as one of the courts to which the legislation applies. Thus, the decision of the case highlights how the work of the ECOWAS Court could be undermined when the critical enforcement mechanism is not available in member States. The effect of the ECOWAS Court's decisions has only become one of moral persuasion with no practical value to the party that sought and obtained such relief from the Court.

5. Individuals' Rights of Establishment in ECOWAS Juxtaposed with the East African Community (EAC)

Within this ambit, this study briefly examined the available mechanisms within the East African Community (EAC), a selected case study, for the protection of individuals' rights within its domain, with a view to establishing a comparative perspective.

5.1 The East African Community

The Treaty Establishing the East African Community (EAC Treaty) made a deliberate effort to hinge the achievement of its integration objectives on a set of principles that include adherence to the principles of good governance, democracy, rule of law, and respect for human rights.⁶² By virtue of the provisions of articles 6(d) and 7(2) of the EAC Treaty, the EAC Partner States agreed a set of fundamental and operational principles, such as the principles of good governance, democracy and the rule of law, gender equality, as well as the recognition, promotion and

⁶⁰ Article 15(3) of ECOWAS Treaty, 1975.

⁶¹ An application was brought to enforce the judgment of the Community Court of Justice of the ECOWAS against the Republic of Ghana; High Court unreported suit No. HRCM/ 376/15,2/2/2016

⁶² V. Lando, "The Domestic Impact of the Decisions of the East African Court of Justice," *African Human Right Law Journal*, 18, No. 2 (2018). EAC integration is to be achieved through four phases: a customs union, the protocol for which entered into force on 1 January 2005; a common market, which is still under implementation, although the protocol establishing it came into force on 1 July 2010; a monetary union, the protocol establishing which was signed on 30 November 2013; and a political federation.

protection of human and peoples' rights in recognition of the principles enshrined under the African Charter on Human and Peoples' Rights (ACHPR).⁶³

Thus, for proper interpretation and application of the EAC Treaty, the East African Court of Justice (EACJ) was established under Article 9(e) of the EAC Treaty as the Community's judicial arm, whose main function is to ensure adherence to law in the interpretation and application of the Treaty.⁶⁴ The EACJ jurisdiction covers both contentious and non-contentious matters relating to the interpretation and application of the EAC Treaty.⁶⁵ Thus, the Court may be seised of a matter through references by natural and juristic persons residing within the Community, EAC Partner States, and the EAC Secretary-General.⁶⁶ The EAC Council may also seek advisory opinions from the Court under Article 14 of the Treaty.

Although, the EACJ does not have express jurisdiction to hear and determine human rights cases as provided under article 27 of the EAC Treaty, which is not the major focus of this study, but this study is mainly concerned with the judicial protection guaranteed and offered by the EAC legal order to Community citizens that can provide them avenue, either individually or collectively, to enforce their rights or seek redress through litigation in the Community court.⁶⁷ Again, we are also concerned with the jurisdiction of the EACJ to interpret Community legal orders at the suit of

⁶³ See Article 6(d) of the East African Community (EAC) Treaty. The provisions relating to human rights in the EAC legal framework are found in Articles 3(3)(b), 5(1) and 5(3) (f); Articles 120, 123, and 124, as well as Articles 146 and 147 of the EAC Treaty.

⁶⁴ The EACJ is different in composition and jurisdiction from the defunct East African Court of Appeal which was a Court of Appeal from decisions of the national courts on both civil and criminal matters, except constitutional matters and the offence of treason in Tanzania. See H.R. Nsekela, "Overview of the East African Court of Justice", being a Paper Presented at the Sensitisation workshop on the Role of the EACJ in the EAC Integration, in Kampala, Uganda, 1-2 November, 2011. Available at <http://www.eacj.org/docs/overview-of-the-EACJ.pdf>. Accessed 5 December, 2014.

⁶⁵ The EACJ is also empowered to determine disputes between the EAC and its employees with regard to their terms and conditions for employment and arbitrate disputes pursuant to an arbitration clause contained in a contact agreement which confers such jurisdiction on the Court. For detailed provisions on the mandate and functions of the Court are highlighted in Articles 23-47 of the EAC Treaty. Also available at <http://www.eacj.org/establishment.php>. Accessed 5 December, 2019.

⁶⁶ Articles 28-32 of the EAC Treaty.

⁶⁷ It should be noted that the status of an "EAC citizen" is not yet formally recognized, despite the availability of EAC passports for nationals of EAC Partner states. Therefore, the use of the phrase "EAC citizen" in this study shall be understood as meaning "a national of a Partner State recognised under the laws governing citizenship in the Partner State", this being the interpretation provided under Article 1 of the Protocol on EAC Common Market.

individuals, particularly as it relates to the rights of free movement, residence, and establishment of Community citizens within the Partner States.⁶⁸

It is axiomatic that the free movement of persons, residence, and establishment is also one of the core tenets of the EAC common market, making it seem like a purely economic project. The free movement of persons within the region is thus one of the key cooperation elements of the Community. Indeed, by virtue of the provisions of Article 104 of the EAC Treaty, the EAC Partner States undertook to achieve the free movement of persons, labour and services, and the right of establishment and residence of their citizens in the EAC region.⁶⁹

Having noted that the EAC is a supranational organisation which has also recognised the free movement, residence, and establishment of Community citizens as one of its core tenets, it is, however, expedient to argue that, for the EACJ to be seen as an integrating institution, it has to facilitate such an integration process through the recognition of the rights of individuals.⁷⁰ This position was brought to bear in *Nyang v. Attorney-General of Kenya*,⁷¹ where the court had to consider preliminary objections from defendants alleging a lack of *locus standi* by individuals to institute an action before the EACJ. In that case, the court held that individuals have access to the

⁶⁸ See Articles 6, 7, 10, 13 and 14 of the Protocol on the Establishment of the East African Community Common Market.

⁶⁹ Treaty Establishing The East African Community, Article 104(1) and (2), (noting that, “For purposes of paragraph 1 of this Article, the Partner States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence at a time to be determined by the Council”); Its preamble also affirming that, ‘...with a view to realising a fast and balanced regional development are resolved to creating an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities through the development of sound macro-economic and sectorial policies and their efficient management while taking cognisance of the developments in the world economy... and as may be decided by the Partner States, the development of technological capacity for improved productivity.’

⁷⁰ Ruhangisa, “Judicial Protection under EAC Law”, 244; LR Helfer “Sub-regional courts in Africa: Litigating the hybrid right to free movement” (2015, iCourts working paper series no 32), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653124. Accessed 17 June, 2020; A. Possi, “The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community,” *Max Planck Yearbook of United Nations Law*, 17, (2013), 1 at 19.

⁷¹ *Peter Anyang’ Nyong’o and Others v. Attorney-General of Kenya and Others*, REF No 1 of 2006 & Appeal No. 1 of 2009, (the Court declaring that, ‘the Rules of election applied by Kenya National Assembly infringed article 50 of the Treaty establishing EAC to the extent of their inconsistency with it. It was declared further that the National Assembly of Kenya did not undertake an election within the meaning of Article 50 of the Treaty, and that the election rules in issue infringe the same Article. The Court ordered that the claimants have costs of the reference’); *Christopher Mtikila v. Attorney-General of Tanzania and Others*, Ref No. 2 of 2007.

court by virtue of the provisions of Article 30 of the EAC Treaty,⁷² which is a basic right to the regional justice mechanism enabling the people to ‘participate in protecting the integrity of the Treaty.’⁷³ It was concluded that an infringement on the rights of citizens of the EAC by the Partner States or their institutions is therefore actionable in the EACJ.⁷⁴

Under the ECOWAS legal order, Article 88 of the ECOWAS Revised Treaty clearly defines the legal standing of the Community with respect to member States, to the effect that the Community shall have international legal personality. By implication, Member States are enjoined to respect and honour the treaty provisions to actualise Community objectives. Also relevant are the provisions under articles 5 and 59 of the Treaty, which conceptualise the right of entry, residence, and establishment. By virtue of this, Member States are obliged to recognise the rights of Community citizens in their territories with due regard to the provisions of the protocol relating thereto.⁷⁵

In the same vein, Article 9(6) of the Treaty provides that decisions of the Authority of Heads of State and Government “shall automatically enter into force sixty (60) days after the date of their publication in the Official Journal of the Community.” In effect, the above provision envisaged the direct applicability of Community laws in member States.⁷⁶

In view of the above discourse, it is imperative to state that the EACJ, however, from its interpretative tenet, has so far been courageous in its rights-oriented approach to interpretation, especially when compared to the ECOWAS Court, though such jurisdiction has not been explicitly conferred by its legal order. In effect, this might just be the key to realising a progressive transformation in the rationalisation of the right of establishment within the EAC.

⁷² Treaty Establishing the East African Community, Article 30 provides that, “Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.”

⁷³ *East African Law Society and 4 Others v. Attorney-General of Kenya and 3 Others*, Ref No. 3 of 2007, (the Court noting that, ‘... the lack of people’s participation in the amendment process constituted infringement of principles and provisions in articles 5 (3) (g) and 7 (1) (a). The Court further held that the purpose for which Article 26 was amended constituted infringement of article 38 (2) of the Treaty.

⁷⁴ Ruhangisa, “Judicial Protection under EAC Law,” 244.

⁷⁵ Article 59(1) of the Revised Treaty.

⁷⁶ Nwauche, “Enforcing ECOWAS Law in West African National Courts”, 181.

On this note, it is therefore hoped that the ECOWAS Court will someday be courageous enough, just as its EACJ counterpart, to boldly give clear interpretative meanings to the ECOWAS laws.

6. Concluding Remarks

It is, moreover, sad that ECOWAS citizens who venture into another ECOWAS State, pursuant to the provisions of the rights on free movement, residence, and establishment, are in no better position than individuals were in those days when only States could bring international claims. This is because the ECOWAS Court, to which the individuals would have resorted, lacks jurisdiction in this respect. Therefore, just as in those days, ECOWAS citizens whose rights to movement, residence, and establishment have been violated by another member State will have no other alternative but to look to their State of nationality for protection.

In effect, international investors are left virtually defenceless in protecting their foreign investments, with the knowledge that international law will not permit a shareholder's national State to exercise diplomatic protection in a situation of a triangular relationship between the States of incorporation, the place of investment, and the shareholder's State, as demonstrated in the *Barcelona Traction Case*. The investor will become discouraged from placing capital abroad through the medium of a multi-national corporation not domiciled in his State. It is the stand of this study to reason therefore that ECOWAS, with an international legal regime, should seek to ensure that States are held accountable when the rights of individuals are violated, particularly their rights of establishment within the sub-region.

Conclusively, although it has been established that individuals do not have the competence to litigate economic rights before the ECOWAS Court. However, an understanding of the status of ECOWAS instruments within the municipal sphere of member States became necessary in determining whether individuals will be able to assert ECOWAS laws within the municipal realm of the States. From the above discussions, it is the study's submission that, since the ECOWAS Treaty was couched in a manner that benefits individuals, it is definitive of the intention of the drafters to make it applicable in the municipal laws of member States, especially through the referral procedure.

Conflict of Interest

The author declares no conflict of interest.