

**REVISITING THE ROLE OF SUB-REGIONAL COURTS IN THE PROTECTION OF
HUMAN RIGHTS IN AFRICA**

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DECLARATION

I Lucyline Nkatha Murungi hereby declare that this is my original work, that it has not been submitted for assessment before any other academic forum and that where another person's work is used, it has been duly acknowledged.

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DEDICATION

This work is dedicated to my dear parents Rev. Samuel Murungi and Mrs. Priscilla A. Murungi. I honour you.

And

To my late sister Jennifer Wanja Murungi - It breaks my heart that I never got to bid you farewell but I thank God that I shared a part of my life with you. You will always be special to me. Rest in Peace.

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LIST OF ABBREVIATIONS

ACHPR	:	African Charter on Human and Peoples' Rights
ACmHPR	:	African Commission on Human and Peoples' Rights
ACtHPR	:	African Court on Human and Peoples' Rights
ACRWC	:	African Charter on the Rights and Welfare of the Child
ACJHR	:	African Court of Justice and Human Rights
AEC	:	African Economic Community
AHRS	:	African Human Rights System
AU	:	African Union
EAC	:	East Africa Community:
EACJ	:	East Africa Court of Justice
ECCJ	:	ECOWAS Community Court of Justice
ECOWAS	:	Economic Community of the West African States
ICJ	:	International Court of Justice
OAU	:	Organisation of African Unity
REC	:	Regional Economic Community
REC Courts	:	Regional Economic Community Courts
SADC	:	Southern African development Community
SADCC	:	Southern Africa Development Coordinating conference
UNDHR	:	United Nations Declaration of Human Rights
SADCT	:	Southern African Development Community Tribunal

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CHAPTER ONE

INTRODUCTION AND PRELIMINARIES

1.1 Background of the study

Several attempts at intergovernmental cooperation have been made in post-colonial Africa both at the regional and sub-regional levels. It started with the adoption of the Charter of the Organisation of African Unity (Charter of OAU) in 1963. This was followed by sub-regional organisations commonly referred to as regional economic communities (RECs) such as the East African Community (EAC), Economic Community of the West African States (ECOWAS) and the Southern African Development Coordinating Conference (SADCC).¹The main object of cooperation was to enhance economic development. Save for a remote reference to the United Nations Declaration of Human Rights (UNDHR) the purposes of the Organisation of African Unity (OAU) did not include promotion or protection of human rights. Though the African Charter on Human and Peoples' Rights (ACHPR) was adopted in 1981, it was not until the adoption of the Constitutive Act of the African Union² that human rights formally became an objective of the African Union (AU).³

Similarly, the founding documents of most RECs adopted before the ACHPR, did not provide for protection or promotion of human rights whether as a goal or principle thereof. Currently however, promotion and protection of human rights and democracy is part of the fundamental principles or goals of most RECs. For instance, the treaties of the EAC⁴, ECOWAS⁵ and SADC⁶ provide for human rights either as a fundamental or operational principle of the REC or one of its objectives. Also, the competence of their courts (REC courts) has been expanded to cover human rights issues.⁷ But, their exercise of human rights jurisdiction is much more recent.

¹ Formed in 1967, 1975 and 1980 respectively.

² Article 3(h) of the Constitutive Act of the African Union adopted in 2000 and came to force in 2001.

³ It can be termed as incremental to the extent that earlier documents such as the Treaty Establishing the African Economic Community, adopted under the auspices of the OAU in 1991 had already established human rights as a fundamental concern. See its chapter II article 3(g) and 5(1).

⁴ Article 5(3)(e), 6(d) and 7(2) of the Amended Treaty for the Establishment of the East Africa Community (as amended on 14 December 2006 and 20 August 2007).

⁵ Article 4 of the Revised Treaty of Economic Community of the West African States as amended in 1993.

⁶ Article 4(d), 5 and 6 of the Declaration and Treaty of the Southern African Development Community.

⁷ ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: prospects and challenges' *African Journal of International and Comparative Law* (2009), volume 17 Issue 1 (79-101) 80.

The shift towards human rights was pioneered by an amendment of the ECOWAS treaty⁸ in 1993 that mainstreamed human rights into the agenda of ECOWAS.⁹ Subsequently, ECOWAS member states adopted a Supplementary Protocol¹⁰ to give the ECOWAS Community Court of Justice (ECCJ) competence to determine cases of violation of human rights in the member states.¹¹ This was followed by the adoption of the EAC Treaty in 1999¹² which established respect, promotion and protection of human rights in accordance with the ACHPR as a fundamental principle thereof.¹³ In 2002, the SADC treaty¹⁴ was amended to expand its scope to the area of human rights.¹⁵ This also meant that its tribunal was now bound to interpret questions of human rights.

In effect, the RECs have introduced a new layer of supranational protection and promotion of human rights in Africa. Their courts now play an important role in the protection of human rights through the determination of human rights cases. This work underscores the significance of this role and its impact on the protection of human rights in Africa.

1.2 Problem statement

Whereas the entry of RECs as an avenue for protection of rights is generally favourably hailed,¹⁶ its novelty demands a consideration as to their appropriateness as forums for the protection of human rights. Particularly, there is need to establish the place of REC Courts within the African human rights system (AHRS) and their relationship with the regional human rights institutions. There is also concern over their capacity to effectively exercise the new competence in light of the economic focus of their founding treaties. The potential impact of the proliferation of human rights courts on the unity of international human rights law in Africa and how best to deal with this reality is another outstanding issue for advocates for human rights in the region.

⁸ Treaty of ECOWAS (n 5 above).

⁹ ST Ebobrah 'Human rights developments in sub-regional courts in Africa in 2008' (2009) *Africa Human Rights Law Journal* 7.

¹⁰ Supplementary Protocol A/SP.1/01/05 Amending the Preamble and articles 1, 2, 9, 22 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and article 4 paragraph 1 of the English version of the said Protocol.

¹¹ Ebobrah 'Litigating human rights' (n 7 above) 86.

¹² EAC Treaty Establishing the East Africa Community, 1999.

¹³ As above article 6(d).

¹⁴ Revised Declaration and Treaty of the Southern African Development Community, 1992.

¹⁵ See F Viljoen *International Human Rights Law in Africa* (2007) Oxford University Press for a general discussion on the changing trend in the RECs 497-8.

¹⁶ Viljoen (n 15 above) 503.

These issues have been raised in existing literature, but it is not clear what the solution is or whether they completely undermine the viability of REC courts as avenues for the protection of rights. The necessary institutional and normative adjustments to address these concerns also need to be established.

1.3 Literature review

There is a growing body of literature regarding the role of sub-regional courts in the protection of human rights. Most of this however relates to the role of the RECs generally as opposed to REC courts, albeit with a few references to the REC courts. For instance, *Ruppel*¹⁷ traces the development of human rights into the agenda of RECs to the Abuja Treaty¹⁸ and argues that RECs moved to the protection and promotion of human rights in response to the obligations arising under the Treaty. A similar discussion is made by *Ebobrah*¹⁹ albeit much more specific to the REC courts. He explores some of the salient concerns underlying the human rights mandate of the three REC courts highlighted in this work.

In another instance, *Ebobrah*²⁰ identifies the challenges posed by the entry of REC courts as human rights protectors to the unity of human rights law in the region. He proposes an amendment of the rules of procedure of both the ACtHPR and the ACmHPR and the adoption of measures aimed at fostering judicial co-operation to deal with the threat to the unity of the law. *Shany*²¹ suggests jurisdictional regulation principles to deal with the problems associated with the proliferation of international courts.

*Viljoen*²² offers a background to the development of RECs in Africa while highlighting the gradual evolution of rights into their agenda and the development of a human rights competence for REC courts. He highlights the significant contribution of REC courts to the

¹⁷ OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in Anton Bösl & Joseph Diescho (eds) (2009) *Human Rights Law in Africa: Legal perspectives on their protection and Promotion* Mc Millan Education Namibia 319 - 350.

¹⁸ AEC Treaty (n 3 above).

¹⁹ Ebobrah 'Litigating human rights' (n 7 above).

²⁰ ST Ebobrah 'Addressing sub-regional challenges to the unity of African international human rights law' http://www.jus.uio.no/forskning/grupper/intrel/arrangementer/seminarer/oslo_conference_2009/drafts/ebobrah.pdf accessed 19 June 2009.

²¹ S Yuval S *The Competing Jurisdiction of International Courts and Tribunals* (2003) Oxford University Press.

²² n 15 above.

protection of human rights in the region and potential benefits of their continued role in this regard.

Regarding an appropriate normative source for REC courts, *Musungu*²³ proposes the application of the ACHPR as a bill of rights for African REC courts on the basis that all member states of the AU are party to the ACHPR. Supporting this position, *Viljoen* argues that the development of separate catalogues in each REC is likely to compromise the prospect of eventual unification of international human rights law in Africa.

Regarding the jurisdiction of the REC courts, *Ruppel*²⁴ argues that in the absence of express provisions vesting human rights jurisdiction on them, the content of their founding treaties notwithstanding, they lack such jurisdiction. The exercise of human rights jurisdiction by REC courts in the absence of express jurisdictional provisions has been interpreted in different ways. *Ebobrah*²⁵ regards it as exercise of a 'derivative mandate' and a potential usurpation of the role of the legislative organs of the REC, while *Viljoen* deems it as necessary activism of the court.²⁶ Ultimately, there is no consensus in existing literature on whether REC courts can legitimately exercise jurisdiction on the basis of an implied mandate, sufficient to serve the purpose of protecting rights.

There is extensive literature on the AHRS. For instance, the discussions by *Murray*²⁷ and *Viljoen* are instructive in highlighting the institutional structure and roles of the AHRS. This is applied in this discussion to identify the place accorded RECs within the existing framework of the AHRS. Literature on the role of REC courts is scanty save for some works on specific REC courts.²⁸

This work collates the strewn pieces to establish the common issues and to highlight the possible points of convergence on the role of REC courts in the protection of human rights in

²³ SF Musungu 'Economic integration and human rights in Africa: a comment on conceptual linkages' (2003) 3 *Africa Human Rights Law Journal*.

²⁴ Ruppel (n 17 above) arguing with respect to the EACJ.

²⁵ Ebobrah 'Litigating human rights' (n 7 above) 82.

²⁶ n 15 above.

²⁷ M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2008) 2nd edition Cambridge University Press 78.

²⁸ For instance CM Peter (ed) *The protectors: human rights commissions and accountability in East Africa* (2008) Fountain Publishers Kampala; ST Ebobrah *A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice* (2008) Danish Institute for Human Rights Denmark; K Thoko "SADC and human rights: fitting human rights into the trade matrix" *African Security Review* 13(1) (2004) 109 -117.

Africa for a common discussion. The foregoing literature serves for a background for this purpose. The points of concern highlighted therein with respect to REC courts are explored for their credibility and the possible solutions for better protection of rights in the region.

1.4 Research questions

The research addresses the question as to whether REC courts are suitable forums for protection of human rights in Africa, and what, in light of their newly acquire role, is an appropriate mandate with respect to human rights.

1.5 Relevance of the study

This study contributes to the debate surrounding the suitability of REC courts as avenues for protection of human rights in view of the economic focus of RECs. It identifies adjustments that can be made within the AHRS to deal with the challenges associated with the development of REC courts both in the interim and in the long-term.

1.6 Research methodology

The work is based on desktop research. The information used is obtained from secondary sources particularly text books, journals, case law and internet resources. The work uses the example of the EACJ, the ECCJ and the SADCT to illustrate the issues surrounding human rights mandate of REC courts. Conclusions drawn from an analysis of this information are applied towards answering the research questions.

1.7 Limitations of the study

There are several other REC courts in Africa but, in view of the limitations of space, this study focuses only on the EACJ, ECCJ and SADCT for illustration as necessary. These three are representative of the geographical regions of Africa. The EACJ is referenced more often since it is recently established, and is in the process of defining its mandate. It is therefore more suited to benefit from the current discussion. The EACJ is further considered representative of the issues surrounding the role of REC courts in the protection and promotion of human rights in Africa.

1.8 Overview of chapters

This introductory chapter is followed by a study of the historical development of RECs in the region and an exposition of the steps leading to the current status of human rights in their agenda and in the jurisdiction of their courts. In chapter three, the work identifies and addresses concerns raised regarding the suitability of REC courts as human rights courts. The fourth chapter assesses the salient issues surrounding a proper mandate of the REC courts. It explores normative and structural adjustments necessary for the AHRS to further optimum performance of RECs in their mandate. The final chapter offers a synopsis of the findings in the work, adopts recommendations based on the findings, and concludes the research.

CHAPTER TWO

REGIONAL ECONOMIC COMMUNITIES AND HUMAN RIGHTS IN AFRICA: RELEVANT DEVELOPMENTS

2.0 Introduction

This chapter traces the journey of human rights into the agenda of various RECs in Africa to date. It begins by outlining in summary the development of RECs in Africa, followed by an assessment of the development of human rights as an agenda of specific RECs. The current status and approach of each of these RECs to the subject of human rights is highlighted for discussion in the subsequent chapters of this work.

2.1 Regional integration in Africa - historical background

After the demise of colonial rule in Africa, mainly in the 1960s, the reality of the political and economic fragility of the post colonial African state became apparent. In response to this need, African states were called upon to integrate politically and economically in order to achieve development and to undo the balkanization of Africa brought by colonialism.¹ This was to be done through creation of larger markets and consolidation of the resources and potential of the poor economies.² Though this agenda was not immediately achieved at the regional level, states began to come together in their respective sub-regions following a pattern of geographical proximity and country contiguity.³ Hence, most RECs are centred on geographical sub-regions.⁴ The 1996 OAU decision to divide Africa into 5 sub-regions along geographical lines⁵ seems to have endorsed this approach.

¹ KN Lolette "Regional integration: concepts, advantages, disadvantages and lessons of experience" (2005) unpublished paper available at http://www.sarpn.org.za/documents/d0001249/P1416-RI-concepts_May2005.pdf accessed on 05 September 2005.

² K Thoko "SADC human security: fitting human rights into the trade matrix" *African Security Review* 13(1) (2004) 1.

³ Economic Commission for Africa *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* (2006) ECA Addis Ababa Ethiopia.

⁴ F Viljoen *International human rights law in Africa* (2007) Oxford University Publishers 488.

⁵ R Ajulu (ed) *The making of a region: revival of the East Africa Community* (2005) Institute For Global Dialogue 19.

2.1.1 The Abuja process

In 1980, the OAU adopted the Lagos Plan of Action⁶ addressing the political and economic crisis affecting African states. It resolved *inter alia* to promote economic and social integration of African economies in order to enhance self-reliant and self-centred development.⁷ It proposed the creation of national, sub-regional and regional institutions in pursuit of self-reliance.⁸

The Abuja process culminated in the adoption of the Abuja Treaty establishing the African Economic Community (AEC).⁹ This treaty sets out the legal framework of the AEC and entrenches the position of RECs as its building blocks.¹⁰ Strengthening of the existing RECs and establishment of new ones where none exist is the first step on the road towards the agenda of African economic integration pursued by the AEC.¹¹ The Abuja Treaty bases the pursuit of African economic integration on *inter alia* the principle of recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the ACHPR.¹²

The Abuja process postdates some of the RECs discussed in this work but in the main, it predates the incorporation of human rights into their agenda. Its influence on the place of human rights in their operations is evident from the framing of their documents which in some cases almost replicate its provisions.¹³ It also illustrates that RECs are part of a greater regional agenda, as opposed to isolated initiatives dependent on the will of the member states. Member states to the Abuja Treaty are irrevocably bound to respect the principles and objectives of the AEC and to desist from conduct that would defeat this purpose.¹⁴ In essence, RECs have a duty to respect and promote human rights in their jurisdictions.¹⁵

⁶ Organization of African Unity Lagos Plan of Action for the Economic Development of Africa (1980 - 2000) available at http://www.uneca.org/itca/ariportal/docs/lagos_plan.PDF accessed on 29 October 2009.

⁷ RN Kouassi "The itinerary of the African integration process: an overview of the historic landmarks" *Africa Integration Review* Vol 1 No. 2 July 2007 available at <http://www.africa.union.org/root/UA/Newsletter/EA/Vol.1,No.2/Kouassi.pdf> accessed on 14 September 2009.

⁸ See paragraph 3 (iii) of the Preamble of the Plan of Action (n 6 above).

⁹ Treaty Establishing the African Economic Community 1991 (Abuja Treaty).

¹⁰ OC Ruppel "Regional economic communities and human rights in East and Southern Africa" in Anton Bösl & Joseph Diescho (eds)(2009) *Human Rights Law in Africa: Legal perspectives on their protection and Promotion* Mc Millan Education Namibia (319 - 350) 280.

¹¹ n 9 above article 4(2).

¹² As above article 3(g).

¹³ See as above article 3(g) and article 6(d) of the EAC Treaty.

¹⁴ n 9 above article 5.

¹⁵ Ruppel (n 10 above) 281.

Pursuit of African economic integration through the AEC is a core project of the OAU/AU. Notwithstanding arguments that economic integration did not take centre stage in the transformation of the OAU into the AU,¹⁶ the Constitutive Act of the AU recognises the need to coordinate and harmonize policies between the existing and future RECs for gradual attainment of the objectives of the union.¹⁷ This reaffirms the centrality of RECs to AU agenda and their role as economic building blocks within the AU. Alongside other factors,¹⁸ the Abuja process can be regarded as the key driver behind the formation of RECs across the continent.¹⁹

Departure of RECs from previous indifference on human rights is evident in the specific references made to human rights in their founding or other documents and themes underlying some of them such as gender and equality or HIV/AIDS.²⁰ For instance, the SADC Protocol on Gender and Development provides that,²¹ by 2015, member states are obliged to enshrine gender equality in their respective constitutions, and to have their constitutions state that the provisions enshrining gender equality take precedence over their customary, religious and other laws.²² This illustrates the centrality of human rights in the RECs currently.

2.1.2 Other reasons for integration of human rights into the mandate of RECs

First, the adoption of the ACHPR has made human rights a common feature in interstate relations in the continent.²³ The obligations of states emanating from the ACHPR and other human rights treaties to which African states are party oblige them to reflect human rights protection in subsequent commitments such as REC treaties.²⁴

¹⁶ Viljoen (n 4 above) 480.

¹⁷ Article 3(c) and (l) of the Constitutive Act of the African Union.

¹⁸ Such as calls by the UN Economic Commission for Africa (UNECA) on African States to work towards a single economic union through the creation of sub-regional economies. See Ruppel (n 10 above) 275.

¹⁹ There are at least 14 RECs in Africa today, 8 of which are recognised by the African Union. See www.africa-union.org (accessed on 20 September 2009) for a list of the recognised RECs.

²⁰ Ruppel (n 10 above) 3.

²¹ Article 4.

²² See also article 5(3) (e), and chapter 22 of the Revised Treaty Establishing the East Africa Community. See also the EAC Plan of Action on the Promotion and Protection of Human rights in East Africa (EAC/CM 15/Decision 36) EAC (2008c:20). These efforts have been interpreted to provide an in-depth protection of human rights within EAC. See Ruppel (n10 above) 305.

²³ ST Ebovrah 'Litigating human rights before sub-regional courts in Africa: prospects and challenges' *African Journal of International and Comparative Law* (2009), volume 17 Issue 1 (79-101) 80.

²⁴ Thoko (n 2 above) 112. He argues that the obligations contained in the Universal Bill of Rights establish the civil, political, economic and social needs of people as rights which may not be curtailed in the pursuit of economic development. It is hence proposed that the Treaties of these RECs may not be interpreted in isolation of the other human rights obligations, but rather in a manner that furthers these objectives. This approach is derived and

Secondly, human rights coupled with good governance create an appropriate investment climate that is critical to furthering economic development.²⁵ The adoption of strong human rights values and institutions creates confidence for investors and trading partners and ensures effective participation of individuals. This in turn facilitates protection from the negative effects of trade. Also, regional integration is accompanied by high levels of economic, political and social interaction which in turn call for a coherent framework of rules for governing the relations that arise there from.²⁶ Human rights form a part of such framework.

Finally, 'international human rights law emphasises the importance of human rights obligations in all areas of governance and development and requires governments and economic policy forums [such as RECs] to take into account human rights principles while formulating national, regional and international economic agendas.'²⁷

2.2.1 Evolution of human rights into the mandate of REC courts²⁸

RECs tend to have an institutional structure that includes a court which is the judicial or principal legal organ of the community to deal with controversies relating to the interpretation or application of the REC's law.²⁹ As the organs vested with such responsibility, they have, as a result of the incorporation of human rights into the agenda of RECs, been required to adjudicate over cases, to interpret provisions of their treaties or to advise their principals on questions with implications for human rights. The treaties of most RECs have therefore gradually moved towards according REC courts competence to hear human rights cases.³⁰

In some cases such as the ECCJ (discussed in section 2.2.3.2 below), competence is expressly provided while in others such as the SADCT and EACJ (discussed in section 2.2.4.2 and 2.2.5.2 below respectively) it is not as clearly set out. But even in the absence of express competence³¹ REC courts have not been deterred from exercising jurisdiction over matters in which questions

supported by the provisions of Article 31(3) (c) of the Vienna Convention on the Law of Treaties. In the context of RECs, one is bound to interpret their treaties in line with their obligations as obtaining under other human rights instruments.

²⁵ Ruppel (n 10 above) 279.

²⁶ Thoko (n 2 above) 112.

²⁷ Oloka-Onyango J & D Udagama *Human rights as the primary objective of international trade, investment and finance policy and practice* UN Doc.E/CN.4/Sub.2/1999, para 47.

²⁸ The term 'courts' as used in this work refers to both courts and tribunals.

²⁹ Ruppel (n 10 above) 282.

³⁰ Ebobrah (n 23 above) 80.

³¹ Ebobrah (as above) argues that the EACJ and the SADCT have no clear competence over human rights.

of human rights were raised.³² This exercise of jurisdiction in the absence of an express provision vesting it points to the existence of an implied mandate.

2.2.2 Specific developments

The evolution of protection of human rights as an agenda of RECs and as part of the jurisdiction of their courts is unique to each one of them, and the approaches adopted in this regard are also different. Thus to trace these developments, it is imperative to look at each of these RECs in turn.

2.2.3.1 Economic Community of the West African States, (ECOWAS))

ECOWAS is a fifteen member group of West African states formed in 1975 to promote economic integration of member states.³³ This scope of co-operation expanded in tandem with the need to respond to issues in the member states which also created an entry point for human rights into the agenda of ECOWAS. ³⁴ Its founding Treaty³⁵ did not contain any references to human rights.³⁶ Gradually however, protocols adopted under the Treaty incorporated different rights in their scope, culminating in the 1991 ECOWAS Declaration of Political Principles which expressed *inter alia* a determination by member states to respect fundamental human rights as embodied in the ACHPR.³⁷ In 1993 the Treaty of ECOWAS was amended to recognise promotion and protection of human and peoples' rights in accordance with the ACHPR as a fundamental principle of the community.³⁸ The move towards rights consciousness is a combination of necessity and changing international dynamics.³⁹

³² *Katabazi and 21 others v Secretary General of the EAC and another* Ref. No.1 of 2007; *Nyong'o and 10 others v The Attorney General of Kenya and others* Ref No. 1 of 2006; *East Africa Law Society and 3 others v The Attorney General of Kenya and 3 others* Reference 3 of 2007 for the EACJ, and *Ernest Francis Mtingwi v SADC Secretariat* SADC (T) Case No.1/2007; *Campbell and 78 others v Zimbabwe* SADC(T) Case Number 2/2007 for the SADCT.

³³ <http://www.comm.ecowas.int/sec/index.php?id=about-a&lang=en> accessed on 17 September 2009. See also paragraph 6 of the preamble to the 1975 Treaty (n 35 below).

³⁴ ST Ebobrah, *A critical analysis of the human rights mandate of ECOWAS Community Court of Justice* (2008) Danish Institute for Human Rights 7.

³⁵ Treaty of the Economic Community of West African States (ECOWAS), 28 May 1975, available at: <http://www.unhcr.org/refworld/docid/49217f4c2.html> [accessed 29 October 2009].

³⁶ Ebobrah (n 34 above) 9.

³⁷ Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States para 5 of the preamble and para 4, 5 and 6 of the substantive part of the Declaration.

³⁸ Article 4(g) of the 1993 Revised Treaty for the Establishment of ECOWAS which also refers to specific rights and obligations of member states as in article 56(2), 59 and 66(2) c.

³⁹ N Nwogu 'Regional integration as an instrument of human rights: re-conceptualizing ECOWAS' *Journal of Human Rights* 6:3, 345-360 349.

2.2.3.2 ECOWAS Community Court of Justice, (ECCJ)

The ECCJ is the judicial arm⁴⁰ and the principal legal organ⁴¹ of ECOWAS with the responsibility to administer justice according to law by ensuring observance of law and the principles of equity in the interpretation and application of the Treaty of ECOWAS.⁴² The Protocol to operationalize the ECCJ was adopted in 1991 and amended in 2005 and 2006 respectively⁴³ to give the ECCJ competence to determine cases of violation of human rights occurring in any of the member states.⁴⁴ The amendment reads;⁴⁵

“Article 9 of the Protocol relating to the Community Court of Justice is hereby deleted and substituted by the following new provisions:

Article 9: Jurisdiction of the Court

4. The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.”

The ECCJ has since admitted and determined several cases⁴⁶ on human rights and is the only of the courts highlighted in this work that has an express mandate over questions of human rights.

2.2.4.1 The Southern Africa Development Community, (SADC)

SADC is the Southern Africa sub-regional equivalent of ECOWAS with a current membership of 15 states.⁴⁷ It dates back to the 1980 Lusaka Declaration forming the Southern African Development Coordinating Conference (SADCC) whose objectives were to foster joint co-operation for sustainable social and economic development of their peoples and their economies, and the economic liberation of the member states from the historical domination in the region by the then apartheid South Africa.⁴⁸ In 1992, the Summit of Heads of States and

⁴⁰ Article 6(1) of the Revised ECOWAS Treaty (n 38 above).

⁴¹ Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice.

⁴² Article 9(1) of the Protocol on the ECOWAS CCJ (before the 2005 amendment).

⁴³ By Supplementary Protocol A/SP.1/01/05 and A/SP.2/06/06. See Official Journal of the Economic Community of the West African States Vol. 49 (2006).

⁴⁴ Ebobrah (n 29 above) 86.

⁴⁵ Article 3 of Supplementary Protocol A/SP.1/01/05.

⁴⁶ It is said to have adjudicated about 13 - 15 cases alleging human rights violations in member states. See Brendan Sweeny 'ECOWAS court shows way forward' Danish Institute for Human Rights available at <http://www.humanrights.dk/news/ecowas+court+shows+way+forward+in+africa> accessed on 29 October 2009.

⁴⁷ See <http://www.sadc.int> on the member states of SADC.

⁴⁸ Thoko (n 2 above) 109.

Governments formalised the status of SADCC through the adoption of the SADC Treaty.⁴⁹ The current framework of co-operation is based on *inter alia* guarantee of human rights⁵⁰ which is also one of the principles of SADC.⁵¹

Therefore, it is also clear that human rights now form an integral part of the functions of SADC. In addition, the political institution building envisaged by SADC is said to promote economic development into a community based on human rights, democracy and the rule of law.⁵² However, despite the human centred conception of development within the Treaty and the centrality of human rights in its objectives, it is argued that human rights protection under the SADC treaty, its institutions and programmes has a secondary, almost cursory status.⁵³ It is also argued that promotion and protection of human rights is not the top priority of SADC.⁵⁴

Also, the commitment to human rights apparent in the core principles of SADC and the proclamation of observance of human rights as critical to ensuring peoples' participation in the initiative is not translated with equal force into the normative framework established by the treaty or into the SADC's programmatic activities.⁵⁵ For example, the Treaty does not create any institution with the specific mandate to deal with human rights issues.⁵⁶

2.2.4.2 The SADC Tribunal, (SADCT)

It is established as one of the institutions of SADC⁵⁷ with the duty to ensure adherence to and proper interpretation of the Treaty and its subsidiary instruments, and to adjudicate disputes referred to it.⁵⁸ It was primarily set up to resolve disputes arising from closer economic and political union as opposed to human rights.⁵⁹ Its responsibility includes development of community jurisprudence with regard to the applicable treaties, general principles, and rules of

⁴⁹SADC Secretariat *SADC Profile: Southern Africa Development Community (SADC)* available at www.sadc.int accessed on 1 September 2009.

⁵⁰ Articles 5 (a)(b) (c)(i)(j)(k).

⁵¹ Article 4(c).

⁵² Thoko (n 2 above) 110.

⁵³ As above.

⁵⁴ Ruppel (n 10 above) 291.

⁵⁵ Thoko (n 2 above) 111.

⁵⁶ As above.

⁵⁷ Treaty of the Southern African Development Community article 9 (1) (g).

⁵⁸ As above article 16(1).

⁵⁹ Viljoen (n 4 above) 503.

public international law.⁶⁰ The Protocol on Tribunal and Rules of Procedure Thereof necessary to bring SADCT to operation were adopted in 2000⁶¹ as required by the SADC Treaty.⁶² It was inaugurated in 2001⁶³ but only began to function effectively in 2007 after the establishment of its registry.⁶⁴

SADCT has jurisdiction over the interpretation and application of the Treaty, protocols and subsidiary instruments of SADC and on all matters arising from specific agreements between member states whether within the community or amongst themselves.⁶⁵ The provision establishing its jurisdiction⁶⁶ omits an express mention of jurisdiction over human rights. For this reason, it has been argued that the tribunal lacks a clear human rights mandate⁶⁷ though an argument for an implied mandate would render the position more clearly.

The tribunal has the potential to contribute significantly to a deeper harmonisation of law and jurisprudence and to better protection of human rights in SADC. This however depends on the commitment of member states and SADC institutions to the enforcement of the tribunal's judgments⁶⁸ and clarification of the court's jurisdiction over human rights.

2.2.5.1 The East Africa Community, (EAC)

Economic integration in post-colonial East Africa dates back to the East African Co-operation Treaty of 1967 concluded between Kenya, Uganda and Tanzania.⁶⁹ The Co-operation eventually collapsed amidst, *inter alia*, ideological differences in the post-colonial governments, lack of political will, personal differences of the leaders and economic imbalance amongst the member

⁶⁰ AO Chidi 'Complementary, competition, contradiction: the relationship between the African Court on Human and People's Rights and Regional courts in East and Southern Africa' (2003) Unpublished paper.

⁶¹ <http://www.sadc.int>.

⁶² Article 16(2) of SADC Treaty.

⁶³ Ebobrah (n 23 above) 83.

⁶⁴ As above.

⁶⁵ Article 14 of the SADC Protocol on the Court.

⁶⁶ As above.

⁶⁷ TS Ebobrah 'Human rights developments in sub-regional courts in Africa in 2008' (2009) *Africa Human Rights Law Journal* 20.

⁶⁸ Ruppel (n 10 above) 301.

⁶⁹ See paragraph 2 of the Preamble to the EAC Treaty (n 22 above)

states.⁷⁰ The EAC was revived in 1999 through the signing of the Treaty Establishing the East Africa Community and its entry into force in 2000. The new EAC was inaugurated in 2001.

The fundamental principles of the EAC include good governance which entails *inter alia* gender equality and the recognition, protection and promotion of human and peoples' rights in accordance with the ACHPR.⁷¹ This provision can be regarded as an entry point for human rights into the EAC. It is argued that good governance and human rights are coming to the fore of the EAC focus as the community moves deeper into integration.⁷² To the extent that the 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 record⁷³ then it can be argued that it has incorporated human rights into the treaty⁷⁴ which is a remarkable departure from the purely economic pursuit of the predecessor.⁷⁵

2.2.5.2 The East Africa Court of Justice, (EACJ)

The EAC Treaty establishes the EACJ as the judicial organ of the EAC⁷⁶ with the responsibility to ensure adherence to law in the interpretation, application of, and compliance with the Treaty.⁷⁷ It is the central figure of the community's legal system.⁷⁸ As an organ of the community, it is further expected to foster co-operation leading to regional peace and security and to provide appropriate responses for economic development and competitiveness.⁷⁹ The

⁷⁰ Adar KG *Federalism and East Africa Community integration process; the role of the East African Legislative Assembly* (2008) Conference Paper 2.

⁷¹ Article 6 of the EAC Treaty (n 22 above).

⁷² Comment by Juma Mwapachu Secretary General EAC 3 September 2007, at a meeting held with the delegation of the Kituo Cha Katiba to discuss a draft East African Bill of Rights; cf. EAC (2008a).

⁷³ Article 3 (3) b.

⁷⁴ Ruppel (n 10 above) 3.

⁷⁵ Article 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.

⁷⁶ Article 9 of the EAC Treaty (n 22 above).

⁷⁷ As above article 23.

⁷⁸ W Oluoch "The East Africa Court of Justice: review of its composition, administration and jurisdiction" in *Reinforcing judicial and legal institutions: Kenya and regional perspectives*, Vol. 5 Judiciary Watch Series, The Kenya Chapter of the ICJ Nairobi Kenya (2007) 57.

⁷⁹ JE Ruhangisa "The East Africa Court of Justice" in Rok Ajulu (n 5 above) 96.

EACJ administers justice by hearing and deciding on cases brought before it.⁸⁰ It was inaugurated in 2002⁸¹ and admitted its first case in 2005.⁸²

The EACJ is vested with an initial jurisdiction over the interpretation and application of the EAC Treaty⁸³ and other original, appellate, human rights or other jurisdiction at a subsequent date upon a determination by the Council of Ministers.⁸⁴ In addition, the court may hear and determine disputes between the EAC and its employees in matters relating to their employment,⁸⁵ or arbitrate a dispute arising from a contract in which the parties have, by virtue of an arbitration clause, conferred jurisdiction on it, irrespective of whether or not the EAC is itself a party to that contract.⁸⁶

The mandate of the EACJ is vast⁸⁷ and completely different from its predecessor the East African Court of Appeal.⁸⁸ The indeterminacy of article 27 (2) illustrates an attempt to cover future functions of the EAC. Also, reference to an initial and other jurisdiction 'as will be determined' by the council indicates that the member states of the EAC intended to develop its jurisdiction in phases.⁸⁹ This means the second set of areas of the EACJ's jurisdiction which fall to be determined at a future date, including human rights, fall outside its current jurisdiction. In the absence of the relevant determination and adoption of the necessary protocol, it is said that the EACJ does not yet have jurisdiction over human rights.⁹⁰

However, the inference of lack of mandate is contested. While some commentators interpret it to mean that the jurisdiction is lacking,⁹¹ it is also argued that the provision is simply not clear.⁹² The latter view implies the existence of an implied mandate and is backed by several

⁸⁰ As above.

⁸¹ TO Ojienda 'Alice's adventures in wonderland': preliminary reflections on the jurisdiction of the East African Court of Justice' (2004) *East African Journal of Human Rights and Democracy* 94.

⁸² *Calist Andrew Mwatela & 2 others v East Africa Community* Application No. 1 of 2005 (unreported) available at www.eac.int.

⁸³ Article 27(1) of the EAC Treaty (n 22 above).

⁸⁴ As above article 27(2).

⁸⁵ As above article 31.

⁸⁶ As above article 32.

⁸⁷ Ruhangisa (n 79 above) 97.

⁸⁸ The East Africa Court of Appeal was an appeal court for civil and criminal decisions of domestic courts excepting constitutional matters and treason in Tanzania. See <http://www.eac.int/index.php/organs/eacj.htm?start=1>

⁸⁹ Ojienda (n 81 above) 95.

⁹⁰ Ebobrah (n 67 above) 3.

⁹¹ Ruppel (n 10 above) 306 and Ebobrah (n 67 above) argue that though the Treaty provides for broad protection with regard to human rights, the EACJ has no jurisdiction over human rights issues.

⁹² Viljoen (n 4 above) 504.

factors including extensive references to human rights under the EAC Treaty and the fact that the EACJ has thus far adjudicated over cases raising human rights questions.⁹³ Further, exercise of the jurisdiction articles 27(1), 31 and 32 of the EAC Treaty is likely to touch on human rights questions. In these circumstances, the response of the EACJ to issues arising in such instances is of essence in determining whether indeed it has a human rights mandate at all.

In 2005, the secretariat of the EAC⁹⁴ developed a draft protocol⁹⁵ for the expansion of the EACJ's jurisdiction to *inter alia* human rights.⁹⁶ The process of consultation on the draft was scheduled to be completed by August 2006, but this target was not met even as at the date of this work. This delay in adoption of the Protocol is attributable to several factors including unrealistic time framing of the schedule for adoption, limited consultation with stakeholders,⁹⁷ and susceptibility of the process to political manipulation.⁹⁸

Nevertheless, the discussions elicited by the draft Protocol have been instrumental in highlighting critical issues relating to the human rights jurisdiction of the EACJ. Predominantly the need for a clear provision on the law applicable in the EAC Treaty or Draft Protocol is underscored.⁹⁹ This is in view of the fact that the EAC Treaty does not clearly outline the law applicable by the EACJ save for the references made to the principles of the ACHPR in the objectives of the EAC.¹⁰⁰

The discussions have also served to highlight concerns surrounding the suitability of the EACJ as a human rights court. For instance whether in light of bureaucracy characteristic of RECs, ignorance of law prevalent amongst the citizens, the political landscape and the possible future expansion of the EAC, the EACJ is likely to achieve much for human rights in the area. Concern

⁹³ *Katabazi and 21 others v Secretary General of the EAC and another* Ref. No.1 of 2007 and *Nyong'o and 10 others v The Attorney General of Kenya and others* Ref No. 1 of 2006.

⁹⁴ CM Peter *The Protectors: Human Rights Commissions and Accountability in East Africa* (2008) Fountain Publishers, Kampala Uganda 210.

⁹⁵ Draft Protocol to Operationalize the Extended Jurisdiction of the East Africa Court of Justice, 2005 available at http://www.ealawsociety.org/joomla/UserFiles/File/draft_protocol_eacj.pdf accessed on 29 October 2009.

⁹⁶ Oluoch (n 78 above) 172. It is argued that though ultimately benefiting the cause of human rights, the urgency for adoption of the Protocol to extend the jurisdiction of the EACJ was triggered by other factors such as the need to fast-track the political federation and to handle disputes arising from the implementation of the EAC competition law. See Peter (note 94 above) 210.

⁹⁷ Peter (n 94 above) 210.

⁹⁸ Ojienda (n 82 above 98) argues that the Council which is charged with the responsibility of adopting the Protocol is a political organ that is prone to the influence of the Summit.

⁹⁹ Peter (n 94 above) 213.

¹⁰⁰ Article 6 and 7 of the EAC Treaty (n 22 above).

is further raised regarding its combined jurisdiction which translates into an enormous task for the small number of judges. This has potential to jeopardise expediency and efficiency. Lack of clarity on the law applicable, exacerbated by the absence of a specific protocol, and a clarification of the relationship of the EACJ with the regional mechanisms particularly the African Commission on Human and Peoples' Rights (ACmHPR) and the African Court on Human and Peoples' Rights (ACtHPR) was also identified.

2.3 Concluding remarks

It is evident that in the recent past human rights have become a fundamental component of the task of RECs in Africa. This development can be regarded as a response to the regional agenda as set out in the ACHPR and the Abuja Treaty. The mandate of REC courts has also now been extended to cover human rights. However, the approaches adopted by RECs in this regard are dissimilar and uncoordinated. Hence concerns persist as to their suitability as forums for promotion and protection of human rights, the delimitation of such role so as to remain legitimate yet sufficiently utilitarian within the existing frameworks of RECs and the implications of these new actors on the human rights discourse in the continent.

The subsequent chapter considers some of the issues raised with respect to the suitability of REC courts as forums for protection of human rights in a view to establish their credibility.

CHAPTER THREE

SUITABILITY AND IMPLICATIONS OF THE ROLE OF RECS IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

3.0 Introduction

As above highlighted, the role of RECs in the protection and promotion of human rights in Africa is relatively new. The contribution of REC courts to the protection of rights in Africa notwithstanding, there are concerns respecting their suitability in this regard and how this impacts on the discourse on human rights in the continent. These concerns relate to; the place of RECs within the AHRS, the relative advantage or disadvantage of REC courts over the ACtHPR and the ACmHPR, the jurisdictional relationship between REC courts, ACtHPR and the ACmHPR and the implications of the proliferation of REC courts with a human rights mandate on the unity of international human rights law in Africa.

3.1 Relationship of REC courts with the AHRS

A human rights system comprises of a set of norms and institutions accepted by states as binding.¹ In the AHRS, these are contained in the ACHPR and its protocols and the African Charter on the Rights and Welfare of the Child (ACRWC). These treaties establish the African Commission on Human and Peoples' Rights (ACmHPR),² the African Court on Human and Peoples' Rights (ACtHPR)³ and the Committee of Experts on the Rights and welfare of the Child (The Committee)⁴ respectively. These bodies promote and protect the rights established under the respective treaties.⁵ There are however different opinions on the scope of the AHRS. Some scholars restrict it to the foregoing documents and institutions⁶ while others extend it to include all documents adopted by the AU which relate to an element of human rights such as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969.⁷

¹ M Freeman, *Human rights: an interdisciplinary approach*, (2002) Cambridge: Polity 53.

² Article 30 of the ACHPR.

³ Article 1 of the Protocol to the ACHPR on the Establishment of an ACtHPR, 1998/2004 (Court Protocol).

⁴ Chapter 2 of the ACRWC.

⁵ See articles 30 of the ACHPR, 2 of the Court Protocol (note 3 above) and 32 of the ACRWC.

⁶ Benedek, W (ed) *Understanding human rights: manual on human rights education* (2006) Antwerpen Intersentia 46.

⁷ C Heyns 'The African regional human rights system: the African Charter' (2004) Hein online 681.

In 2008, the AU adopted a protocol⁸ to establish an African Court of Justice and Human Rights (ACJHR). The statute of the ACJHR is, as at the time of this work, not yet in force pending deposit of the 15th instrument of ratification.⁹ Once it is in force, the role currently vesting in the ACHPR will be overtaken by the human rights wing thereof. So far, only Libya has ratified the Protocol¹⁰ hence this work focuses on the ACtHPR as opposed to the ACJHR.

The entry of RECs into the protection of human rights has led to a complex institutional framework in the region.¹¹ Creation of REC courts with a human rights competence means that the ACtHPR no longer has a monopoly in the interpretation and enforcement of the ACHPR. However, the ACHPR does not contemplate the existence of other supra-national courts in Africa such as RECs dealing with human rights. This can probably be explained by the fact that the ACHPR predates the entry of RECs in the field on human rights.¹²

Assessed against the characteristics of an ideal system,¹³ the efforts of RECs with respect to human rights fall short of constituting independent human rights systems. This is because despite making extensive references to human rights, they lack corresponding institutions established specifically to deal with human rights. This is the basis of the argument that there are no sub-regional human rights systems existing in Africa but that they are simply sub-regional intergovernmental groupings with human rights as a concern within their mandate.¹⁴ This may ultimately change if RECs commit to developing the existing initiatives into fully fledged systems. Indeed, the ACmHPR¹⁵ has acknowledged that human rights do not fall exclusively under the ACmHPR's mandate. Rather, all the organs of the AU are bound to integrate human rights into their mandate and functioning.

⁸ Protocol on the Statute of the African Court of Justice and Human Rights (Statute of the ACJHR) adopted by the eleventh ordinary session of the AU Assembly, held in Sharm el-Sheikh, Egypt, 1st July 2008.

⁹ Article 60 of the Statute of the ACJHR (n 8 above).

¹⁰ <http://www.africa-union.org/root/AU/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf> accessed on 29 October 2009.

¹¹ AO Chidi 'Complementary, competition, contradiction: The relationship between the African Court on Human and People's Rights and Regional courts in East and Southern Africa' (2003) Unpublished paper 3.

¹² Refer to Chapter 2 of this work for the general discussion on the journey of human rights into the REC agenda.

¹³ See note 1 above.

¹⁴ F Viljoen *International human rights law in Africa* (2000) Oxford University Press 10.

¹⁵ See Report of the Brain Storming Meeting of the African Commission on Human and Peoples' rights: 9-10 May 2006 Banjul, The Gambia 20th Activity Report, Annex 2 (Brainstorming Meeting).

The assertions that the AHRS does not include the role of RECs must be understood to mean the AHRS as established in the formal documents and institutions of the ACHPR. It is submitted that in view of the depth of integration of human rights into the economic and other agenda of the AU, it is difficult to understand human rights in Africa without recognising the role of REC courts. It is further argued that despite the absence of an express linkage between RECs and the AHRS, it is undeniable that RECs sit in a relationship with the AU.

Strengthening the existing RECs and establishment of new ones where none exist is the first step on the road towards the agenda of African economic integration pursued by the AEC.¹⁶ It is based *inter alia* on the principle of recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the ACHPR.¹⁷ Thus it is argued that RECs as part of the AEC have a duty to respect and promote human rights in their jurisdictions.¹⁸ By analogy, REC courts, to the extent that they preside over matters of human rights, can be deemed to be in an informal relationship with the ACtHPR and ACmHPR.

Certainly therefore, the Abuja Treaty has had profound influence in shaping the agenda of RECs especially with respect to human rights. However, in light of the economic focus of the AEC, it is submitted that the placement of RECs within its framework emphasizes their traditional economic role. In this light, the relationship of the AU with RECs is still seen through the prism of economic integration as opposed to human rights. As discussed in section 2.1.1 above, RECs are the building blocks of the AEC, which is a core project of the AU. This suffices to create a relationship between the AHRS and RECs as institutions established under the auspices of the AU. Hence it is arguably incorrect to treat them as distinct systems. It is therefore submitted that the literature and documents of the AHRS have long been overtaken by practice. Nevertheless, this work proceeds on the basis of the formal parameters of the AHRS as defined in the first paragraph of this part.

¹⁶ Article 4(2) Treaty Establishing the African Economic Community, 1991.

¹⁷ Article 3(g).

¹⁸ OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in Anton Bösl & Joseph Diescho (eds) (2009) *Human rights law in Africa: legal perspectives on their protection and Promotion* Mc Millan Education Namibia 319 - 350 281. See also article 6(2) of the Protocol on the Court. Viljoen 448 argues that the ACtHPR is not obliged to apply the criteria.

3.3 Jurisdictional relationship between REC courts and the ACtHPR and the ACmHPR

This relationship can be inferred from the weight accorded to the decisions of REC courts by the ACtHPR and the ACmHPR. The primary avenue to determine this is how the criterion for admissibility of matters before the ACtHPR and the ACmHPR treats matters that have been before REC courts. This criterion is set out in article 56 of the ACHPR.¹⁹ The article raises two issues that could be relevant to the relationship between RECs and the AHRS. These relate to the exhaustion of local remedies and the principle of *res judicata*.

3.3.1 Exhaustion of local remedies

In this regard it is argued that there is no obligation on victims to go to the REC court before submitting their matter to the ACtHPR or the ACmHPR. The requirement of exhaustion of local remedies is relevant to the relationship between an international court and a state. It is founded on principle that the national authorities should have an opportunity to remedy the breach within their own jurisdiction.²⁰ Local remedies refer to 'the ordinary remedies of common law existing in jurisdictions and normally accessible to persons seeking justice'²¹ as opposed to an international court such as a REC court. Therefore, it is doubtful that the ACmHPR or ACtHPR could decline to admit a matter on the basis that it has not been heard by the relevant REC court or even that this question might arise at all.

3.2.2 Matters settled by another court or tribunal

Article 56(7) of the ACHPR provides that the ACmHPR may not admit for consideration cases which have been settled by the states involved in accordance with the principles of the United Nations, the Charter of the OAU or the ACHPR. This provision embodies the principle of *res judicata* to the extent that it excludes a matter which has been 'settled by the states' involved.²² It does not however preclude the consideration of matters that are before another judicial or quasi-judicial forum, and hence leaves an opening for judicial forum shopping. In the absence of a prohibition of concurrent proceedings on the basis of the principle of *lis pendens* in the

¹⁹ Viljoen F "Communications under the African Charter: procedure and admissibility" in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2008) 2nd edition Cambridge University Press 78.

²⁰ Viljoen (n 14 above) 336.

²¹ n 26 above. Communication 242/2001, *Interights and others v Mauritania* (2004) Africa Human Rights Law Report 87.

²² Viljoen (n 14 above) 340.

'other forum', it is possible for a litigant to institute concurrent proceedings before a REC court and the ACmHPR or ACtHPR.²³

The concern in this part is whether one whose cause has been heard and determined by a REC court can approach the ACmHPR or ACtHPR for redress in the same case. This depends on both the provisions of each REC regarding the finality of their decisions, and the approach of the ACtHPR or ACmHPR. However, it is submitted that to allow an unsuccessful litigant at the sub-regional level to pursue a remedy at the regional level would be tantamount to establishing the ACHPR as an appellate body, which it is not.²⁴

The approaches adopted by different RECs on the relationship of their courts with the ACHPR vary.²⁵ For instance, while the Treaty of the EAC is silent on the finality of the decisions of the EACJ, the Protocol of the SADC tribunal is explicit that the decisions of the SADCT are final and binding.²⁶ It can be argued that in the latter scenario, a complainant, upon admitting to the jurisdiction of the REC court, equally submits to the finality of its decision in terms of its treaty. In this view, the regional mechanism ceases to be an appellate body and thus the need for the consideration of article 56(7) dissipates. Where there is no finality clause however, it has to be determined whether REC courts are forums for dispute settlement in terms of the principles of the UN Charter, the OAU or the ACHPR.²⁷

The principles of the UN on dispute settlement implore states to pursue peaceful means of settlement including judicial settlement and resort to regional agencies or arrangements.²⁸ The Charter of the OAU also encourages peaceful settlement of disputes through non-judicial means²⁹ but this does not proscribe judicial means. The provision is not specific to human rights cases, but the recurrent theme is peaceful settlement. To the extent that international judicial

²³ As above.

²⁴ LR Helfer 'Forum shopping for human rights' *University of Pennsylvania Law Review*; Dec 99, vol. 148 Issue 2, 285 makes a similar argument in respect of the European Court of Human Rights and the UN Human Rights Committee. An analogy can be drawn from his argument to the present relationship between the ACHPR and the RECs.

²⁵ Article 38 of the EAC treaty provides that a dispute referred to the EACJ cannot be settled by any other method other than that established under the Treaty. This can be read as establishing the finality of the decisions of the EACJ.

²⁶ Article 24(3) of SADC Protocol on tribunal.

²⁷ Viljoen (n 14 above) 339.

²⁸ Article 33(1) of the Charter of the UN.

²⁹ Article 7(4) of the Charter of the OAU. Its successor the Constitutive Act of the AU has similar provisions but leaves the definition of peaceful means to the AU Assembly.

settlement is considered a means for the peaceful settlement of disputes,³⁰ coupled with the presence of finality clauses in the REC treaties, there is potential that the decisions of the REC tribunals could completely oust the jurisdiction of the ACmHPR and the ACtHPR and by virtue of article 56(7) of the ACHPR.

3.4 Regional versus sub-regional human rights mechanisms

Whether or not the proliferation of REC courts may be deemed a blessing or a liability depends partly on its relative advantage or disadvantage over the existing regional mechanisms. The underlying assumption that REC tribunals are favourable forums and an illustration of state commitment to the course of human rights may not be entirely misguided. But certain issues hold sway on the practical benefit of one relative to another. These include but are not limited to accessibility, enforcement, quality of jurisprudence, responsiveness to the peculiar needs of a region, potential for better standards of rights and the capacity to complement existing mechanisms. These are addressed below.

3.4.1 Responsiveness to the peculiar needs of a region

It is argued that RECs as opposed to regional mechanisms are better suited to address region specific issues. The small number of states constituting RECs allows them to address the issues with particular detail to its peculiar circumstances. Also, the notoriety of certain issues in a sub-region attracts development of jurisprudence surrounding them, in a manner that it may not have been considered at the regional level. In addition, the judges of a REC court are likely to have a better appreciation of the issues affecting a region than those at the regional level who are likely to hear matters from different regions.

3.4.2 Enforcement

The ACtHPR has the capacity to make binding decisions³¹ but it has not presided over any matter yet. The ACmHPR on the other hand does not render binding decisions. In these circumstances, the binding decisions³² of REC courts remain the best alternative for enforcement of rights. However, the difficulty of enforcing the decisions of international courts arising from

³⁰ RP Alford 'The proliferation of international courts and tribunals; international adjudication in ascendance' (2000) HeinOnline 94 *American Society of International Law* 160.

³¹ See articles 30 and 46(2) of the ACHPR and ACJHR respectively.

³² See article 35 of the EAC Treaty.

the consensual nature of international law equally affects REC courts. Just like other international courts, REC courts lack institutions with power to coerce states into enforcement.³³ For instance the government of Zimbabwe has expressed intention not to comply with the judgment of the SADC tribunal in the *Campbell* case.³⁴ The only point of recourse for the SADCT in that matter is to refer the finding of non-compliance to the Summit of Heads of States or Governments.³⁵

3.4.3 Accessibility

Accessibility may be classified into physical accessibility and capacity to bring a matter before the forum. With respect to the former, the geographical proximity of REC tribunals to the victims of rights abuse in some cases brings them within reach of the victims as compared to the regional mechanism. In this way, they are more responsive to the needs of the victims. In practical terms, it means less cost and ease of litigation especially with respect to obtaining witnesses.³⁶ It is recognised that the Interim Rules of Procedure of the ACmHPR allow it to sit in the state of origin of the claim.³⁷ In the practice of the ACmHPR however, matters are heard during its sessions which mostly take place in Banjul.³⁸ It is also unlikely that the ACmHPR may hold sessions in all the states against which a case is brought. Besides, hosting the sessions has financial implications for the host state thus it is not an attractive option. On this basis, RECs are an appropriate and more practical forum for a victim of rights violation.

Regarding the right to be heard, most REC courts allow individuals direct access.³⁹ This contrasts access to the ACtHPR which is subject to the consent of the states.⁴⁰ To date, only Burkina Faso has tendered the relevant declaration⁴¹ to allow individual communications. Also,

³³ ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: prospects and challenges' *African Journal of International and Comparative Law* (2009), volume 17 Issue 1 (79-101) 96.

³⁴ Ruppel (note 18 above) 300. *Mike Campbell (PVT) Limited and another v The Republic of Zimbabwe* SADC (T) 2/2007.

³⁵ Article 32(5) of the SADC Protocol on Tribunal.

³⁶ N Nwogu 'Regional integration as an instrument of human rights: re-conceptualizing' ECOWAS 354.

³⁷ Rule 30 of the Interim Rules of Procedure of the African Commission on Human and Peoples' Rights available at <http://www.achpr.org/english/other/Interim%20Rules/Interim%20Rules%20of%20Procedure.pdf> accessed on 29 October 2009.

³⁸ Viljoen (n 14 above) 313.

³⁹ As above 507.

⁴⁰ Article 5(3) of the Protocol on the ACtHPR.

⁴¹ Declaration under article 34(6) of the Protocol on the ACtHPR.

some of the REC treaties admit cases without need for exhaustion of local remedies⁴² thereby making it easy for individuals to access the court.

3.4.4 Capacity to perform the protective functions effectively

RECs have demonstrated the intention to accord human rights a place in their agenda, but their capacity to achieve this goal is doubtful within the existing frameworks. Whereas there are extensive provisions on the duty of the REC member states to protect rights, it has been argued that there are no corresponding institutions to oversee the performance of these obligations or to drive the agenda of human rights in the REC.⁴³ To the extent that RECs have incorporated the respect and promotion of rights into their agenda, they have a duty to translate these principles and ideals into practice such as through a competent judicial mechanism.⁴⁴ There is potential for human rights to be rendered insufficiently prominent in the business of the community as against the economic pursuits thereof.⁴⁵ This could mean that the courts are more focused on the other functions at the expense of stifling the development of human rights jurisprudence.

Most of the REC courts have a combined jurisdiction, doubling as courts of justice and human rights. This for instance is one point of criticism for the EACJ and the Protocol for the expansion of its jurisdiction.⁴⁶ This vast responsibility and a corresponding small number of judges raises questions on whether these courts are sufficiently equipped to competently discharge the responsibility. A further concern relates to the human rights competence of the judges of REC courts to determine human rights matters. Whereas the appointment of judges at the regional level emphasises their competence in respect of human rights,⁴⁷ there is no corresponding emphasis on a human rights competence for judges of REC courts.⁴⁸

⁴² Article 10(d) of Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 on the Community Court of Justice on the requirements for admissibility of a matter before the ECCJ.

⁴³ K Thoko "SADC and human security: fitting human rights into the trade matrix" *African Security Review* 13(1) 111 argues in respect of SADC that the SADC Treaty does not create any institution with a specific mandate to deal with human rights despite having an unequivocal commitment to human rights.

⁴⁴ Ruppel (n 18 above) 281.

⁴⁵ Lamin AR 'African sub-regional human rights courts: The ECOWAS Court of Justice, the SADC Tribunal and the EAC Court of Justice in comparative perspective' in Akokpari J and Zimble DS (eds) *African Human Rights Architecture* (2008) Jacana Media South Africa 233 - 244.

⁴⁶ Ruppel (n 18 above) 307.

⁴⁷ See article 11(1) of the Protocol on the ACtHPR and article 4 of the Statute of the ACJHR.

⁴⁸ See for instance article 24(1) of the EAC Treaty.

3.4.5 Better standards

Most RECs in Africa recognise the ACHPR as a minimum standard hence any attempts at the protection of rights within the RECs such as the adoption of rights catalogues would have to build upon the ACHPR.⁴⁹ In theory, this means that they would develop better standards for rights. However, in view of the fact that there is not yet a human rights catalogue in either of the RECs considered in this work, this inference can be deemed speculative.

Through litigation before REC courts and harmonisation of legislation in the member states, there is growing jurisprudence on human rights in the respective sub-region and inculcation of human rights law principles into the domestic systems. Further, deliberations emanating from these forums are essential in enriching the human rights discourse in the sub-regions and hence empowering the citizens. Furthermore, emphasis on respect for human rights emanating from REC treaty obligations serves to create pressure on the member states to adhere to higher standards of rights.

On the other hand the discussions in section 2.2.3.2, 2.2.4.2 and 2.2.5.2 above reveal disparate approaches to the incorporation of human rights into the mandate of REC courts. These differences translate into varying degrees of protection in each of the regions which in turn exposes the region to disparate standards and difficulty in consolidation. This stands in the way of the RECs as building blocks to an effective regional mechanism.

The foregoing factors would persist even after the establishment of the ACJHR⁵⁰ and therefore, there is a strong case for the continued development of a human rights competence for REC courts and tribunals.

3.5 Question of the proliferation of REC courts in Africa

The dramatic increase in the number of international judicial bodies represents what is referred to as the proliferation of international courts and tribunals.⁵¹ This phenomenon is neither unique to Africa nor specific to REC courts. Rather, it is global, attributable to both the nature of

⁴⁹ Viljoen (n14 above) 500.

⁵⁰ Nneoma (n 36 above) 354.

⁵¹ S Yuval *The competing jurisdiction of international courts and tribunals* (2003) OUP, Oxford 5.

international law and the recent development in the field of international law.⁵² In the absence of properly coordinated judicial integration in the continent, it is argued that multiplicity of courts poses a threat to the unity of international human rights law in the region. The threat of overlapping jurisdiction of various courts and a possibility of conflicting decisions on the same law is imminent.⁵³

3.5.1 Potential threat of the proliferation of courts and tribunals on the unity of international human rights law in Africa

This refers to the possibility of establishment of separate uncoordinated systems of international human rights standards and norms in different parts of Africa. It creates potential for varied interpretations of substantive and procedural human rights norms in the different sub-regions. Whereas the potential for disaggregated jurisprudence is real in the face of several independent tribunals, it is submitted that it is the lack of a systematically coordinated or defined relationship between the tribunals as opposed to the phenomenon of multiplicity of courts that is the real problem. Such structural organisation implies the existence of a normative or institutional hierarchy or system established under the relevant treaty.

As stipulated above, RECs do not form part of the AHRS *per se* hence the threat of disintegration is very real. In addition, the varied approaches of REC tribunals towards to the ACHPR impacts on the unity of jurisprudence. For instance the use of the ACHPR as a rights catalogue for a REC court as in the case of the ECCJ coupled with a finality clause creates the possibility of variant interpretations of the same provision at regional and REC level. With respect to RECs that have a separate rights catalogue, as proposed in the case of the EACJ, the possibility of varying decisions on similar provisions equally exists but it may not conflict with the regional mechanism since the two courts draw from different normative sources. But in view of the fact that currently no REC has a rights catalogue the threat of conflicting and contradicting interpretations is real. Hence, it can be said that the current state of the AHRS and the continued uncoordinated increase in the courts and tribunals indeed poses a threat to coherence of human rights jurisprudence in the region.

⁵² K Oellers-Frahm "Multiplication of international courts and tribunals and conflicting jurisdiction – problems and possible solutions" in JA Frowein and R. Wolfrum (eds) *Max Planck Year Book of the United Nations Law*, Volume 5, 2001 67 – 104, 71 who argues that international law is not a comprehensive body of laws consisting of a fixed body of rules applicable to all states with a central legislative organ. Rather, it is in permanent development with its actors and ambit of activity increasing considerably in the past few years.

⁵³ As above 70.

Nevertheless, it is noted that it is difficult to point at an instance in practice where a REC court or the ACmHPR contradicted one another. On the contrary, REC courts have often referred to the jurisprudence of the ACmHPR with approval to aid their decisions.⁵⁴ This implies that there is an informal inter-fora respect and interaction. However, it would be important to have this relationship institutionalised to lessen the possibility of subjectivity.

3.5.2 The prospect of forum shopping

It is argued that the presence of several judicial forums with concurrent personal and subject matter jurisdiction creates an opportunity for human rights petitioners to pursue the option that is most favourable to them or to institute several proceedings in the various forums. In the current context, it would entail a choice between one REC court over another or a REC court and the ACtHPR or ACmHPR. Forum shopping is generally regarded as negative due to its potential to undermine the authority of tribunals, generate conflicting decisions and create possibilities for endless litigation.⁵⁵

Helper identifies three types of forum shopping based on the nature of choice available to the potential litigant: choice of tribunal, simultaneous petitioning and successive petitioning.⁵⁶ The first refers to a situation where the individual has an unlimited choice over where to institute their proceedings due to the availability of different forums with competence to deal with the issue. In the second case, the potential litigant is not precluded from instituting proceedings before different forums concurrently and the potential result is just as varied. The latter case refers to a situation where a dissatisfied litigant retains a right to pursue another remedy after conclusion of the first one, and has a connotation of an appeal.

The concern regarding forum shopping can, in as far as human rights are concerned in Africa, be regarded as perceived as opposed to real. Certain other factors mitigate the potency of this threat such as the indigence of most victims of rights violation.⁵⁷ It is also argued that if well regulated, forum shopping can materially benefit international human rights law. ⁵⁸ For instance, forum shopping encourages jurists to dialogue on norms shared in the cross cutting treaties thereby encouraging development of jurisprudence. However, in view of the

⁵⁴ See the decision in the *Campbell* case (n 34 above).

⁵⁵ *Helper* (n 24 above) 287.

⁵⁶ As above 286.

⁵⁷ As above 287 argues that successive litigation is not costless.

⁵⁸ As above.

overlapping membership of African states in various RECs,⁵⁹ and the possibility of conflicting decisions, the balance tilts in favour of regulating the practice.

Article 56(7) of the ACHPR which is material in this regard only prohibits admission of successive claims. This is insufficient to deal with the possibility of forum shopping. Recourse must also be had to the regulations of each REC to determine whether forum shopping is possible.

3.6 Concluding remarks

The formal parameters of the AHRS do not adequately cater for the role of RECs in the field of human rights. This deprives the region of the benefits of coordinated development of protective mechanisms that would create an optimum environment for the protection of rights. Though there are numerous problems associated with the emerging role of RECs in the protection of human rights, there is an equal wealth of benefits to be reaped from their work. The problems highlighted in this chapter render themselves to a solution through proper delimitation of the role of REC courts and restructuring of the system to take cognisance of the recent developments. The next chapter discusses the salient issues underlying the delimitation of the mandate and structure of REC courts and proposes an appropriate framework for the interaction of the two systems.

⁵⁹ Ruppel 283

CHAPTER FOUR

DELIMITING THE ROLE OF REC COURTS IN PROTECTING HUMAN RIGHTS: ISSUES AND SUGGESTIONS

4.0 Introduction

RECs form part of the African agenda for integration, they are a reality that the AHRS needs to deal with sooner or later. There is need to clarify the jurisdictional competence of REC courts to deal with human rights, the normative content of rights protected at the sub-regional level and an appropriate framework for the operation of REC courts in relationship to the AHRS.

4.1 RECs as international courts

Whether or not REC courts are international courts is important in the delineation of their jurisdiction. There is no universally agreed definition of an international court or tribunal.¹ But there are factors that may be assessed to determine whether a court may be regarded as international. The existence of an international court should be 'independent of the vicissitudes of a given case,'² it should be established by an international legal instrument and bound to apply international law in its adjudication.³ The rules of procedure applied must pre-date the dispute adjudicated and its decisions should be legally binding.⁴ Finally, at least one of the parties appearing before it ought to be a state or an international organisation.⁵

REC treaties establish judicial organs comprising of standing courts for the interpretation of their treaties and adjudication of disputes arising. They are bound to apply international law in their adjudication and to a large extent, have existing rules of procedure. The cases brought before them usually involve the state parties. Therefore, REC courts can be regarded as international courts.

¹ PR Cesare 'The proliferation of international judicial bodies: the pieces of the puzzle' *New York University Journal of Law and Politics* Vol. 32 713.

² As above.

³ As above 714.

⁴ BB Solomy 'A critique of the East African Court of Justice as a human rights court' in CM Peter *The Protectors: Human Rights Commissions and Accountability in East Africa* (2008) Fountain Publishers 290 – 291.

⁵ As above 291.

4.2 Jurisdictional competence

Jurisdiction is a legal term referring to either a power or competence to exercise authority over a legally defined relationship between the subjects.⁶ It creates a capacity to generate legal norms and to alter the position of those subject to such norms.⁷ It also refers to the power of a court to determine a case before it in terms of an instrument either creating it or defining the jurisdiction.⁸ A court is generally precluded from adjudicating the merits of a cause over which it does not have jurisdiction.⁹

The terms competence and jurisdiction are so deeply intertwined that they are often used interchangeably even in the statute of the International Court of Justice itself.¹⁰ But subtle distinctions can be made between the two, such as that while jurisdiction relates to a court's capacity to decide a concrete case with final and binding force, competence regards the propriety of the exercise of such jurisdiction.¹¹ A tribunal is generally incompetent to act beyond its jurisdiction.¹²

4.2.1 Approaches to the definition of the jurisdiction of REC Courts

Various approaches have been adopted in defining the jurisdiction of REC courts with respect to human rights. Mainly, such competence is either expressly established by treaty or the specific intention of the state parties to the treaty is not as clearly elaborated. However, despite this seemingly clear distinction, the existence of jurisdiction is a matter of interpretation in each case especially in the latter scenario.

4.2.2 Express versus implied mandates

Of the three REC courts referred to in this work, the ECCJ is said to have an express human rights mandate.¹³ With respect to the EACJ and the SADCT, the answer is not so obvious

⁶ M Evans et al *Asserting jurisdiction: international and European legal perspectives* (2003) Hart Publishing xix.

⁷ RA Alexy *Theory of constitutional rights* (2002) Oxford University Press, Oxford 132 – 38, 149 – 59.

⁸ B Cheng *General principles of law as applied by international courts and tribunals* (2006) Cambridge University Press 259.

⁹ As above.

¹⁰ A Koroma 'Asserting jurisdiction by the International Court of Justice' in Evans (n 6 above) 189.

¹¹ S Rosenne *The Law and Practice of the International Court 1920 -1996* (1997) Martinus Nijhoff The Hague Vol II 536.

¹² Cheng (n 8 above) 259.

¹³ ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: prospects and challenges' *African Journal of International and Comparative Law* (2009), volume 17 Issue 1 (79-101) 80.

though the general inclination is that they have an implied mandate.¹⁴ It is reported that inclusion of a specific human rights mandate for the SADCT was discussed and rejected, with a panel of experts mandated to draft a proposal for the tribunal preferring a general jurisdiction with respect to human rights.¹⁵ The absence of express provisions notwithstanding, both the EACJ and the SADC tribunal have determined cases with an impact for human rights.

The two tribunals are often bundled together as lacking an express jurisdiction over human rights implying that they have similar provisions.¹⁶ A subtle but critical distinction must however be made between their provisions regarding human rights. The Protocol on SADCT¹⁷ is silent on the human rights mandate of the tribunal.¹⁸ The EAC Treaty on the other hand expressly excludes such jurisdiction until the adoption of a Protocol to expand the jurisdiction of the EACJ to human rights.¹⁹ In effect, while the silence of the SADC Protocol can be interpreted as indifference on the subject, legitimacy of the exercise of a human rights jurisdiction by the EACJ is even more precarious.

4.2.3 Challenges to the assertion of an implied jurisdiction

The exercise or assertion of jurisdiction rests on a quest for legitimacy to be found in the expression of state consent.²⁰ Legitimacy of the court's actions is circumscribed by the bounds of its authority. It affects the response of the parties to the decision rendered; if such decision is deemed to exceed the power of the court, it is unlikely to be enforced effectively. Absence of an express jurisdiction leaves it upon the court and the parties to delimit the scope of the courts authority. This opens an opportunity for subjectivity and conservatism that could injure genuine pursuit of redress.

¹⁴ OC Ruppel "Regional economic communities and human rights in East and Southern Africa" in Anton Bösl & Joseph Diescho (eds)(2009) *Human rights law in Africa: legal perspectives on their protection and promotion* Mc Millan Education Namibia 319 - 350 307 with respect to EACJ. See the discussions in section 2.2.4.2 and 2.2.5.2 of this work.

¹⁵ Viljoen *International human rights law in Africa* (2007) Oxford University Press 505.

¹⁶ Ebobrah (n 13 above) 80.

¹⁷ SADC Protocol on the Tribunal and Rule of Procedure Thereof available at <http://www.sadc.int/index/browse/page/163> accessed on 23 October 2009.

¹⁸ Article 15 which provides for the jurisdiction of the SADCT neither provides for competence over human rights questions nor excludes such jurisdiction.

¹⁹ Article 27(2) of the EAC Treaty.

²⁰ Koroma (n 10 above) 198.

4.2.4 Jurisprudence of REC courts on the issue of an implied mandate

In the *Katabazi*²¹ case, the applicants were part of a group of 21 charged with treason and misprision of treason. They applied and obtained bail from the High Court of Uganda but while the bail papers were being processed, the Court building was surrounded by security personnel who re-arrested and arraigned them before a court martial for the same offences as those for which the High Court had granted them bail. The actions of the government were contested successfully by the Uganda Law Society before the Constitutional Court but the applicants were not released, leading to the application before the EACJ.

The application claimed *inter alia* a breach of articles 6, 7(2) and 8 (1) (c) of the EAC treaty. Counsel for the applicants requested the EACJ to regard the matter as an application for determination of whether the conduct of the state of Uganda was in breach of a fundamental principle of the EAC. Counsel for the respondent on the other hand argued that the claims of the applicants related to a question of human rights over which the EACJ did not have jurisdiction by virtue of article 27(2) of the EAC Treaty.

In response to the question of its jurisdiction, the EACJ stated as follows

“Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No it does not have.....It is very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*.”

Yet it continued,

“While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation.”

On this basis, the EACJ found that the principle of the rule of law, a fundamental principle of the community had been breached.

The decision of the court to deal with the matter in the face of an express exclusion of its jurisdiction over human rights is nothing short of extreme judicial activism, skewed towards a

²¹ *Katabazi and 21 others v Secretary General of the East African Community and another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007).

usurpation of legislative functions.²² Yet, if the court had determined otherwise, it would indeed have 'abdicated itself' from performing a duty with which it is vested in terms of the treaty; that to interpret a provision of the Treaty. Therein lies the dilemma of courts whose express mandate does not sufficiently cover the scope of its functions. The capacity of a court to address an issue is circumscribed by the scope of its mandate. Hence a clear articulation of the mandate of the EACJ is necessary to avoid this impasse.

In the *Campbell* case²³ the applicants filed an application challenging the acquisition of their land by the respondent state. They simultaneously filed an application for an interim order restraining the respondent from taking an action with respect to the land pending the determination of their application. In determining the application for interim relief, the court stated that the application was founded on a breach of a fundamental principle of the community in terms of article 4(c) of the SADC treaty. It found itself to have jurisdiction over the matter and granted the interim relief.

During the hearing of the main application, the respondent contested the jurisdiction of the SADCT over the matter arguing that in the absence of a rights protocol, the tribunal had no jurisdiction over human rights. In response the SADCT stated that the stipulation of human rights, democracy and the rule of law as a principle of the community sufficed to grant it jurisdiction over human rights, democracy and rule of law. The predicament of the tribunal in this case was not as bad as that facing the EACJ for the reason that there wasn't an express exclusion of the mandate of the tribunal with respect to human rights. Nevertheless, the silence of the treaty gave an opportunity for contestation and is undesirable.

In *Olajide v Nigeria*,²⁴ the ECCJ declined to adjudicate over questions of human rights arguing that its protocol did not confer such jurisdiction. The matter arose before the 2005 amendment of the EECJ protocol which vested the court with jurisdiction over human rights and allowed individual access to the court. The decision was taken despite the existence of 'sufficient human rights content in the constitutional and other legislative instruments of ECOWAS.'²⁵ It was

²² Ebobrah (n 13 above) 82.

²³ *Mike Campbell (PVT) Limited and another v The Republic of Zimbabwe* Unreported Case No. SADC (T) 2/2007.

²⁴ *Afolabi Olajide v Federal Republic of Nigeria* Unreported Suit no. 2004/ECW/CCJ/04.

²⁵ ST Ebobrah *A Critical analysis of the human rights mandate of the ECOWAS Community Court of Justice* (2008) Danish Institute for Human Rights 17.

argued that where the meaning of the treaty was clear, the court would apply it as such.²⁶The decision has been criticised as shying away from activism since nothing in the same protocol prevented the admission of the matter.²⁷

The foregoing cases illustrate three main issues underlying the exercise of an implied jurisdiction. First, the exercise of such jurisdiction can be interpreted as exceeding the authority of the court and therefore compromise the legitimacy of the decision. It also makes the scope of the power of the court elusive. It is argued for instance that by deciding on a human rights matter despite an express deferral of the mandate of the court, the EACJ can be deemed to have breached the rule of law which is another principle of the EAC.²⁸ Secondly, it creates an opening for litigious contestation of the courts authority thereby lengthening the process unnecessarily which is undesirable for human rights litigation. Lastly, it accords discretion to the judicial officers to determine the court's competence. This introduces subjectivity and in the face of a conservative bench, the likelihood that such matters may not be admitted. This is for instance clear when the decisions of the EAC and the ECCJ in *Katabazi* and *Olajide* are contrasted.

In light of the foregoing factors, it can be concluded that an implied mandate for human rights, whilst not absolutely barring exercise of jurisdiction, does not achieve optimum protection for rights and is inconsistent with the commitment of RECs to protection of human rights evident in their founding documents.

4.3 Normative framework

This refers to the body of law applied by REC courts in dispensing their obligations under their respective treaties. It defines the values and goals pursued by the REC,²⁹ and the primary rules that impose duties on actors to perform or abstain from actions.³⁰ The normative sources applied by REC courts in exercise of the human rights mandate vary from one REC to the next.

The SADC protocol on the Tribunal provides as follows

²⁶ *Olajide* Case (n 24 above) para 53 – 54.

²⁷ Viljoen (n 15 above) 507.

²⁸ Ebobrah (n 13 above) 90.

²⁹ PF Diehl & C Ku 'The dynamics of international law: the interaction of normative and operating systems' excerpts from *International Law: Classic and Contemporary Readings* 2nd edition (2003) Lynne Rienner Publishers USA 13 available at <http://www.rienner.com/uploads/47d94d3774b6d.pdf> accessed on 22 October 2009.

³⁰ PF Diehl et al "The Dynamics of international law: the interaction of normative and operating systems" in (2003) *International Organization* 57, Cambridge university Journal Press Winter, pp+ 43-75 9.

“The Tribunal shall:

- (a) apply the Treaty, this Protocol and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and
- (b) develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States.”³¹

A literal reading of the provision implies sufficiency to direct the tribunal on what law to apply. With respect to human rights however, the answer is not as obvious. The SADC treaty establishes an obligation for states to abide by the principle of human rights, democracy and the rule of law.³² But the normative source of such standards is not specified. Hence the contention of the respondent in the *Campbell case* is arguably understandable.

The EAC Treaty does not specify the law applicable by the EACJ. With respect to human rights, article 27(2) of the EAC Treaty can be interpreted to mean that the law to be applied by the court will be defined in the Protocol expanding the jurisdiction. The treaty establishes ‘recognition, promotion and protection of human rights in accordance with the provisions of the ACHPR as a fundamental principle of the EAC.’³³ Hence, a determination of whether a state party is in breach of the treaty would inevitably entail a determination of whether or not the conduct is a breach of the ACHPR. That demands an enquiry into the substantive content of the rights. It is submitted that this does not suffice to establish the ACHPR as a normative source and standard of rights in the EAC. In addition, there have been suggestions that the EAC should adopt a rights catalogue alongside a protocol for the expansion of the jurisdiction of the EACJ.³⁴

4.3.1 The ACHPR as a rights catalogue

It is suggested that in view of the wide recognition of the ACHPR as a standard for rights in the RECs, it can be employed as the normative source of rights for REC courts. In this regard it is argued that since all the AU members are party to the ACHPR, it should serve as a common

³¹ Article 21 of the SADC Protocol on Tribunal.

³² See part 2.2.4.2 above.

³³ Article 6(d) of the Treaty.

³⁴ CM Peter *The protectors: human rights commissions and accountability in East Africa* 213.

standard.³⁵ It is further argued that the development of 'distinct sub-regional human rights standards, such as the SADC Charter of Fundamental Social Rights, is likely to accentuate differences, [thereby] undermining the movement towards African unity and legal integration.'³⁶ In similar vein, it is suggested that the ACHPR can be regarded as 'a kind of bill of rights for the African regional human rights system.'³⁷ These arguments are founded on the assumption of recognition of the ACHPR by RECs as a standard for rights.³⁸ Notably however, the SADC Treaty does not make any reference to the ACHPR, meaning that its recognition is not universal. But this does not also mean that failure to refer to it implies disaccord with its provisions. Indeed, in the *Campbell* case, the SADCT referred to the ACHPR extensively and even relied on the jurisprudence of the ACmHPR.³⁹

4.3.2 Implications of the application of the ACHPR as a rights catalogue

The interpretation and enforcement of the ACHPR is a function of the ACmHPR and the ACtHPR. The suggestion of its application by REC courts would create another forum for interpretation and enforcement. Recalling the absence of judicial hierarchy, the use of finality clauses with respect to the decisions of REC courts, the exclusion of REC courts from the formal structure of the AHRS and lack of judicial coordination in the region, the inevitable result of this suggestion is a replication of forums with a similar mandate and a real chance of conflicting decisions. It does not hold promise for addressing the threats to the unity of human rights law in the region.

The use of the ACHPR as a rights catalogue blurs the normative hierarchy between the regional and sub-regional human rights instruments that underlies the intention of the eventual unification at the regional level. Such hierarchy is implicit in judicial order and is an invaluable asset for the AHRS.

³⁵ Viljoen (n 15 above) 500.

³⁶ As above.

³⁷ SF Musungu "Economic integration and human rights in Africa: a comment on conceptual linkages" (2003) *Africa Human Rights Law Journal* 93.

³⁸ Viljoen (n 15 above) 501.

³⁹ See pages 20, 21, 30, 32, 47.

4.3.3 Case for separate cataloguing

It is argued against separate cataloguing that it is likely to accentuate differences and undermine integration.⁴⁰ The possibility of accentuating differences, it is submitted, is adequately mitigated by the recognition of the ACHPR and other international standards of human rights as a normative minimum. Logically, any other 'differences' would add to the minimum and thus enhance rights. Allowing RECs the leeway to create better standards would point the regional mechanism to possible areas of development as identified and developed by REC courts. For instance the draft East African Bill of Rights⁴¹ has extensive provisions covering both on the rights established under the ACHPR and beyond. If adopted, it would present better protection than the ACHPR. In the case of SADC, there are differences of opinion on whether the SADC Charter of Fundamental Social Rights can be deemed as a rights catalogue for the SADCT.⁴²

4.4 Structural framework

This refers to the institutional organisation of the AHRS. A system is a purposeful arrangement of interrelated elements or components which cannot be adequately described and understood in isolation from one another.⁴³ It has been established in the preceding chapter that REC courts are not formally recognised as part of the AHRS. The concern at this point is the relationship between the REC courts and the institutions established at the regional level, and how the AHRS institutional framework can be modified if at all to accommodate the role of REC courts.

It is argued in section 3.1 above that RECs do not constitute independent human rights systems.⁴⁴ They are created for the pursuit of other goals; economic integration and human rights is barely incidental to that main purpose. Furthermore, they do not have institutions specifically tailored towards the performance of human rights functions. If RECs indeed fall short of independent human rights systems in Africa, then, in order for them to achieve the

⁴⁰ See note 36 above.

⁴¹ The Draft East African Bill of Rights Annexure II in CM Peter (n 34 above) 336-359 developed by the National Human Rights Institutions in the East African region under the auspices of Kituo Cha Katiba. The draft, though not formally adopted by the EAC is intended to be a human rights code to guide the human rights jurisprudence and operations of the EACJ. See CM Peter (n 34 above) 121.

⁴² Viljoen (n 15 above) 500 argues that it is a rights catalogue while Ruppel (note 14 above) 295 regards it simply as a guide to the SADC Treaty.

⁴³ S Yuval *The competing jurisdiction of international tribunals* (2003) Oxford University Press Oxford 78.

⁴⁴ Viljoen (n 15 above 10).

optimum protection of rights as envisaged in their respective documents they need either to fully develop their institutions to a fully fledged system or to align with a better co-ordinated and institutionally established system, namely the AHRS.

Persistent independence of the regional and sub-regional mechanisms implies a lateral relationship between the courts. It creates opportunity for lack of order which is an affront to the unity of human rights law in the region. It is proposed therefore that the regional human rights system should be able to accommodate REC courts within its framework in a hierarchical relationship.

4.4.1 Structural hierarchy

By this is meant the interaction between the institutions at the regional and sub-regional levels. The institutions created at the regional level are currently totally detached from those at the sub-regional level as a consequence of the exclusion of the sub-regional mechanisms from the AHRS. In practice, there is no hierarchy between the two levels and consequently no obligation on REC courts to pay regard to the jurisprudence of the ACtHPR or ACmHPR or for these two to oversee the propriety of the decisions of the REC courts.

This division, coupled with varying approaches and extensive references to and application of the ACHPR by REC courts, affronts the role of the ACmHPR and the ACtHPR under the ACHPR. For instance, the ACmHPR has the duty to ensure the protection of rights recognised under the ACHPR in accordance with the conditions established therein and to interpret the provisions of the ACHPR.⁴⁵ This creates a policing role for the ACtHPR and ACmHPR that cannot be performed effectively in the absence of an institutional relationship with the REC courts. The argument made here then is that the AHRS falls short of defining an appropriate structural system that would facilitate interaction between the REC courts, the ACtHPR and ACmHPR in a manner likely to achieve optimum protection of rights in Africa.

It is suggested that just as in the case of a normative hierarchy proposed above, structural hierarchy between the institutions of RECs and those of the AHRS is necessary.

⁴⁵ Article 45(2).

4.5 Case of the EAC

The issues highlighted in this chapter reverberate across the RECs referred in this work and beyond. This part highlights how these issues present themselves in a real situation as in the case of the EACJ.⁴⁶

4.5.1 Question of jurisdiction

The EAC is the most recent sub-regional integration initiative. As highlighted in section 2.2.5.2 above, the Protocol necessary to expand the jurisdiction of the EACJ to human rights has not yet been adopted. Consequently, human rights are not actionable before the EACJ *per se*. Nevertheless, the EACJ has had occasion to adjudicate on cases with implications for human rights.⁴⁷ In light of the express exclusion of such jurisdiction, the legacy of its decisions in these cases reeks of illegitimacy and is most illustrative of the absurdities appurtenant to implied mandates.

Article 27(2) of the Treaty of the EAC provides

“1. The court shall initially have jurisdiction over the interpretation and application of this treaty.

2. The court shall have such other original, appellate, **human rights**, and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the partner states shall conclude a protocol to operationalize the extended jurisdiction.”

The express intention of the parties in the foregoing section is a deferral of human rights jurisdiction to a future date. Hence to exercise human rights jurisdiction in these circumstances would be to breach that express intention of the member states. This distinguishes it from the situation of the SADCT and exacerbates the illegitimacy of its decisions relating to human rights. But most fundamentally, it conflicts with other provisions of the EAC Treaty that are equally expressive of the intention of member states. For instance, an interpretation and application of the EAC Treaty in terms of article 27(1) would potentially entail an enquiry into whether the member states have adhered to their commitment to the ‘recognition, promotion

⁴⁶ See section 2.2.5.2 on the human rights mandate of the EACJ.

⁴⁷ *Katabazi* (n 21 above), *Nyong’o and 10 others v The Attorney General of Kenya and others* Ref No. 1 of 2006 and *East African Law Society and 3 others v The Attorney General of Kenya and 3 others* Reference No. 3 of 2007.

and protection of human and peoples' rights in accordance with the ACHPR'.⁴⁸ In such case, the EACJ would be obliged to desist from deciding on the matter. Yet to assume that the parties intended that a breach of a fundamental principle of the EAC should go unaddressed is absurd.⁴⁹ This pits the need for the EACJ to remain within the bounds of its defined mandate⁵⁰ against its effectiveness as a human rights court.

4.5.2 Normative source

In this respect, the EAC Treaty does not specify a catalogue of rights. Rather, it refers to the ACHPR as a standard of rights to which member states are bound to adhere.⁵¹ The draft Protocol drafted by the secretariat of the EAC⁵² also does not establish a rights catalogue. The need to adopt a rights catalogue is a recurrent theme of the discussions surrounding the adoption of the draft Protocol.⁵³ Meanwhile, a draft East African Bill of Rights has been developed and proposed for adoption.⁵⁴ The proposed bill of rights extends far beyond the rights recognized under the ACHPR and if adopted would offer better standards for rights in the region.

In terms of the EAC Treaty, disputes tendered to the EACJ for determination cannot be submitted to any other form of settlement other than that established under the EAC Treaty.⁵⁵ This provision has the effect of establishing the finality of the decisions of the EACJ. It potentially excludes the ACtHPR or ACmHPR from subsequent receipt of the claim. Seeing that the judges of the EAC need not have any special expertise in human rights⁵⁶ the exclusion of the ACtHPR or ACmHPR has an attendant risk of perpetuating varying standards in different regions.

⁴⁸ Article 6(d) of the EAC Treaty.

⁴⁹ B Cheng *General Principles of Law as applied by international courts and tribunals* (2006) Cambridge University press 106 argues that it should not be presumed that parties intended something that is unreasonable, absurd and contradictory.

⁵⁰ As above 261.

⁵¹ Article 6(d).

⁵² Refer to section 2.2.5.2 above.

⁵³ Peter (n 34 above) 213.

⁵⁴ Refer to section 4.3.3 above.

⁵⁵ Article 38 (1) of the Treaty.

⁵⁶ See article 24(1) of the EAC Treaty.

4.5.3 Institutional hierarchy

With respect to the institutional relationship, the EAC treaty does not attempt to forge a relationship between the EACJ and the ACmHPR and ACtHPR. In any event, the EACJ is a court of justice with a mandate broader than human rights.⁵⁷ In terms of the draft Protocol, the extended jurisdiction of the EACJ covers *inter alia* cases concerning the interpretation and application of instruments for the promotion and protection of human and peoples' rights.⁵⁸ Despite its silence on the ACHPR, the use of 'peoples' rights' in the Protocol, a feature unique to the ACHPR, implies reference to the ACHPR.

Parties to a dispute alleging violation of human rights are obliged to refer the matter first to the EACJ before any other relevant regional or international court.⁵⁹ This provision establishes the primacy of the EACJ over the ACtHPR and other RECs in light of the overlapping membership of the state parties in other RECs.⁶⁰

This state of affairs brings into question the commitment of the member states of the EAC to their human rights obligations under the EAC Treaty. An effective EACJ could enhance the protection of human rights in the EAC⁶¹ yet the lacuna created by its deferred mandate compromises this purpose to a large extent.

4.6 Concluding remarks

In order to optimally discharge the duty to protect human rights as envisaged in the creation of the AHRS⁶² there is need to revisit the relationship between the AHRS and the REC courts. This should entail revisiting the jurisdictional competence of REC courts so as to strengthen their role as avenues for protecting rights and alignment of their normative and institutional frameworks with those of the AHRS.

⁵⁷ As above article 23 .

⁵⁸ Article 10 of the draft Protocol for the extension of the jurisdiction of the EACJ.

⁵⁹ As above article 14.

⁶⁰ See Ruppel (n 14 above) 283 on the overlapping membership of African states in RECs.

⁶¹ Ruhangisa JE 'The East Africa Court of Justice' in Ajulu R *The making of a region: revival of the East Africa Community* 2005 Institute For Global dialogue 95-110, 96

⁶² Paragraph 10 of the preamble to the ACHPR.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Synopsis of findings

This study has established that the role of RECs in Africa has expanded beyond an exclusive pursuit of economic integration to include the protection and promotion of human rights. The trend is a consequence of many factors but in the main, it is a response to a regional agenda that demands *inter alia* that RECs should incorporate human rights and democracy into their respective instruments. To further the protective aspect of this development, REC courts have been accorded human rights competence leading to the proliferation of human rights courts in the region.

A number of concerns are raised regarding the suitability and capacity of REC courts as human rights protectors. Mainly, these concerns relate to the relationship between REC courts and the AHRS, their relative advantage or disadvantage over the AHRS and the potential impact of their work in the field of human rights on the unity of human rights law in Africa. This work has established that though the fears arrayed are credible, the challenges associated with the new development are attributable to its relative novelty, and lend themselves to solutions within reach of the system.

It has also been established that REC courts are not formally recognised as part of the AHRS. This makes it difficult to oversee the maintenance of standards established under the ACHPR. In light of lack of coordination and oversight and limited inter-fora interaction, the risk of disparate standards in the different sub-regions is imminent and very likely to compromise eventual harmonisation at the regional level.

The proliferation of RECs has raised potential for forum shopping. However, this is not yet evident in practice due to the intervention of other factors such as the indigence of litigants. It is also established that despite the reservations raised against forum shopping, it is not an entirely negative phenomenon. Rather, the capacity of a litigant to choose a forum for redress empowers the litigant to access optimum protection of their rights. But the affront to the authority of courts posed by forum shopping may overbear on the already weak AHRS. For this reason, it is concluded that it is necessary for the AHRS to adopt mechanisms to curb forum shopping.

The need for jurisdictional and normative hierarchy between the REC courts and the AHRS mechanisms has been established as an appropriate way to deal with the multiplicity of forums and to preserve jurisprudential unity. The views regarding an appropriate normative framework are however disparate. But it is argued in this work that in view of the current structural realities, the ACHPR should be regarded as a normative standard, and the REC tribunals left to establish separate catalogues, building on the ACHPR. To insist on the ACHPR as a rights catalogue would stifle the development of rights beyond its provisions and recall the challenges of conflicting jurisdictions and disunity of jurisprudence.

5.2 Recommendations

In view of the foregoing discussions, the following recommendations are proffered;

First, for the sake of judicial order in the region, that the ACmHPR and the ACtHPR should be recognised as the supervisory organs of the AHRS and in that regard, should retain their position as the final arbiters and interpreters of the rights established under the ACHPR. Hence REC courts that use the ACHPR as a normative catalogue should allow for referral to the ACtHPR and ACmHPR.

Second, REC courts may use the ACHPR as a basis for standards of rights with the view to ultimate unification at the regional level. However, the use of the ACHPR as a catalogue of rights should be discouraged in view of the current disharmony in the system. Where a REC uses the ACHPR as its rights catalogue, that REC court should not proclaim finality over its decisions based on the ACHPR. The distinction between a rights standard and a rights catalogue should be maintained.

Third, article 56(7) of the ACHPR should be amended to accommodate the role of REC courts as supra-national rights protection mechanisms and to offer guidance on the relationship between the AHRS and the sub-regional mechanisms. In the meantime, the ACmHPR should advise on this issue.

Finally, REC courts should have an expressly stated human rights mandate and a clearly stipulated source of applicable norms. Express mandates will help to entrench the all necessary

legitimacy of their functions and to reduce the potential for litigious contestation of authority that is not conducive for protection of human rights.

5.3 Conclusion

The significance of the role played by REC courts in the protection of human rights in the Africa today cannot be denied. It is a reflection of a renewed commitment by African states to the realisation of human rights in the region. It also points to the fact that the traditional human rights institutional framework in the region has long been overtaken by practice. Whether or not the region stands to benefit from the role of these new players is almost entirely dependent on a corresponding willingness of states to revisit the AHRS and to align the operations of the RECs with the regional framework.

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BIBLIOGRAPHY

Books

Ajulu, R (ed) (2005) *The making of a Region: Revival of the East Africa Community Institute For Global dialogue*, South Africa

Akokpari, J & Zimbler, DS (eds) (2008) *African Human Rights Architecture* Jacana Media, South Africa

Alexy, RA (2002) *Theory of Constitutional Rights* Oxford Press, Oxford

Benedek, W (ed) (2006) *Understanding human rights: manual on human rights education* Antwerpen, Intersentia

Brown, C (2007) *A Common Law of international adjudication* Oxford University Press, Oxford

Cheng, B (2006) *General Principles of Law as applied by International Courts and Tribunals* (2006) Cambridge University Press, Cambridge

Evans, M & Murray, R (eds) (2008) *The African Charter on Human and Peoples' Rights* 2nd edition Cambridge University Press, Cambridge

Evans, M & Murray, R (eds) (2002) *The African Charter on Human and Peoples' Rights; the system in practice, 1986 – 2000* Cambridge University Press, Cambridge

Evans, M; Patrick C & Stratos K (2003) *Asserting jurisdiction: international and European legal perspectives* Hart Publishing, USA

Freeman, M (2002) *Human Rights: An interdisciplinary Approach*, Cambridge University Press, Polity

Heyns, C & Killander, M (eds) (2007) *Compendium of Key Human Rights Documents of the African Union* 3rd Edition Pretoria University Law Press, Pretoria

Peter, CM (ed) (2008) *The protectors: human rights commissions and accountability in East Africa* Fountain Publishers, Kampala

Rosenne, S (1997) *The law and practice of the international Court 1920 -1996* Vol. 2 Martinus Nijhoff, Hague

Voitovich, SA (1995) *International Organizations in the International Legal Process* Martinus Nijhoff, Netherlands

Yuval, S (2003) *The competing jurisdiction of international courts and tribunals* Oxford University Press Oxford

Viljoen, F (2007) *International Human Rights Law in Africa* (2007) Oxford University Press

Articles

Alford, RP 'The proliferation of international courts and tribunals; international adjudication in ascendance' (2000) HeinOnline, *American Society of International Law* 160

Cesare, PR 'The proliferation of international judicial bodies: the pieces of the puzzle' (1999) *New York University Journal of Law and Politics* Vol. 32

Diehl, PF et al "The Dynamics of International Law: The Interaction of Normative and Operating Systems" in (2003) *Cambridge university Press Journal*

Ebobrah, TS 'Litigating human rights before sub-regional courts in Africa: prospects and challenges' (2009) *African Journal of International and Comparative Law* Vol.17 Issue 1

Ebobrah, TS 'Human rights developments in sub-regional courts in Africa in 2008' (2009) *Africa Human Rights Law Journal*

Ebobrah, TS 'A rights-protection goldmine or a waiting volcano eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' *Africa Human Rights Law Journal* (2007) 7 No. 2

Helfer, L "Forum Shopping for Human Rights" (1999) *University of Pennsylvania Law Review* Vol 148 Issue 2

Heyns, C 'The African regional human rights system: The African Charter' (2004) Hein online

Kouassi, RN 'The itinerary of the African integration process: an overview of the historic landmarks' (2007) *Africa Integration Review* Vol 1 No. 2 July

Musungu, SF "Economic integration and human rights in Africa: a comment on conceptual linkages" (2003) 3 *Africa Human Rights Law Journal*

Nwogu, N 'Regional integration as an instrument of human rights; re-conceptualizing ECOWAS' (2007) *Journal of Human Rights*, (6:3, 345 - 360)

Ojienda, TO 'Alice's adventures in wonderland: preliminary reflections on the jurisdiction of the East African Court of Justice' (2004) *East African Journal of Human Rights and Democracy* 94

Thoko, K 'SADC and human rights: fitting human rights into the trade matrix' (2004) *African Security Review* 13(1) 109 -117

Chapters in Books

Diehl, PF & Ku, C "The dynamics of international law: the interaction of normative and operating systems" in Diehl, PF & Ku C, (2003) *International Law: Classic and Contemporary Readings* 2nd edition Lynne Rienner Publishers USA

Koroma, A "Asserting Jurisdiction by the International Court of Justice" in Evans, M Patrick C & Stratos K (2003) *Asserting jurisdiction: international and European legal perspectives* Hart Publishing, USA

Lamin, AR 'African sub-regional human rights courts: The ECOWAS Court of Justice, the SADC Tribunal and the EAC Court of Justice in comparative perspective' in Akokpari, J & Zimble, DS (eds) *African Human Rights Architecture* (2008) Jacana Media, South Africa

Oellers-Frahm, K 'Multiplication of international courts and tribunals and conflicting jurisdiction - problems and possible solutions' in JA Frowein and R. Wolfrum (eds) (2001) *Max Planck Year Book of the United Nations Law*, Vol.5 Kluwer Law International, Hague

Oluoch, W 'The East Africa Court of Justice: review of its composition, administration and jurisdiction' in (2007) *Reinforcing Judicial and Legal Institutions: Kenya and Regional Perspectives*, Vol. 5 Judiciary Watch Series, The Kenya Chapter of the ICJ Nairobi, Kenya

Ruhangisa, JE 'The East Africa Court of Justice' in Ajulu R (2005) *The making of a Region: Revival of the East Africa Community* 2005 Institute For Global Dialogue, South Africa

Shaw, TM 'The future of new regionalism in Africa: beyond governance, human security, development and beyond' in Grant JA & Soderbaum, F (eds), (2003) *The New Regionalism in Africa* Ashgate, Aldershot

Solomy, BB 'A Critique of the East African Court of Justice as a human rights court' in Peter, CM (2008) *The Protectors: Human Rights Commissions and Accountability in East Africa* Fountain Publishers, Kampala

Viljoen, F 'Communications under the African Charter: procedure and admissibility' in Evans, M and Murray, R (eds) (2008) *The African Charter on Human and Peoples' Rights* 2nd edition Cambridge University Press, Cambridge

International Legal Instruments

African Charter on Human and Peoples' Rights, 1981/1986

Amended Treaty for the Establishment of the East Africa Community (as amended on 14 December 2006 and 20 August 2007)

Charter of Fundamental Social Rights in the Southern African Development Community, 2003

Charter of the Organization of African Unity, 1963

Constitutive Act of the African Union, 2000/2001

Declaration and Treaty of the Southern African Development Community as Amended in 2001

Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States

Draft East African Bill of Rights

Draft Protocol to Operationalize the Extended Jurisdiction of the East Africa Court of Justice, 2005

East African Co-operation Treaty, 1967

ECOWAS Declaration of Political Principles, 1991

Interim Rules of Procedure of the African Commission on Human and Peoples' Rights, 2008

Lusaka Declaration forming the Southern African Development Coordinating Conference (SADCC), 1980

OAU Lagos Plan of Action for the Economic Development of Africa (1980 – 2000)

OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004)

Protocol on the Statute of the African Court of Justice and Human Rights, 2008

Revised Treaty of Economic Community of the West African States as amended in 1993

SADC Protocol on the Tribunal and Rule of Procedure Thereof, 2000

Southern Africa Development Community Protocol on Gender and Development, 2008

Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice, 2005

Supplementary Protocol A/SP.2/06/06 Amending Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice, 2006

Treaty of the Economic Community of West African States (ECOWAS), May 1975

Treaty Establishing the African Economic Community (AEC) 1991 (Abuja Treaty)

United Nations Declaration of Human Rights, 1948

Vienna Convention on the Law of Treaties, 1969

Case Law

Afolabi Olajide v Federal Republic of Nigeria Unreported Suit no. 2004/ECW/CCJ/04 (ECOWAS CCJ)

Calist Andrew Mwatela & 2 others v East Africa Community (EACJ) Application No. 1 of 2005 (unreported)

Campbell and 78 others v Zimbabwe SADC (T) Case Number 2/2007

East African Law Society and 3 others v The Attorney General of Kenya and 3 others (EACJ) Reference No. 3 of 2007

Ernest Francis Mtingwi v SADC Secretariat SADC (T) Case No.1/2007

Katabazi and 21 others v Secretary General of the EAC and another (EACJ) Ref. No.1 of 2007

Mike Campbell (PVT) Limited and another v The Republic of Zimbabwe Unreported Case No. SADC (T) 2/2007

Nyong'o and 10 others v The Attorney General of Kenya and others (EACJ) Ref No. 1 of 2006

Conference Papers

Adar, KG 'Federalism and East Africa Community Integration Process; The Role of the East African Legislative Assembly' (2008) Paper prepared for presentation at CIGI/GARNET Conference on Mapping Integration and Regionalism in a Global World: The EU and Regional Governance outside EU, 17-20 September 2008 Bordeaux-France

Chidi, AO 'Complementary, competition, contradiction: the relationship between the African Court on Human and People's Rights and regional courts in East and Southern Africa' (2003) Unpublished paper presented to the conference of Eastern and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9-10 December 2003

Ebobrah, TS 'Addressing sub-regional challenges to the unity of African international human rights law' (2009) Paper presented to the conference on 'Unity or fragmentation of international law: the role of the international and national tribunals', Oslo 14 -15 May, 2009

Other Publications

East Africa Community Plan of Action on the Promotion and Protection of Human rights in East Africa (EAC/CM 15/Decision 36) EAC (2008c:20)

Ebobrah, TS 'A Critical analysis of the human rights mandate of the ECOWAS Community Court of Justice' (2008) Danish Institute for Human Rights Denmark

Economic Commission for Africa, 'Assessing regional integration in Africa II: rationalizing regional economic communities (2006) ECA Addis Ababa, Ethiopia.

Oloka-Onyango, J & Udagama, D "Human rights as the primary objective of international trade, investment and finance policy and practice' (1999) UN Doc.E/CN.4/Sub.2/1999

Official Journal of the Economic Community of the West African States Vol. 49 (2006)

Report of the Brain Storming Meeting of the African Commission on Human and Peoples' rights: 9-10 May 2006 Banjul, The Gambia 20th Activity Report, Annex 2 (

Internet sources

African Union, 'AU RECs; Background and History' available at <http://www.africaunion.org/root/AURECs/eac.htm> (accessed 1 September 2009)

Lolette, KN 'Regional integration: concepts, advantages, disadvantages and lessons of experience' (2005) unpublished paper available at http://www.sarpn.org.za/documents/d0001249/P1416-RI-concepts_May2005.pdf (accessed 05 September 2009)

SADC Secretariat *SADC Profile: Southern Africa Development Community (SADC)* available at www.sadc.int (accessed 1 September 2009)

<<http://www.comm.ecowas.int/sec/index.php?id=about-a&lang-en>> (accessed on 17 September 2009)

<<http://www.sadc.int>> (accessed 28 September 2009)

<www.eac.int> (accessed 15 August 2009)

<<http://www.eac.int/index.php/organs/eacj.htm?start=1>> (accessed 15 August 2009)

<<http://www.africa-union.org/root/AU/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf>> (accessed 27 October 2009)

<<http://www.sadc.int/index/browse/page/163>> (accessed 29 October 2009)

<<http://www.unhcr.org/refworld/docid/49217f4c2.html>> (accessed 28 October 2009)

<http://www.uneca.org/itca/ariportal/docs/lagos_plan.PDF> (accessed 29 October 2009)

<<http://www.humanrights.dk/news/ecowas+court+shows+way+forward+in+africa>> (accessed 29 October 2009)

<<http://www.africa.union.org/root/UA/Newsletter/EA/Vol.1,No.2/Kouassi.pdf>> (accessed 14 September 2009)

<http://www.pict-pcti.org/publications/PICT_articles/JILP/Romano.pdf> (accessed 21 October 2009)

<<http://www.humanrights.dk/news/ecowas+court+shows+way+forward+in+africa>> (accessed 30 October 2009)

<<http://www.africaunion.org/root/AURECs/eac.htm>> (accessed 1 September 2009)