



Chapter One

Introduction

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1.1 Background to the study

Some of the most memorable moments for Africa's most famous 19th and 20th century nationalist leaders probably were in the conferences and struggles leading to independence in the various states that make up present day Africa. Relying on the so-called arbitrary borders set by the colonial powers, nationalist spirits were high as elites took pride in the achievement of independence from colonial masters. While the nationalist fire burnt all over Africa, some visionary African leaders saw a need for integration in Africa as a mechanism for realising the lofty goals and expectation of the populace. At the forefront of the campaign for African unity was former Ghanaian president Kwame Nkrumah.¹ Although the message of political integration did not immediately bear expected fruits, economic realities and the pressures of competing with very small economies in an increasingly reducing global space rapidly pushed African states towards economic integration. This trend of events was probably facilitated by the fact that different forms and degrees of economic cooperation had taken place during the colonial era within the territories that had been divided into separate states at independence.

Thus, right from the early days subsequent to flag independence, the newly independent states of West Africa (in particular) and Africa (in general) have sought to integrate for economic purposes.² Although at the regional level the message of

¹ See generally, K Nkrumah (1963) *Africa must unite*.

² SKB Asante (1986) *The political economy of regionalism in Africa* 5.

African cooperation and integration was preached on all fronts so that political integration was part of the integration agenda, it was not a serious issue in West Africa at the time.³ As was the experience in other subregions in Africa in the early 1960s, West African leaders held on tightly to their newly acquired independence and sovereignty.⁴ In the process of jealously guarding over newly acquired independence and political sovereignty from external interference at the subregional level, African leaders unconsciously also obstructed the process of economic integration. For example, although as Asante records, the earliest attempt at economic union in West Africa was in 1959 when former French colonies in the region signed a convention to create the West African Customs Union, this Union only lasted for about six years.⁵ It was therefore not surprising that the earliest successful integration in Africa took place at the continental level with the formation of the Organisation of African Unity (OAU) in 1963.⁶

The failure to achieve early political and economic integration in the subregions may have been a double loss as it hindered cooperative efforts which may have brought in certain common goods. As Viljoen has noted, it is at the subregional level that cooperation resulting from ‘greater cohesiveness and a shared historical tradition should be exploited to undo the damage done especially by colonialism’.⁷ In addition to this potential, it has been suggested that ‘the protection of human rights and protection of foreign investment are two examples of areas where a regional or a bilateral approach to treaty-making was in the longer term a more successful route to the development of legal rules on the lines favoured by western democracies’.⁸ This position is explained by the fact that states can fail to attend meetings or be indifferent to negotiations when they believe the outcome of such negotiations would be irrelevant to their corporate existence.⁹ By contrast, close trade and other economic links, more likely to be developed at the subregional level, may serve as a guarantee

³ R Robert (2005) *The social dimension of regional integration in ECOWAS* 4.

⁴ For the East African experience in this regard, see TO Ojienda, ‘The East African Court of Justice in the re-established East African Community: Institutional structure and function in the integration process’, (2005) 11.2 *East African Journal of Peace and Human Rights* 220.

⁵ Asante (1986) 47.

⁶ See generally, GJ Naldi (1999) *The Organisation of African Unity on the OAU*.

⁷ F Viljoen (2007) *International human right law in Africa* 485.

⁸ E Denza (2002) *The intergovernmental pillars of the European Union* 10.

⁹ As above.

for respect to commonly agreed standards, including human rights.¹⁰ Hence, by failing to integrate, African states lost the early opportunity to achieve economic and human rights objectives.

By the late 1960s and early 1970s, talks of integration had begun to take concrete shape in some subregions even though subregional integration was, at the time, typically associated with the objective of increased trade and stronger economic linkages between countries.¹¹ In West Africa, despite the failure of some of the early attempts, cooperation arrangements based on colonial groupings managed to take off albeit with limited success. In 1972, a renewed attempt at subregional integration in West Africa began to yield positive results and in 1975, the Economic Community of West African States (ECOWAS) was born. Considering the fragmented nature of the region, the uneven distribution of natural and human resources, the size and weakness of states in the region, the differences in political culture and the obvious language barriers between states in West Africa, the successful launch of ECOWAS was a major achievement.¹²

In continuation of the trend that began immediately after independence, issues of a socio-political nature were considered to be outside the scope of subregional integration. Thus, such issues, including the protection of human rights, remained untouched in treaties that gave birth to subregional organisations including the ECOWAS Treaty of 1975.¹³ Commentators like Asante have also argued that the political rationale or objective of West African integration appeared to be secondary in terms of importance to the economic rationale.¹⁴ From the perspective of human rights this was a major deficit, as Twomey has noted, albeit in relation to Europe, ‘in shifting the focus from the nation state, the proponents of integration have underestimated the extent to which ... human rights form the constitutional bedrock

¹⁰ Viljoen (2007) 482.

¹¹ Asante (1986) 47.

¹² The UNDP Development index places West African states like Guinea-Bissau, Burkina Faso, Mali, Sierra Leone, and Niger at the lowest rung of states included in the annual development survey. The UNDP Development index is available at www.undp.org/hdr2006 (accessed 17 July 2007).

¹³ CA Odinkalu, ‘The Economic Community of West African States’ in C Heyns (ed) (2004) *Human rights law in Africa* 644.

¹⁴ Asante (1986) 44.

of a legal order, be it national or transnational'.¹⁵ In the case of West Africa the deficit is amplified as ECOWAS was founded in an era of democratic poverty when military rule and one party regime were the prevailing systems of governance. Not unexpectedly human rights did not rank high in the domestic scale of the high contracting parties and ranked even lower in the agenda at the transnational level.

Since economic rather than political or social goals propelled integration, it is not a wonder that neither the prevailing political system nor the human rights situation within the member states of ECOWAS mattered much in the integration agenda. Ironically, this approach failed to appreciate the link between political stability and economic integration. For example, as Asante observed, the overthrow of government in a state within a given region is likely to upset relations between the contracting parties.¹⁶ Similarly, civil unrest or other forms of instability arising from massive human abuse within a given state has the potential of upsetting the cart of economic integration in a region. It was on the back of such structural defects that subregional integration in West Africa took off on the platform of ECOWAS.

Apart from the link between domestic political stability and the goals of economic integration, there are at least two other identifiable reasons why socio-political concerns such as human rights ought to have featured in the agenda of international organisations like ECOWAS. On the one hand, similar to the European Communities (EC), though not in exact replica, the constitutive instruments of the subregional economic organisations such as the ECOWAS Treaty succeeded in creating institutions and organs that are separate and distinct from the arms, organs and institutions of the contracting states. Operating separately from national organs and at the international level, these institutions are clearly international institutions. These international institutions take decisions and act in manners that directly or indirectly impact on the ordinary citizens of the contracting states. If the essence of human rights in the modern sense is to protect the individual or group of individuals from the abusive use of 'externalised authority'¹⁷ upon the transfer of some powers of state to

¹⁵ PM Twomey (1994) 'The European Union: Three pillars without a human rights foundation' in D O'Keefe and PM Twomey (eds) *Legal Issues of the Maastricht Treaty* 121.

¹⁶ Asante (1986) 145.

¹⁷ F Viljoen, 'The realisation of human rights through subregional institutions' (2001) 7 *African Yearbook of International law* 186, 188.

such institutions, it should be necessary to introduce human rights regimes to protect individuals as was the practice in the domestic system. Perhaps the argument against such a stance may have been that ‘the essentially economic character’¹⁸ of the organisations reduced the chances of their institutions negatively affecting the rights and liberties of the individual in any appreciable manner. Actual practice has since shown however that this was not the case as the acts and omissions of such institutions regularly affect the rights and obligations of ordinary citizens.¹⁹

In any event, there is a relation of rights and obligations that arises out of such arrangements for economic integration. Hence, in his discussion on the EC, Mathijsen stated:²⁰

... if these measures may impose upon them obligations, they also grant them rights which they can ask the national courts to uphold against fellow citizens, undertakings and even their own governments. And indeed, those rights arise not only where they are expressly granted by Community law, but also as a corollary to the obligations which this law, in a clearly defined way imposes upon the member states and institutions of the Community.

Considering that the ECOWAS system largely takes after the EC, it is arguable, on the one hand, that the ECOWAS system also confers rights and imposes obligations on citizens of the member states of the Community, which rights may require vindication. On the other hand, the ultimate objectives of economic integration coincide with certain aspects and generations of human rights so that realising such rights become inevitable for the realisation of organisational objectives. Viljoen captures this aptly as he argues that ‘in so far as the right to development is a conglomerate consisting of numerous rights to the basic necessities of life, the developmental imperative that drives the project of regional integration is closely linked to socio-economic rights’.²¹ Taking an approach that is not based on rights-

¹⁸ AG Toth, ‘The individual and European law’ (1975) 24 *International and Comparative Law Quarterly* 659 at 667.

¹⁹ In relation to the East Africa, Viljoen (2007) 490 suggests that pressure put on the Kenyan government by some Kenyan businessmen against the background of the negative impact of integration on their financial and commercial interests partly resulted in Kenya’s withdrawal from the earlier East African Community.

²⁰ PSRF Mathijsen (2004) *A guide to European law* 9.

²¹ Viljoen (2007) 496.

language, Asante had earlier observed that the objectives of economic integration could be restricted by some obstacles to ‘development, which cannot be directly affected by integration’.²² Asante specifically listed high illiteracy, the inadequacy of educational systems in the contracting states and ‘the disturbing health problem throughout the ECOWAS countries’ as obstacles to industrial development as envisaged by integration.²³ Putting it differently, Musungu also argues that ‘trade rules and the idea of economic liberalisation may also mean that the rules limit states in terms of welfare policies that are inextricably linked to socio-economic rights’.²⁴ If socio-economic rights are only impliedly linked to the objectives of subregional economic integration, the same cannot be said of civil and political rights such as the right to freedom of movement and the right to association which come into focus within the framework of these organisations.²⁵ Against this background, there is arguably a case for the inclusion of human rights in the subregional integration agenda.

In the 1980s, a new wave of socio-political consciousness started to appear in Africa and brought with it new concerns, including a growing awareness of human rights.²⁶ While the OAU followed the emerging trend, subregional bodies like ECOWAS remained resolute in their economic focus. However, as a report by the World Commission on the Social Dimension of Globalisation indicates, regional integration can (and should) play a greater role in addressing democratic participation, respect for basic rights and other issues of a social dimension.²⁷ This position may be justified by arguments already set out above that economic growth and other goals of an economic nature can only thrive in an environment of peace and social justice. Hence it was not surprising that in the early 1990s, severe security concerns in the West African region forced ECOWAS leaders to begin to consider an expansion of the mandate of the organisation when it became clear that the OAU lacked the political will to deal with these concerns.

²² Asante (1986) 195.

²³ Asante (1986) 195 – 196.

²⁴ SF Musungu, ‘Economic integration and human rights in Africa: A comment on conceptual linkages (2003) 3(1) *AHRLR* 88.

²⁵ See eg art 59 of the 1993 revised ECOWAS Treaty.

²⁶ A consciousness that led to the adoption of the African Charter on Human and Peoples’ Rights in 1986. See Viljoen (2001) 3.

²⁷ Cited by Robert (2005) 1.

With the renewed security concern, socio-political issues such as human rights and democratic concerns came to the fore in subregional integration discourse.²⁸ This in itself was not completely new as it has been suggested that human rights, democratic freedoms and other social welfare concerns need not be alien to the integration process, particularly as some regional integration groupings have always considered these principles as prominent in regional economic policies.²⁹ Thus, ECOWAS as an organisation gradually shifted its focus from purely economic objectives to include socio-political and human rights issues. This development has led some commentators to argue that economic objectives in ECOWAS have gradually been relegated in favour of socio-political results. Hence Rene Robert argued:

Despite missed deadlines and at times political inertia, the region has pushed for even deeper political and social integration through initiatives such as the Community Court of Justice, the ECOWAS parliament and several protocols on the free movement of persons. Perhaps the most dramatic and publicised example of a deepening political cooperation in ECOWAS however, has involved the activities of the Standing Mediation Committee (SMC) and the ECOMOG³⁰

The venture into peacekeeping operations by ECOWAS raised serious legal issues that have attracted several commentaries.³¹ Apparently in a bid to engage such rising criticism head on, ECOWAS leaders began to make far-reaching protocols to modify the organisational focus. By 1993, it was finally resolved that the original treaty establishing ECOWAS should be amended and this led to the inauguration of a Committee of Eminent Persons under the Chairmanship of General Yakubu Gowon of Nigeria, for the purpose of reviewing the 1975 ECOWAS Treaty.³² The amendment of the ECOWAS Treaty completely reshaped the organisational goals and mandate of ECOWAS.

²⁸ A Bah, 'West Africa: from a security complex to a security community' (2005) 14 *African Security Review* 77.

²⁹ Robert (2005) 1.

³⁰ As above.

³¹ See eg E Conteh-Morgan, 'ECOWAS: peace-making or meddling in Liberia?', (1993) 23 *Africa Insight*, 36-41 and KO Kufour 'The legality of the intervention in the Liberian civil war by the Economic Community of West African States' (1993) 5 *African Journal of International and Comparative Law* 525.

³² Odinkalu (2004) 665.

As Aryeetey notes:

The revision of the ECOWAS treaty in 1993 marked an important change in the structure and the character of West African cooperation. There was a shift to a more people-centred organisation as opposed to the overtly bureaucratic inter-governmental agency of the past.³³

Hence a comparison of the two generations of ECOWAS treaties will show clearly that the 1993 Treaty has expanded the initial aims of the Community. This expansion arguably created sufficient room for human rights protection under ECOWAS.

Even under the regime of the 1993 Treaty, ECOWAS still has no actual catalogue of human rights. However, there are collections of rights in the Treaty and in various ECOWAS Protocols that can form the basis of the demand of human rights under the system. Most importantly, the revised ECOWAS Treaty incorporates the provisions of the African Charter on Human and Peoples' Rights (the African Charter) by reference and accordingly brought the promise of a possibility for those recognised as Community citizens to demand for the realisation of human rights under the ECOWAS framework.³⁴ This promise has been carried further by the express grant of human rights jurisdiction to the ECOWAS Community Court of Justice (ECCJ) and the opening up of individual access to the Court in human rights matters.

Two sets of fundamental issues arise under the human rights regime that has emerged in the 1993 revised ECOWAS Treaty framework. The first relates to the question of legitimacy of the regime. In view of the original economic objectives of ECOWAS, it needs to be asked whether the emerging trend that tilts heavily towards the evolution of a fairly robust human rights regime falls within the organisation's legal boundaries under the prevailing principles of the law of international institutions. The second set of issues relates to the functioning of ECOWAS organs and institutions within the field of human rights in relation to national institutions and continental institutions traditionally saddled with the responsibility for the promotion and protection of human rights in Africa. On the basis of its new mandate, the ECCJ is an addition to the body of international judicial and quasi-judicial institutions with a claim to

³³ E Aryeetey, 'Regional integration in West Africa', (2001) OECD Technical Paper no 170, cited in Robert (2005).

³⁴ Art 4(g) of the ECOWAS Treaty of 1993.

competence and human rights jurisdiction over the citizens of ECOWAS member states. Even before the conferment of a human rights jurisdiction on the ECCJ, other organs of ECOWAS have been involved in human rights and rights-related work. Thus, in terms of judicial and non-judicial protection of human rights as well as in relation to human rights promotion, ECOWAS organs and institutions actually or potentially compete with national and continental human rights institutions. The question that emerges from this scenario is whether the evolving ECOWAS human rights regime can legitimately and practically co-exist with the traditional structures of the African human rights architecture. Linked to this question is the need to determine the implications of such coexistence.

Apart from the evolving ECOWAS regime, there is reason to contend that other subregional international organisations in Africa can also lay some claim to human rights competence in their respective spheres of influence and operation. This contention would be sustained by an analysis of the treaties of some of these subregional organisations. Indeed, current practice in at least two of such subregional organisations would show that budding human rights regimes already exist under the platforms of these organisations. The questions that arise in relation to the evolving ECOWAS human rights regime would naturally also arise in relation to these other subregional organisations. Some of the implications of this development are the risks of duplication of functions, negative jurisdictional competition and conflicts and the possibility of disruption of the entire system. However, if the evolving regimes are properly understood and guided, there is possibility for them to grow to complement rather than disrupt the existing structures for human rights realisation in Africa.

Against this background, the necessity for a comprehensive and detailed study of the potential and challenges of the ECOWAS regime as a forum for human rights protection and actualisation comes into focus. Considering that some of the challenges linked with the ECOWAS regime can also arise in relation to the other subregional systems in Africa and the possibility that other subregional systems can contribute to the development of an appropriate model for subregional involvement in the African human rights system, there is need to also understand these. This study therefore focuses on the evolving ECOWAS human rights regime but also on the budding

regimes of the East African Community (EAC) and the Southern Africa Development Community (SADC).

1.2 Thesis statement and research questions

The main argument in this work may be captured in the following thesis statement: African RECs, in particular ECOWAS, can be effective vehicles for the realisation of human rights without compromising their original economic objectives, without upsetting their relations with their member states or the African Union and its institutions, and without jeopardising the work of continental institutions involved in the field of human rights.

This study has three broad objectives. First, it seeks to investigate the existing normative, structural and institutional framework for the realisation of human rights under the ECOWAS system as a case study for subregional international organisations in Africa. In pursuit of this objective, the study attempts to answer these questions:

- i. Under its present regime, taking into account the sources of Community law, is there a normative framework to support the realisation of human rights under ECOWAS?
- ii. If there is an existing normative framework for human rights realisation in ECOWAS, is such a framework legitimate and sustainable in international law generally?
- iii. Is the ECOWAS *sui generis* or is the system representative of subregional international institutions in Africa?

The second broad objective of the study is to examine how the ECOWAS system (as an example of a subregional system for human rights realisation) fits into the existing two-tier human rights realisation regime in Africa, without upsetting the existing architecture for human rights realisation.³⁵ In furtherance of this objective, the study will try to answer the following questions:

³⁵ Reference to a two-tier human rights system here relates to the national and continental structures that make up the African human rights system.

- i. Would an ECOWAS human rights regime be part of the larger African human rights system or would it stand on its own as an independent human rights system?
- ii. In their current human rights practices, do the organs and institutions of ECOWAS have a potential to negatively affect intra-organisational relations between ECOWAS and its member states, on the one hand, and inter-organisational relations between ECOWAS and the AU and the continental institutions responsible for human rights under the AU framework, on the other hand? If so, are there mechanisms that have been developed to address these issues and regulate organisational relations?
- iii. If the existence of an ECOWAS human rights regime is representative of an emerging practice in other African RECs, will the evolution of subregional systems in the different regions of Africa compromise the functioning of the traditional African human rights system?

Thirdly, the study will investigate the relative advantages and shortcomings of the existing human rights regime in the ECOWAS system with a view to improving the ECOWAS system and to establishing best practices for the benefit of other subregional arrangements in Africa. In furtherance of this objective, answers will be sought for the following questions:

- i. How does the ECOWAS human rights regime compare to non-African international organisations with largely economic objectives? The comparative focus will be on the European Community (EC) and the European Union (EU).
- ii. How does the ECOWAS human rights regime compare to the human rights regimes of the other RECs recognised by the AU?
- iii. Can best practices identified from the regime considered in this study be integrated to develop a non-disruptive model for subregional human rights sub-system in Africa?

1.3 Clarification of terminology

To properly contextualise this study and facilitate general understanding of its purpose, certain terms and concepts that have been used in the title and the body of the study require clarification. The intention is neither to invent the wheel by

developing new definitions nor to engage in debates surrounding the definition of the concepts, but simply to explain the context in which the specific concepts are understood and used in this study. In this regard, the strong link between international relations and international law is noted as a basis for acknowledging the possibility of overlap of terminology in both fields. On a general note, the term ‘international relations’ refers to the field of enquiry that deals primarily with the political aspects of the interaction and relations between and among nations states. In other words, the main focus of international relations is the pursuit of a better understanding of the global political system. International law for its part relates to the rules or system of rules that regulate the relations and interactions of nation states and the functioning of international institutions and organisations. International law to a lesser extent, also regulates the relations between nation states and international organisations on the one hand and nation states and their citizens on the other. Considering that international law deals essentially with norms that have emerged from the stability of established patterns of relations at the international level, international relations is wider in scope and embraces the field of interest of international law. In this study, concepts and terms are used in their international law context.

‘Legitimacy’

The Oxford Dictionary defines ‘legitimacy’ to mean ‘something allowed by the law or rules’ and as something that is ‘able to be defended by reason’.³⁶ In the first sense, legitimacy is associated with law and therefore takes a legal character. However, the second usage goes outside the boundaries of law, taking on a meaning that relates to the application of logic and to some extent, moral considerations. The Black’s Law Dictionary attributes a strictly legal connotation to legitimacy as it defines legitimacy to mean ‘lawfulness’.³⁷ The same law dictionary defines ‘lawful’ to mean ‘not contrary to law; permitted by law’.³⁸ These distinct definitions illustrate the point that legitimacy can be used in a strict legal sense just as much as it can be used in a more expansive sense.

³⁶ Oxford Paperback Dictionary Thesaurus and Wordpower Guide (2001).

³⁷ Black’s Law Dictionary (8th ed) (2004).

³⁸ As above.

In the strictly legal usage of the term, legitimacy is closely linked to legality prompting a debate whether or not any real distinction exists between the two terms.³⁹ Clark argues that ‘rather than being the same, legitimacy is one vehicle for redefining legality, by appeal to *other* norms’.⁴⁰ For Clark, one argument in favour of separating legitimacy from legality is that ‘the idea of legitimacy has a greater role to play precisely at those moments when the legal ground appears least secure, or possibly is in flux’.⁴¹ Thus, ‘the language of legitimacy is employed to reach those parts that cannot be reached by the language of legality alone’.⁴²

One deduction that can be made from Clark’s arguments is that legitimacy can be employed as a tool of legal analysis where it becomes apparent that strict adherence to legality would lead to the rejection of a position that could be permissible by applying other considerations such as logic and morality. Thus, the Oxford Dictionary’s expansive usage of the term fits with Clark’s understanding and both of them offend the legal philosophies that emphasise the need to maintain purity of law. In the context of international law and international relations where political considerations play a role almost as important as law itself, the attraction of purity of law is lesser. It is against this background that this study opts for the more expansive understanding of legitimacy. Hence, in the context of this study, legitimacy is understood as legality in terms of law, tinted with logical deductions from surrounding circumstances.

‘Feasibility’

Feasibility, as a term, does not attract any significant debate. The Oxford Dictionary defines feasibility as something that is ‘able to be done easily’.⁴³ Other words that the dictionary uses as synonyms for feasibility include ‘achievable’, ‘attainable’, ‘easy’, ‘possible’, ‘practicable’ and ‘workable’.⁴⁴ Feasibility does not have any particular legal sense or usage. It is therefore used in this study in its ordinary context to mean attainable, practicable and workable. However, it is also stretched in this study to mean ‘desirable’. Thus, as used in the title of this study, feasibility relates to the

³⁹ See I Clark (2005) *Legitimacy in international society* 210.

⁴⁰ Clark (2005) 211 (emphasis supplied).

⁴¹ As above.

⁴² As above.

⁴³ Oxford Dictionary (2001).

⁴⁴ As above.

inquiry whether it is possible, practicable and desirable to realise human rights in the regional economic communities.

‘Realisation’

Faced with the task of finding an appropriate term that would capture ‘relatively confrontational’ and ‘relatively non-confrontational’ methods of translating human rights rhetoric contained in documentary form into ‘practical realities’, Viljoen concluded that the term ‘realisation’ was ‘best suited to cover all nuances’.⁴⁵ Conscious of the need to find such a comprehensive term that embraces the different means by which human rights rhetoric can be put to concrete use, this study adopts the term ‘realisation’ as it is used by Viljoen. Consequently, as used in the title and in the body of this study, ‘realisation’ covers all activities and actions applied for the purpose of promoting and protecting human rights.

‘Human rights regime’

The Black’s Law Dictionary defines ‘regime’ as ‘a system of rules, regulations or government’. It also defines a ‘legal regime’ as ‘a set of rules, policies and norms of behaviour that cover any legal issue and that facilitates substantive and procedural arrangements for deciding that issue’.⁴⁶ Applied in our context, the human rights regime of ECOWAS is used to mean all the rules, norms, policies and processes of ECOWAS relevant for the determination, application and realisation of human rights at the institutional level of the Community. It includes primary and secondary rules as applicable under the system.

‘International organisation’

Since the 19th century when the term ‘international organisation’ was first used,⁴⁷ legal scholars have found difficulty in finding a commonly acceptable definition of the term. Archer for example sees ‘international organisation’ as ‘a formal, continuous structure established by agreement between members, whether governmental representatives or not, from at least two sovereign states with the aim of

⁴⁵ F Viljoen, ‘The realisation of human rights through inter-governmental institutions in Africa (1997) Unpublished LLD thesis presented to the University of Pretoria, 14.

⁴⁶ Black’s Law Dictionary (2004).

⁴⁷ HG Schermers & NM Blokker (2003) *International institutional law* 29.

pursuing the common interest'.⁴⁸ Amerasinghe prefers the term 'public international organisation' and defines it as a body 'normally created by a treaty or convention to which states are parties and the members of the organisation so created are generally states, though sometimes but rarely governments may constitute the membership'.⁴⁹ Perhaps in a bid to find a uniting definition, the International Law Commission (ILC) in 2003 defined 'international organisation' as 'an organisation established by treaty or other instrument governed by international law and possessing its own international legal personality'.⁵⁰ To this definition, the ILC added 'international organisations may include as members, in addition to states, other entities'.⁵¹

Despite the differences in these definitions, there is consensus in the view that an international organisation should be set up by treaty or any other form of international agreement and should have at least two or more states in its membership. As used in this study, the term 'international organisation' refers to any organisation created and administered in accordance with the principles of international law and having two or more states as members. Accordingly, it covers 'inter-governmental organisations', 'supranational organisations' and 'post-national organisations', all of which are defined below. Thus, the term embraces the subregional economic communities, the African Union (including its predecessor) and the European Union (including its predecessor).

'Intergovernmental organisation'

Although connected to international organisations, Schermers and Blokker suggest that the term 'intergovernmental organisation' only came into use after the Second World War.⁵² Shanks, Jacobson and Kaplan define an 'intergovernmental organisation' as an association 'established by governments or their representatives that are sufficiently institutionalised to require regular meetings, rules governing decision-making, a permanent staff and a headquarters'.⁵³ Volgy *et al*, for their part, define 'intergovernmental organisation' as 'entities created with sufficient

⁴⁸ C Archer (1992) *International organizations* 38.

⁴⁹ CF Amerasinghe (2005) *Principles of the institutional law of international organisations* 9.

⁵⁰ Cited by Schermers and Blokker (2003) 22.

⁵¹ As above.

⁵² Schermers & Blokker (2003) 29.

⁵³ C Shanks, HK Jacobson & JH Kaplan, 'Inertia and change in the constellation of international governmental organisations, 1981 -1992' (1996) 50 (4) *International organisations* 594.

organisational structure and autonomy to provide formal, ongoing, multilateral processes of decision-making between states, along with the capacity to execute the collective will of the member states'.⁵⁴ The relevance of government in the definition of 'intergovernmental organisation' is also evident in the way Schermers and Blokker define the term. According to them, the term is most appropriate when it is applied to organisations that involve 'cooperation between the executive branches of the governments of member states'.⁵⁵ They go on to identify two main features of intergovernmental organisations. Firstly, in an international organisation, the concentration of decision-making powers is in representatives of governments rather than independent organs of the international organisation. Secondly, obligations under intergovernmental organisations are voluntarily undertaken by governments to the extent that decision-making is generally unanimous and governments cannot be bound by organisational decisions or by the decisions of the organs of the international organisation against the will of the government.

The significance of the decision-making process in the definition of intergovernmental organisations is further elaborated by Archer who argues that the intergovernmental character of an international organisation 'leaves the formulation of rules - and their acceptance - in the hands of an organisation's member states and downgrades the possible autonomous role by the institutions of the organisation itself'.⁵⁶ Taking all the definitions already considered into account, the term 'intergovernmental organisation' is used in this study to refer to any international organisation in which the most important law-making and decision-making powers remain with the member states as represented by heads of states and governments congregating as an organ of the organisation. In this sense, this study sees an intergovernmental organisation as one in which law-making involves the adoption of treaties according to the ordinary principles of international law and the submission of treaties and decisions of organisational organs to national constitutional processes before they become directly applicable in the national systems of member states.

⁵⁴ TJ Volgy, E Fausett, KA Grant & S Rodgers, 'Identifying formal intergovernmental organisations' (2008) *Journal of Peace Research* 849, 851.

⁵⁵ Schermers & Blokker (2003) 45.

⁵⁶ Archer (1992) 171.

‘Supranational organisation’

Originally linked to the European Coal and Steel Company, the term ‘supranational’ has been used to describe organisations that ‘possess both independence from and power over their constituent states to a degree which suggests the emergence of a federal hierarchy and which goes beyond traditional intergovernmental cooperation in the form of international organisations’.⁵⁷ Perceiving ‘supranationalism’ as a ‘a political quality, rather than a power or a right’, Hay lays out its six main criteria to include independence from the member states, ability to bind member states by majority or weighted majority votes, the entrenchment of the direct binding effect of law of the organisation on natural and legal persons in member states and the transfer of sovereignty from member states to the organisation.⁵⁸ Tangney, for his part, sees a supranational organisation and supranationalism in terms of ‘institutions whose decisions have binding force on nation-states and who can enforce their decisions’.⁵⁹ He adds that ‘they are supranational rather than international because they are superior to nation-states in matters coming under their jurisdiction’.⁶⁰

Although they also trace the term ‘supranational’ to the European Coal and Steel Company, Schermers and Blokker conclude that the term does not have any clear meaning as it has mainly been described rather than defined.⁶¹ Thus, they also describe supranational organisations in terms of their characteristics. These include the power to make decisions that are binding on member states, decision-making that is not entirely dependent on the cooperation of member states, power to directly bind inhabitants of member states without the need for national transformation of the rules of the organisation, power to enforce decisions, financial autonomy and prohibition of unilateral withdrawal or decision-making by member states without the involvement of supranational organs.⁶² Archer’s view is simply that a supranational organisation

⁵⁷ P Hay, ‘International and supranational organisations: some problems of conceptualisation’ (1965) 1965 *University of Illinois Law Forum* 733.

⁵⁸ Hay (1965) 735 -737. Other criteria are extent of functions, powers and jurisdiction attributed to the organisation and (specific to the European Communities), the institutions it has been equipped with.

⁵⁹ P Tangney, ‘The new internationalism: The cession of sovereign competences to supranational organisations and constitutional change in the United States and Germany’ (1996) 21 *Yale Journal of International Law* 395, 402.

⁶⁰ As above.

⁶¹ Schermers & Blokker (2003) 46.

⁶² Schermers & Blokker (2003) 46 – 47.

should be able to ‘make its own rules independent of the wishes of the member states’.⁶³

It would be noticed that notwithstanding the differences in the positions considered above, all authors agree that decision-making and the reach of rules and decisions of an international organisation are important in the definition or description of a supranational organisation. Hence, the terms ‘supranational organisation’ and ‘supranationalism’ are used in this study to refer to an international organisation that has relatively autonomous organs with power to make rules and decisions independent of the member states, which rules and decisions can apply directly in member states without the need to follow the usual process of constitutional transformation.

‘Post-national organisation’

Although it is used less frequently, the term ‘post-national’ is often also associated with the EU and its institutions.⁶⁴ Unlike other terms employed in this study, the term ‘post-national’ has not enjoyed too much scholarly attention. However, using it in the context of post-national political representation, Glencross relates ‘post-national’ to non-confinement to the nation-state.⁶⁵ Vogt also uses the term ‘post-national’ in the sense of ‘an institutionalised political community beyond the nation-state along cosmopolitan lines’.⁶⁶ Besson uses the term to refer to ‘the non-national’ but emphasises that it is different from ‘supranational’ because it co-exists with national law and does not supplant or replace it as ‘supranational law’ would do.⁶⁷ Besson further distinguishes between traditional international law and ‘post-national law’ by suggesting that the use of ‘post-national law’ is broader because it is not restricted to relations ‘between states’ but covers laws and relations ‘amongst states, individuals,

⁶³ Archer (1992) 171.

⁶⁴ See eg A Glencross, ‘Post-nationalism and the problem of supranational political representation: Legitimising the EU without the nation-state’ (2008) EU Working Papers SPS 2008/01 available at www.eui.eu (accessed 24 August 2009).

⁶⁵ Glencross (2008) 1.

⁶⁶ CR Vogt, ‘Reconsidering the normative implications of European integration: Questioning the optimism about post-national communities in critical international theory’ (2003) 2. A paper presented at the 2003 Conference of the Danish Network on Political Theory, 22 – 24 May 2003, Aarhus, Denmark.

⁶⁷ S Besson ‘The European Union and Human Rights: Towards a post-national human rights institution?’ (2006) 6 *Human Rights Law Review* 328, 325.

and/or any other kinds of entities such as international organisations and NGOs'.⁶⁸ Although they are used advisedly in this study, the terms 'post-national' and 'post-national organisation' are used in the same sense as they have been used by Besson. Therefore, in this study, the terms are used to differentiate contexts of international organisations in which activities are strictly between states from other contexts of international organisations in which non-state actors are allowed to participate.

'International', 'regional' and 'subregional'

The term 'international' in the context of 'international organisations' is used in this study to refer to all forms of inter-state cooperation that takes place between two or more states, that is not governed by national or municipal law. Such cooperation may occur at the global, continental or at the sub-continental level. International cooperation that occurs at the continental level is generally referred to as regional integration. Hence, the term 'regional' is used to refer to continental cooperation and activities that take place in that context. In contradistinction, the term 'subregional' is used in reference to sub-continental cooperation. However, 'regional economic community' is commonly used to refer to international organisations established to pursue economic cooperation at the subregional level. Hence, in this study, 'regional economic community' is used in the common sense, to refer organisations that exist at the sub-continental levels in Africa.

1.4 Significance of the study

Since the 1990s when a resurgence of regional integration began with the revision of existing treaties, the revival of moribund subregional organisations or the establishment of new organisations, African RECs have become more involved in the realisation of human rights in the continent. Naturally, this should have brought with it new opportunities for human rights actors and stakeholders in the African human rights system to explore for the benefit of the most vulnerable. However, as Viljoen correctly observed, 'the social dimension of subregional integration, generally, and its human rights aspect more particularly, have received inadequate attention'.⁶⁹ Despite the fact that the scholarly environment has changed somewhat since Viljoen's

⁶⁸ As above.

⁶⁹ Viljoen (2007) 481.

observation,⁷⁰ popular knowledge and understanding of the potentials and challenges associated with subregional realisation of human rights in Africa arguably remains limited. As a result of this limited knowledge the risk of underutilisation and, in extreme cases, resistance to the use of subregional fora for human rights realisation threatens to obliterate the actual and potential benefits of this emerging trend. This study is therefore significant for its potential to contribute to a reversal of this threat. Firstly, the significance of this study lies in the fact that by engaging in an expository scrutiny of the ECOWAS regime as a case study for subregional international organisations in Africa, it will enhance popular understanding of the potential for human rights realisation in these arrangements. In this regard, the study would promote awareness of both the benefits of Community citizenship and the institutional framework for the enforcement of rights catalogued in other international instruments applicable in the relevant system.

By furthering an understanding of the systems, this study hopes to encourage popular involvement in the integration process. This is further important to the extent that involvement of civil society will enhance democratic control of the system and subsequently encourage accountability in the systems. If the objective of integration is to promote the well-being of ordinary people, popular involvement leading to constructive demands at national and international levels is necessary to achieve this. It is further expected that creating awareness among law students, practitioners and the general public at large would be an important foundation to encourage initiation of such demands.

The study is also significant to the extent that its evaluation of the legitimacy and desirability of subregional involvement in the field of human rights will provide material to stimulate an informed debate on the point and avoid unnecessary resistance to the emerging regimes. By providing a balanced assessment of the pros and cons of subregional human rights regimes and practices, especially in relation to national and continental human rights mechanisms, this study would allay fears concerning the perceived disruptive effect of these regimes. Consequently, the study

⁷⁰ Since the commencement of this study, there have been new scholarly materials on these areas since around September 2007. Most of the new materials touch on aspects of the subject matter and have been referred to in this study

is also significant for its potential to prevent protectionism of the existing African human rights system to the detriment of the emerging subregional regimes and thereby promote a holistic appreciation of the regimes as a positive addition to the African human rights institutional landscape.

Finally, it is hoped that by providing a basis for critical comparative analysis, the study has brought out the best practices that would promote an improvement of the workings of the various systems. The study is also significantly located to promote inter-organisational cooperation necessary to avoid potential conflicts at various levels of human rights realisation. Overall, this study is expected to contribute to human rights protection and realisation in Africa.

1.5 Research methodology

The study is based mainly on desk and library research. Relying on the background of the literature on the law of international institutions and of international human rights law, a detailed review and analysis of the treaties, conventions, protocols and other instruments and documents of ECOWAS is made. Where formal documents were not available, reliance was placed on working papers and other informal documents of the ECOWAS organs and institutions. The main documents of the EAC, SADC and the EC and EU were also examined. Analysis was also made of the actual human rights practices of the various organisations. To ensure that the analysis undertaken in the study goes beyond the descriptive level, a critical approach has been adopted. The documents and human rights practices of the organisations have been evaluated with the benefit of existing wisdom in the fields of international human rights law and international institutional law. In evaluating these organisations, value-judgments have been made on the basis of my understanding of the prevailing principles of international law with a view to identifying the positive and negative aspects of each organisation.

In order to bring out best practices, some comparative analysis was made in this study. Using ECOWAS as the constant institution, the study has employed the EAC, the EU and SADC as comparators. The approach adopted was to describe the relevant documents and human rights practices of each individual organisation, evaluate each institutional practice and compare the institutional practice with the practice in the

ECOWAS regime. Recognising the relevance of the functionality principle in comparative methodology, the criteria for the selection of the comparators were similarity of organisational structures and comparable functions. The study proceeds on the assumption that ECOWAS on the one hand, and the EAC, the EU and SADC on the other, have similar original economic objectives, are more or less similar in structure, have comparable functions and have demonstrable evidence of entry into the field of human rights. In the face of these similarities and the further assumption that the organisations face similar challenges, the study has evaluated each organisation's documents and practices to decipher how the challenges have been met, are being met or are likely to be met. The EU, as the older and more mature system has been selected because arguably, it has provided a motivation for the ECOWAS practice. Furthermore, with the benefit of its older experience, the wealth of jurisprudence that has emerged from the relevant courts and the expansive scholarly literature available on its practice, the EU stands out as an attractive comparator. The EAC and SADC are still emerging organisations and have relatively novel practices. However, they have been identified as comparators as they share similar experiences with ECOWAS and provide bases for evaluating the suitability of emerging but dissimilar approaches to addressing the challenges identified in the practice of human rights realisation through subregional organisations in Africa. Collectively, these organisations provide a basis for suggesting that some form of state practice exists or is emerging in this area.

In addition to the desk and library research, field visits were undertaken at different stages of the study. Field visits undertaken included visits to ECOWAS institutions such as the ECOWAS Commission, the ECOWAS Parliament and the ECCJ. During these visits, informal interviews were conducted with different levels of ECOWAS officials. These interviews are used in a non-technical sense to improve my understanding of the entire system. Thus, the interviews have not been referred to in the footnotes or in the bibliography. With respect to the ECCJ, in order to understand the actual functioning of the Court, I attended a session of the Court that took place outside of the usual location of the Court. With funding provided by the Centre for Human Rights, University of Pretoria, I had the opportunity of attending the session

of the ECCJ in Niamey, Niger in April 2008, where the case of *Koraou v Niger*⁷¹ was heard. The visit provided valuable contacts and materials that have aided my understanding of the judicial aspects of the ECOWAS human rights regime. In particular, the visit was useful for the assessment of member states' perception of the question of exhaustion of local remedies in the ECOWAS human rights regime. Subsequent to this session, further field visits were undertaken to the SADC Tribunal and to the ECCJ for the purpose of conducting interviews with the judges of the Court. The interviews with the judges were used in a holistic way to stimulate ideas and initiate lines of inquiry, and are therefore not specifically referred to in the footnotes or in the bibliography. In view of the difficulty of gathering materials of these organisations and considering the dearth of scholarly writings on these organisations and their institutions, these visits contributed immensely towards the study. These field visits were further complemented by discussions at seminars and conferences in Africa and abroad.

Considering the relatively novel nature of the involvement of subregional organisations in the field of human rights and understanding the need to lay a proper foundation for the study, generous space has been given for descriptive analysis. In this regard, the study has attempted to provide a basis for understanding the human rights functioning of the organisations considered without neglecting the critical aspects of the analysis. Overall, the study synthesises subregional human rights regimes by presenting a comprehensive picture of the ECOWAS human rights regime and then engages in comparative analysis that culminates in the development of a prototype for human rights realisation in subregional organisations.

1.6 Breakdown of chapters

Chapter One – In chapter one, a general introduction of the study is made by laying out the background to the study and identifying the main questions that the study undertakes to explore. Chapter one also contains the significance of the study, the limitations of the study and the methodology adopted in the study.

Chapter Two – This chapter lays a foundation for the study by demonstrating that international organisations established for certain purposes (including those

⁷¹ *Koraou v Niger*, Unreported Suit No: ECW/CCJ/APP/08/08, Judgment delivered in October 2008.

established for the pursuit of economic integration) have a theoretical basis for engaging in other seemingly unrelated activities like human rights realisation, that affect their core activities. This need not result in conflict with the original objective of the organisation nor cause an abandonment of the main organisational goal.

Chapter Three – In this chapter, the thesis demonstrates through an analysis of the founding ECOWAS Treaty, other instruments and documents as well as the mandate of ECOWAS institutions, how the realisation of human rights has seeped into the agenda and work of ECOWAS. The chapter also attempts to determine if and how the emerging human rights regime fits into the existing human rights architecture in Africa.

Chapter Four – A detailed exposé of the actual functioning of human rights within the ECOWAS framework, with analysis to evaluate how the various human rights activities impact on the organisation’s relations with different actors, is undertaken in this chapter. The chapter also assesses the utility of the organisation’s human rights activities and determines the possibility of fragmentation and restriction of the work of specialised continental human rights institutions. The chapter also attempts to bring out the positive and negative aspects of the organisation’s current practice and involvement in human rights work.

Chapter Five – In this chapter, the study considers the human rights practice of the European Union as an alternative model of human rights in an economic integration scheme. The chapter evaluates the success of this model with a view to identifying best practices vis-à-vis the challenges identified in the ECOWAS human rights regime.

Chapter Six – Chapter six examines the existing treaties, instruments, documents, institutions and current human rights practice of the EAC and SADC as representative of other RECs in Africa with a view to assessing if and how a modification of the current ECOWAS practice in the field of human rights can be adopted in these organisations. An effort is also made to seek valuable best practices within these organisations in the field of human rights that can be retained and possibly combined with best practices from the ECOWAS regime to culminate in a complementary subregional human rights regime.

Chapter Seven – This chapter contains a summary of findings, the conclusions drawn from the study and a presentation of the modified model of human rights practice that ECOWAS could adopt and that could be recommended for other RECs in Africa. The

chapter also identifies the characteristics that a complementary subregional human rights regime should possess, paying particular attention to functionality, legality and legitimacy.

1.7 Limitations and temporal delineation of the study

This study is limited by certain factors. Firstly, the study is limited by the fact that there was some much difficulty gaining access to important primary documents of the institutions considered. This was especially the case with the African RECs. Thus, although effort was made to locate and collect necessary primary documents, in some cases, reliance is placed on secondary materials found on the websites of the relevant organisations. Consequently, some of the information contained in these sources is out of date since the websites are not updated regularly. Linked to this limitation, there was also difficulty in finding materials dealing with the relations between the African Union and its institutions, on the one hand, and the different RECs on the other. Consequently, the study has had to rely on informal interviews with officials who prefer not to be quoted.

The study was also limited by the dearth in scholarly legal materials on the African RECs. This fact was particularly responsible for situations where the study has had to devote a significant amount of space to describing the structures and practices of the regimes. Further, the dearth of material also narrowed down the scope for constructive analytic engagement that would otherwise have been possible. Another factor that limits the study is the insufficiency of material to evaluate the effect of the human rights engagements of RECs on the original objectives of the organisations. This limitation was due as much to the lack of material as it was due to the infancy of available state practice. Thus, it is both a limitation of this study and an illustration that there is room for further research.

Conscious of the fact that lawyers have a tendency to base evaluation and analysis on the perception of a concept as part of a legal system, the point must be made here that if this occurs in this study, it is not to deny the importance of non-legal perspectives to human rights realisation in Africa. It may also be necessary to state that if there is an appearance that the study lays too much emphasis on adjudicatory institutions, particularly courts, that can be explained by stating that non-judicial processes and

institutions generally do not involve the complications and technicalities that come with the adjudicatory process and its use of technicalities and therefore require relatively lesser analytical focus. However, a conscious effort has been made to avoid overly emphasising the adjudicatory process.

Finally, the study is limited by the fact that it does not engage in detailed scrutiny of all the RECs recognised by the African Union. This, in my view, raises or amplifies the risk of generalisation which may result in error of analysis in cases where a particular REC is fundamentally different or takes a different approach from the RECs considered in this study.

Although the thesis in this study is relevant for all the RECs in Africa, ECOWAS has been selected as a case study because it represents the most advanced subregional human rights realisation regime in the continent. This fact is partly evidenced by the number of human rights cases that have been concluded by the ECCJ.⁷² The EAC and SADC have also been selected for comparative analysis in this study because, apart from ECOWAS, both organisations have advanced more than other RECs in the field of human rights.⁷³ The immediate focus of the study is therefore restricted to these three organisations. In terms of temporal delineation, although the submission date of this study is 30 September 2009, in order to allow for sufficient time to engage in analysis of materials, 30 June 2009 was adopted as a cut-off date for the collection of materials. Consequently, while effort has been made to incorporate the most recent developments in the African RECs considered in this study, materials and events that have emerged after the cut-off date have not been included in the critical analysis undertaken in this study. In this regard, Zimbabwe's response, in July 2009, to attempts by SADC organs and institutions to persuade that country to implement decisions of the SADC Tribunal made against it has been noted with interest. The main thrust of Zimbabwe's response, which was to challenge the legal status of the 2001 amendment to the SADC Treaty and the Protocol of the SADC Tribunal essentially calls the legal competence of the SADC Tribunal into question. For the

⁷² Since 2005, the ECCJ has delivered judgments in no less than 16 cases. Around 95% of these judgments are human rights related. See ST Ebobrah, 'Human rights developments in subregional courts in Africa during 2008' (2009) 9 *AHRLJ* 312, 313.

⁷³ As would be shown in the course of this study, the judicial organs of the EAC and SADC have each also concluded at least one human rights or human rights related case as at June 2009.

purpose of this study, the challenge to the 2001 SADC Treaty amendment, if successful, may impact on the legitimacy of human rights realisation on the platform of SADC. With regard to the SADC Tribunal, the challenge reinforces the position of this study that a sound and unambiguous legal foundation is essential for judicial protection of human rights to legitimately take place at the subregional level.