

Will ECOWAS Benefit from Being Transformed into a « Confederation of States »?

By Alioune Sall & Moubarack Lo

Summary

The transformation of the Economic Community of Western African States (ECOWAS) into a « Confederation of States » is sometimes considered, including by the Heads of State of the Community, as a natural next step in the process of deeper integration in West Africa.

The purpose of this study is to explore its feasibility and relevance, based on the experience of other continents. A confederation of states can be defined as an association of sovereign states which, by means of an international treaty, decide to delegate the exercise of their competences in specific areas to common bodies which will be tasked with the mission of coordinating or harmonizing their policies in the relevant sectors.

At the international level, the evolution of confederal experiences shows a certain instability of this political form, whether it is subject to a progressive (transformation into a federation) or regressive (return to the full and complete sovereignty of states) destiny.

As far as ECOWAS is concerned, its transformation into a confederation would not, in itself, have significant legal and political implications, since there is nothing to prevent the designation of « confederation » from being a simple revision of the ECOWAS Treaty.

On certain points, far from representing a qualitative step in the process of integration of the states, this reform could imply « steps backwards », in terms of decision making (which would henceforward be unanimous and not by qualified majority) or in terms of integrating community acts into national law.

Thus, the only meaning of transforming ECOWAS into a « confederation » would be to explicitly conceive it as a step towards the implementation of a properly federal project.

A study on the prospect of transforming ECOWAS (Economic Community of West African States) into a « Confederation of States » could be organized along two lines:

- On the one hand, reflecting on the very concept of « confederation », on what it intrinsically means, as well as on the use that has been made of this form of organization throughout history, its various « experiments » and the lessons that can be learned from them;
- On the other hand, in a more precise or, more topical manner, exploring the nuts and bolts of the specific project in question: the transformation of ECOWAS into a « Confederation of States » and the main issues raised by this perspective.

I. General considerations regarding the « Confederation » as a form of political organization

First of all, we must look at the very definition of the Confederation of States.

A Confederation of States can be defined as an association of independent states which, by means of an international treaty, decide to delegate the exercise of their competences in specific areas to common bodies tasked with the mission of coordinating or harmonizing their policies in the relevant sectors. This association of states will, therefore, rely on specific inter-state bodies to achieve the objectives of the grouping thus established.

The first characteristic element of this definition lies, therefore, in the fact that the Confederate States keep their sovereignty, i.e. their independence vis-à-vis the international order. The Confederation is established through an international treaty, and any modification of this treaty requires, almost systematically, the unanimous stand of the Confederate States. This is a tribute to the principles of the sovereignty and equality of states, and already suggests that the confederal form is not so « revolutionary » with regard to the classical principles of international relations.

The « confederation » does not give rise to a new legal

personality, a new entity, unlike, in particular the federal state. Delegations of competences granted by the Confederate States may require the setting up of bodies specifically responsible for managing the areas delegated, but this will not, strictly speaking, generate a new legal person, nor will the communities participating in it be subject to a foreign legal order: member states keep control of their decisions, while the Confederation's own bodies will not, in principle, have normative or operational powers, except in restricted areas of competence defined in advance.

Unlike the « Federation », the Confederation is not a « super-state », it cannot create a state will higher than that of its members states. The institutional architecture of the Confederation is affected by this fact: the confederal institutions are generally reduced to the strict minimum, and their competences and powers remain effectively residual. The conditions under which they operate are rather similar to the mechanisms of simple consultation that take place in « diplomatic conferences ».

This form of political organization has the advantage of reassuring states to a certain extent, and preventing them from entering into a process leading, more or less, to their dissolution. One of the most famous provisions mentioned in this respect concerns West Africa: this is namely the Banjul Agreement of 11 November 1981, signed between Senegal and the Gambia, and relating to the creation of the Confederation of Senegambia, which states that « each of the confederated states will keep its independence and sovereignty ».

The Confederation is, therefore, characterized in its functioning by the prevalence of an inter-state logic – and not a logic of supra-nationality as such. This explains why it has had some success in all cases where states, being jealous of their sovereignty, are nevertheless faced with the need to maintain certain links between them.

Another characteristic element of the classical form of the confederation is that, in principle, the norms adopted by the confederal bodies will not be immediately applicable in the states concerned. They will have to be the subject of a special procedure for acceptance by the latter. The actual denomination of this formality of acceptance may vary from one state to another (« acceptance », « ratification », « approval » etc.), but the principle remains that the Confederation is not endowed with « normative immediacy », a property with which, on the contrary, « advanced » forms of state grouping are endowed.

Finally, a confederate state always has, in principle, the possibility of leaving the Confederation whenever it wishes. Again, this is a consequence of its freedom.

As a matter of fact, the concept of Confederation remains characterized by its flexibility, its elasticity, and, therefore, by a certain relativism in its qualification.

Within the range of « Confederations » experimented to date, there are variants; the nature of the relationship between the common institutions can vary considerably from one Confederation to another. Some entities, resembling international organizations, are sometimes called « confederations », as are groupings of states which are similar to real federations.

The notion of confederation does not really correspond to a classically delineated category. Neither in international law nor in constitutional law are there perfectly clear-cut and durable definitions. There are, therefore, no legal rules applicable to the various confederal systems, apart from the general characteristics that have been mentioned in the definition already indicated. The categories that have been developed or proposed in doctrine are rather tools designed to present the infinite variety of associations of states, rather than the actual translation of a community of norms or objects. This is why, behind the general theoretical presentation, we find multiple classifications, while the authors want to bring into their respective schemes the different types of associations created by treaty that exist in contemporary societies.

The most striking proof of the uncertainty surrounding the concept of confederation is the theoretical discussion that may have taken place about certain « confederations », such as Switzerland or the European Union (EU). In the former case, a major doctrinal controversy took place between 1815 and 1848 over whether the country was a « Confederation ». Advocates of the affirmative approach based their position on the fact that the central authority in the country had little power compared to that of some cantons.

As for the opponents of this theory, they relied on elements such as the provisions of the « Federal Treaty » of 1815 and on a certain practice of the « Diet » itself. Similarly, a terminological dispute has arisen over the category to which an entity, such as the European Union, belongs. The variety of designations observed in this respect (« Confederation », « Federation of Sovereign States », « Unidentified Political Object », « Inter-governmental Federalism », « Pre-federal Institution »,

etc.) is, to some extent, only proof of the difficulty of defining with precision the concept of « confederation » referred to in this debate.

Let us add another element of complexity to the debate. It is the transformations in the very concept of federalism, whose attenuated or current forms may refer to a confederation. This is particularly true of the concept of « cooperative federalism », which is intended to reveal new trends in federalism, such as the rise of polyarchic phenomena in federal states, the obsolescence, still in these states, of the idea of exclusivity of competences between the « local » and central levels and the substitution of the latter by practices based more on partnership or participation than autonomy. In a state, such as Germany, this reality was reflected in a revision of the Constitution, which took place in 1969, through the entrenchment of the notion of « common tasks ».

The variety of experiences of « confederations », in the past as well as in contemporary times, attests well to this relative vagueness surrounding the confederal institution.

The confederal form is quite old. It can already be found in Greek Antiquity (Achaean League, Aetolian League), as well as in Latin Antiquity (Etruscan Confederation), in « combinations » by which the states intended not to strip themselves of the essence of their independence.

In more contemporary times, we can mention the German Confederation (created in 1815, then transformed in 1866, after the departure of Austria, into the Confederation of Northern Germany), the Confederation of United Provinces (Netherlands), whose members were bound by the « Union of Utrecht » (1579) until 1795 (date on which the Netherlands formed a unitary state).

There are currently four more examples:

- The « Commonwealth », an association of states from the British Empire, with a minimum of common bodies: The Crown and a conference of heads of government;
- More recently, in December 1991, the break-up of the USSR gave way to a « Community of Independent States » (CIS) comprising twelve of the fourteen republics of the former USSR (excluding the Baltic States);
- The European Union, which emerged from the Maastricht Treaty signed on 7 February 1992

(supplemented by the Treaty of Amsterdam signed on 2 October 1997), is also sometimes presented as a « Confederation »;

- The Confederation established by the Agreement of 18 March 1994 between Bosnia-Herzegovina and Croatia.

It should be noted, however, that the qualification of « confederation », even for these four examples, is not unanimous, which is indeed proof of the relative characterization of an entity as « confederation » and, therefore, of a certain elusiveness of the latter as a notion.

Indeed, some consider that the « Confederation of the Commonwealth » now exists only in name, each member state having, in fact, recovered its full sovereignty.

The CIS, too, is now merely an entity whose components entertain rather loose relationships. Despite some twenty summit meetings of Heads of state and numerous agreements (in particular the Convention on the Financial Union of the CIS Member States, which entered into force on 23 January 1997), this Confederation has not managed to take decisive steps in economic or military cooperation, despite the creation in 1996 of an Intergovernmental Economic Committee of the Economic Union. In truth, it appeared that Russia prefers to develop a bundle of bilateral relations with other members, rather than inspire or participate in a comprehensive policy within the CIS. It thus signed a friendship treaty with Ukraine on 31 May 1997 (providing in particular for the definitive sharing of the Black Sea fleet), and a union treaty with Belarus, ratified on 10 July 1997, which provides for the establishment of « confederal structures »; its Article 1 states that « Each Member State of the Union shall keep its sovereignty, independence, territorial integrity, Constitution, flag, anthem and other attributes of State », even if a « Citizenship of the Union » is provided for.

In fact, this other « Confederation » has not materialized.

Equally problematic is the qualification of « confederation » in relation to the third commonly cited example: that of the European Union. It is true that some of the characteristics of this Organization are similar to those of the « confederation »: it is governed by a Treaty (and not a Constitution), which can only be revised by unanimity of the Member States; the latter also remain sovereign (the German Constitutional Court considers that the EU is an « association of sovereign states », in its

ruling of 12 October 1993, and the French Constitutional Council considers that the European treaties must not « affect the essential conditions for the exercise of sovereignty », notably in its « Maastricht I » decision of 9 April 1992; lastly, the confederal aspect is also reflected in the fact that in a number of areas (defense, foreign politics, security) there is only cooperation – and not really « integration » or « fusion » – of national policies. Such cooperation or coordination takes place in particular in the framework of the biannual meetings of the heads of state and government acting unanimously, which is a confederal-type arrangement.

In other areas, however, the EU has certainly gone beyond the confederal stage, which makes this qualification inappropriate. This is the case in the economic and monetary sector, but also in health, transport, education and industrial policy, where there is greater integration, illustrated by the existence of European law of direct and immediate application in the Member States, a law which is becoming increasingly abundant, to the point where almost four fifths of the national law of each of the Member States will be based on European standards.

This reality somewhat undermines the « principle of subsidiarity », which is supposed to « reassure » states of the risk of dissolution of their sovereignty.

With regard to the last example mentioned, some people consider that, because there has been no concrete follow-up, the Confederation between Bosnia-Herzegovina and Croatia is « stillborn ».

Thus, it is clear that the qualification of « confederation » is never self-evident, and that in any case, the examples usually cited today are not unanimous. This is because the confederal institution is characterized by its substantial, intrinsic fragility: it often appears to be a transitory, fleeting political form, incapable of lasting much longer and ultimately subject to the alternative of either returning to the previous state (each state recovering full sovereignty as a result of the loosening of ties between members), or going further and forming a « federation » (due to the « success » of the confederal experiment).

This truth is corroborated by the evolution of almost all the confederations.

Among the « aborted » experiences, we can mention, in addition to those just mentioned, the case of the

« United Arab Republic » (UAR) - created in 1958 by the union of Egypt and Syria, which disappeared in 1961 (although Egypt continued to use this name until 1971) – and that of the Confederation of Senegambia – which, after a long period of lethargy, officially ended in the 1990s. Those who believe that the « Commonwealth » does not really constitute a Confederation of States also consider that the Member States have in fact recovered their full and complete sovereignty a long time ago. Under the same heading, certain transitional political formulas can be classified as part of a decolonization process, such as the « Community » established with the former colonized countries of Africa in the French Constitution of 1958, or the Dutch-Indonesian Union, established with a view to Indonesia's accession to international sovereignty.

Conversely, the confederal process led to a true federation in the cases of the United States of America (the Confederation of the United States of North America lasted from 1751 to 1787), Switzerland (the Helvetic Confederation lasted from 1815 to 1866) or Germany (the Confederation of North Germany lasted from 1867 to 1870).

As a union of states without being a state, the confederation is a political form that poses both a theoretical and a practical problem. In theory, its contours are not always very clearly defined, which sometimes makes its qualification rather uncertain in relation to certain associations of states. From a practical point of view, the very evolution of confederal experiences attests to a form of instability of this political form, which is subject to a progressive (transformation into a federation) or regressive (return to the full and complete sovereignty of States) destiny.

In the light of these theoretical and practical, legal and empirical considerations, we now need to see what the implications of « transforming » ECOWAS into a « Confederation of States » can be.

II. What could be the meaning and scope of transforming ECOWAS into a « Confederation of States »?

Two important observations must be made in this regard. They sum up the problem as follows:

1. First of all, it should be noted that such a transformation would not, in itself, have a significant legal and political implication.

Indeed, the mere benefit of qualifying a grouping of States as a « confederation » does not mean much, since international organizations could be qualified as such, and ECOWAS is unquestionably an international organization. We simply have to think of the definition and characteristics of a « confederation » to realize that these do indeed exist within the « current » ECOWAS:

- States are « united » on the basis of an international treaty: this is the case of ECOWAS;
- This treaty can only be modified by unanimity of the Member States: Art. 9 of the ECOWAS Treaty;
- States have « pooled » a certain number of areas of competence: this is also the case of ECOWAS which does not only aim to achieve economic and monetary union (Preamble of the revised Treaty), but has also extended its fields of competence to cover « political » and military matters (competence in « governance » or « peacekeeping »).

States keep their international sovereignty: this is self-evident, as there is no provision in the ECOWAS Treaty that refers, even in the distant future, to an « abandonment of sovereignty » on the part of States.

Thus, in the current ECOWAS, we have the consensual characteristics of a « confederation ». It should be made clear at this stage that what makes a « confederation » is not necessarily a text; it is not just because the founding act of an association of States does not specify that it is a confederation, that it is not a confederation. What is important is that it is only in this association that we find the characteristics of a confederation. The most striking evidence of this truth is the qualification of « confederation » that a respectable doctrine applies to an entity such as the European Union, or the « Commonwealth ». However, nowhere in the texts relating to these organizations is the name of « confederation » entrenched. This is not surprising, since we have seen that the criteria for a confederation remain relatively « elusive », relatively « elastic ».

Admittedly, nothing prevents the advocates of a confederal project from achieving their goal and

enshrining the name of « confederation », for example, through a revision of the ECOWAS Constitutive Treaty. But such a reform would have a scope that is more theoretical than practical, more symbolic than real.

One may even question the opportunity of such a project, when we realize that on certain points, far from constituting a qualitative breakthrough in the process of integration of states, it could rather imply « steps backwards ». Two examples can be cited in this respect to show that the move towards a « confederation » might not constitute « progress », compared to what currently exists.

The first example is the decision-making process. Traditionally, in a confederation, decisions are taken unanimously precisely because states intend to assert their sovereignty.

However, in today's ECOWAS, a number of decisions are taken by qualified majority (although other decisions continue to be adopted by « unanimity » or « consensus »). These are Articles 9 and 12 of the Treaty, relating to the decision-making process within the Conference of Heads of State and Government and the Council of Ministers respectively. The majority rule in an international organization means that the organization, as a legal person different from the Member States, is strengthened, since it introduces the likelihood that states may be « minoritized » and find themselves obliged to apply standards to which they have not subscribed. The majority rule is therefore appropriate for organizations that are strengthening, for genuine integration-driven organizations requiring sacrifices of sovereignty on the part of Member States. This is why this decision-making process almost never appears at the very beginning of the organization's establishment, and is only introduced after a few years, when states are psychologically ready to make substantial transfers of competence for the benefit of the organization. ECOWAS itself did not provide for such a mechanism in its initial version (the Founding Treaty of 1975), it only adopted it later on (when the said Treaty was revised in 1993). The adoption of a confederal pattern could, therefore, should we remain within the orthodoxy of the latter, lead to a total return to the unanimity rule, which would undoubtedly be detrimental to the strengthening of the organization which brings states together. In other words, a genuine integration-driven organization (as the current ECOWAS tends to be) could be « stronger » than a « Confederation of States ». The important lesson to be

learned from this is that « designations » may not mean much, and that it is always necessary, beyond the formal designations, to examine, in substance, the reality of the concessions of sovereignty made by States.

The second example is the force with which supranational norms could be imposed on states. We have seen that in a confederation, the conditions under which the collectively agreed norms applied to the Member States ultimately depend on them. More specifically, in order to apply at national level, confederal acts always had to be subject to explicit reception procedures, as these acts are not intended to apply directly and immediately. Transforming ECOWAS into a « confederation », if it were to comply with this rule, would certainly represent a « step back » from the current situation. Today, in fact, with the 1993 revision and the recent reform of 16 February 2010, the conditions for the entry into force of acts taken within the framework of ECOWAS testify to a rise in supra-nationality, i.e. a strengthening of the international organization as a person distinct from the Member States. The acts adopted enter into force according to a centralized procedure, more precisely after their publication in the Official Journal (OJ) of ECOWAS. Although States are invited to publish them nationally as well, this is not a condition for the entry into force of the norms. In other words, this entry into force is not dependent on the States, which is contrary to the principles of the confederation. If ECOWAS were to become a confederation, the achievements of 1993 and 2010 would be threatened, and we would not see progress in integration, but rather a setback on this very point.

All this shows that transformation into a « confederation », if it were to be considered on its own, outside of any more ambitious perspective, would not be so useful. On the contrary, we have seen that, regarding at least two points, it would reflect a form of atavism, not a « qualitative breakthrough », a form of regression and not progress.

2. In fact, the only meaning of transforming ECOWAS into a « confederation » would be to explicitly conceive it as a step towards the implementation of a properly federal project.

In other words, the process through which a number of states, which are now federal, were formed should be repeated here: the establishment of a « confederation »

as a first step – as a transitional phase and moment of adaptation of the federal scheme – followed by the actual creation of a « federation ».

Indeed, nowhere in its texts does the current ECOWAS state a federative ambition. It merely states, notably in the Preamble of the revised Treaty, that it is « ultimately the only framework for the integration of states in West Africa ». Such a proclamation means that the Community's inclination is to « integrate » or « phagocytize » the other integration-driven organizations that exist in West Africa (such as WAEMU, the Council of Accord (Conseil de l'Entente) or the Mano River Union ...), but it does not in any way induce any federative form.

The only « added value » of transforming ECOWAS into a « confederation » consists precisely in giving the Community of West African States a new and even revolutionary vocation, by being the framework of a future Federation of States.

The proposal to make ECOWAS a « Confederation » should, therefore, if it is to be truly innovative, indicate its ultimate end: erecting a Federation of States in West Africa.

Such a political and legal project must, however, be mindful of two requirements in particular:

- It will first have to define a schedule, i.e. a calendar for the realization of the « Federation ». It is not imperative that it define the « communitarized » areas of competence, since these already exist (these are the areas of competence of ECOWAS itself), but it is important to propose a direction, a horizon, to at least reflect on the shift to the federal stage;
- It will have to ensure that it remains compatible with continentalist, pan-African grouping projects. Indeed, it should not be forgotten that ECOWAS has, since its inception in 1975, designed its vocation and its action in relation to the project of grouping States throughout the entire continent, which was the project of the Organization of African Unity (OAU) and, today, the AU. In its Constitutive Treaty, the Community of West African States affirms, even today, its articulation with pan-Africanism. The two pan-African organizations themselves, notably through the Lagos Plan of Action (1979-1980), the Abuja Treaty establishing the African Economic Community (1991) and the Constitutive Act of

the African Union (Art. 4) have, at least implicitly, assigned to the sub-regional organization, ECOWAS, the mission of achieving the integration of States at its level. However, nowhere in the texts of the Pan-African Organizations is there any mention of the achievement of « federations », or even « confederations » in the « sub-regions ».

In fact, these texts do not prohibit it. However, since the freedom of States is the principle, it may be thought that they keep the right to gather in whatever form they wish, including the federal form.

In our view, therefore, there is no legal obstacle to the prospect of making ECOWAS a « confederation » and then possibly a « federation ».

At best, it will be recommended that a legal precaution be taken if such a project were to come true. The treaty establishing the project should, for all intents and purposes, be deposited with the African Union Commission in Addis Ababa. This would show that the project is not conceived « in secret » or out of control of the Pan-African Organizations. Above all, it would be a way of remaining faithful to the long-standing doctrine on the compatibility of sub-regional groupings with the continental project of African integration. This doctrine was developed in August 1963 by the OAU Council of Ministers meeting in Dakar and nothing since then has contradicted or changed it.

Three conditions were then laid down to ensure the compatibility of the sub-regional groupings with the Pan-African ambition itself:

- Sub-regional organizations should reflect real solidarity between their Member States;
- These organizations were to solemnly affirm their compatibility with the OAU (now AU) Charter;
- The Constitutive Act of these organizations were to be deposited with the Secretariat of the OAU (now the AU Commission) – which did not, however, make it the « depositary », in the technical sense of the term, of the international Treaty.

None of these conditions would pose difficulties if ECOWAS were to transform into a « confederation » and, above all, later on into a « federation » of states.

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The views expressed in this publication are those of the author.



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