

REGIONAL DEVELOPMENTS

DISABILITY RIGHTS IN THE SUB-REGIONAL ECONOMIC COMMUNITIES DURING 2011 AND 2012

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1 Introduction

This subsection reports on recent events relating to disability rights in the East Africa Community (EAC), the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS). The core purpose of these Communities is the pursuit of economic integration in the respective subregions; it is therefore understandable that their mandates did not, at least initially, include a clear human rights focus. However, in recent years, an extension of the Communities' purview to include human rights generally, and to some extent, disability rights in particular, can be discerned.¹ This subsection tracks this expansion and also identifies opportunities for further advancement in each subregion.

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1 See ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *Africa Human Rights Law Journal* 223-224-225; J Biegon 'The promotion and protection of disability rights in the African human rights system' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 65.

2 The East Africa Community

2.1 Legal framework and institutions of the EAC

The East Africa Community (EAC) consists of five Partner States: Burundi, Kenya, Rwanda, Tanzania and Uganda.² The core legal instrument of the EAC is its establishing Treaty of 1999,³ which is supported by a number of protocols⁴ addressing various aspects of co-operation.⁵ Significantly, the Treaty does not contain substantive human rights provisions.

The EAC Treaty sets out the fundamental principles of the Community, which include good governance that is understood to include, amongst other things, the recognition, protection and promotion of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter).⁶ While the core business of the EAC is the pursuit of economic integration amongst member states, issues of good governance and protection of human rights are increasingly forming part of the EAC's agenda as the Community moves deeper into integration.⁷ Indeed, to the extent that the EAC Treaty refers to respect for human rights as a component of good governance, makes reference to aspects of human rights such as gender mainstreaming, and even predicates the admission of new members of the Community on their human rights record,⁸ it can be argued that it has incorporated human

2 Treaty establishing the East Africa Community, (1999) (EAC Treaty) para 2. For a historic overview of economic integration in post-colonial East Africa see H Ochwada 'The history and politics of regionalism and integration in East Africa' in K Omeje & TR Hepner (eds) *Conflict and peace building in the African great lakes region* (2013) 56; AT Mugomba 'Regional organisations and African underdevelopment: The collapse of the East African Community' (1978) 16 *Journal of Modern African Studies* 261 262.

3 The EAC Treaty was signed on 30 November 1999 and entered into force on 7 July 2000, following its ratification by the three original Partner States, Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to this EAC Treaty on 18 June 2007 and became full members of the Community with effect from 1 July 2007.

4 As of March 2013, the EAC had adopted 21 Protocols to the Treaty, the most recent of which is the Protocol on the establishment of the EAC Common Market East Africa Community (2009). See http://www.eac.int/index.php?option=com_docman&Itemid=226 (accessed 22 August 2013).

5 F Viljoen *International human rights law in Africa* (2012) 471-2 highlights the phases of regional integration. These are the establishment of a preferential trading area or arrangement, a customs union, a common market, an economic union, and ultimately a political union. The EAC is currently (2013) at the third stage.

6 EAC Treaty, art 6.

7 OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 302; LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 13 *SUR International Journal on Human Rights* 119 123.

8 Art 3(3)b.

rights into the Treaty.⁹ This is a remarkable departure from the purely economic pursuit of its predecessor.¹⁰

Among the institutions established by the EAC Treaty,¹¹ the East Africa Legislative Assembly (EALA) and the East Africa Court of Justice (EACJ) are particularly significant to the promotion and protection of human rights, and hence the rights of persons with disabilities. As the legislative arm, the EALA spearheads the development of the law of the Community, and generally provides guidance to the secretariat on legal matters of concern to the Community.¹² For instance, the EALA has adopted resolutions urging Partner States to ratify the Convention on the Rights of Persons with Disabilities (CRPD)¹³ and also to implement the provisions of the Convention.¹⁴ In its 2009 resolution on violence against women in the EAC region, the EALA identified women with disabilities as one of the groups of women that are especially vulnerable to violence.¹⁵

The EACJ is the judicial organ of the EAC,¹⁶ tasked with ensuring adherence to law in the interpretation, application of, and compliance with the Treaty.¹⁷ The EAC Treaty does not specify the law applicable by the EACJ; however article 27(2) of the Treaty provides for the adoption of a Protocol to extend the jurisdiction of the Court beyond the interpretation of the Treaty to other matters including human rights. The adoption of the Protocol is therefore pivotal to the promotion and protection of human rights in the sub-region, including the rights of persons with disabilities – The absence of the Protocol significantly compromises the potential of the EACJ to promote and/or protect the rights of persons with disabilities to the extent that the exercise of such jurisdiction is often contested.¹⁸

⁹ Ruppel (n 7 above) 305.

¹⁰ Art 2(1) of the 1967 East African Co-operation Treaty established the sole purpose of the defunct Community as the pursuit of commercial and other relations of Partner States so as to achieve development and expansion of economic activities the benefits of which were to be equally shared.

¹¹ EAC Treaty, art 9(1).

¹² EAC Treaty, art 49(2)(d).

¹³ EALA 'Resolution of the Assembly urging the EAC Partner States to Ratify the Resolution of the UN General Assembly on the Convention on the Rights of Persons with Disabilities' in the Official Report of the Proceedings of the East African Legislative Assembly 37th sitting – second assembly: second meeting – second session 24 September 2008, 21.

¹⁴ EALA 'Resolution of the Assembly Urging the East African Community and Partner States to take urgent and concerted action to end violence against women in the EAC region and particularly the Partners States' (2009).

¹⁵ EALA (n 14 above).

¹⁶ EAC Treaty, art 9.

¹⁷ EAC Treaty, art 23.

¹⁸ The challenges of the exercise of a human rights jurisdiction by the EAC have been highlighted by various commentators including TO Ojienda "Alice's adventures in wonderland": Preliminary reflections on the jurisdiction of the East African Court of Justice' (2004) 2 *East African Journal of Human Rights and Democracy* 94 95; Ruppel (n 7 above) 306; and ST Ebobrah 'Human rights developments in sub-regional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 312. The EACJ has itself put forward its views on the exercise of the extended jurisdiction in *Katabazi & Others v Secretary General of the East African Community & Another* (2007) AHRLR 119 (EAC

The prolonged failure to adopt such a Protocol to extend the Court's jurisdiction has resulted in legal action against the EAC Secretary General, with the EACJ in 2011 finding the Secretary General in violation of the Treaty for this failure to adopt the Protocol.¹⁹ Despite this determination, no action was taken and a follow up case was filed in 2012 against the Secretary General.²⁰ The Protocol was yet to be adopted as at the date of writing.

If the Protocol is eventually adopted, it will open an avenue for the inclusion of international standards such as the CRPD into the legal framework and hence enhance the protection of the rights of persons with disabilities in the subregion. Until such time, it is arguable that the African Charter should serve as a basis for the promotion and protection of the rights of persons with disabilities within the EAC in light of article 6 of the Treaty.

2.2 The promotion and protection of disability rights in the EAC

The EAC Treaty does not provide for disability specific measures. However, the Treaty calls for the promotion and protection of human rights in accordance with the African Charter.²¹ The EAC Treaty refers to persons with disabilities in the context of social welfare and education. Article 102(2) of the Treaty makes reference to collaboration by Partner States in 'putting in place education and training programmes for people with special needs and other disadvantaged groups'. In article 120(c), the Treaty calls for the development and adoption of a common approach towards disadvantaged and marginalised groups, including persons with disabilities, through rehabilitation and provision of amongst others, foster homes, health care, education and training. Article 39 of the Protocol on the EAC Common Market further calls for the harmonisation of social policies by Partner States in various aspects, including the promotion and protection of the rights of marginalised and vulnerable groups.²²

2007); *Nyong'o & 10 Others v The Attorney General of Kenya & 5 Others* Ref No 1 of 2006; *Sitenda Sibalu v The Secretary General of the EAC & 4 Others* Ref No 27 of 2010; and *The Attorney General of the Republic of Uganda & Another v Omar Awadh & 6 Others* Appeal No 2 of 2011. In *East African Law Society & Others v Attorney General of the Republic of Kenya & Others* (Ref No 3 of 2007) [2008] EACJ 1 (1 September 2008), the EACJ had to adjudicate human rights issues though the matter arose from articles 5(3)(g) and 7(1)(a), a factor that clearly indicates the necessity for an express human rights mandate. It is however important to note that none of these cases have focused on the rights of persons with disabilities in particular.

19 *Sibalu* (n 18 above); see also EAC Secretariat, Draft Protocol to the EAC Treaty expanding the jurisdiction of the EACJ (2005) art 10.

20 *Sitenda Sibalu v The Secretary General of the EAC* (2012). The matter was yet to be determined as at the time of writing.

21 EAC Treaty, art 6(d).

22 Protocol to the EAC Treaty on the establishment of the Common Market, art 39(2)(d).

As aforementioned, the EALA adopted a resolution in 2008 calling on Partner States of the EAC to ratify the CRPD. To date, four member states of the EAC have separately ratified the CRPD while Burundi has signed but not ratified the Convention.²³ It would require a more in-depth enquiry to establish the extent to which the subsequent resolution on the implementation of the CRPD was adhered to. Following a meeting of the key stakeholders on disability rights, including departments of the EAC Secretariat, EALA, partner states, civil society, and organisations of persons with disabilities (DPOs), the secretariat of the EAC developed a policy on persons with disabilities based on the article 120(c) of the Treaty.²⁴

The Policy is intended to 'be used as a yard stick to inform other policies, programmes and sectoral plans among EAC partner states'.²⁵ It acknowledges that the promotion and protection of the rights of persons with disabilities requires the adoption of a broad range of measures 'beyond a single piece of legislation'.²⁶ This recognition is profound and reflective of the general trend in the promotion and protection of the rights of persons with disabilities, which often entails the adoption of a disability specific statute backed by policy measures. The Policy also highlights measures taken in each of the member states towards the protection of persons with disabilities. However, while the Policy is a welcome step towards harmonisation of standards on the protection of the rights of persons with disabilities, it fails to give clear direction for action in this regard.²⁷

2.3 Protection of the rights of persons with disabilities in the future of the EAC

The EAC development strategy for the decade, that is 2011-2020, does not contemplate disability specific action, save in as far as there is an intention to ensure the improvement of health and education that could arguably

23 At the time of the Resolution, all member states of the EAC had signed, but only Kenya and Uganda had ratified the CRPD.

24 EAC Secretariat, EAC Policy on Persons with Disabilities (2012). It is important to note that the Council is the ultimate policy making organ of the Community. However, the Secretariat is mandated to co-ordinate and harmonise policies and strategies relating to the development of the Community through the Coordination Committees (article 71(1)(e)). Thus while the Policy in its current form is still instructive and unlikely to be rejected or fundamentally altered by the Council, it nevertheless has to be adopted by the Council to be an official policy of the Community.

25 EAC Policy on Disability 7.

26 EAC Policy on Disability 2.1.2.

27 Though the Policy was adopted in 2012, it does not refer to the EAC Strategic Plan for Gender, Youth, Children, Persons With Disability, Social Protection and Community Development (2012-2016) EAC Secretariat Arusha, Tanzania March 2012, yet this Strategic Plan contemplates the development of a Policy by December 2013 (para 4.3.4).

benefit persons with disabilities.²⁸ However, the EAC Strategic Plan for Gender, Youth, Children, Persons with Disability, Social Protection and Community Development (2012-2016)²⁹ aims to improve the conditions of the vulnerable members of society through the effective introduction and implementation of social protection programmes within the region, and to improve the livelihoods of persons with disabilities.³⁰

The strategic plan also seeks to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities for improved livelihoods.³¹ The mainstreaming of and interventions to address the social and development of, *inter alia*, persons with disabilities, is one of the priorities of the Strategic Plan.³² The Strategic Plan is arguably a lot more comprehensive than the Policy, and a lot more instructive on the potential entry points for the protection of the rights of persons with disabilities. The challenge with it however is that it approaches the issue from a social welfare as opposed to a rights perspective as is required under the CRPD.

The adoption of the Protocol for the extension of the mandate of the EACJ could be another entry point for the entrenchment of the rights of persons with disabilities at the subregional level. If a catalogue of rights is included in the Protocol, there would be an opportunity to include a disability specific provision alongside a general non-discrimination clause that recognises disability as one of the prohibited grounds of discrimination. In the alternative, if a more general provision allowing the Court to refer to international human rights instruments is allowed, the possibility of importing the standards of the CRPD into the subregion will be heightened. Either way, the opportunity presented by the adoption of the Protocol should be explored appropriately by those working to advance disability rights.

It is also noteworthy that the EAC Treaty dedicates certain sections to the development of some social groups, particularly women.³³ This is not necessarily done from a human rights perspective, but is significant in showing that there is sensitivity to the peculiar challenges of marginalised social groups in the EAC, that can be expanded to persons with disabilities.

28 4th EAC Development Strategy (2011/12-2015/16) 'Deepening and accelerating integration' (2011) 14.

29 EAC Strategic Plan for Gender, Youth, Children, Persons With Disability, Social Protection and Community Development (2012-2016) EAC Secretariat Arusha, Tanzania March 2012. The Policy seems to overlap with the EAC Strategic Plan for Gender, Youth, Children, and Social Protection and Community Development (2011 – 2015) of 2010.

30 As above, para 4.1.4.

31 As above, para 4.2.4.

32 As above, para 4.2.3.

33 EAC Treaty, arts 121-122.

3 Southern African Development Community

3.1 Legal framework and institutions

The Southern African Development Community (SADC) consists of fifteen members, extending to the Democratic Republic of the Congo and including the smaller 'island states' such as Mauritius and Seychelles.³⁴

The Treaty of the Southern African Development Community (SADC Treaty), which is the constitutive instrument, contains a general prohibition of discrimination on certain grounds. Disability is expressly listed amongst these grounds.³⁵ In addition to the Treaty, SADC member states have further adopted a number of instruments that include reference to some aspects of disability.³⁶

The SADC Protocol on Health, which envisages cooperation between SADC member states in respect of certain health aspects, *inter alia* provides that States Parties shall promote effective measures to prevent and manage disabilities; increase access to improved technology related to assistive devices, and the creation of a barrier free environment for the equalisation of opportunities for persons with disabilities; and promote community based rehabilitation programmes.³⁷ While the objectives of removing barriers and increasing accessibility are laudable, the emphasis on rehabilitative services and environmental accessibility may be disconcerting.

The Charter of Fundamental Social Rights in the SADC (Social Rights Charter) contains further provisions speaking to disability.³⁸ Member states are required to create an enabling environment so that all persons with disabilities, whatever the origin and nature of their disability, are

34 At the time of writing, the SADC has fifteen members; membership has in the past years varied due to suspension of some member states and admission of new members. See <http://www.sadc.int/member-states/> (accessed 25 September 2013).

35 Art 6(2) of the Treaty of the Southern African Development Community (SADC Treaty), adopted on 17 August 1992 and entered into force in 1993.

36 In fact, most SADC areas of cooperation are closely inter-linked with disability. In terms of art 21 of the SADC Treaty, cooperation will be sought in respect of, *inter alia*, food security; infrastructure and services; human resources development and science and technology; and social welfare. For instance, the type of infrastructure to be developed by SADC member states must be accessible to all, including persons with disabilities. In the same vein science and technology should be employed to advance the rights of everyone, including people with disabilities.

37 Art 15 of the SADC Protocol on Health, adopted in 1999 and entered into force in 2004.

38 The Charter provides a framework for regional cooperation in the collection and dissemination of labour market information, promotes the establishment and harmonisation of social security standards and health and safety standards at workplaces across the subregion. It also promotes the development of institutional capacities as well as vocational technical skills in the region. See www.sadc.int (accessed 25 September 2013.)

entitled to 'concrete measures' aimed at improving their social and professional integration. These measures must, 'according to the capacities of beneficiaries', relate to vocational training, accessibility and mobility, transport, housing and employment.³⁹ While this article ostensibly takes a progressive approach in its broad scope of application (specifically all persons with disabilities, whatever the origin and nature of their disability), and the goals of 'social and professional integration' conform with the CRPD, the phrase 'according to the capacities of beneficiaries' raises serious concerns.

The Social Rights Charter's provisions are taken further in the Code on Social Security, which devotes its article 14 to people with disabilities.⁴⁰ The concrete measures referred to in the Charter are specified more clearly here: member states should ensure that persons with disabilities are entitled to social security, and in particular, benefit from 'social safety net mechanisms'.⁴¹ Member states should further ensure that social security instruments guarantee equality of access and coverage to persons with disabilities.⁴² The special needs (including the need for assistive devices) and circumstances of persons with disabilities should be provided for in national social insurance and social assistance instruments.⁴³

In 2008, SADC member states adopted the SADC Protocol on Gender and Development, which includes an article dedicated to persons with disabilities.⁴⁴ However, the substance of this article is disappointing: States Parties are required, in accordance with the SADC Health Protocol, to adopt legislation and related measures to protect persons with disabilities that 'take into account their particular vulnerabilities'. In addition to the fact that this provision does not contain any statement of rights, the deferral to the (inadequate) Health Protocol and the protective approach adopted towards people with disabilities as a 'vulnerable group' are less than satisfactory.

The Protocol also more generally aims to harmonise the implementation of treaties to which SADC member states have subscribed or ratified. Importantly, the CRPD is included in the list of treaties enumerated in this regard.⁴⁵

In addition, the SADC armory on disability rights also includes Principle 7(9) under the SADC Principles and Guidelines Governing

39 Art 9(1) & (2).

40 Code on Social Security in the SADC (Social Security Code), adopted in 2008.

41 Social Security Code, art 14(1).

42 Social Security Code, art 14(2).

43 Social Security Code, art 14(4).

44 Art 9 of the SADC Protocol on Gender and Development (Gender Protocol), adopted in 2008.

45 See art 3(b) of the Gender Protocol.

Democratic Elections.⁴⁶ In terms of this principle, member states holding elections are required to encourage participation of women and persons with disabilities in all aspects of the electoral process. The principle of participation is also reiterated in the SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region, which lays the foundation for democratic governance and elections in the region.⁴⁷

Despite the promising framework sketched above, it should be noted, however, that certain of these instruments still adopt a 'medical' approach to disability, which may in the long-term not be optimal for to the promotion of disability rights.⁴⁸

3.2 Recent developments

The period from 2011 to 2012 held both positive and negative aspects in the promotion and protection of the rights of persons with disabilities in the SADC region. On the positive side, between 2011 and 2012 the Secretariat and member states of the SADC began a process envisaging the development of policy documents and strategic plans in areas relevant to the disability sector. These include food and nutritional security, non-transmissible diseases, and African traditional medicines.⁴⁹

On the negative side, the SADC Tribunal, which is responsible for ensuring adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments, saw its activities suspended in May 2011.⁵⁰ This setback left a major gap in the subregional human rights regime and at the time of writing the Tribunal remains out of action.

In sum, the SADC subregional framework boasts of a more generous inclusion of disability rights in its key documents than, for example, the East Africa Community – admittedly in some instances with some flaws. However, it should be added that SADC is arguably the most attenuated

46 SADC Principles and Guidelines Governing Democratic Elections, adopted in 2004.

47 SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region, adopted in 2001.

48 See generally, I Grobbelaar-du Plessis & T van Reenen 'Introduction to aspects of disability law in Africa' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) xxiii –xxv. See also R Traustadóttir 'Disability studies, the social model and legal developments' in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities – European and Scandinavian perspectives* (2009) 5.

49 See the 2010-2011 Activity report of the SADC Secretariat, available at <http://www.sadc.int/documents-publications/show/2112>, (accessed 20 September 2013). The plans also captured the need to obtain essential medicines for treatment of various diseases (diseases leading to disabilities included) and the manufacture of medicines within the subregion. At the time of writing, the status of these documents was unclear.

50 For further details on the reasons behind the suspension of the activities of the SADC Tribunal, see E de Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' *ICSID Review* (2013) 1.

among the African subregional economic communities in terms of its capacity to implement and monitor rights-related instruments.

4 Economic Community of West African States

The Economic Community of West African States (ECOWAS) was founded in 1975 by sixteen West African states.⁵¹ The Revised ECOWAS Treaty provides as one of its underlying principles, the 'recognition, promotion and protection of human and peoples' rights' in accordance with the provisions of the African Charter.⁵² Furthermore, Community members also agree to cooperate towards achievement of the realisation of the African Charter on Human and Peoples' Rights.⁵³ This incorporates, by reference, the provisions of article 18(4) of the African Charter relating to persons with disabilities.⁵⁴

In terms of institutional arrangements, the Community is made up *inter alia* of the Community Parliament and the Community Court of Justice. The Community Parliament, which plays an important consultative role, may consider issues relating to human rights and fundamental freedoms and make recommendations to the organs of the Community.⁵⁵

The ECOWAS Court of Justice gives advisory opinions on matters that require an interpretation of the Community text and also has jurisdiction to determine cases of human rights violations that take place within any member state.⁵⁶ This human rights mandate was introduced by the 2005 Supplementary Protocol, which extended the jurisdiction of the Court to cases of human rights violations that occur in any member state.⁵⁷ This implies that the Court can receive cases on disability-based discrimination and other human rights violations of persons with disabilities; the Supplementary Protocol also introduced direct individual access to the Court.

51 Currently, its membership consists of fifteen states which are; Benin, Burkina Faso, Cape Verde, Cote D'ivoire, Gambia, Ghana, Equitorial Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo – see <http://www.ecowas.int> (accessed 25 September 2013).

52 Revised ECOWAS Treaty 1993, art 4(h).

53 Revised ECOWAS Treaty, art 56(2).

54 See Biegon (n 1 above) 67.

55 Arts 6 & 13, Revised ECOWAS Treaty; Art 6, Protocol A/P.2/8/94 relating to the Community Parliament, adopted in 1994 http://www.parl.ecowas.int/English/the_parliament.html (accessed 25 September 2013).

56 Arts 6 & 15, Revised ECOWAS Treaty. See http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5 (accessed 25 September 2013).

57 Article 3(4) Supplementary Protocol A/SP.1/01/Amending Protocol A/P.1/7/91 relating to the Community Court of Justice.

Although the ECOWAS Court is one of the more prolific human rights bodies in the African human rights system, and commentators have noted its 'growing confidence and competence' in the field of human rights.⁵⁸ It has however not yet been presented with a disability-related case.

In 2012 the ECOWAS Commission adopted the ECOWAS Humanitarian Policy to standardise the practice of humanitarian action in ECOWAS member states. Its overall strategic objective is the prediction, prevention and overall management of disasters and conflicts; and enhancing the protection and social situations in West Africa as basic conditions for regional integration, peace, security and development. One of the objectives of this policy is to promote special measures for the protection of vulnerable persons, including 'physically challenged persons' during emergency situations.⁵⁹ The priority measures proposed include 'ensuring the domestication and implementation of relevant international instruments relating to the prohibition of discrimination based on disability'.⁶⁰ Prominent among these instruments is the CRPD. These steps towards domestication of the CRPD, albeit in this mainly humanitarian context, may lead to further concretising the rights of persons with disabilities in the sub-region.

58 Ebobrah (n 1 above) 245.

59 Strategic Objective 5 ECOWAS Humanitarian Policy, ECOWAS Commission 2012.

60 Priority measure (b) ECOWAS Humanitarian Policy.