Chapter 4 THE REALISATION OF HUMAN RIGHTS IN AFRICA THROUGH SUB-REGIONAL INSTITUTIONS

4.1 Introduction

A number of sub-regional inter-governmental organisations and institutions have been functioning and still function in Africa today. Those predating African independence had (and still have, where they still exist) close links with colonialism (or its aftermath). The East African Community is an example of an organisation that is now defunct. Examples of defunct institutions are the Court of Appeal of East Africa, the West African Court of Appeal and the Rhodesia and Nyassaland Court of Appeal. Presently, a multiplicity of organisations, mainly concerned with economic priorities and co-operation, exist sub-regionally in Africa. The most important of these are the Economic Community of West African States ("ECOWAS"), the Southern African Development Community

("SADC"), the Common Market of Eastern and Southern Africa ("COMESA") and the Maghreb Arab Union.[1]

One of the reasons for the emergence of these regional arrangements is the **failure of the OAU to address Africa's economic problems**. At its inception in 1963, the OAU Charter proclaimed its involvement in economic development, but due to the context of its origin and first years, it focused almost exclusively on the political aims set out in its founding Charter. It was targeted mainly at colonialism and the eradication of racially discriminatory political orders from Africa.[2] The newly independent constituent party states of the OAU jealously guarded their own sovereignty. Not only the OAU's potential impact on internal political issues, but also its potential of collectively addressing economic concerns, was constrained in the process.

So far, the **impact of the African human rights regime on the sub-regional level** has been insignificant. In none of these treaties are the provisions of the Charter incorporated as binding obligations on states. There is little talk on their part of implementing human rights as part of their mandate, or of the possiblity of accession to the African Charter in the near future. This does not mean that human rights are not mentioned, referred to or incorporated at all.[3] But wherever that is done, it remains very limited and without implementation. In general, individuals may also not refer cases to and do not have standing before sub-regional judicial institutions, making it impossible for them to raise concerns in these fora.

This Chapter investigates the extent to which these sub-regional arrangements have been and can be vehicles for the improvement of human rights on the continent. Each of these organisations provides for a court or tribunal to resolve conflicts or to interpret the founding treaty. This judicial

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1 There are numerous other sub-regional organisations in existence in Africa today, including the Economic Community of the Countries of the Great Lakes ("CEPGL"), the Southern African Customs Union ("SACU"), the Mano River Union, the Customs and Economic Union of Central Africa ("UOEAC") and the African and Mauritian Common Organisation ("OCAM"). See eg Elias (88) at 25 – 29.

2 See ch 3.1.1 above.

3 It should be conceded that, as these institutions are directed at socio-economic goals, they aim indirectly at the implementation of socio-economic rights. Even so, the rights discourse, with all that follows therefrom, is not adopted.

dimension will be the centre of focus and will lead into more general observations on courts in a supra-national, but sub-regional setting. First, those institutions which have ceased to operate are dealt with, and then an exposition is given of those functioning at present.

4.2 Defunct institutions

Africa's colonial past presents one with some early precedents of inter-territorial arrangements of a judicial nature. Examples are the Court of Appeal of East Africa, the West African Court of Appeal and the Rhodesia and Nyassaland Court of Appeal.[4] Of these, the courts in East and West Africa extended the furthest geographically and covered the longest period of time. They are discussed here.

4.2.1 Court of Appeal of East Africa[5]

4.2.1.1 Overview of its evolution

The East African Court of Appeal was established in 1902 by the British colonial authorities in respect of the territories that would later become known as Kenya, Malawi and Uganda.[6] This Court was one of the institutions of the British East Africa High Commission.[7] Unity at the judicial level was just one form of a broader process of inter-territorial political co-operation that in 1947 became concretised in the East African High Commission.[8] The evolutionary process of

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4 See, in general on these courts, Roberts-Wray (1966) at 760-761, 783 and 220-221 respectively.

5 The name of this institution differs through the decades. It was initially called the Eastern African Court of Appeal. Its last appearance was as the Court of Appeal of East Africa.

6 Mvungi (1994) points out that trade networks, political dynamism and social mingling had over centuries succeeded in establishing a common cultural identity and a "non-tribal common language", known as Kiswahili (at 108).

7 See Elias (1988) at 26.

8 See Kato (1971) 7 *East African Law Jnl* 1 at 2.

establishing a supra-national court in East Africa was thus part and parcel of "the general desire of the British Colonial regime to join the three territories, a desire which was later welcomed and almost concretised by African politicians".[9]

Zanzibar, Aden and Tanganyika were later added to the Court's jurisdiction. Nyassaland (Malawi) was excluded when the Rhodesia and Nyassaland Court of Appeal came to be established in 1947.[10] At that stage the Court consisted of the Chief Justices and other judges of superior courts of the countries over which it had jurisdiction. Practical problems arose, prompting an investigation.[11] The investigation revealed that an increase in the number of cases submitted to the Court had led to delays in their finalisation. This caused concern, especially as many cases involved persons convicted of murder and awaiting execution. In 1946 the Court already sat for twenty weeks yearly. This took up a considerable amount of the Chief Justices' time. They were obviously primarily needed in their own countries, and their duties there were subsequently neglected. Pressure was not only exerted on their domestic duties. A tendency also developed to deal very rapidly with cases at the East African Court of Appeal. In other words, the main cause of the difficulties faced by the Court was identified as the temporary basis of judicial appointment to the Court.

These findings led to structural reforms of the system. In terms of reforms effected in 1950, three permanent Court members were appointed to the Court. All other judges of superior courts of the countries involved were eligible to sit on the Court. A permanent seat was also established at Nairobi, Kenya. The choice of the seat was motivated with reference to Nairobi's central geographical location. On occasion the Court could also sit in other countries.

It should be noted that the possibility was also raised that a separate court of appeal could be established for each of the major territories. The official investigation, reporting on possible reforms, rejected such a course of action: "If this were done, ... East Africa would be left without

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9 *Ibid.*

10 See Roberts-Wray (1966) at 760.

11 For background to these problems and the solutions offered, see *Proposals for the Re-Organization of the Eastern African Court of Appeal* (1948).

any high co-ordinating legal authority, and moreover these territories would be unable to fulfil commitments already entered into with other Colonial Governments".[12]

The role of the Court in the broader policy of "indirect" colonial rule is apparent from the fact that the judges were appointed by the Governor of Kenya,[13] and were usually "expatriates".[14]

The **East African Community** was established when the Treaty for East African Cooperation was concluded between Kenya, Tanzania and Uganda in 1967,[15] following the independence of the three countries. It provided for co-operation in various fields. The Court, as the Court of Appeal of East Africa, was retained in its previous form as one of the institutions of the Community. Another judicial institution was provided for under this Treaty.[16] This Court, the Common Market Tribunal of the East African Community, had the task of ensuring observance of treaty law, such as allegations of breach of treaty obligations. Two cases had been referred to the Tribunal. Due to the fact that it was never fully constituted these cases were never considered.[17] The Community, and with it the Court, was abolished in 1977.[18]

On paper, the future prospects for co-operation in East Africa must still be regarded as good. Factors uniting the three states (Kenya, Tanzania and Uganda), are:

- geographic proximity

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12 *Proposals for the Re-Organization of the Eastern African Court of Appeal* (1948) at 3.

13 See (1971) 7 *East African Law Jnl* 1 at 11.

14 In 1970 the permanent members of the Court were President Newbold, Vice President Duffus and Justice Spry. In the same year Mr Justice Lutta became the first East African to hold a position as permanent member of the Court.

15 By the Treaty of East African Co-operation signed at Kampala, and which entered into force in December 1967. It took over the assets and liabilities of the East African Common Services Organisation ("EACSO"), which was established in 1962. The EACSO was established to take over from the British East Africa High Commission (see Elias (1988) at 26).

16 Another "tribunal" established under the EAC was the East African Industrial Court: see art 84 of the EAC Treaty.

17 Schermers and Blokker (1995) at 433. By May 1970 two cases had been referred to the Tribunal, which had at that stage not been constituted.

- institutional links[19]
- shared history
- broad knowledge of one language, Swahili
- ethnic ties across borders, for example the presence of Luos in all three states.

However, whether there is room for such an arrangement in the light of the development of COMESA and SADC, seems questionable.[20]

4.2.1.2 Functioning of the Court

In general, the Court exercised **judicial restraint**. Writing optimistically about the future of the Court in 1971, Kato expressed the opinion that it survived because it did not involve itself in political controversy.[21] One of the reasons was the limited jurisdiction of the Court as far as human rights matters were concerned.

The first of the three states to become independent, **Tanzania**, did not include a Bill of Rights in its Constitution.[22] Questions of the interpretation of human rights as such could therefore not arise. As for the Constitution, the Court was excluded from hearing any appeal concerning its

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18 On its demise, see Mvungi (1994) at 118.

19 For a recent manifestation of these links, see the Establishment of the Lake Victoria Fisheries Organisation between Kenya, Tanzania and Uganda ((1997) 36 *ILM* 667).

20 See also Muzan (1994) 15 *African Study Monographs* 37, who argues that the efforts to establish a federation between the three states in the early 1960s failed because the Ugandan leader Okello was too protective of the role of the Kabaka of the Buganda.

21 See Kato (1971) 1 *East African Law Jnl* 1 at 30. He considered the future if the Court to be "bright".

22 Also, before a one party state was established in 1968, the possibility was considered, but rejected: See *Report of the Presidential Commission* (1968) at 30-32.

interpretation.[23] However, other contentious issues, such as cases involving *habeas corpus* directions, could be heard by the Court.[24]

Uganda became independent next, in 1962. Its independence Constitution included a Bill of Rights. The Court, however, had no jurisdiction to entertain an appeal from a Ugandan Court dealing with Chapter III of the Constitution, which contained fundamental human rights. In terms of section 95 of the independence Constitution, issues involving a substantial question of law could be referred to the Ugandan High Court, but not to the East African Court of Appeal.[25]

Independence for **Kenya** came last of the three, in 1963. Its Constitution was clear about the limitations on the Court's role in the internal affairs of the newly independent nation. The jurisdiction of the Court was excluded as far as the interpretation of the Constitution and the enforcement of human rights provisions in the Constitution were concerned.[26]

From an analysis of the Court's annual reports[27] it is clear that the Court was **constantly utilised**. The total number of appeals for some years are given as examples:

- 1961: 297 appeals
- 1962: 300 appeals
- 1963: 278 appeals
- 1970: 289 appeals
- 1971: 254 appeals
- 1972: 231 appeals
- 1973: 220 appeals
- 1974: 195 appeals

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23 S 9 of the Appellate Jurisdiction Ordinance 55 of 1961, referred to by Kato (1971) 7 *East African Law Jnl* 1 at 20.

24 S 8(3) of the Appellate Jurisdiction Ordinance 55 of 1961, referred to in (1971) 7 *East African Law Jnl* 1 at 20

25 See Kato (1971) 1 *East African Law Jnl* 1 at 22.

26 See Kato (1971) 1 *East African Law Jnl* 1 at 28.

27 *Court of Appeal for East Africa Annual Reports*, consulted in the Nairobi University Library, Africana section. Other data in this discussion is also based on this analysis.

- 1975: 248 appeals
- 1976: 199 appeals

In general, a slight decreasing trend, as well as a significant drop in numbers between 1975 and 1976, may be identified.

The total number of appeals originating in the **three national legal systems** from 1970 to 1973, and in 1976 are as follows:

- 1970: Kenya (76), Uganda (146), Tanzania (67)
- 1971: Kenya (81), Uganda (97), Tanzania (76)
- 1972: Kenya (76), Uganda (88), Tanzania (67)
- 1973: Kenya (90), Uganda (53), Tanzania (77)
- 1976: Kenya (95), Uganda (30), Tanzania (74)

From these figures it appears that a relatively constant number of appeals from Kenya and Tanzania were submitted annually. Another feature is that the number of Kenyan cases were always slightly more than that emanating from Tanzania. Most striking, however, is the steady **decrease of cases brought from Uganda**. Within seven years the number of Ugandan cases changed from the highest to the lowest of the three states.

The **majority** of cases heard by the Court were **criminal cases**. In 1962, for example, 201 of the 300 cases were criminal appeals. Of the criminal appeals before the Court in 1971, it dismissed 148, and allowed 39.[28] This trend continued: In 1973, 107 criminal appeals were dismissed, and 46 allowed; in 1976 100 criminal appeals were dismissed, and 55 allowed. The majority of criminal appeals involved murder convictions. In 1973, for instance, 91 murder cases were heard, and in 1976, 73. In general, the Court interfered more frequently in civil cases. Of the civil appeals heard in 1971, 32 were dismissed and 22 allowed. In 1973, the number of civil appeals allowed (25) exceeded the number dismissed (17). In 1976 the Court disallowed 46 and 31 civil appeals.

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[28] Including those allowed in part. The discussion here is, again, based on an analysis of annual reports of the Court personally undertaken in the Africana section, University of Nairobi Library, Nairobi, Kenya.

4.2.1.3 Demise of the Court

The most important reason for the Court's demise is the lack of continued political will at the inter-governmental level. Kenyan domination appears from the facts about the functioning of the Court set out above. Kato described the term from 1951 to 1961 as the period in which the Court became fully Kenyan.[29] This factor caused tension between Kenya and especially Tanzania. But all three states contributed in the eventual collapse. Businessmen in Kenya pressurised the government to withdraw, as the Court's appellate jurisdiction had affected their interests. In Tanzania, a socialist state and economic structure was being developed. This was in clear conflict with the broadly capitalist economies of Kenya and Uganda. Tanzania became reluctant to submit all civil matters to the jurisdiction of a Court dominated by lawyers with a liberal-capitalist world view.

In Uganda, Idi Amin took over power by military means in 1971, causing a break-down of civil and state institutions.[30] This was reflected in the declining number of cases from Uganda after 1973. Amin's gross human rights violations presented Tanzanian president Nyerere with an ideal opportunity to disband the East Africa Community. This happened in 1977.[31] In any event, when Tanzanian forces invaded Uganda, little prospect remained of political and judicial unity. Tanzania subsequently developed closer ties with Southern African states. In 1980 it became part of SADCC, and remained a member of the reconstituted SADC.[32]

4.2.1.4 Case-law

The case-law of the Court of Appeal of East Africa, in its various forms, presents early examples of a supra-national African human rights jurisprudence. One such case, also frequently cited by

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29 (1971) 7 *East African Law Jnl* 1 at 11 - 17.

30 See Republic of Uganda (1994) at 24.

31 See United Republic of Tanzania (1979) at 2.

32 Brooks (1993) at 450.

the Court itself, is *Njuguna s/o Kimani v R.*[33] The principles set out in that case were valuable in both the colonial and post-colonial eras:

- It is highly improper for the police to keep a suspect in unlawful custody and prolong their questioning of him by refraining from formally charging him.
- A judge has a discretion to exclude statements obtained by improper means, even if they are admissible under established rules.
- Formal cautioning of a suspect is of little significance when given to a prisoner who has been in the police officer's custody for weeks, and who has previously been induced by questioning to incriminate himself.

This did not mean that these principles were rigorously followed in all instances. In *Ochieng v Uganda*[34] a suspect was unlawfully detained for nine days and repeatedly interrogated. His subsequent confession was the object of argument. Allowing the confession, the Court stated the following: "The fact that the necessary safeguards provided for by law had not been carried out ... would not in itself prevent a voluntary confession of guilt" if the judge kept that fact in mind when deciding on admissibility.[35]

In *Ibingira v Uganda*[36] the Court allowed an appeal by making an order of *habeas corpus*. As this case dealt with what later came to be known as a "claw-back clause", it is of particular relevance to the interpretation of the African Charter. Section 19(1)(j) of the Ugandan Constitution provides the following: "No ... person shall be deprived of his liberty save as may be authorised by law in any of the following cases, that is to say to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Uganda ...". On behalf of Uganda it was contended that a deportation order was "authorised by law" as "it is made under

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33 [1954] EACA 21.

34 [1969] EA 1.

35 At 4 E-F.

36 [1966] EA 306 (*per* Acting Vice-President Spry).

statutory power".[37] The authority of law and the requirement of "lawfulness", in this view, refer to compliance with the procedure prescribed by statute. If this interpretation were accepted, section 19(1) would authorise legislation for the restriction of the movements and residence of the individual, thus allowing for the violation of guaranteed rights. The Court did not accept the interpretation proposed on behalf of the state. The effect of the reference to "lawful order" in section 19(1) "is to provide that lawful orders made under a statute restricting freedom of movement shall not constitute violations of the right to personal liberty", the Court held.[38] Terms such as "authorised by law" and "lawful" have to be interpreted in the light of the Constitution as a whole, including the provisions on fundamental rights.

4.2.2 West African Court of Appeal

The West African Court of Appeal was established later (in 1928), and its functioning came to an end earlier (towards the end of the 1950s), than its eastern equivalent.[39] It was established for all the British dependencies along the African West coast: The Gold Coast, Nigeria, Sierra Leone and the Gambia. Liberia, the only other West African anglophone area with a common law-based legal system, was not included. This is explained by the fact that Liberia was already an independent state and had no historical links with Britain.

In 1948 the principal judicial officials of this Court were made permanent. These structural changes could not prevent the Court's demise. It "disappeared by a process of erosion",[40] as the territories gained independence. The first to sever its ties was Ghana (previously the Gold Coast), in 1957. Ghana immediately set up its own Court of Appeal,[41] a move that seems to have contradicted Nkrumah's efforts at regional unity in other spheres. Nigeria followed. A combined Court of Appeal was then established for the two remaining non-independent territories, the Gambia and Sierra Leone. Also this came to an end soon, with the independence of Sierra Leone.

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37 At 310 b-c.

38 At 310 d.

39 See Roberts-Wray (1966) at 783.

40 Roberts-Wray (1966) at 783.

41 West African Court of Appeal (Amendment) Order in Council, 1957.

Compared to the experience in East Africa, this Court had much less "staying power". Some of the reasons that may account for this difference are:

- The territories (countries) did not form a geographic unit, but were dispersed along the West coast. This had obvious implications for logistical arrangements and other practical matters.
- The Court was not a component part of a more comprehensive regional structure. No inter-territorial judicial institution is likely to flourish in the absence of a clearly expressed political will of the participating territories to pursue collective goals.

4.3 Judicial institutions in the framework of present sub-regional organisations

4.3.1 ECOWAS Court of Justice

The Economic Community of West African States ("ECOWAS") was formed in 1975.[42] Its aim is to promote economic development in Western Africa by establishing a common market, harmonising economic policies, including agriculture, industrial development and monetary policies. ECOWAS institutions are the Authority of Heads of State and Government, the Council of Ministers, the Community Court of Justice, an Executive Secretariat and some specialised commissions. In 1993 the Treaty was amended.[43] By 1997, sixteen states in West Africa had become members. They are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.[44]

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42 Treaty reproduced in (1975) 14 *ILM* 1200, entered into by Côte d'Ivoire, Dahomey, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta. (See the 1975 Treaty also in Awechue (gen ed) (1991) at 82.)

43 See (1996) 35 *ILM* 660. The revised Treaty was done at Cotonou, Benin, 24 July 1993.

44 *Africa South of the Sahara* (1997) at 107.

No explicit reference to human rights is to be found in the original ECOWAS Treaty. Neither did any of the 65 articles forming the body of the treaty refer to human rights as such. This omission must be viewed against the contemporaneous background. Few would have thought, at that stage, that an African Charter would be given effect within a decade. A limited number of provisions, such as the freedom of movement and residence[45] have human rights implications, but does not extend the Court's jurisdiction to human rights matters as such.

Disputes arising from the application of the Treaty had to be resolved by the states among themselves, and in amicable settlement "by direct agreement".[46] Failing such a settlement, any of the parties involved may refer the matter to the Community Court of Justice. This Court is provided for in the 1975 treaty to "ensure observance of law and justice".[47] In 1991, due to the "scope and degree of regional integration ECOWAS had embarked on",[48] a Protocol setting up a Community Court of Justice was adopted. In other words, this Protocol, already provided for in 1975,[49] took fifteen years to realise. The Protocol adopted on 6 July 1991 does not in any way extend the competencies of the Court. It clarifies that only states parties may seize the Court, also "on behalf of its nationals".[50] Proceedings may be instituted against another state or an ECOWAS institution.

After the ECOWAS Treaty was amended in 1993, one of the fundamental principles of the organisation relates to "the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".[51] This shift in emphasis has been brought about, primarily, by the adoption of and ratification by ECOWAS member states of the African Charter in the intervening years. This development provides a clear example of the increased importance attached to the Charter in African political life. Institutions

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45 Art 27 of the ECOWAS 1975 Treaty.

46 Art 56 of the ECOWAS 1975 Treaty.

47 Art 11(1) of the ECOWAS 1975 Treaty.

48 Final Communiqué of the Fourteenth Session of the Authority of Heads of State and Government, Abuja, July 1991 contained in (1991) 19 *Official Journal of ECOWAS* 62.

49 Art 11(2) of the ECOWAS 1975 Treaty.

50 Art 9(3) of the Protocol.

51 Art 4(g) of the revised ECOWAS Treaty. See also the Preamble par 4 of the revised Treaty.

provided for include the Community Court of Justice, retained in its old form, and an Arbitration Tribunal. The powers and composition of these institutions are not regulated by the Treaty, but are to be set out in Protocols to the Treaty. In the case of the Court of Justice, this has already been done.

Although ECOWAS was initially designed as a sub-regional organisation for the pursuit of economic and social goals, it has gradually extended its mandate.[52] Two protocols, which supplement the 1975 Treaty, illustrate this shift. The one is the 1978 Protocol on Non-Aggression, and the other is the 1981 Protocol on Mutual Assistance on Defence.[53] The internal conflict in one of the ECOWAS member states, Liberia, prompted the establishment of the ECOWAS Mediation Standing Committee in 1990. Not all ECOWAS members participated, but decisions were taken on behalf of the Authority of the Heads of State and Government. These decisions called for a cease-fire between the warring parties and established a cease-fire observing force, called the ECOWAS Military Observer Group ("ECOMOG"). The force consisted of troops from member states, and soon it counted approximately 5 000. Not all the ECOWAS member states approved of the decision of the Mediation Standing Committee. Some regarded ECOMOG as interference in the domestic affairs of a member state. The ECOWAS Authority of Heads of State and Government subsequently approved the Committee's decisions

Initial attempt at a cease-fire and a national coalition failed. In 1991 the Yamoussoukrou agreement was reached, providing for a cease-fire and elections. ECOWAS imposed sanctions on the National Patriotic Front of Liberia ("NPFL") when they failed to keep to the agreement. The UN Security Council endorsed these decisions. The UN eventually became actively involved when the Secretary General appointed a Special Representative to Liberia. The UN Special Representative was instrumental in getting the parties to sign the Cotonou Agreement in 1993. In terms of this agreement ECOWAS was assigned primary responsibility to ensure implementation of the treaty, which provided for a cease-fire and election in early 1994. The role of the UN was to

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52 On ECOMOG, see Weller (1994), Ouguergouz (1994) 2 *AYBIL* 208 and Kwakwa (1994) 2 *AYBIL* 9.

53 Reprinted in full by Weller (1994) at 18 - 24.

ensure an impartial application of the treaty provisions. To this end, the UN Observer Mission in Liberia ("UNOMIL") was established.[54]

The establishment of ECOMOG is significant in particular for the following three reasons:

- Most relevant as far as human rights are concerned: It marks a **decisive shift** in focus away from economic goals to the promotion of human rights. The intervention was directed not only at securing lives by ending the massacres, but ultimately at the restoration of democratic governance and institutions.[55]

- ECOMOG is the **first regional peace-keeping initiative** on the African continent.[56] As such, it may be indicative of an emerging trend that Africa endeavours to solve its own problems. Strict adherence to notions of state sovereignty would have made these efforts impossible. This operation is premised on the assumption that internal events in one state are of concern to other states and may allow them, under certain circumstances, to interfere.

- The UN force, UNOMIL, was deployed as the first United Nations peace-keeping mission undertaken in **co-operation** with a peace-keeping operation already established by another international organization.[57] This illustrates the extent to which the interests of the UN and a African sub-regional organisations could coincide.

4.3.2 SADC Tribunal

In 1992 a number of Southern African states adopted a "Declaration regarding Establishment of the Southern African Development Community",[58] followed in 1993 by the adoption of the Treaty establishing the Southern African Development Community ("SADC").[59] It was created through

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54 See ch 2.3.1(e) above.

55 See sources in Weller (1994) at xxii.

56 Kwakwa (1994) 2 *AYBIL* 9 at 26.

57 Ouguergouz (1994) 2 *AYBIL* 208.

58 See (1993) 32 *ILM* 267.

59 The SADC Treaty appears at (1993) 32 *ILM* 116 and (1993) 5 *RADIC* 418.

the transformation of a pre-existing regional institution, the Southern African Development Co-ordination Conference ("SADCC"). SADCC was founded in 1980 mainly as a bulwark against South Africa's stated policy of establishing a "Southern African constellation of states". The current member states of SADC are: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.[60] Of the twelve, three (Mauritius, Namibia and South Africa) have never been members of SADCC. SADC is aimed at regional peace and security, co-operation in a number of sectors, and at integrating regional economies. Its stated ideals are much more ambitious than those of SADCC.

Reference to **human rights** is found in the Preamble to the Treaty, which declares that the member states are "mindful of the need to involve peoples of the Region centrally" in development and integration, "particularly through the guarantee of democratic rights, observance of human rights and the rule of law". One of the five groups of principles in accordance with which SADC will act, is "human rights, democracy and the rule of law".[61] In this respect the SADC Treaty allows for a more significant role to human rights than the EC in its establishing treaty. Like the EC Treaty, the SADC Treaty guarantees equal treatment and non-discrimination in member states and by SADC and its institutions.[62] Though less precise than the EC Treaty, its objectives have clear socio-economic implications.[63]

Disputes arising from the interpretation and application of the Charter should be settled amicably through a process of friendly settlement.[64] If a dispute cannot be settled amicably, it is to be referred to the **SADC Tribunal**. The Tribunal is one of six SADC institutions established under the Treaty.[65] It can adjudicate disputes or give advisory opinions.[66] Its decisions will be final and

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60 In September 1997, the Summit of Heads of State and Government approved the applications for membership of the Democratic Republic of Congo (the former Zaïre) and the Seychelles.

61 Art 4 of the SADC Treaty.

62 Art 6(2) and 6(3) of the SADC Treaty.

63 See eg art 5(1)(a) of the SADC Treaty.

64 Art 32 of the SADC Treaty.

65 Art 9 of the SADC Treaty.

66 Art 16 of the SADC Treaty.

binding.[67] A protocol establishing the tribunal must be adopted by the Summit of Heads of State and Government of SADC. This will set out the composition, powers, functions and procedures of the Tribunal.[68] As the Protocol has not been elaborated, the details and actual functioning of the Tribunal remains a subject of speculation. So, too, does the role of the individual in the system. It is not clear whether only states parties would be able to seize the tribunal. It is suggested that individuals should be granted standing and the right to refer cases to a future judicial organ. This would be in line with the SADC Treaty, which already provides for the full involvement of individuals and NGOs in the process of regional integration.[69]

The **lack of effective implementation** of the commitment to human rights in the Treaty has been criticised.[70] In 1996, these criticisms culminated in a draft regional human rights charter, which was drafted by NGOs in some of the member states.[71] The charter, which carries no official SADC stamp of approval, provides for civil and political rights, as well as cultural rights, the right to health and to a clean environment. It goes much further, however, by proposing the establishment of a SADC Human Rights Court. The Charter would only apply after a prospective litigant had exhausted domestic remedies. It further provides that any state "which does not comply with an order of the Court interpreting this Charter shall be suspended from SADC for the duration of its non-compliance with such order". The proposal has as yet not been considered seriously by the Summit of Heads of State and Government of SADC. Although most states have included similar

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67 Art 16(5) of the SADC Treaty.

68 Art 16(2) of SADC Treaty.

69 Art 23(2) of the SADC Treaty.

70 Mvungi (1994) referred to the fact that SADC members are obliged to act in accordance with principles of democracy, human rights and the rule of law, but that the Treaty "does not establish a regional human rights regime that will make these principles and ideals a reality" (at 161). He therefore recommended that SADC conclude a "Human Rights Convention" and establish a "fully fledged Court of Justice with appellate jurisdiction on human rights and community law cases" (at 161). He also made a clear link between regional integration, democratic government and human rights: "Member states of the SADC cannot proceed towards any regional integration without ensuring that they respect and guarantee basic rights of their subjects. This commitment can only be guaranteed at regional level by introducing a regional convention on human rights to be applied by an independent regional human rights court" (at 69).

71 (13 - 19 May 1996) *West Africa* 743.

rights in their own constitutions, a supra-national court giving final pronouncements thereon may still seem like a threat to national sovereignty.

It must be questioned whether a **separate human rights court** should be established. The principle of a court to adjudicate on regional matters has been accepted. Another institution need not be established. Rather, the jurisdiction of the SADC Tribunal should be extended to include human rights. Efforts in this direction need to be intensified, to ensure that the SADC Tribunal is not established without serious consideration of these possibilities. It will be much more difficult to overturn the position once a Tribunal which excludes human rights matters has already been set up.

In 1996, SADC launched the **Organ on Politics, Defence and Security** ("OPDS").[72] Its mandate includes human rights matters.[73] The OPDS has so far involved itself mainly in security matters. At a Summit of the OPDS, held on 2 October 1996, the situation in Angola was discussed. The Summit noted that "the prevailing situation in Angola is the remaining major obstacle to total regional stability".[74] A call was made on UNITA to fulfil its commitments in terms of the Lusaka Protocol. Amnesty International has recommended that this organ should serve as an "effective means to ensure uniform training in the protection of fundamental rights within the sub-region".[75]

In 1997 a **Parliamentary Forum** was set up. Its membership is open to national parliaments of the SADC member states.[76] Each parliament must ensure fair representation of women, and all political parties to the Forum. The Forum will be an integral institution within SADC, with its seat in Windhoek, Namibia. Organs of the Parliamentary Forum will be a plenary assembly, an

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72 See Amnesty International (1997) at 10.

73 One of its stated objectives is to "promote and enhance the development of democratic institutions and practices within members states, and to encourage the observance of universal human rights as provided for in the Charters and Conventions of the OAU and United Nations" (see Amnesty International (1997) at 10). See also Gyan-Apenteng and Mwananyanda "The Birth of Sahringon" (April – May 1997) *African Topics* 22.

74 See par 10 of Communiqué of the Summit, 2 October 1996, Luanda, Angola.

75 (1997) at 10.

76 The account of the Parliamentary Forum is based on information in (1997) 34 *Africa Research Bulletin* 12636

executive committee, the office of the Secretary-General and standing committees. The Forum is mandated not only to promote economic co-operation, but also to advance democracy, the rule of law and human rights in the sub-region.

Efforts to secure the place of human rights within the activities of SADC depend largely on NGOs.[77] For this reason, the recent creation of the Southern African Human Rights NGO Network ("SAHRINGON") is important. It was established between over 60 NGOs in the region. The objectives of the Network include "forming a platform to lobby SADC members to prioritise human rights issues".[78]

4.3.3 COMESA Court of Justice

The Common Market of Eastern and Southern Africa ("COMESA") was established in 1993.[79] Its aim is to enhance economic development in the region.[80] COMESA was established in the place of the Preferential Trade Area of Eastern and Southern African states ("PTA") of 1981.[81] The scope of COMESA is much broader than that of the PTA. It is open for ratification by a large number of states, stretching from Angola, to Eritrea, and the Comoros. It was created within the ambit of the broader ideals of the creation of an African Economic Community.

One of the institutions of the regional body is a yet to be established Court of Justice. This Court has to ensure "the adherence to law in the interpretation and application" of the Treaty.[82] Seven

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77 See also Amnesty International (1997) at 14, for a recommendation that the Heads of State should make a declaration affirming their commitment to human rights at their August 1997 summit.

78 On its establishment, see Gyan-Apenteng and Mwananyanda "The Birth of Sahringon" (April – May 1997) *African Topics* 22.

79 See (1994) 33 *ILM* 1067.

80 See art 3 of the COMESA Treaty.

81 The PTA wound itself up on 5 November 1993 and established COMESA in its place. The PTA comprised 23 countries in East and Southern Africa ((1994) *New African Market Bulletin* at 23).

82 See art 19 of COMESA Treaty.

judges are appointed by the COMESA Authority for a once-renewable term of five years.[83] Not more than one national from a specific member state may hold judicial office simultaneously. The Court has a contentious and advisory jurisdiction.[84] Court judgments are binding and member states undertake to implement them without delay.[85] The Court may also grant appropriate interim orders.[86]

Not only COMESA institutions and member states, but also legal and natural persons may bring cases before the Court.[87] That means that individuals may refer the legality of any act, regulation, directive or decision of the Council or any member state to the Court, arguing that it is unlawful or an infringement of treaty provisions. Domestic remedies have to be exhausted before a legal or natural person may approach the Court. According to reports, the Court can be a reality by 1998.[88] The acting legal director of COMESA, Karangizi, said in March 1997 that the establishment of the Court will be on the agenda of the summit to be held on 10 April 1997.[89] He expected that the host country would be designated at the Summit. However, this did not happen.

COMESA is **not aimed at realising any specific aims in the field of human rights**. But as the treaty establishing COMESA suggests, issues pertaining to human rights cannot be divorced totally from its functioning. In the Preamble, reference is made to "the principles of international law governing relations between sovereign states, and the principles of liberty, fundamental freedoms and the rule of law". This formulation may be read as an attempt at reconciling the sanctity of the state with attempts to protect human rights within the state. The initial hesitance is supplemented by an unequivocal adherence to human rights as part of the organisation's fundamental principles. These principles include the promotion and sustenance of a democratic system of governance in each Member State,[90] the recognition and observance of the rule of law,[91] and the recognition,

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83 Arts 20, 21 of the COMESA Treaty.

84 Advisory jurisdiction is regulated by art 32 of the COMESA Treaty.

85 Art 34(3) of the COMESA Treaty.

86 In terms of art 35 of the COMESA Treaty.

87 See art 26 of the COMESA Treaty.

88 See news release by Panafrican News Agency, also at e-mail <camnet@vm.cnuce.cnr.it>

89 *Ibid.*

90 Art 6(h) of the COMESA Treaty.

promotion and protection of human and peoples' rights in accordance with the African Charter.[92] The inclusion of human rights as part of COMESA's fundamental principles and the possibility of individual actions, make this a system full of potential human rights realisation.

4.3.4 Maghreb Court of Justice

The Treaty of Marrakech, establishing the Maghreb Arab Union, was concluded in 1989 between Mauritania, Morocco, Algeria, Tunisia and Libya.[93] The main aims of the union are to promote regional security, to create viable regional economic integration and to develop trade and other links with the European Union.

A Maghreb Court of Justice, consisting of two judges from each state, is instituted. Its function is to adjudicate on disputes relating to the interpretation and application of the Treaty and other agreements within the ambit of the Union.[94] Human rights are not expressly referred to in the Treaty, making it practically impossible for this Court to base any of its decisions on human rights considerations. Its seat is to be established at Nouakchott, Mauritania. The Court will have contentious and advisory jurisdiction. In its latter capacity, the Court will provide advice to the Presidential Council.[95]

4.4 Future options for sub-regional organisations in African

Two main options seem available to establish effective human rights protection at the sub-regional level in Africa:

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91 Art 6(g) of the COMESA Treaty.

92 Art 6(e) of the COMESA Treaty.

93 See, in general on the Maghreb Arab Union, El Kahiri (1994) 2 *AYBIL* 141.

94 Art 13(2) of the Marrakech Treaty.

95 See El Kahiri (1994) 2 *AYBIL* 141 at 146.

- Each of these regional inter-governmental organisations may adopt its **own sub-regional charter on human rights**, to be enforced by and within the jurisdiction of the specific community courts of justice.[96]

- Each regional economic grouping may as institutions **accede to the African Charter**. The specific community Court of justice would then be able to draw inspiration from the Charter in exercising its mandate.[97]

Arguments **favouring** the option of **sub-regional charters** include:

- There could be institutional and practical difficulties in sub-regional groupings acceding to the African Charter. At present **only states** are parties, and no provision is made for accession of institutions other than states.[98] Such a change would require an amendment to the Charter. The process of adopting regional charters will be much quicker and appears more feasible. The treaties of existing sub-regional organisations also leave open the possibility of accession to an instrument such as the African Charter.[99]

- The protection granted by the **African Charter has been criticised as insufficient**, especially due to the inclusion of "claw-back" clauses.[100] It seems quite likely that at least some regional groupings would create a higher human rights standard. Unlike Europe, where an EC Convention on Human Rights would merely restate the European Convention on Human Rights, such conventions would not be superfluous in Africa.

- In fact, the sub-regional human rights instruments could be utilised as a **basis for addressing the shortcomings of the African Charter**. Once the different regional economic regimes

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96 See, on this possibility, Benedek in Theodoropoulos (ed) (1992) at 28, who foresaw such a possibility in Southern Africa. In his view, this could be accompanied by a revision of the Charter to fulfil the needs of the sub-region.

97 See also ch 5, on similar options open to the European Community to accede to the European Convention.

98 In terms of art 63(1) of the Charter.

99 See eg art 84(1) of the 1993 ECOWAS Treaty, which provides that member states may "among themselves" conclude agreements with other international organisations, provided that the agreement is not incompatible with the provisions of the Treaty. See also art 24(1) of the SADC Treaty.

integrate, the higher level of protection will be a *fait accompli*. If this would be the case in different regions, pressure will be exerted to adopt amendments to the African Charter at that stage.

Some arguments in support of **acceding to the African Charter** are as follows:

- Sub-regional human rights standards will only **enhance and accentuate differences**. It would be preferable that one common standard, based on the African Charter, starts evolving. To set up new regimes would be divisive, and contrary to the movement towards African unity. These differences may be so great that once the African Economic Community ("AEC") is established, they are unbridgeable.[101]

- The option of creating new charters will take **time and effort**, requiring the member states to agree on a common standard. It might be difficult. Regions should rather opt for a charter already agreed upon and in fact ratified by just about all African states. It has reached a degree of familiarity.

- The argument that regional charters can **raise the human rights standard** set out in the African Charter may be correct, but the same aim can be attained if the African Charter is interpreted and applied creatively by activist regional "economic" courts.

- Once an African Court on Human Rights has been established, the functions of the regional courts will be fulfilled by the AEC Court of Justice. If both would adjudicate on the basis of the African Charter, a **cohesive jurisprudence** will develop, each with its own focus. This will lead to **cross-fertilisation** and will strengthen both institutions. In terms of the Abuja Treaty, no human rights charter is provided for. Neither is accession to the African Charter by the Court of Justice an explicit possibility. Once the African Court of Justice starts functioning, the easiest would be to accede to the African Charter if the different regional institutions had by then already done so.

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100 See also ch 8.2.3 below.

101 See also ch 8.2.5 below.

Whichever alternative is followed, it is argued here that the sub-regional institutions in Africa should take decisive steps at incorporating human rights concerns meaningfully into their organisations. Sub-regional structures are already in place and function at a level closest to individual Africans. The success of the project to realise human rights in Africa depends on efforts at this level as well.

4.5 The Commonwealth in Africa

The Commonwealth (or Commonwealth of Nations) is a loose association which brings together over 1.5 billion people from different ethnic and cultural backgrounds from all corners of the globe.[102] Membership of the Commonwealth is based on a common acknowledgement of the British Monarch as unifying head, as illustrated by a past of direct and indirect British rule or administrative links with other Commonwealth members. By 1997, 19 African states, all from the sub-Saharan region, have become members of the Commonwealth.[103] This included recently-admitted Cameroon and Mozambique. Although membership of the Commonwealth extends worldwide, it clearly has a significant African membership. The role of the Commonwealth in sub-Sahara Africa is to some extent similar to that of a sub-regional organisation. Its role in the realisation of rights in states of the region is now investigated.

4.5.1 The Commonwealth and human rights in Africa

The principal decision-making organ of the Commonwealth is the **Commonwealth Heads of Government Meeting** ("CHOGM"), which takes place every two years. The CHOGM has not adopted a coherent or consistent approach to human rights violations in member states.[104] The

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102 See (1995) *Report of the Commonwealth Secretary-General.*

103 These 19 states are Botswana, Cameroon, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

104 Duxbury (1997) 46 *ICLQ* 344 at 361.

Commonwealth is built on consensus and informal means of persuasion. An exception to this approach is the condemnation of massive human rights violations in **Uganda** at the 1977 meeting. A clear indication that human rights standards form one of the cornerstones of the organisation was the adoption in 1991 of the Harare Declaration. At the 1995 meeting in Auckland **Nigeria** was suspended because of its serious violation of the Harare Declaration.[105] At the same meeting, two other African countries, **Sierra Leone**[106] and the **Gambia**, were also targeted because of their human rights abuses.

The **Commonwealth Secretariat** provides administrative support to further the human rights agenda of the Commonwealth. It has adopted a pro-active role by organising training workshops on human rights for public officials. The Secretariat's Legal and Constitutional Division has been active in various fields, such as the publication of law reports and the *Commonwealth Law Bulletin*. One of its major contributions (with the NGO Interights) to the improvement of human rights in member states has been a series of colloquia on the domestic application of international human rights norms.[107] The Secretariat was further involved in the monitoring of elections in **Namibia**, **South Africa**, the **Seychelles** and **Kenya**.[108] In 1985 the Human Rights Unit of the Secratariat was set up. It has, since then, been involved in human rights promotion and training.[109] It has also developed two "accession kits" to assist governments when they have ratified CEDAW and the two UN Covenants.[110]

NGOs play an important role in the Commonwealth, and have contributed to the prominence of human rights on the organisation's agenda. Most prominent of the NGOs dealing with human rights is the **Human Rights Initiative**.

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105 The Ministerial Action Group has subsequently followed a process of continued dialogue.

106 On 11 July 1997 the Commonwealth suspended Sierra Leone until the Armed Forces Provisional Council was replaced by a democratically elected government (see (1997) Sept *New African* at 21).

107 See Commonwealth Secretariat (1988 - 1993) *Developing Human Rights Jurisprudence* vols 1 to 6.

108 See (1995) *Report of the Secretary-General* at 73.

109 Duxbury (1997) 46 *ICLQ* 344 at 359.

110 Duxbury (1997) 46 *ICLQ* 344 at 358.

The Commonwealth's impact in the field of human rights has been limited by the nature and objectives of the association, which relate to friendship and co-operation. As in the case with the UN, effective supervision of standards was hampered by the doctrine of non-interference in the domestic affairs of states. But the Commonwealth allowed an exception in the case of South Africa. Even though **South Africa** was not a member, its close links with a number of Commonwealth states (the "Front Line states") prompted a decision to impose sanctions against South Africa.[111] The fact-finding mission of the Eminent Persons Group again demonstrated intervention by the Commonwealth in the internal affairs of states.[112]

The Commonwealth has given a prominent role to human rights, especially by standard setting and promotion. This has been described as a tidal wave which must be ridden.[113] In fact, it has used the human rights debate "to reaffirm and reform its role as an international organisation".[114] But the effective supervision of standards has been almost non-existent. The Secretariat has consistently denied that it has any role in investigating the human rights conduct of member states.[115]

The Human Rights Initiative and some commentators have proposed the creation of a Commonwealth adjudicatory machinery in the form of a judicial mechanism as a way of ensuring that "the Commonwealth can be taken seriously on human rights matters".[116] This proposal has not received serious consideration within formal Commonwealth structures,[117] as it is generally regarded as falling foul of the consensual framework within which the "family" of members co-exist. However, the Judicial Committee of the Privy Council has been and still is in existence as a judicial institution in the Commonwealth. Although its mandate does not specifically include human rights matters, it has adjudicated on human rights issues arising in African member states.

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111 Only the UK consistently opposed that decision.

112 See Saravanamutto (1995) *The Round Table* 145.

113 Chongwe (1992) 4 *RADIC* 962.

114 Duxbury (1997) 46 *ICLQ* 344 at 345.

115 Duxbury (1997) 46 *ICLQ* 344 at 348.

116 See sources quoted by Duxbury (1997) 46 *ICLQ* 344 at 374.

117 *Ibid.*

4.5.2 The Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council does not fit squarely in any of the categories of "defunct", "present" or "future" judicial institutions. Although many African states are members of the British Commonwealth, the possibility of a final appeal to the Privy Council only exists in a limited category of cases in two states on the continent today. The Gambia and Mauritius are the two African states that have retained the possibility of a final appeal to London.[118]

This was not always the case. The Judicial Committee of the Privy Council for many years performed the function of final court of appeal for former British colonies not only in Africa but in the world at large. It helped to develop the local law in many states, geographically far removed from the British Isles. As a constitutional court it influenced legal developments, particularly in Canada. Especially in developing countries it sought to preserve "certain fundamentals of criminal justice".[119]

In the period 1980 to 1994 one case involving constitutional matters emanating from the Gambia, and a number of similar cases involving Mauritius have been reported in the Commonwealth Law Reports.

In the single Gambian case, *Attorney-General of the Gambia v Jobe*[120] the Privy Council underscored the need for a purposive and generous approach to constitutional interpretation. Lord Diplock said the following: "A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in a state are to be entitled, is to be given a generous and purposive construction".[121] However, its application of the presumption of constitutionality showed deference to legislative authority.

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118 Bradley and Ewing (1993) at 343.

119 *Ibid.*

120 [1985] LRC (Const) 556.

121 At 183.

Of the nine Mauritian cases noted, five dealt with property rights.[122] The Privy Council overturned the domestic finding in five of the nine cases.[123] Constitutional violations were found in two cases. In one case, the Privy Council found a breach of the fundamental right to be provided with an interpreter.[124] In another, the provision in the Dangerous Drugs Act which enabled a prosecutor to fix sentence was held to violate the principle of separation of powers.[125] In *Mungroo v R* [126] the issue of unreasonable delay in the finalisation of a criminal trial was considered. Taking account of the prevailing social and economic conditions, the Privy Council found that a period of four years did not constitute unreasonable delay. It is submitted here that the decision is not in line with international trends, and diminished the constitutional protection to a negligible level.

In one instance the Privy Council allowed an appeal instituted by the government.[127] Reversing a finding by the Supreme Court of Mauritius, the Privy Council found that a deprivation of property did not amount to a violation of the chapter on fundamental rights.

A thread that runs through judgments of the Privy Council is the need for a broad and purposive approach to constitutional interpretation,[128] which implies a narrow interpretation of constitutional restrictions.[129] Individual decisions may serve as counter-balance to the set ideal. In *De Boucherville v The State*[130] the accused was convicted on 21 February 1986 and sentenced to death. More than eight years later (on 18 April 1994), the Judicial Committee of the Privy Council

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122 Nine cases which have been decided by the Privy Council in respect of Mauritius have been reported in the Commonweatlth Law reports since 1985. A striking feature of the Mauritian cases submitted to the Privy Council is that property rights was the most frequently litigated issue.

123 See the following cases: *Société United Docks v Government of Mauritius* [1985] LRC (Const) 801 (partially allowed); *Norton v Public Service Commission* [1988] LRC (Const) 944; *Ali v R* [1992] LRC (Const) 401; *Government of Mauritius v Union Flacq Sugar Estates* [1993] 1 LRC 616 and *Kunnath v The State* [1993] 2 LRC 326.

124 *Kunnath v The State* [1993] 2 LRC 326.

125 *Ali v R* [1992] LRC (Const) 401.

126 [1992] LRC (Const) 591.

127 *Government of Mauritius v Union Flacq Sugar Estates* [1993] 1 LRC 616.

128 See also, eg, the *Société Union Docks* case, above at n123.

129 See *Ramburn* case above, at 275g.

130 [1994] 2 LRC 602.

gave finality to the convicted person's fate. The Privy Council considered the case in the light of the common law. It then referred to the constitutional provision, and remarked that it took the common law no further.

In my respectful view this is an incorrect approach. In the Court's approach no weight was accorded to the difference between constitutional and common law interpretation. Furthermore, there had been unreasonable delay in the execution of the death penalty in the particular case. Not only was the issue brushed over, but Lord Woolf's concluding remarks are made in a spirit of excessive courtesy to the authorities. Responding to the issue of the lengthy period spent on death row, he remarked that "their Lordships have no reason to doubt that the appropriate authorities in Mauritius will deal with the situation in accordance with the correct principles".[131] This statement is an uncritical acceptance of the length of time already spent awaiting finality.

A question that arises concerning the Gambia and Mauritius is whether an appeal to the Privy Council is one of the "domestic remedies" to be exhausted before the African Commission will declare a communication admissible. The Commission has not stated its views on the subject. Ankumah has put forward two arguments why an appeal to the Privy Council should not be required as part of "domestic remedies".[132] Requiring a petitioner to first take the case to England would be costly and bring about undue hardship. Further, requiring prior submission of the petition to a former colonial power "might be inconsistent with the notion of having an African Charter designed to meet the special needs of African people".[133]

These judgments illustrate that accepting the Privy Council's jurisdiction is not merely a formality, but may have a significant practical effect. For this reason, the Singapore Parliament passed legislation that made an appeal to the Privy Council conditional on consent by all parties involved. This new law came into force on 1 May 1989, having been rushed through Parliament. The intention was to disable any further appeal in a case pending before the Singapore Court of Appeal. That case dealt with press freedom. A decision on the basis of Privy Council precedents

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131 At 609e-f.

132 (1966) at 69.

133 *Ibid.*

was unlikely to favour the Singapore government. A decision by the Singapore Court of Appeal was postponed until the new act came into operation, rendering an appeal to the Privy Council no longer possible. [134]

4.6 Conclusions

- The historical view of sub-regional courts undertaken here shows that a close link exists between the political success of a regional body and the viability of courts established under its auspices. The success of institutions established sub-regionally depends on the existence of an effective and functional political structure.

- Human rights have not featured prominently on the agenda of modern regional organisations in Africa. Predictably, these organisations have concerned themselves more with economic matters and regional unity. Promising developments have been taking place in SADC, the most recently established of the sub-regional groupings. SADC has the most expansive human rights-related mandate. This may perhaps be explained with reference to the fact that the countries in Southern Africa have suffered denials of human rights for a longer period than other African countries. Playing an almost inevitable hegemonic role in the region, the democratic South Africa has reinforced concerns for human rights within SADC. It is argued elsewhere that this region has already started to and is best positioned to produce a regional human rights jurisprudence. The notion of human rights is given a much more important position in the amended ECOWAS Treaty of 1993 than in the original 1975 Treaty. It remains to be seen whether these changes are largely cosmetic responses, occasioned by the rhetorical demands of international relations, or whether human rights concerns will be integrated meaningfully within the activities of ECOWAS.

- Although each of these institutions provides for judicialised conflict resolution, such methods were almost uniformly absent from the activities of the organisation or were ineffectual.

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134 See Bradley (1990) *Public Law* 453-461.

- Of all the sub-regional bodies, the Privy Council had the most significant impact. This must be one of the reasons why most African states have abolished this avenue of recourse soon after independence.

- Two main options for the improvement of regional human rights are open to regional institutions: acceding to the African Charter, or the adoption of independent regional human rights charters. Each of these possible courses has its advantages and disadvantages. Accepting one of the options will enhance the movement towards economic, legal and political unity already underway in Africa. Economic and political liberalisation should go hand in hand in growing regional integration. Constitutional reform at the regional level must include an effective human rights framework in which democratic governance can be ensured at both national and supra-national levels. Sub-regional institutions should incorporate serious concern for human rights into their mandates without delay. The option favoured in this study is accession to the African Charter by the existing sub-regional organisations.