



Chapter Two

Human rights and international integration in Africa

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2.1 Introduction

As the idea of human rights realisation within the framework of subregional organisations in Africa is still relatively new, it is natural to find a certain level of resistance to the idea. Two common ways in which this resistance can be expressed are to deny the legality or legitimacy⁷⁴ of subregional intervention in the field of human rights and to contend that such intervention is likely to disrupt the work of the main African human rights institutions. Consequently, the human rights work of African subregional organisations can only flourish if these perceptions are adequately addressed. Indeed, the essence of this study is to tackle and address some of the main challenges that subregional organisations face in their endeavour to add human rights realisation to their core functions.

In order to lay a foundation and set the tone for the entire study, this chapter will demonstrate that international organisations lawfully expand the scope of their activities in pursuit of their main objectives. To prove this position, the chapter will sketch the evolution of human rights within the African continental integration process to show that the continental human rights regime is also a late addition to the project of African integration. Theoretical bases to explain the movement of international organisations to areas of activity outside of their founding objectives will also be supplied. The chapter will further highlight the continental human rights bodies that operate in the field in which subregional human rights activities would take place. Laying out the institutional links between the continental body and the subregional organisations, this chapter also sets out the basis for considering the place of subregional human rights mechanisms in the wider African human rights system.

⁷⁴ As explained in the previous chapter, I have used 'legality' in a strict and narrow sense of law while legitimacy is used in a broader sense.

The chapter begins with a brief consideration of the tension between state sovereignty and the exercise of powers by international organisations. It then traces political and economic integration in Africa, explaining the concept of integration and drawing out the human rights content at various levels of the integration process. In mapping out the relationship between the continental and subregional organisations, the status of the subregional organisations as building blocks for continental integration is discussed with a brief introduction of the main subregional organisations. The essence of these first two sections is to put the chapter and the thesis in perspective. The chapter then conceptualises the link between political and economic integration. This is followed by an evaluation of the rationale and process for including human rights in continental and subregional integration processes. A consideration of the place of subregional human rights mechanisms in the wider African human rights systems precedes the conclusion of the chapter.

2.2 States, sovereignty and international organisations

The concept of sovereignty is one of the intriguing aspects of modern statehood. In addition to whatever else it may stand for, state sovereignty is a recognition that the powers of any entity known as ‘a state’ derives from the entity itself. There is no other external or internal source from which a state could be said to derive authority. It is in the concept of sovereignty that the essential contrast between domestic law and international law can be identified.⁷⁵ Within the domestic sphere, state sovereignty basically translates into independence of the state in relation to its functions. In its international law manifestation, state sovereignty connotes equality in inter-state relations. It also allows the state to decide (alone or in community with other states) what portion of its authority it is willing to give up or donate to a body created in the exercise of sovereign will. Sovereignty and its various manifestations also distinguish the state from other subjects of international law like international organisations or institutions.

While the legalism of international law emphasises independence on the basis of state sovereignty, the pragmatism of international relations has basically propelled states towards cooperation over the years. Interstate cooperation takes place within the

⁷⁵ Schermers & Blokker (2003) 9.

framework of international law, either on a bilateral plane or takes the form of multilateral arrangements. Where interstate cooperation is on a multilateral basis, states have increasingly shown a preference for the creation of specialised institutions for the realisation of set goals. Accordingly, these institutions (international institutions) have become recognised as the ‘obvious and typical vehicles for interstate cooperation’.⁷⁶ Following the principle of state sovereignty international law recognises that states are at liberty to act and exercise power widely in so far as such is within the ambits of international. Hence, international cooperation and the creation of international institutions is an exercise of state sovereignty.

In contrast to states, international organisations or institutions as creations of states do not enjoy the same freedom to exercise powers other than those conferred by their constitutive instrument. By their very nature, international institutions are limited in structure and scope. In seeking to explain what an international institution is, Abi-Saab identified treaty, structure and means as three elements imperative for the recognition of such an institution.⁷⁷ Hence, it is generally agreed in the literature that international institutions do not have the competence to ‘generate their own powers’.⁷⁸ This essentially means that, as a general rule, unless the states that set up a given international institution endow such an institution with specific powers in the treaty establishing it, such an institution may not exercise those powers. Thus, it has been argued that international institutions only have functional competence to the extent that in the absence of unlimited powers, these institutions may only exercise powers crucial to the performance of their functions and objectives.⁷⁹

By the doctrine of implied powers, it is acknowledged that in certain situations, either on the basis of the principle of attribution or on the principle of derived powers, an organisation may necessarily exercise powers not expressly granted.⁸⁰ Hence, in its advisory opinion in the *Jurisdiction of the European Community of Danube between Galatz and Braila* case, the Permanent Court of International Justice (PCIJ) for example, formulated the principle of speciality or principle of attribution when it

⁷⁶ J Klabbers (2002) *An introduction to international institutional law* 28.

⁷⁷ A George (ed) (1981) *The concept of international organisations* 11.

⁷⁸ Eg see Schermers & Blokker (2003) 156; Amerasinghe (2005) 100 and Klabbers (2002) 60.

⁷⁹ Schermers & Blokker (2003) 156.

⁸⁰ Schermers & Blokker (2003) 155.

stated that the European Community has powers to exercise functions to their full extent in so far as the statute (Treaty) does not impose restriction on it.⁸¹ Strict compliance with international law would mean that any exercise of power other than power expressly granted by states may amount to an intrusion on the sovereignty of the states involved. Accordingly, in the *SS Lotus case*,⁸² the PCIJ laid down the principle that restrictions on sovereign freedom are not to be lightly presumed. Consequently there is a possibility of international institutions acting *ultra vires* by exceeding powers expressly conferred by constitutive instruments. This is a possibility that has been acknowledged to exist in the field of human rights.⁸³ In view of the nature of international institutions that exist at the subregional level in Africa, the question has to be asked whether those institutions are competent to exercise powers in the realm of human rights.

Ordinarily, international organisations are institutions that provide groups that share common interests with a focus of activity. In this context, such institutions can operate either as instruments for interest articulation and aggregation, or as fora in which shared interests are articulated. In some situations, international institutions could even articulate interests separate from those of their members.⁸⁴ As noted earlier, state cooperation within the framework of international law and international relations is not a strange phenomenon. In the event of such cooperation, particularly where this has led to the creation of an international organisation, the states concerned may have ‘accepted obligations and considerable limitations on their powers and liberties which were a consequence of their sovereign character’.⁸⁵ This is especially so in the area of human rights since the end of the World Wars as it has been increasingly accepted that interstate cooperation is essential for the protection of human rights. With respect to Africa, the nature of the state and the use and abuse of state sovereignty has made it even more imperative to look beyond national boundaries for the protection of rights. However, it is necessary to determine whether subregional organisations have been set up in various parts of Africa for the protection of human rights protection. In this context, a starting point would be to

⁸¹ Advisory Opinion [1926] PCIJ, Series B, no. 14, 64.

⁸² [1927] PCIJ, Series A, no 10.

⁸³ Schermers & Blokker (2003) 154.

⁸⁴ Archer (1992) 162.

⁸⁵ Amerasinghe (2005) 8.

trace the process of African interstate cooperation with a focus on the nature, scope and objectives of subregional institutions in Africa.

2.3 History of African integration

As it was with the evolution of the African state in its modern form, African interstate cooperation did not originate from within the continent. Interstate cooperation in Africa can best be described as an offspring of the concept of African unity that was initiated and pursued outside of today's formal state structure. Thus, the earliest attempts at interstate cooperation by Africans directly or indirectly link to the search for unity among Africans which originated in the form of pan-Africanism in the Americas and elsewhere in Europe.⁸⁶ Pan-Africanism itself has defied any generally acceptable definition. Hence, it has been described as a multi-dimensional concept that may be used in a cultural perspective to assert a 'common ancestry' of people with a black skin and politically as a means to encourage a bonding of African states.⁸⁷ Pan-Africanism has also been presented as a reaction to the recognition that there were unwarranted divisions among Africans and in that context, an invitation to look inwards for strength.⁸⁸ However, it is perceived that pan-Africanism stands as the precursor to unity, cooperation and integration in Africa.

Pan-Africanism as conceived by its founding fathers has undergone modification in various forms to emerge in its present guise. Under the leadership of non-resident Africans such as WEB Du Bois, Marcus Garvey, George Padmore and Sylvester Williams, pan-Africanism was originally launched as a rallying point for the mobilisation of support for the idea of unity of black people on the basis of a shared ancestry in Africa. It was a medium for resistance against oppression of black people.⁸⁹ Over several conferences and change of leadership from 'Africans-in-the-Diaspora' to 'native- Africans' such as Kwame Nkrumah and Jomo Kenyatta, pan-Africanism began to take on a different character. It essentially metamorphosed into a tool for political mobilisation against colonialism.⁹⁰ Recognising that the key to a successful struggle against colonialism lay in collective action on the basis of unity

86 GJ Naldi (1989) *The Organisation of African Unity: An analysis of its role* 3.

87 Viljoen (2007) 157 – 158 (citing A Ajala (1974) *Pan-Africanism: evolution, progress and prospects* 93.

88 T Murithi (2005) *The African Union* 8.

89 As above.

90 Viljoen (2007) 158 – 159.

and cooperation, African elites took advantage of pan-Africanism as a platform for political action. The independence struggle thus simultaneously became the basis for the initial attempts at collective political and economic arrangements.⁹¹ Accordingly, it is possible to argue that one of the earliest motives behind African integration was the desire to present a common front in the demand for independence.⁹²

The point has to be made that in the period preceding independence, the ‘African unity’ project and the idea of continental integration was not top on everyone’s agenda. For example, it is on record that whereas French West and Equatorial Africa, which had achieved some degree of integration during the colonial era, appeared willing to move towards wider continental unity, the Maghreb leaders demonstrated a lack of enthusiasm, preferring a limited and symbolic unity of the Maghreb region.⁹³ Notwithstanding the initial challenges, sufficient unity was achieved to enhance the struggle for independence on the platform of ‘modified’ pan-Africanism. By the 1960s, with several African countries boasting of flag independence, attempts at political and economic integration based on regional grouping began to appear even though pan-Africanism continued to stand as a motivating factor for a continent-wide integration scheme.⁹⁴

By the early 1960s to the 1970s, the ideology of pan-Africanism could be found in repeated, albeit often unsuccessful efforts by African countries to engage in some or other form of integration arrangement. As would be shown later in this work, the ideology ultimately resulted in the achievement of continental unity in the shape of the Organisation of African Unity (OAU) and subsequently in the establishment of the subregional international institutions. In fact it has been suggested that the explanation for the division between the political and the developmental aspects of African regionalism on the one hand and the adherence to both continental and subregional regionalism on the other hand can be found in the historical compromise reached

91 SC Saxena, ‘The African Union: Africa’s giant step toward continental unity’ in JM Mbaku and SC Saxena (eds) (2004) *Africa at the Crossroads* 165.

92 C Hoskyns ‘Pan-Africanism and Integration’ in A Hazlewood, (1967) *African integration and disintegration* 369.

93 Hoskyns (1967) 355.

94 Naldi (1989) 3.

between the “softer” and “harder” versions of pan-Africanism’.⁹⁵ It is possible to argue that the aspect of the pan-Africanism ideology that aimed at fighting oppression of the black race and achieving political independence from colonialism relates to human rights in the sense of a collective right to determination and (to some extent) the rights to association, assembly and expression. It is also possible to contend that even though human rights was not top of the OAU agenda, the liberation objectives of the Organisation were nonetheless issues that touched on human rights.

On the basis that human rights is generally more associated with political integration than it is with economic integration, it is even easier to put forward the argument that the OAU as an organisation aimed at political integration rightly expanded its human rights focus. However, it is not so easy to explain the link between institutions for economic integration and the realisation of human rights. With clear and circumscribed objectives of trade and economic integration such as those contained in the treaties of the African RECs, the question arises whether these institutions have actual or implied powers to veer into the realm of human rights. Yet, it would not be easy to dismiss the possibility of a link between the aims and objectives of subregional institutions and the field of human rights. If ‘improvement of the standard of living’ of citizens constitutes a prime focus of these institutions, then one cannot escape the fact that there is a connection between this focus, poverty and human rights.⁹⁶ Thus, in the following pages, this work would try to trace the progress of state integration in Africa and subsequently locate human rights in the subregional institutions in Africa.

2.4 Human rights in continental integration initiatives in Africa

With the collapse of colonialism in Africa, the stage was set for the second phase of the pan-Africanism ideology.⁹⁷ In this second phase, the focus was on African unity and possibly a continental government resulting from political and economic

⁹⁵ PH Bischoff, ‘Regionalism and regional cooperation in Africa: New century challenges and prospects’ in JM Mbaku and SC Saxena (eds) (2004) 121 - 146.

⁹⁶ EG Salmon, ‘The long road in the fight against poverty and its promising encounter with human rights’ (2007) 4 *SUR International Journal on Human Rights* 151 -153

⁹⁷ Murithi (2005) 8.

integration of the states that made up the continent.⁹⁸ While they are not mutually exclusive, political integration and economic integration do not mean exactly the same thing. There are differences in the meaning, consequences and degrees of political integration and economic integration. It has even been suggested that whereas political integration envisages political bonding leading ultimately to a central continental government, economic integration relates more to economic and technical cooperation that should only result in limited outcome at the subregional level.⁹⁹ However, the integration experience in Africa indicates the existence of a very thin line between political integration and economic integration. The African experience does not seem to support the view that political integration can only take place at the continental level while economic integration is only possible at the subregional level. Since delimiting what is meant by integration would enhance an appreciation of the issues related to African integration, it would perhaps be useful to explore the concept of integration as a springboard for the present enquiry.

2.4.1 Explaining integration

According to Haas, integration is ‘the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new and larger centre, whose institutions possess or demand jurisdiction over the existing national states’.¹⁰⁰ In other words, for Haas, the fundamental consideration is the transfer of focus (political or economic) from individual national realms to a commonwealth that is stronger and bigger than the component states. Deutsch, for his part, sees integration as ‘the attainment, within a territory, of a “sense of community” and of institutions and practices strong enough and widespread enough to assure, for a “long” time, dependable expectations of “peaceful change” among its population’.¹⁰¹ From this perspective, integration is possible at any level provided the interaction has the force to sustain long term relations. For Nye, integration is a ‘process leading to political community – a condition in which a group of people recognizes mutual obligations and some notion

98 KO Kufour (2006) *The institutional transformation of the Economic Community of West African States* 45.

99 B Ndi-Zambo, ‘African Unity: Looking back, looking forward and a recipe for failure’ in Eddy Maloka (ed) (2001) *A United States of Africa?* 127.

100 EB Haas (1958) *The uniting of Europe: political, social and economic forces, 1950 -1957* 16.

101 KW Deutsch et al (1966) Political Community and the North Atlantic Area’ in *International political communities: an anthology* 4.

of a common interest'.¹⁰² The focus in Nye's definition seems to be on the process rather than the expected outcome.

Limiting his interest to political integration, Lindberg has defined 'political integration as adaptation and orientation of actors to a political structure at a given level of generalisation'.¹⁰³ Lindberg uses adaptation to mean the response of individuals to directives issued to them in the name of the collective political structures. In other words, where integration is said to have taken place, certain aspects of internal sovereignty in the exercise of governmental power should shift (as Haas envisaged) from the state to the 'commonwealth'. By orientation, Lindberg expects that actors should be involved in identification with and evaluation of the political structure. Thus, political integration requires voluntary transfer of sovereign powers which normally reside in national governments and the acceptance and participation of the society in the process. Taking his argument further, Lindberg posits that in cases of political integration, the linkage consists of collaboration by the partners in 'regularised, ongoing decision-making'. Hence, 'international political integration involves a group of nations coming to regularly make and implement binding public decisions by means of collective institutions and/or processes rather than by formally autonomous national means'.¹⁰⁴ For him therefore, the defining factor in political integration is 'the emergence or creation over time of collective decision-making processes', in other words, there should be political institutions to which the integrating governments would delegate decision-making.¹⁰⁵

At the minimum, international integration involves partial transfer of authority over predetermined subject-matters, from the usual locus at the municipal level to a different, central and international institutions jointly created by the converging states which institutions are independent of the converging states. The quality of integration is therefore largely a function of the decision-making power that is vested in the institutions created for that purpose by the 'commonwealth'. As Lindberg observes, 'The essence of political integration is that governments begin to do together what

102 J Nye (1965) *Pan-Africanism and East African Integration* 84.

103 LN Lindberg, 'Political Integration as a multidimensional phenomenon requiring multivariate measurement' in LN Lindberg and SA Scheingold (1971) *Regional integration; theory and research* 323.

104 As above.

105 As above.

they used to do individually'.¹⁰⁶ Consequently, states set up communal decision-making mechanism 'that in greater or lesser degree handle actions ... that used to be done (or not done) autonomously by governments or their agencies'.¹⁰⁷ The pooling of decision-making power could either be in the form of a federation with centralised powers or in the form of intergovernmental collaboration where power relations are basically decentralised even though the converging states constitute 'the elementary units in terms of which this process transpires'.¹⁰⁸ It is against this background that continent-wide political and economic integration in Africa would be examined.

2.4.2 The Organisation of African Unity

Although by 1957, there were at least four groupings in Africa with the semblance of integration as a result of colonial antecedents, it was in 1958 that meaningful efforts aimed at continental integration began. With Ghana gaining independence in 1957, Nkrumah shifted the focus of pan-Africanism to seeking African unity within the continent. Hence in April 1958, plans were made to convene a conference of the governments of African states that were independent at the time. The Conference of Independent African States (CIAS) which some see as a 'carry-over of pan-Africanism', became the first real attempt at continental integration in Africa.¹⁰⁹ Although there were disappointments with the CIAS, Nkrumah used the opportunity of the December 1958 All African Peoples' Conference (AAPC) which took place in Accra, Ghana to push for the ideals of African unity. This subsequent AAPC, which was essentially a meeting of political parties in Africa rather than a conference of governments, is recognised as a major step towards the latter establishment of the OAU.¹¹⁰

While it is clear that the early conferences were aimed at the attainment of African unity at the continental level, it is not easy to discern the degree of integration that was envisaged. Nkrumah, who stands out as one of the most passionate advocates of continental unity and integration reportedly rejected the view that the integration

106 Lindberg (1971) 59.

107 As above.

108 JA Caporaso (1972) *Functionalism and regionalism integration: A logical and empirical assessment* 18.

109 Hoskyns (1967) 361. See also Viljoen (2007) 159.

110 Murithi (2005) 24.

process that was proposed would result in the loss of the sovereignty of the participating states.¹¹¹ In his own words, Nkrumah stressed that African states:

... need a common political basis for the integration of our policies in economic planning, defence, foreign and diplomatic relations. The basis for political action need not infringe the essential sovereignty of the separate African states. The states would continue to exercise independent authority, except in the fields defined and reserved for common action in the interests of the security and orderly development of the whole continent.¹¹²

Nkrumah's views demonstrate that integration at this point was for specific purposes and may not have envisaged total or substantial loss of sovereignty that would allow for scrutiny of national human rights situations by the proposed international organisation. Yet, there were others, disciples of Nkrumah's message of unity who considered it imperative to adopt a federalist approach with the ultimate goal of a continental government. Hence the argument was put forward that 'Union Government is our assurance of peace. It is our assurance of progress. It is our promise of early escape from poverty's prison. Union Government is our diamond of hope'.¹¹³ Such a continental government would have resulted in the transfer of state powers and accordingly created the need for a regime to address the potential abuse of public powers. But this did not happen.

Considering that African states had just began to attain independence, it is not surprising that even the strongest proponents of continental unity saw the need to express caution in pushing for integration. As Hazelwood notes, 'political leaders would naturally be reluctant to surrender political autonomy to a body or institution outside their control when they are not under any internal or external threat from which they hope to be protected by the collective strength. This is especially so, when they do 'not feel confident they would have anything but a subordinate role in the proposed federal government'.¹¹⁴ The significance of these observations lie in the fact that these concerns potentially compel restraint in the integration process and limit the quantum of decision-making powers that African states would subsequently transfer to the institutions of integration. From a human rights perspective, it has demonstrated

111 Sexena (2004)167.

112 Nkrumah (1963) 216 – 222.

113 K Armah (1965) *Africa's golden road* 60.

114 Hazelwood (1967) 4.

that at the point of conception, continental integration schemes were not exactly concerned with the protection of human rights within converging states or issues related thereto. In fact for some, ‘the promise of economic advancement for all the peoples, as peoples and as citizens of a continent’ was the main attraction that lay behind the call for African unity.¹¹⁵ This was the ideological springboard upon which political integration in Africa was launched.

In view of the circumstances surrounding the adoption of the Charter of the OAU, the Charter has been described as ‘a product of compromise’.¹¹⁶ The compromise may have tempered the nature and degree of integration that was originally contemplated by the states that held a more radical conception of continental unity based on pan-Africanism. Instead of a continental government along the lines of a federal structure, the OAU emerged as an organisation whose main integration purposes were ‘to promote the unity and solidarity of the African states’ and ‘to coordinate and intensify cooperation and efforts to achieve a better life for the peoples of Africa’.¹¹⁷ The scope of integration was also limited as collective competence could only be exercised over a specified range of issues. These issues included political and diplomatic cooperation, economic cooperation, including transport and communication, educational and cultural cooperation, health, sanitation and nutritional cooperation, scientific and technical cooperation and cooperation for defence and security.¹¹⁸

Human rights did not feature prominently in the scheme of things in the Charter of the OAU. Although the purposes of the OAU also included the promotion of international cooperation ‘having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights’, the primary concern in that regard seemed to have been the eradication of colonialism and apartheid hence none of the specialised commissions created in the Charter was ‘devoted to human rights’.¹¹⁹ Considering the principle of non-interference upon which the OAU was proclaimed to be based, the omission of human rights from the competence of the organisation may not be totally surprising. As Ankumah notes, the major preoccupation of the OAU was with

115 Armah (1965) 47.

116 Naldi (1989) 4.

117 Art 1(b) of the OAU Charter.

118 Art II (2)(a) – (f) of the OAU Charter.

119 EA Ankumah (1996) *The African Commission on Human and Peoples’ Rights* 136.

‘political unity, non-interference in the internal affairs of OAU member states and the liberation of other African territories which were under foreign domination’.¹²⁰ In the absence of an explicit competence over human rights, the principles of international institutional law would apply to mean that the OAU could only exercise powers on the basis of attributed competence or implied powers in this field if the objectives of unification required the protection of human rights.

Notwithstanding the observations above, in terms of the objective of continental unification, the OAU was seen as representing ‘a remarkable achievement of ... African leaders’.¹²¹ This was especially so against the fact that the organisation was founded soon after African states escaped from the grips of colonialism when leaders were still very anxious to consolidate leadership in their respective states.¹²² Thus, even though the outcome of the Addis Ababa conference ‘fell short of the vision of a number of African leaders, who had hoped and worked for a continental African government as part of a grand design to achieve economic and political development of the African continent’, the founding of the OAU reflected a consensus on the need for continental bonding.¹²³ African leaders ‘saw the danger posed by the division of language, culture and religion, by the economic inequalities, by the controversies over boundaries arbitrarily drawn by the colonial powers’ and recognised the need for cooperation to tackle the challenges of the time.¹²⁴ At the founding of the OAU, the most obvious challenges that faced the continent were the questions of African unity and the decolonisation of African states that were still under colonial rule. These formed the immediate interests that the congregating states sought to pursue.

A question that arises out of the integration process under the OAU is whether the unification objective could not have been interpreted to allow collective scrutiny of domestic issues as part of the wider African territory. While ordinarily this could have been a possibility, the actual execution of the ‘African unity’ project under the OAU did not allow for such liberty. It is argued that ‘unity’ as used in the Charter of the OAU does not translate into continental unity in the form of a borderless continent but

120 As above.

121 JOC Jonah, ‘The OAU: Peacekeeping and conflict resolution’ in Maloka (ed) (2001) 3.

122 Z Cervenka (1977) *The Unfinished quest for unity, Africa and the OAU* ix

123 Jonah (2001) 3

124 Cervenka (1977) ix.

rather meant that ‘all ideological blocs into which African states were divided should be dissolved and that the views of African states on any issue would be expressed by the collectivity called the OAU’.¹²⁵ In this context, retaining the borders of the component states and incorporating the principle of non-interference in the internal affairs of states meant that the organisation’s professed unity was only restricted to the issues upon which the states had agreed to ‘cooperate’. Hence, it has been observed that under the OAU, ‘African leaders settled for a superficial unity which brought together African Heads of state but not African people. This in no way affected the sovereignty of each state and they were left free to pursue policies in which continental priorities were sacrificed to narrow national interests’.¹²⁶

Apart from the ‘shallow’ unification that could be accommodated under the OAU Charter, the choice of the intergovernmental collaboration mode of integration and the attendant decision-making procedure permitted by the OAU prevented easy expansion of the scope of integration. In addition to concentrating the decision-making powers of the organisation in the heads of state and government, the OAU Charter only allowed for resolutions based upon two-third majority of members. Essentially, the organisation became a ‘democratic’, ‘participatory’ and ‘voluntary’ club of African leaders that could only make decisions in the form of resolutions ‘made after proper consultation with the relevant stakeholder’, basically the government against whom the decision is made.¹²⁷ Although such decisions arrived at after extensive consultation and near unanimity ought to bind members ‘at least morally if not politically’, the organisation was completely powerless to enforce its own decisions. The incapacity of the OAU in this regard is aptly captured by a former Secretary General of the organisation who is quoted as stating that ‘the basic problem is that the OAU, even in its Charter, is not a supranational body. It is a sort of institution that cannot impose any solution and consequently is sometimes unable to implement its own resolutions’.¹²⁸ These difficulties challenge the prospects for efficient and effective protection of human rights at this level.

125 Sexana (2004)175.

126 Cervenka (1977) ix.

127 Sexana (2004) 175.

128 William Eteki Mbouma, former OAU Secretary in 1978, quoted by Sexana (2004) 180.

In the light of the various structural limitations of the OAU, expectations of realistic protection of human rights under that organisation framework outside of a deliberate expansion of the scope of integration or at least a conscious inclusion of human rights in the organisational agenda would be all but misplaced. Notwithstanding these facts, as Ankumah notes, by addressing refugee matters and considering famine relief issues, the OAU managed to take certain initiatives relating to the field of human rights even before the actual adoption of a human rights instrument and the consequent inclusion of human rights protection within its competence.¹²⁹ As would be shown later in this work, as a result of several factors, the OAU eventually overcame its own institutional restrictions to adopt the African Charter and firmly placed human rights in its agenda.

2.4.3 The Lagos Plan of Action and Final Act of Lagos

Generally, integration under the OAU has been viewed as political rather than economic. For example, it has been noted that the OAU may have dedicated the first thirty years of its existence to addressing issues of continental unity and decolonisation through the mobilisation of support for national liberation movements involved in agitations for self-determination while economic matters were left to be engaged by the United Nations Economic Commission for Africa (ECA).¹³⁰ However, there are those who hold the opinion that even during the pre-OAU conferences, debates on African unity tended to veer towards the ‘virtues of economic cooperation’.¹³¹ Some of the goals set by the AAPC in 1958 included plans for the creation of a common market and an African economic community.¹³² These economic goals resurfaced during the 1963 Addis Ababa conference where in their advocacy for economic integration as the best route towards political unification, African leaders in the so-called Monrovia group rejected calls for deeper political integration.¹³³ Despite the allusions to economic unification and the inclusion of economic cooperation as part of the purposes of the OAU, it was from the late 1960s that the OAU began to pay concrete attention to the economic situation of the continent, leading to the adoption in 1979, of the ‘Monrovia Declaration of

129 Ankumah (1996) 4 -5.

130 Bischoff (2004) 127.

131 Cervenka (1977) 7.

132 Bischoff (2004) 128.

133 B Ndi-Zambo (2004) 128.

Commitment on guidelines and measures for national and collective self-sufficiency in economic and social development for the establishment of a new Economic Order'.¹³⁴

Closely following the Monrovia Summit, African leaders meeting in April 1980 on the platform of the OAU in Lagos, Nigeria, approved a Plan of Action prepared previously under the auspices of the ECA. The eventual outcome of the Lagos session was the adoption of the Lagos Plan of Action (LPA) and Final Act of Lagos (FAL).¹³⁵ Although resting on the institutional framework of the OAU, the Lagos Plan of Action and Final Act of Lagos stood as resolutions of the OAU that could be said to have basically, albeit slightly, extended the scope of the OAU Charter with regards to economic integration. Hinging on the OAU objective to 'coordinate and intensify cooperation and efforts of Member states with a view to providing the best conditions of life to the peoples of Africa', a commitment was made to establish an African Economic Community by 2000, with a view to accelerating cooperation and integration in the economic, social and cultural fields.

Essentially concerned with creating better lives for Africans, the focus of the LPA and FAL was more on 'the key principles' of 'collective self-reliance and self-sustaining development and economic growth. Accordingly, the seven priority areas identified included areas such as food and agriculture, human resources, transport, communications and industry.¹³⁶ Recognising previous and existing efforts at economic integration at the subregional level, the LPA and FAL committed to strengthening such initiatives. As with the original OAU Charter, no deliberate mention was made of human rights in the scheme of things even though from a social, economic and cultural rights perspective, economic integration for improving the living standards of people raised certain human rights issues. Despite the promise that it apparently held, the LPA did not manage to take off successfully, thus burying the hopes for the realisation of social and economic rights that could have been achieved.

134 RN Kouassi, 'The Itinerary of the African integration process: An overview of the historical landmarks' (2007) *1 African Integration Review* 3.

135 As above.

136 E Maloka, 'African Union in the 21st Century' in Maloka (ed) (2001) 2.

2.4.4 The African Economic Community (The Abuja Treaty)

With the failure of the LPA and the FAL, economic integration at the continental level suffered a set back but was not completely abandoned.¹³⁷ Thus, drawing inspiration from resolution adopted as far back as 1968 up till the 1980 LPA and FAL, 51 African Heads of State and Government convening in Abuja, Nigeria on 3 June 1991 adopted the ‘Treaty Establishing the African Economic Community’ (The Abuja Treaty). Eulogised as the instrument that ‘firmly committed the continent along the path of economic integration and collective development,¹³⁸ the Abuja Treaty stands out as a major institutional improvement in the search for integration and continental unity in Africa. Though founded on the institutional framework of the OAU, the Abuja Treaty represented Africa’s boldest attempt at any sort of concrete integration, tilting heavily towards the creation of actual supranational institutions and organs for the achievement of set objectives.¹³⁹

Probably building on a realisation that the organisational structure and framework of integration that existed under the OAU was not strong enough to support genuine integration efforts, the model of intergovernmental collaboration under the Abuja Treaty was raised to a level that could sustain implementation in the face of political ‘cold-feet’. As a starting point, the Abuja Treaty excludes ‘non-interference in the internal affairs of states’ and ‘respect for the sovereignty and territorial integrity of each state ...’ as principles guiding pursuit of the stated objectives. Instead, the Abuja Treaty demonstrates a commitment of the member states to partially surrender sovereignty to the ‘commonwealth’ for the purpose of integration. Hence, article 5 records general undertakings of states to create conditions favourable to the attainment of collective goals, and to refrain from unilateral actions that would threaten set objectives.

Rumumamu sees these undertakings as implying ‘a willingness to sacrifice some control over national economic policy management that directly affects the

137 S Rumumamu, ‘Africa’s search for regional cooperation and integration in the 21st Century’, The African Capacity Building Foundation, Working Paper No 3, October 2004, 2 for eg views the visions of the LPA as ‘largely elusive’.

138 Kouassi (2007) 5.

139 Rumumamu (2004) 3 notes that the Abuja Treaty was the first in African history to ‘provide legal, institutional, economic and political framework for economic cooperation and integration.’

populations of the participating countries'.¹⁴⁰ Considering that the attachment to state sovereignty evident in the Charter of the OAU was a major stumbling block for the attainment of the objectives of the organisation and restricted expansion of the powers of the institution even when the situation warranted it, the Abuja Treaty could be said to have begun on a better structural foundation. Overall, the framework of the Abuja Treaty is more favourable for human rights realisation through international inquiry. Thus, there is arguably a sense that African states are more willing to relax attachment to sovereignty in the context of economic integration.

Linked to the partial surrender of sovereignty, the Abuja Treaty makes better provisions for implementation. In addition to the provisions in the general undertaking which translates into acceptance by state parties that sanctions may be taken against persistently non-compliant states,¹⁴¹ the Treaty makes decisions of the Assembly of Heads of State and Government (the highest decision-making body of the Community) binding on member states, organs of the Community and regional economic communities (RECs). Such decisions become enforceable 30 days after the Chairman signs it and the decision has been published in the Community Journal.¹⁴² For a Community that is hinged on the OAU with no implementation provisions, the Abuja Treaty is a huge leap towards continental integration.

Further on the structure, article 6 of the Abuja Treaty contains a rather elaborate outline of proposed stages for its implementation, including the establishment or strengthening of RECs in the various regions of the continent. The RECs are the designated building blocks upon which the Community is expected to be erected, as such, the Treaty envisages the coordination, harmonisation and gradual integration of the activities of the RECs into the framework of the AEC.¹⁴³ It has to be noted further that although the General Secretariat of the OAU is adopted as the secretariat of the AEC, the Abuja Treaty grants more powers to the organ for effective implementation. As would be argued subsequently, the recognition of RECs as building blocks of the AEC should have some consequence for their involvement in the realisation of human rights.

140 Rumumamu (2004) 8.

141 Art 5(3) of the Abuja Treaty.

142 Art 10(2) and (3) of the Abuja Treaty.

143 Arts 4(2) and 6 of the Abuja Treaty.

While retaining objectives such as the promotion of economic, social and cultural development and the integration of African economies and the promotion of cooperation in all fields of human endeavour in order to raise the standard of living in Africa,¹⁴⁴ the scope of the field covered by the Abuja Treaty creates more room for the realisation of human rights. Coming into being after the entry into force of the African Charter, the Abuja Treaty affirms the parties' adherence to 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' as a principle of the AEC.¹⁴⁵ This arguably provides some form of precedent for African RECs. In the body of the Treaty itself, state parties take on other human rights obligations in areas such as free movement and the right of establishment, environmental protection, education, health and the rights of women.¹⁴⁶

Although these provisions are not couched as individual rights similar to instruments cataloguing human rights, they go further than the Charter of the OAU in linking issues of human rights and the LPA and FAL in demonstrating an intention to implement human rights rhetoric. In fact, it has been noted that 'the link to human rights is ... both implicit and explicit'.¹⁴⁷ In making provisions for the establishment of organs like the Pan African Parliament and the Court of Justice,¹⁴⁸ the Treaty is essentially 'democratised' and addresses concerns that arose with respect to disregard for popular participation in the previous schemes for continental integration. While these appear as precedents and possible room for subregional organisations contributing to the actualisation of objectives, they also raise questions relating to duplication of functions as between those organisations and the AEC.

In theory, the Abuja Treaty of the AEC represents Africa's preparedness to tackle the shortcomings of the earlier integration instruments. However, implementation of the Treaty has not been exactly fruitful in major areas and despite the acceleration of certain aspects, especially the establishment of fundamental organs and institutions,

144 Art 4(1)(a) –(d) of the Abuja Treaty.

145 Art 3(g) of the Abuja Treaty.

146 See eg arts 43, 58, 68, 73 and 75 of the Abuja Treaty.

147 Viljoen (2007) 171.

148 Art 7 of the Abuja Treaty.

much still remains to be done. Indeed, strengthening RECs becomes more imperative for the overall success of continental economic integration in Africa. The AEC Treaty has since been incorporated in the AU following the dissolution of the OAU and as a result of provisions in the AU Constitutive Act subjecting the Abuja Treaty to the Constitutive Act.¹⁴⁹

2.4.5 The African Union

The failures and disappointments that trailed the continental unification project under the OAU culminated in the serious initiatives that ultimately lead to the creation of the African Union (AU) in 2001 to replace the OAU as the continental vehicle for African integration.¹⁵⁰ Despite the numerous declarations and treaties adopted in its lifetime, the feebleness of the OAU's institutional framework continued to hinder genuine integration in Africa right up to the late 1990s.¹⁵¹ Accordingly, in pursuit of the pan-Africanist goal of continental unity reflected in the Charter of the OAU, African leaders adopted the Constitutive Act of the African Union (AU Constitutive Act) as the final outcome of a process that effectively began with the adoption of the Sirte Declaration of 1999.¹⁵² The AU has thus been seen as 'only the latest incarnation of the idea of pan-Africanism'.¹⁵³ However, similar to the pre-OAU era, the AU Constitutive Act represents a 'watered down' documentation of more radical integration attempts. Seeking continental structures upon which Africans could push for more balanced negotiations in a globalised world, Libyan Leader, Colonel Ghaddafi advocated for the formation of a United State of Africa. Although, African leaders rejected the idea of a United States of Africa, preferring 'a lesser form of integration that did not involve complete loss of sovereignty by individual

149 Art 33(1) and (2) of the AU Constitutive Act; CAA Parker & D Rukare, 'The New African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365, 372.

150 The Constitutive Act of the AU was adopted on 11 July 2000 but entered into force on 26 May 2001.

151 T Maluwa, 'International Law-Making in the Organization of African Unity: An Overview' (2000) 12 *African Journal of International and Comparative Law* 201, 202 records that the OAU adopted about 20 treaties over the period of its existence.

152 In September 1999, at the invitation of the Libyan President, Colonel Muammar Ghaddafi, OAU leaders met in an extraordinary session in Sirte, Libya to discuss issues around the question of African integration. The Sirte session resulted in the adoption of the Sirte Declaration, EAHG/DECL (IV) REV.1. This document is effectively the precursor of the AU Constitutive Act.

153 Murithi (2005) 8.

countries’,¹⁵⁴ the AU Constitutive Act is a major improvement over the OAU Charter in terms of structural foundation for continental integration.¹⁵⁵

Considering the criticism that trailed the OAU, the AU appears to be an attempt at a fresh start at integration by African leaders rather than a reformation or amendment of the Charter of the OAU.¹⁵⁶ However, the similarity between the AU Constitutive Act and the Abuja Treaty of the AEC cannot be denied. Most of the structural improvements introduced in the Abuja Treaty seem to have been reproduced in the AU Constitutive Act, leading some commentators to conclude that ‘The Constitutive Act of the African Union was essentially foreseen in, and proceeds from the AEC Treaty’ because ‘terms and conditions of the new organisation were effectively extracted from the AEC Treaty, and most of the provisions of the Constitutive Act were taken word for word from the AEC Treaty’.¹⁵⁷ Although the objectives and the principles of the AU as contained in the Constitutive Act are more in number and wider in scope than the Abuja Treaty, combining the political integration goals of the OAU and the economic integration objectives of the Abuja Treaty,¹⁵⁸ the organs of the AU are basically those envisaged under the Abuja Treaty (with a few additions and some modification). More importantly, the AU Constitutive Act reflects a major shift in terms of the incorporation of human rights rhetoric in the agenda of continental integration. It goes further than the OAU and the Abuja Treaty in this regard.

Coming at a time when human rights had become a major issue in international law and international relations, the AU Constitutive Act contains explicit and implicit references to human rights and concepts associated with human rights.¹⁵⁹ Reference to human rights can be found in the preamble, objectives and principles of the AU Constitutive Act. However, paradoxically, the Constitutive Act which is supposed to be a more ambitious instrument in the sense of combining political and economic

154 Sexana (2004) 165.

155 President Thabo Mbeki of South Africa, for eg, saw the AU process as ‘the enlargement of African Unity’ that will ‘enable all of us to overcome the problems that have confronted us for centuries...’, *ANC Today* Vol. 1 No. 7, March 2001.

156 CAA Packer & D Rukare (2002) 369.

157 CAA Packer & D Rukare (2002)370 -371.

158 E Baimu, ‘The African Union: Hope for better protection of human rights in Africa?’ (2001) 2 *AHRLJ* 299, 304

159 Viljoen (2007) 173.

integration of African states reverts to inclusion of the principles of respect for colonial borders and slightly ‘diluted’ concept of non-interference in the internal affairs of member states.¹⁶⁰ Notwithstanding the paradox, the AU regime mainstreams human rights in the continental scheme of things and installs the AU as some kind of specialised international human rights organisation in Africa. This becomes a ground for justifying the AU’s claim to priority for human rights protection over subregional bodies.

Although the Constitutive Act recognises the right of the AU to intervene in a member state pursuant to a decision of the Assembly in the event of grave circumstances such as war crimes, genocide and crimes against humanity¹⁶¹ or at the invitation of the member state in question,¹⁶² two challenges potentially stand out with respect to their use for the protection of human rights. In the first case, decision-making under the AU is either by consensus or by a two-third majority of the members. Considering the experience of the OAU, it is almost certain that it would be difficult to achieve the required number of votes for the authorisation to intervene even in the most deserving cases. The Zimbabwe situation in 2008 is a case in point in this regard. With respect to the second option, there are chances that incumbent leaders who have lost legitimacy are more likely to invite AU intervention than legitimate leaders seeking intervention in favour of human rights protection.

It is also important to note that unlike the Abuja Treaty where African states accepted undertakings that amounted to a partial surrender of state sovereignty,¹⁶³ the AU Constitutive Act does not contain any evidence of intention to cede sovereignty. It could be argued that partial transfer of sovereignty was easy under the Abuja Treaty because it was generally recognised as an economic integration scheme which would only require conceding the right to make law and policy with respect to economic issues rather than in the more delicate political field. However, from a human rights perspective, the chances of enforcement are greater under the regime of the Abuja

160 Art 4(b) and (g) of the AU Constitutive Act.

161 Art 4(h) of the AU Constitutive Act. By a 2003 Protocol on Amendments to the Constitutive Act of the African Union, adopted in Maputo, Mozambique, which is yet to come into force, there is an intention to expand the grounds on which the right to intervene can be exercised to include where there is a serious threat to legitimate order and a need exists to restore peace and stability.

162 Art 4(j) of the AU Constitutive Act.

163 Art 5 of the Abuja Treaty.

Treaty. It is therefore not surprising that the AU Constitutive Act contains very little in terms of provisions for sanctioning non-compliance with the Act. Although article 23(2) of the Constitutive Act provides for sanctions to be imposed on member states for failure to comply with decisions and policies of the Union, the provision is a far cry from the wide scope allowed under the Abuja Treaty which defines in greater details the risk that states face if they fail to live up to their obligations under that instrument. Further on sanctions, with respect to human rights protection, it has to be pointed out that the Constitutive Act makes no reference to any of the human rights supervisory bodies created under the OAU. The failure to acknowledge the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights while recognising the African Charter can potentially be interpreted as a lack of commitment to those institutions under the AU regime.¹⁶⁴ In the context of this study, it also prompts the question whether the exclusion of these human rights supervisory bodies from the Constitutive Act necessarily removes them from the relationship that exists or that should exist between the AU and the RECs since the relation between the RECs and the AU can be read as applicable only to enumerated institutions. Notwithstanding its shortcomings, the 'provisions in the AU Act are more far reaching than what obtained under the OAU Charter in respect of the guarantee of human rights'.¹⁶⁵

Probably building on its reputation as 'the highest level of economic integration that African states could aspire to',¹⁶⁶ the AU has also become the platform for African leaders to activate the New Partnership for Africa's Development (NEPAD). The product of the Millennium Africa Recovery Plan and the OMEGA Plan both of which were initiated as vehicles for economic recovery of African states, NEPAD is a 'continental economic and development framework' that was launched in 2001 as a 'pledge of African leaders' to pursue 'sustainable growth' in the continent.¹⁶⁷ Originally established as an independent though related initiative, NEPAD has now

164 B Manby, 'The African, NEPAD and Human Rights: The Missing Agenda' (2004) 26 *Human Rights Quarterly* 983, 987.

165 A Abass & MA Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the African Union' (2002) 49 *Netherlands International Law Review* 1, 29.

166 Baimu (2001) 310.

167 Viljoen (2007) 175. See the New Partnership for Africa's Development (NEPAD Declaration) (2001) reproduced in C Heyns & M Killander (eds) (2007) *Compendium of Key Human Rights Documents of the African Union* 338.

been integrated in the framework of the AU in continuation of the pan-Africanism agenda of continental integration and unification.¹⁶⁸ Based essentially on the vision of collaboration between Africa as a collective unit and governments of the developed world for the eradication of poverty in Africa, NEPAD is a development strategy that recognises peace and security, human rights, economic and political governance as well as regional and subregional approaches to development as conditions for sustainable development.¹⁶⁹ With the hoisting of NEPAD on the AU, there arises a combined political and economic platform for asserting the human rights obligations of African states.

2.5 Subregional institutions as foundational blocks for integration in Africa

One of the legacies of colonialism in Africa is the creation of regional (or subregional) bonds in the various regions of the continent.¹⁷⁰ Not surprisingly, attempts at integration in Africa are known to have started at the subregions rather than at the continental level. However, most of the early subregional integration schemes faltered soon after independence while those that commenced after the independence years recorded little success in the attainment of set objectives.¹⁷¹ An outstanding feature of African integration is that, along the mental lines of a ‘softer’ and ‘harder’ integration, integration schemes were divided along political and economic boundaries. Whereas economic integration occurred mostly at the subregional level, political integration more often than not, occurred at the continental level. With the onset of the OAU, most African leaders focused on wider continental issues allowing the regional or subregional initiatives to remain moribund. Lost hopes and underachievement became the hallmark of most subregional integration schemes by the 1980s when the LPA and FAL were launched on the platform of the OAU. Since then, continental economic integration schemes have incorporated subregional economic integration schemes (commonly referred to as regional economic

168 Manby (2004) 988.

169 Viljoen (2007) 175; Manby (2004) 989.

170 Regionalism is often used in the literature when reference is made to groupings other than continental groupings (ie subregions). Accordingly, regionalism and subregionalism would be used interchangeable in this work as against continentalism or continental integration.

171 DC Bach, ‘Revisiting a paradigm’ in DC Bach (ed) (1999) *Regionalisation in Africa: Integration and disintegration* 5 argues that the results achieved by the numerous intergovernmental organisations for integration in Africa are a far cry from the objectives assigned in their various treaties.

communities (RECs) as part of the wider continental efforts. It is this context that RECs have become more relevant institutions for academic enquiries.

Over the last few years, there seem to have been more interest among African states to pursue economic integration either by the creation of new initiatives or the renewal of schemes that previously existed. Several reasons have been adduced to explain this trend. While some argue that Africa's marginalisation as a result of globalisation is the motivation for this,¹⁷² others have attributed the renewed enthusiasm to a belief that regional integration is 'good for development and poverty reduction'.¹⁷³ The renewed enthusiasm has also heightened academic interest in the field of regional integration in order to find explanations as to why states are willing to voluntarily surrender part of their sovereignty to integrate and the 'outcomes and consequences' of such state action both for the converging states individually and for the region as whole.¹⁷⁴ In the African context, understanding how RECs fit into the wider continental political and economic initiatives as well as the implications this holds for 'raising the overall living standard' of citizens, especially from a human rights perspective becomes imperative.

2.5.1 Nature and motivation for subregional integration

To put the investigation in context, it is essential to go beyond a general understanding of integration into a specific understanding and appreciation of 'regional integration' or 'regional economic integration'.¹⁷⁵ As with most other value-laden concepts, it is difficult to find a generally accepted definition of regional integration so that it would be necessary to consider a variety of definitions and explanations of the term. Regional integration has been described as 'the situation where two or more countries come together to discuss common provisions to create a Regional Trade Agreement in the WTO sense' in order to 'regulate or encourage cross-border trade, investment and migration'.¹⁷⁶ In this context, emphasis is on the movement and trade of goods and services, including the migration of labour, across national borders.

172 Murithi (2005) 7.

173 DW te Velde (ed) *Regional integration and poverty* (2006) 1.

174 EB Haas, 'The study of regional integration' in Lindberg and Schiengold (eds) (1971) 4 – 6.

175 Some commentators prefer the use of 'regionalism' in reference to regional (economic) integration. Such usage is included in the terms used in this work.

176 te Velde (2006) 3.

Regional integration has also been explained as ‘a voluntary pooling of resources for a common purpose by two or more sets of partners belonging to different states’ with the aim of reinforcing ‘structural interdependencies of a technical and economic sort, with positive effects on economic welfare’.¹⁷⁷ Integration is used here in a sense that extends beyond mere cooperation by states. Accordingly, the notion of integration is viewed as being ‘more closely related to that of community and community-building’ in a perspective that considers the ‘collective nature of the process of building a collective space in a conscious, negotiated and irreversible manner by partners’.¹⁷⁸ The argument is pushed further to draw a distinction between regional integration in the sense above and economic integration merely for its sake, where economic integration signifies the convergence of ‘economic activities, sectors or subsectors in the pursuit of economic advantage’.¹⁷⁹ The distinction is that regional integration, including regional economic integration envisages activities within a specific ‘geographical dimension’ whereas ‘spatial proximity’ is not imperative in a general economic integration project.

In essence, regional economic integration would relate to ‘the idea, ideology, policies and goals that seek to transform a geographical area into a clearly identified social space’ and the ‘construction of an identity’, a perception of community bonding that allows for the joint implementation of pre-determined agenda, mostly of an economic nature, using collectively established institutions.¹⁸⁰ Thus, proximity of states is a vital aspect of regional integration. Arguably, proximity in this sense can constitute positive pressure for human rights protection. However, it can conversely result in creating negative influence against human rights protection within a region. This could happen in the event that a regional hegemonic state consistently fails to take part in regional effort to promote and protect human rights and thereby discourage other states in the region from contributing to such efforts.

177 N Bourenane, ‘Theoretical and strategic approaches’ in R Lavergne (ed) (1997) *Regional integration and cooperation in West Africa: A multidimensional perspective* 50.

178 Bourenane (1997)51.

179 As above.

180 Bach (1999) 22.

Considering the failures experienced in the initial attempts at regional integration and the fact that current regional integration initiatives have not exactly been successful, the question would arise as to why there is a renewed vigour and emphasis on RECs both in themselves and as building blocks for continental integration. From the economic perspective, less accommodating commentators have even argued that the realities of African economies should make regional integration in Africa irrelevant and harmful.¹⁸¹ Yet, regionalism is not without its benefits. Hence, it has been argued that one of the attractions of regional integration is ‘in its potential as an alternative to hegemonic stability, within a globalised context, in which the region becomes the nexus of activity both at the state and the super-state level’.¹⁸² In this context, otherwise small and weak states voluntarily cede a part of sovereignty for the sake of better opportunities in the form of ‘prospects for larger markets and greater solidarity in international negotiating forums’.¹⁸³ But this is not necessarily restricted to the economic sphere as the states may elect to expand to seek ‘a significant autonomy of political and economic action within the structures created by economic globalism’.¹⁸⁴ In other words, ‘regional constructs’ become the channel for collective expression and the basis for organising policy ‘across a range of issues’ within the region. As this arrangement does not necessarily threaten the existence of the Westphalian state structure and does not deny the relevance of the states but projects the individual states as the force behind the regional construct, allowing for a subtle claim of ownership and expression of influence, regionalism becomes a convenient tool for the mobilisation of support of collective projects.

It can further be argued that regionalisation presupposes the existence of ‘the cultural foundations of common loyalties, the objective of similarity of national problems and the potential awareness of common interests’ that are essential for sustaining international institutions.¹⁸⁵ With the presence of such unifying factors and the experience of similar challenges, proximity is positively employed to develop ‘collective wisdom’ to find solutions to common problems. Similarly, individual state

181 Hazelwood (1967) 6.

182 GH Joffé ‘Regionalism: A new paradigm?’ in Mario Telò (ed) (2001) *European Union and new regionalism* xiv.

183 Moore (2004) 5.

184 Joffé (2001) xiv.

185 IL Claude (1971) *Swords into plowshares, The problems and progress of international organisation* 102 – 103.

commitment to the general good is elevated and attracts greater loyalty to the general cause, increasing the moral and legal authority of common standards. In this regard, ‘bonds of mutuality’ would also apply to enhance the enforcement of sanction in the event of persistently errant conduct.¹⁸⁶ However, regionalism could also be applied negatively to create resistance to positive change.

As already noted, regional integration initiatives have been in existence in various parts of Africa since before flag independence was attained by most African states, but these initiatives had all almost fizzled out in the years following independence, especially in the heat of the Cold-War era. After the Cold-War, with Africa losing its attraction for the global North, it became convenient to revert to pre-colonial and early post-colonial integration programmes in pursuit of collective economic regeneration and development without threatening the ‘colonial borders’ that African leaders have struggled so much to protect in vehemently opposing the pan-Africanist idea of a wider continental unification project. In fact it has been suggested that ‘subregionalism has been a convenient way of deferring the question of continental political unity, an issue permanently posed by Pan-Africanism since the late 1950s’.¹⁸⁷ However, arguments for the use of regional and subregional groupings as steps towards continental integration began to appear as far back as 1958 at the AAPC meetings.¹⁸⁸ This trend continued up to the pre-OAU conferences and notably became a basis for part of the argument of the so-called Monrovia group in their campaign against a comprehensive political union. The group reportedly argued in favour of economic unity at the regional level as concrete step towards achievement of the goals of pan-Africanism.¹⁸⁹ It was at these early conferences therefore, that the seed of regional communities as building blocks for continental integration was sown.

Although the constitutive instruments and other documents of the RECs portray these institutions as essentially economic integration schemes, it has to be realised that economic integration occurs within the existing socio-political contexts of the converging states so that political concerns cannot be divorced from the interest zone

186 As above.

187 Bischoff (2004) 122.

188 Murithi (2005) 24.

189 DW Nabudere, ‘African Unity in historical perspectives’ in E Maloka (ed) (2001) 23; Ndi-Zambo (2004) 29.

of these organisations.¹⁹⁰ Not surprisingly, political, social, security and other non-economic issues have gradually but increasingly become mixed in the activities of regional organisations. Hence, RECs have also begun to acquire a role as building blocks in the search for viable political integration in Africa. At its 2001 Summit in Lusaka, Zambia, the OAU reaffirmed the role of RECs as building blocks for the AEC but also introduced the concept of RECs as building blocks for the AU itself and expressed the need for a closer involvement of the RECs ‘in the formulation and implementation of all the programmes of the Union’.¹⁹¹ This arguably creates room for a greater level of coordination between continental and subregional levels of integration. The additional recognition of RECs as building blocks for non-economic integration has been confirmed in the role allocated to these regional organisations in the AU initiatives that were introduced subsequent to the 2001 Lusaka Summit.

Under the OAU regime, the LPA presented the first concrete opportunity for recognising the potential role of regional communities as building blocks. It was proposed that interventions of the LPA would be applied to form or strengthen subregional bodies and progressively lead to the establishment of an African Common Market and ultimately an African Economic Community.¹⁹² This expectation was transferred to the Abuja Treaty in 1991 with an understanding that realisation of the envisaged African Economic Community depended on the ‘coordination, harmonisation and progressive integration of the activities of the regional economic communities’.¹⁹³ Accordingly, strengthening existing RECs and establishing new ones where they do not exist was set as the very first target on the six-stage implementation framework.¹⁹⁴ Hence, the regional organisations are firmly entrenched as the building blocks for the continental economic integration initiative of the OAU.¹⁹⁵ Under the AU regime, the Protocol to the Treaty Establishing the African

190 A Bundu, ‘ECOWAS and the future of regional integration in West Africa’ in R Lavergne (ed) (1997) 37. See also C Moore (2004) *Regional Integration and regional governance under the new African initiatives: a critical appraisal* 4.

191 ‘The role of the regional economic communities as the building blocks of the African Union’, (2003) Document of the South African Department of Foreign Affairs (South African DFA Document), available at <http://www.dfa.gov.za/doc/2003/au0815.htm> (accessed 26 June 2008).

192 Maloka (2001) 2.

193 Art 88(1) of the Abuja Treaty.

194 Arts 3(2)(a) and 6(1) of the Abuja Treaty.

195 Bischoff (2004) 141.

Economic Community relating to the Pan-African Parliament (PAP Protocol),¹⁹⁶ the Protocol relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol),¹⁹⁷ and certain aspects of NEPAD demonstrate the current engagement of RECs as building blocks for the AU.

By article 16 of the PSC Protocol, regional security mechanisms are recognised as part of the ‘overall security architecture of the Union’ and the PSC is required to coordinate and harmonise the activities of the regional mechanisms towards fulfilling continental security objectives. Similarly, article 18 of the PAP Protocol envisages ‘close cooperation’ between the Pan-African Parliament and parliaments of the RECs just as it encourages cooperation with national parliaments. The NEPAD implementation structure also acknowledges the role of RECs in the AU framework and encourages the use of regional institutions for the purpose of coordinating and facilitating the development and implementation of NEPAD programmes.¹⁹⁸ Against the background above, it would be safe to conclude that RECs are now almost firmly entrenched as building blocks for both economic and political integration in Africa. Although, there are several subregional bodies set up by states to pursue different forms of integration, only few of these are formally recognised by the AU.¹⁹⁹ These would now be introduced.

2.5.2 The main Regional Economic Communities in Africa

Currently, there are at least 14 main identifiable regional integration initiatives in Africa. These include the Arab Maghreb Union (AMU) or *Union du Maghreb Arabe* (UMA), the Common Market of Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority for Development (IGAD) and the Southern African Development Community (SADC). These six are viewed as the major RECs representing the recognised regions of the continent and accordingly, the six are acknowledged and expressly mentioned as the ‘parties’ (along with the AEC) to the OAU/AU Protocol on Relations Between the

¹⁹⁶ Adopted 2 March 2001 and entered into force in March 2004, available at www.africa-union.org.

¹⁹⁷ Adopted 10 July 2002 and entered into force 26 December 2003, available at www.africa-union.org.

¹⁹⁸ South African DFA Document (2003) 4.

¹⁹⁹ AU Doc Assembly/AUU/Dec.112(VII) (July 2006).

African Economic Community and the Regional Economic Community (OAU/AU-RECs Protocol).²⁰⁰ Others include the East African Community (EAC), the Central African Economic and Monetary Community (CEMAC), the Community of Sahel Sahara States (CEN-SAD), the Great Lakes River Basin (CEPGL), the Indian Ocean Commission (IOC), the Manu River Union (MRU) and the Southern African Custom Union (SACU). These latter organisations are also sometimes referred to as subregional economic communities (SEC). Eight of these organisations were given official recognition by the AU in 2006²⁰¹ and these will be briefly introduced.

2.5.2.1 The Arab Maghreb Union

The AMU was established in 1989 with the signing of a Treaty by Algeria, Libya, Mauritania, Morocco and Tunisia.²⁰² The primary aim of the AMU was to create a common platform for the purpose of engaging in viable trade negotiations with a unified Europe trading as a single market under the European Union (EU).²⁰³ Other objectives of the AMU include ‘to strengthen ties among member states’ and to ‘introduce free circulation of goods, services and factors’ within the territories of the member states. Building on principles of common defence and non-interference in the domestic affairs of members, the AMU envisages general economic cooperation eventually leading to a Union with other Arab and African states.²⁰⁴ Although the AMU is recognised by the AU as one of the main RECs in Africa, and it is included in the OAU/AU-RECs Protocol, the AMU has not signed the Protocol partly because of the conflict arising from the membership of Morocco, which ceased to be a member of the AU in 1982. Since the mid 1990s, AMU has a lull in its activities.

2.5.2.2 The Common Market for Eastern and Southern Africa

Combining states in the Eastern and Southern African region, the Common Market for Eastern and Southern Africa (COMESA) is about the largest REC in the continent. Its members include Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda,

200 The Protocol was signed by the AEC, COMESA, SADC, IGAD and ECOWAS on 25 February 1998 and entered into force on the same day.

201 See AU Doc Assembly/AU/Dec.112 (VII) July 2006.

202 Background materials on the AMU is available on <http://www.maghrebarabe.org> (accessed 25 June 2008). Also see Viljoen (2007) 488.

203 http://www.iss.co.za/tmpl_html (accessed 25 June 2008).

204 As above, see also Viljoen (2007) 488.

Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. COMESA is the result of a 1994 transformation of the former Preferential Trade Area for Eastern and Southern Africa (PTA) which was established within the OAU framework in pursuit of the LPA to improve economic cooperation between member states.²⁰⁵ Under its current form, COMESA aims at the creation of a full free trade area, a customs union, facilitating free movement of capital and investment, a common monetary union in the long run and the free movement of citizens of COMESA member states. One of the main objectives of COMESA is also to contribute to the establishment of the AEC.²⁰⁶ COMESA has signed the OAU/AU-RECs Protocol and maintains formal and informal relations with other RECs, especially those covering the Eastern and Southern African regions.

2.5.2.3 The Economic Community of Central African States

Following an agreement taken at a Summit of leaders of the Customs and Economic Union of Central Africa (*Union Douanière et Économique de l'Afrique Centrale* (UDEAC) in December 1981 to form an Economic Community for Central African states, arrangements began for the creation of the Economic Community of Central African States (ECCAS). In October 1983, the Treaty creating ECCAS was adopted but it was not until 1985 that the organisation began to function. The current members of ECCAS include Angola, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Equatorial Guinea, Rwanda, Gabon and Sao Tome e Principe.²⁰⁷ The organisation was established to promote regional economic co-operation in Central Africa. Some of the main objectives of ECCAS are to 'achieve collective autonomy, raise the standard of living of its populations and maintain economic stability through harmonious cooperation'.²⁰⁸ Although ECCAS was recognised by the OAU along with the other main RECs and was included as a party to the OAU/AU-RECs Protocol in February 1998, it only signed the Protocol in October 1999, effectively positioning it as a building block of the AEC.

205 'COMESA in Brief', April 2007, available at <http://www.comes.int> (accessed 25 June 2008).

206 As above.

207 <http://www.ecac-eccas.org/index/php> (accessed 27 June 2008).

208 As above.

2.5.2.4 The Economic Community of West African States

Originally established in 1975 by Treaty signed in Lagos, the Economic Community of West African States (ECOWAS) was created to pursue wider regional economic integration in West Africa where several and varying forms of integration schemes existed. Following ‘multifaceted difficulties’ that trailed the operations of the 1975 ECOWAS, the Treaty was reviewed and revised in 1993.²⁰⁹ ECOWAS currently exists by virtue of the revised 1993 ECOWAS Treaty to promote cooperation and integration in West Africa with the ultimate goal of an economic union to raise the standard of living of the peoples of West Africa.²¹⁰ With the withdrawal of Mauritania in 2002, the current member states of ECOWAS are Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. ECOWAS is recognised by the OAU/AU as a REC and is a foundation party to the OAU/AU-RECs Protocol.

2.5.2.5 The Intergovernmental Authority for Development

The Intergovernmental Authority for Development (IGAD) previously existed as the Intergovernmental Authority on Drought and Development (IGADD) which was established by African States in the Horn of Africa for the purpose of jointly addressing the scourge of droughts and other natural disasters in that region. With the signing, in Nairobi, Kenya on 21 March 1996, of a ‘Letter of Instrument to Amend the IGADD Charter/Agreement’, the member states of IGADD decided to transform the organisation by expanding the areas of cooperation. The revitalised IGAD was launched on 25 November 1996 to promote economic cooperation and integration, provide food security and environmental protection, and to promote peace and security.²¹¹ One of the objectives of IGAD is to promote and realise the objectives of COMESA and of the AEC.²¹² IGAD is a recognised REC and signed up to the OAU/AU-RECs Protocol in February 1998.

209 SB Ajulo, ‘The Revised ECOWAS Treaty (1993): A Synopsis’ (1995) 21 *Nigerian Journal of International Affairs* 120, 121.

210 Art 3 of the revised 1993 ECOWAS Treaty.

211 <http://www.igad.org/index/php> (accessed 27 June 2008).

212 As above.

2.5.2.6 The Southern African Development Community

The Southern African Development Coordination Conference (SADCC) which was created by states in the Southern African region as ‘a response’ to the foreign policy thrust of the old apartheid government in South Africa is the precursor to the Southern African Development Community. With the end of apartheid in sight, leaders of Southern African States made a declaration at Windhoek, Namibia in August 1992 committing themselves to the establishment of South African Community to engage in a different type of relations with the new South Africa.²¹³ In 1993, a new Treaty established the Southern African Development Community (SADC) as a development community. The 1993 Treaty was amended in 2004, resulting in significant substantial and institutional changes.²¹⁴ SADC has an ultimate objective of establishing an economic community.²¹⁵ Its members include Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. SADC also signed the OAU/AU-RECs Protocol in February 1998 and is recognised as one of the building blocks of the AEC.

2.5.2.7 The Community of Sahel Sahara States

Established on 4 February 1998, the Community of Sahel Sahara States (CEN-SAD) cuts across the usual geographical delineation of the African continent into regions as its membership comprises of states in Central, North and West Africa.²¹⁶ CEN-SAD became formally recognised as a regional economic community by the OAU in July 2000 and currently lays claim to an observer status before the United Nations General Assembly.²¹⁷ Current members of CEN-SAD include Benin, Burkina Faso, Central African Republic, Chad, Cote d’Ivoire, Djibouti, Egypt, Eritrea, The Gambia, Ghana, Guinea Bissau, Liberia, Libya, Mali, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo and Tunisia. CEN-SAD is not a party to the OAU/AU-RECs

213 M Ndulo, ‘African Integration Schemes: A Case Study of the Southern African Development Community (SADC)’ (1999) 7 *African Yearbook of International Law* 3.

214 Viljoen (2007) 492.

215 Ndulo (1999) 3.

216 Viljoen (2007) 489.

217 <http://www.cen-sad.org/index/php> (accessed 27 June 2008).

Protocol of February 1998 but its status as a regional economic community recognised by the OAU/AU was reaffirmed in the 2006 Declaration of the OAU.²¹⁸ CEN-SAD describes itself as ‘a global Economic Union based on the implementation of a community development plan that complements the local development plans of member States’.²¹⁹ The organisation aims at removing obstacles to regional integration among its members and areas of cooperation include economic cooperation and social development, peace and security, agriculture and environment as well as gender issues. CEN-SAD further aims to achieve free movement of people, goods and services and ensure the right of establishment for citizens of its member states.

2.5.2.8 The East African Community

The organisation presently established as the East African Community (EAC) is the replacement of the old EAC which was originally created in 1967 out of the former East African Common Services Organisation (EASCO).²²⁰ Following ideological differences and political instability in certain member states, the old EAC was brought to a premature end in 1977. With the renewed interest in regional integration that arose in the continent, the leaders of the former member states of the old EAC prompted the revival of the EAC with their initial meeting sometime in 1991.²²¹ After between six to eight years of negotiations, the Treaty for the establishment of the East African Community was signed in Arusha, Tanzania on 30 November 1999 and entered into force in 2000.²²² The EAC aims at ‘widening and deepening cooperation among member states’ with the intention of achieving ‘economic, social and political integration’ in the East African region.²²³ The ultimate aim of the EAC is to create a common market by 2010.²²⁴ Having been established after the OAU/AU-RECs Protocol, the EAC is not a party to the Protocol. However, the EAC is recognised by

218 Assembly/AU/Dec.112 (VII).

219 <http://www.cen-sad.org> (accessed 27 June 2008).

220 R Ajulu, ‘The New EAC: Linking Subregional and Continental Integration Initiatives’ in R Ajulu (ed) (2005) *The making of a region: The revival of the East African Community* 17.

221 Ajulu (2005) 17.

222 WTK Kaahwa, ‘The Treaty for the Establishment of the New East African Community: An overview’ (1999) 7 *African Yearbook of International Law* 61; Viljoen (2007) 490.

223 Kaahwa (1999) 66.

224 Viljoen (2007) 491.

the AU as regional economic community and a building block for the AEC.²²⁵ Members of the EAC currently include Burundi, Rwanda, Kenya, Tanzania and Uganda.

As noted already, the RECs briefly introduced above are not the only regional integration schemes that exist in Africa. However, they are the organisations recognised by the AU. While these RECs are various stages of their development, the EAC, ECOWAS and SADC have made some advances in the area of human rights realisation. However, ECOWAS stands out as the most advanced in this regard. Accordingly, ECOWAS is the focus of this study but adequate reference would be made to the structure, procedures and human rights processes of at least two of the other AU-recognised-RECs.

2.6 Conceptualising the link between political and economic integration in Africa

Generally, states enter into integration arrangements with a view to pooling sovereignty and resources in order to enhance ‘collective action to promote mutual interests’ in predetermined fields of human endeavour.²²⁶ In the case of Africa, historical experiences have indicated a deliberate effort on the part of African leaders to pursue integration in fields of political and economic integration separately. The pursuit of integration in the distinct spheres of political and economical cooperation in Africa would presuppose an intention to maintain a difference in goal-setting and achievement under separate arrangements. Prima facie, it was possible to deduce that political integration such as was pursued at the continental level targeted a sort of ‘political federation’ aimed at a central government and a ‘United State of Africa’ whereas the main goal of economic integration initiated at the regional levels was ‘limited to the promotion of subregional economic integration’.²²⁷

At a very simplistic level, the distinction between political and economic integration relates to the nature of issues covered under each of these schemes. Whereas economic integration involves generally ‘non-controversial’ and largely technical issues requiring little more than the partial surrender of a state’s power to make law

225 Assembly/AU/Dec.112 (VII).

226 Caporaso (1972) 31.

227 Ndi-Zambo (2004) 29.

and policy in the field of economics in exchange for a right to participate in collective law and policy making for the interest of a wider area, political integration often involved the partial surrender of sovereignty in areas touching on ‘conflict-laden issues where authoritative decisions are made’.²²⁸ Controversial and non-controversial are used here to signify the presence or absence of consensus among the converging parties or their representatives. Naturally, African leaders have demonstrated a preference for embracing initiatives that left controversial issues to domestic control in accordance with the spirit of domestic jurisdiction. However, there seems to be an increasing convergence of goals and efforts in these otherwise distinct fields. The gradual introduction of human rights in the agenda of regional integration communities in Africa is one of the results or examples of the blur in organisational objectives in African integration initiatives. It is thus essential to seek an understanding of the reasons for this trend.

The easiest explanation for the convergence of the goals, objectives and processes of political and economic integration can be found in the argument that there are clear links between the two areas and it is nearly impossible to completely divorce the one from the other. Thus it has been observed that despite the realities of ‘organisational dynamics underlying modern industrial life’ which have ‘spawned a pluralistic social structure in which it is possible to speak of the economy and the polity as distinct subsystems’ it is still possible to find linkages between the subsystems. This can occur without necessarily invalidating ‘the argument that over certain fairly crucial ranges of behaviour the economy and the polity are highly differentiated from one another’.²²⁹ In relation to the developmental goals of African RECs, one cannot ignore the warning that operationalising the concept of development through exclusively economic and socio-economic lenses could result in the loss of certain otherwise important aspects of development that could be found in the political field.²³⁰

Against this background, there is a suggestion to engage in the task of identifying the ‘relative impacts of the economic and political sectors of society on the integrative

228 Caporaso (1972) 31.

229 Caporaso (1972) 24.

230 te Velde (2006) 3.

process' rather than seek to maintain distinctive pursuit of integration.²³¹ Consequently, some economists have argued that integration initiatives in developed societies do not try to pursue distinct integration in different fields, but engage in a sort of linear integration that follows 'a clockwise sequence, proceeding from the adaptive sectors (economic) to the goal-attainment (political) to the integrative and pattern-maintaining sectors'.²³² The expectation in this venture is that commencing integration in the area recognised as 'non-political' would build trust and experience. From such trust and experience would grow 'a wider net of institutional agreements whose activity would usurp the political' and ultimately lead to 'a community in which interest and activity are congruent and in which politics is replaced by problem-solving'.²³³ Difficulty in maintaining the distinction between economic and political spheres would arise from the fact that economic integration would only succeed in the presence of political stability in the integrating states. Africa's experience provides ample evidence of this fact.

Africa's integration history shows that the integration initiatives that existed between the dying days of colonialism and the years immediately preceding independence took off with either political or economic objectives and largely stuck to such objectives even in the face of obvious challenges resulting from the failure to address issues on the other sector. However, renewed interest in integration in the form of establishment of new RECs or the strengthening of existing RECs appears to have moved away from the original practice of strict compartmentalisation. The so called second-wave of regionalism is described as one which distinguishes itself in the sense of covering a wide range of purpose that cuts across sectoral divides.²³⁴ The perception of regional integration as an essential tool for engaging globalism is said to have blurred the 'clear dividing line between economic and political regionalism'. Hence 'Regional organisations, which were traditionally seen as rather narrowly defined vehicles for economic integration, are now tasked to contribute to the maintenance of economic, military, political and social security'.²³⁵ This, it could be argued, is a reaction to the debate begun in Europe on the question of the relative importance of economic as

231 Caporaso (1972) 24.

232 Etzioni (1964) cited by Caporaso (1972) 24.

233 Caporaso (1972) 27.

234 Bischoff (2004) 123.

235 As above.

against political factors in the process of integration. Accordingly, in the new wave of regionalism, African RECs are experiencing ‘deeper levels of integration’ in the economic field, but this has not excluded the RECs from contributing to ‘the welfare of their members ... as insurance against future global political or economic dislocations’. Thus, there has been a ‘volte-face in economic orientation of regional groupings’ resulting in the expansion of their scope of competencies so that regional integration is no longer ‘focused solely on attaining a single goal’.²³⁶

Considering the often controversial nature of political issues and the fact that political integration challenges the traditional conception of political systems in which the domestic state with its power of official coercion is recognised as the milieu for decision-making, the new trend in regionalism creates an almost new political structure that envisages ‘multiple levels of authority’. Since states are the only subjects of international law with unlimited sovereign powers of decision-making, transfer of such decision-making powers to an international organisation at a level of authority other than the traditional state and the level of such collective activity are generally based on conscious, previous decisions made by the states donating the power.²³⁷ The challenge for theorists is to explain situations where the nature and level of authority collectively exercised exceed the boundaries of the decision previously made. This presents a dilemma for subregional organisations in the field of human rights. In the present context, where the previous decision relates to economic integration, there needs to be an explanation on the entry into the political sphere, including such so-called controversial issues as human rights.

Economic theorists of the functionalist and neo-functionalist schools have posited the concept of spillover as explanation for situations where integration initiatives exercise powers not originally contemplated at formation of the initiative. Thus, the concept of spillover is put forward to describe the nature of the linkage between economic and political aspects of integration in the sense that it ‘offers a theoretical interpretation of the transition rules through which integration moves from the economic to the political’. The argument being that it prevents ‘initial integrative patterns’ from being

236 Kufour (2006) X, XIV.

237 Lindberg & Scheingold (1971) 49.

‘encapsulated or confined to the technical sectors’.²³⁸ The concept of spillover can be traced to thinkers like Haas who defines it as:²³⁹

the accretion of new powers and tasks to a central institutional structure, based on changing demands and expectations on the part of such political actors as interest groups, political parties and bureaucracies. It refers to the specific process which originates in one functional context, initially separate from other political concerns, and then expands into related activities as it becomes clear to the chief political actors that the achievement of the initial aims cannot take place without such expansion.

Schmitter, on his part, describes the concept of spillover as follows:

Spillover refers ...to the process whereby members of an integration scheme agreed on some collective goals for a variety of motives but unequally satisfied with their attainment of these goals – attempt to resolve their dissatisfaction either by resorting to collaboration in another, related sector expanding the scope of the mutual commitment) or by intensifying their commitments to the original sector (increasing the level of mutual commitment), or both.²⁴⁰

Both theorists agree that there is usually an initial decision on the part of the converging states to integrate on specific issues but on the basis of the concept of spillover, a gradual shift to other areas could occur. Spillover could be sectoral or boundary. Sectoral spillover is said to occur when there is an ‘expansion of integrative habits from one sector to another’. Boundary spillover, on the other hand, occurs when there is a ‘spread of integrative habits from one analytically distinct part of a sector to another analytical part of the same sector’.²⁴¹ Hence sectoral spillover may for example be from industry to agriculture while boundary spillover could be from the economic to the political sphere. Essentially, the concept of spillover asserts that there are linkages between economics and politics which ‘make it difficult to isolate integrative attempts to sectors in which it initially occurs’.²⁴²

Theorists posit further that spillover may result as a consequence of the concept of ‘lock-in effect’. The concept of ‘lock-in effect’ can be explained as situations where integration reaches ‘a point beyond which it becomes very difficult to dislodge a state

238 Caporaso (1972) 31.

239 Haas (1968) 523.

240 Schmitter (1969) cited by Caporaso (1967) 33.

241 Caporaso (1972) 32.

242 As above.

from the integrative process'.²⁴³ Haas thus notes that integrating governments would find themselves in circumstances where their 'irreversible involvement' in integration can only attract increased delegation of power to the new supranational milieu as the only means of solving common problems.²⁴⁴ Similarly, Nye describes spillover as the consequence of a 'reduction of alternatives open to the decision-makers once the integrative process is in motion'.²⁴⁵ In this situation, as states raise the level and degree of integration, 'more tasks become interrelated through inherent links or package deals' and 'the cost of disintegrative actions becomes greater because there is the danger of pulling the whole house down'.²⁴⁶ In other words, states resort to when those states have committed themselves to the integration initiative to such an extent that greater loss would result from discontinuing the process, thus creating the need to either expand the scope and degree of the integrative field, or increase the decision-making competence donated to the central locus of decision-making or even engage in a combination of both strategies.

The literature records at least three possible reasons why spillover could occur in an integrative process.²⁴⁷ These are reward generalisation, imitation and frustration. In cases where the integration experience has been mostly successful, reward generalisation applies to spark off a desire and willingness to extend the integration experience to other related and unrelated sectors. Spillover is said to be based on imitation when the motivation for engagement is found in the success of other actors. Hence, imitation is used to explain decisions based on the recognition of the relevance of integration experiences successfully carried out by another integration scheme. Spillover is said to result from frustration where the integration efforts by a group of actors has failed and ignites strong feelings of a need to donate additional decision-making powers in the same or a related sector in order to facilitate or fast-track the integration process. Schmitter²⁴⁸ describes frustration-generated spillover as:

The process whereby members of an integration scheme – agreed on some collective goals for a variety of motives but unequally satisfied with their attainment of these goals – attempt to resolve their dissatisfaction either by resorting to collaboration in another, related sector

243 Caporaso (1967) 28.

244 Haas (1958) 523 - 524.

245 Nye (1965) 84 - 85.

246 As above.

247 Caporaso (1972) 32 - 33.

248 Schmitter (1969) 19.

(expanding the scope of mutual commitment) or by intensifying their commitments to the original sector (increasing the level of mutual commitment), or both

It could even be argued that spillover could be based on a combination of two or all of these factors. Whatever the case, it comes out clearly that there are linkages between the field of economics and politics that allow for an immediate or gradual transition of integrative objectives from the one field to the other.

Spillover in integration may be spontaneous or cultivated. Spillover is spontaneous when the actual pressures of daily activities compel an unconscious shift towards fields on integration not previously contemplated by the parties. Spillover is cultivated when there is a deliberate and conscious decision by policy makers and strategic actors in the converging states, to expand the scope of integration. In both cases, the consequence of spillover is the broadening of organisational agenda to include subjects that were not initially intended as part of the mandate of the organisation.²⁴⁹ In some cases, the link between the original mandate and the added subjects may not even be obvious. Collectively, these theoretical concepts provide strong tools for analysing the nature of spillover that African RECs have experienced, especially in relation to human rights.

Some commentators have thus argued that political institutions such as international organisations created for integration purposes do not always evolve along ‘lines rigidly set by their creators and definitely stated in constitutional documents’ rather, such institutions may evolve in reaction to ‘a dynamic process that combines the propulsive and directive impulses of trends running through the political context and of purposes injected by participants in their operations’.²⁵⁰ This arises from the fact that the uses to which international institutions can be put are generally limited by the restrictions in their founding instruments. In certain cases, such restrictions may even affect the ordinary functioning of the institution in the predetermined field, thereby forcing operators to seek to address basic issues that would enhance the viability of the institution. Accordingly, officials of international institutions could in reaction to the ‘cumulative influence’ of daily pressures, unconsciously stretch the formally

249 Bach (1999) 240.

250 Claude (1971) 6.

stated purposes of the institution, taking the organisation beyond the deliberate intentions of the converging states.²⁵¹ On the basis of the ‘lock-in effect’, the states would more often than not give in to such pressure and validate the widening of powers rather than abandon the integration initiative. In this sense, state actors and their representatives seeing the linkages between the economic and political sectors, could redefine collective interest, identify new opportunities for cooperation or merely respond to internal and external pressures in certain areas. These factors could scientifically be termed stimuli to which actors respond.

For some, such stimuli may be the ‘predicted result of what goes on in the integration process and can be evaluated conceptually without introducing new variables at a later point in an integrative/disintegrative sequence’.²⁵² It could also actually defer from the original objectives of the process, resulting from a combination of internal or external political or social forces which impact on the initiative after it has commenced and either deflects or strengthens the process even though it was not originally contemplated. These factors could arise from within the integrating states and the region or could be from the international environment outside of the integrating region. Whatever the source of the stimuli, ‘the assumed linearity between initially programmed impulses and eventual outcome is disturbed’.²⁵³ The result of the disruption that occurs is that decision is made to expand the scope of the integrative process to meet new challenges. The reaction by the relevant stakeholders and the consequence of the added competence is assessed by a determination of the degree to which decisions based on it penetrate the domestic and collective arenas and are complied with by actors within the systems.²⁵⁴

A cursory observation of the European integration experience from the European Communities (EC) to the European Union (EU) seems to support the theories posited on the concept of spillover as explanation for inter-sectoral transition in integration. Beginning with collective decision-making in relatively uncontroversial fields such as coal production, Europe gradually transited into collective decision-making in highly controversial political issues. Hence, it has been argued that economic integration in

251 Claude (1971) 7.

252 Haas in Lindberg & Scheingold (1971) 35.

253 As above.

254 Lindberg in Lindberg & Scheingold (1971) 49.

Europe indicates ‘Collective decisions ... were made incrementally, based often on consequences not initially intended by the actors (governments and important interest groups). This tendency is summed up in the phrase “spillover in the scope of collective action’.²⁵⁵ Recognising the futility of economic integration in the face of political instability, Europe is noted to have extended the principles of democratic governance present in the municipal states into the integrative process, thereby resulting in a shift from the otherwise essentially economic nature of integration objectives.²⁵⁶ In this regard, the quality of the domestic political landscape and the political orientation of the state became preconditions for entry into the EU. It could be argued thus, that the willingness of states to commit to economic integration which has been identified as ‘most conducive to rapid regional integration and the maximization of a spillover’ became the vehicle for the introduction of issues such as human rights into states that would have been reluctant to submit to external scrutiny even where they have previously committed to global human rights arrangements.²⁵⁷

Along the lines of the European experience, RECs in Africa seem to have abandoned the strict adherence to the previously purely economic objectives of integration, resulting in ‘changing mandates and priorities’ for nearly all the major regional international institutions in the continent.²⁵⁸ The revived interest in regionalism and regional integration now involves ‘spectacular enlargement of institutional agendas and strategies’ as African RECs seem to have discarded the institutional attitude of confining ‘their field of intervention to financial and economic integration and cooperation objectives’.²⁵⁹ Matters that were previously considered to be purely domestic issues and too political for intervention have begun to surface in the agendas of RECs, so that issues like democratic governance and the defence of human rights have become ‘acceptable targets of regional policies’.²⁶⁰ This has happened in the face of clear lack of success in the original objectives of integration. Naturally, the argument can be put forward that the spillover in mandate experienced in the regional integration initiatives is not motivated by reward generalisation, thus, raising the question whether the new trend is as a result of imitation or frustration.

255 Haas in Lindberg & Sheingold (1971)13.

256 Caporaso (1967) 15.

257 Haas in Lindberg & Sheingold (1971) 12.

258 Bach (1999) 23.

259 As above.

260 Bach (1999) 23.

Resulting from a combination of internal factors including a recognition of the complex economic and political linkages that makes it difficult for RECs to operate effectively without engaging across sectoral divides,²⁶¹ and external factors in the form of the end of the Cold War and greater demand for governmental legitimacy, the transition in organisational mandates appears to have been the consequence of conscious decision-making. Hence, it could be termed cultivated spillover. However, to the extent that the decisions were made both in reaction to the failures of the various integrative processes and in attempt to copy the comparatively successful experiences of the European integration, spillover in the African RECs could be said to have been motivated by frustration and imitation. However, with respect to certain aspects of the emerging trend, for example in the area of peacekeeping and the so-called humanitarian intervention, at least one commentator has argued that ECOWAS could not easily be said to have been motivated by imitation (as there was no previous example) or ‘derived from some sudden burst or accumulated frustration’.²⁶² Considering that the earlier spate of interventions by ECOWAS was not based on decision taken in reaction to some sudden obstacle to economic integration, the argument could be supported. This position notwithstanding, in the narrow field of human rights, insofar as human rights was only introduced in the constitutional documents of RECs either as a result of the adoption of new treaties or the amendment of existing treaties, spillover could be explained as a consequence of cultivated reaction to stimuli. It may however be necessary to examine why the highly political issue of human rights became an attraction for states originally integrating for economic objectives.

2.7 Human rights in the institutions for integration in Africa

2.7.1 Continental integration and human rights

The reluctance of African heads of state and government to add human rights to institutional agenda for integration dates back to the establishment of the OAU. Although it was established as an organisation for political integration, the OAU was given a rather restrictive competence. One of the primary reasons behind the establishment of the OAU was to ‘furnish the mechanism for resolving African

261 Bach (1999) 240.

262 Bach (1999) 241.

problems, by Africans in an African forum, free from outside influence and pressure'.²⁶³ This would essentially turn out to only involve problems that affected Africa's relation with the world outside of the continent. However, the OAU also stood as a forum to bring political leaders of African states together to seek means of providing better lives for African peoples.²⁶⁴ This is where human rights ought to enter the discourse either as a 'good' in itself or as a tool for improving the lives of African peoples. However, integration under the OAU was expected to take place in an environment where African leaders jealously protected their then newly acquired sovereignty, which in turn meant that states insisted on being allowed to act as they pleased within national territories.²⁶⁵ Thus, even within the context of political integration, the realisation of human rights could not be taken for granted.

In pursuit of the preference for liberty to control the internal affairs of their various states, African leaders ensured that the OAU was established on the basis of recognition of their sovereignty. Hence, the guiding principles of the OAU at its inception included non-interference in the internal affairs of integrating states, respect for domestic sovereignty and the protection of boundaries created by the departed colonial powers.²⁶⁶ The effect of the policies of the OAU was that there were reports of African leaders oppressing their people with impunity.²⁶⁷ Other African leaders watched helplessly as violations of various forms occurred in neighbouring states.²⁶⁸ Thus, the OAU became seen as 'a club of Presidents engaged in a tacit policy of not inquiring into each other's practices'.²⁶⁹ The only exception to these principles was in the collective resistance put up by the OAU against colonialism and apartheid. Considering the relevance of human rights for successful integration, the non-interventionist posture of the OAU may have contributed to the relative failure of that organisation.

263 GW Mugwayna (2003) *Human rights in Africa* 171.

264 Ankumah (1996) 4.

265 Murithi (2005) 29.

266 CE Welch, 'The OAU and human rights: regional promotion of human rights' in Maloka (ed) (2001) 53.

267 Murithi (2005) 26.

268 As above.

269 Welch (2001) 54.

As some scholars have argued, some sort of symbiotic relationship exists between human rights and politics, enabling the citizenry to participate in and influence governmental decision-making.²⁷⁰ Respect for human rights is therefore seen as important for political stability and democratic governance.²⁷¹ In the African context especially, internal peace and stability stand as vital ingredients for integration and these can only be achieved in the face of respect for the rule of law and the protection of human rights.²⁷² The consequences of a lack of respect for human rights which include internal challenges to governmental legitimacy and the potential of conflict with neighbouring states do not provide the right environment for integration.²⁷³ The shortcomings of the OAU constitutive instruments in the field of human rights reflect the challenges that African integrative initiatives face in proceeding without the inclusion of human rights in their agendas.

Similar to what is currently the practice in the RECs, there was some reference to human rights in the Preamble and in article 2(1)(e) of the OAU Charter. However, that reference could be described as merely a record of adherence to the principles of the UN Charter and the Universal Declaration of Human Rights (UDHR) and an indication of the OAU's compatibility with the spirit of the UN rather than actual commitment to undertake binding obligations of human rights.²⁷⁴ Accordingly, despite the proclamation of adherence in line with the global Charter, Africa did not record the level of progress in human rights protection that was achieved by the UN. The OAU also did not show the type of commitment in the area of human rights as it did in the areas of decolonisation, self-determination and national liberation.²⁷⁵ Even where the OAU showed some interest in the protection of human rights in pursuit of preambular commitments, the structure of the organisation restricted it to a mostly advisory role, with an attendant impotency of action.²⁷⁶ However, by the end of 1969, the OAU took its first tentative step towards the protection of human rights with the adoption of a convention to regulate refugee issues in the continent.²⁷⁷ Thus, up till

270 J Takougang, 'The future of human rights in sub-Saharan Africa' in JM Mbatia (ed) *Preparing Africa for the twenty first century* (2002) 79.

271 Takougang (2002) 79.

272 Armah (1965) 47.

273 Takougang (2002)181.

274 Naldi (1989) 6.

275 Cervanka (1977) 8; Bischoff (2004) 127.

276 Sexana (2004) 180.

277 Naldi (1989) 108; Ankumah (1996) 4 - 5.

the 1970s, human rights remained a peripheral issue in the agenda of integration discourse in Africa. This represents grounds to contend that human rights realisation was almost an afterthought in the continental integration process.

Some have argued that part of the reason why human rights did not feature prominently in African integration discourse was the resistance exhibited by the UN to the decentralisation of human rights protection. Thus, the view was expressed that the ‘UN initially believed that regional approaches to human rights might detract from the perceived universality of human rights’.²⁷⁸ This perception was shattered with the successful evolution of regional human rights systems in Europe and the Americas with feelings emerging that the regional systems of human rights protection could be more effective than the global human rights system.²⁷⁹ Hence, for a variety of reasons including the perceived resistance of the UN and reliance of African states on the principle of domestic jurisdiction, human rights did not find a place in the constitutive instrument of the main integration initiative in Africa.

The OAU Charter was clearly not a human rights instrument and certainly did not ‘proclaim human rights for the African people’.²⁸⁰ Similarly, no institution or organ of the OAU was dedicated to the question of rights protection. All the specialist commissions of the OAU and the ad hoc bodies established by the continental body were targeted at other concerns, notably the ‘eradication of colonialism and the dismantling of apartheid’,²⁸¹ resulting in the conclusion that the OAU ‘historically considered human rights largely in the context of self-determination, through the ending of alien or settler rule’.²⁸² It was in this almost hostile environment, with no prior direct competence in its constitutive instrument that the question of human rights found its way into the agenda for integration in Africa. As the AU is now firmly entrenched as an organisational platform for human rights realisation, there now appears to be some temptation for denying subregional organisations a role in the field of human rights within the continent. Similar to the initial fears in relation to the UN human rights system, such a denial could be based on a perception that

278 Mugwana (2003) 22.

279 Mugwana (2003) 33.

280 EC Welch, ‘The African Commission on Human Rights and Peoples’ Rights: A five year report and assessment’, (1992) 14 *Human Rights Quarterly* 43.

281 Ankumah (1996) 136.

282 Welch (2001) 55.

subregional involvement in the field of human rights could threaten the primacy of the continental human rights system.

In the absence of an original institutional mandate, the evolution of what is currently known as the African human rights system was instigated by stimuli both from within the converging states and from outside the continent. The 1961 Lagos Conference on the Rule of Law which was organised by the International Commission of Jurists represents the first firm call on African Heads of State and Government to give serious thoughts to the adoption of a regional human rights instrument in Africa.²⁸³ This was closely followed by a 1967 statement and Resolution 24 (xxxiv) issued by the UN Commission on Human Rights in 1972 calling for the establishment of continent specific institutions for the protection of human rights in Africa.²⁸⁴ The cumulative effect of the pressure was the convening of a colloquium of African Jurists in Dakar, Senegal in 1978 for the preparing an African human rights instrument. By its Resolution 115 (xvi) of 1979, the OAU began the process of creating a human rights system with the appointment of a Committee of Experts to begin the drafting of a human rights instrument.²⁸⁵ This essentially represents the decision-making process by which the institutional or organisational authority of the OAU was expanded to include human rights. In June 1981, after decades of internal and external pressure, the African Charter was adopted by the OAU Assembly of Heads of State and Government.²⁸⁶

The adoption of the African Charter represents a major shift of policy and principle behind the OAU as an organisation. For an institution established on the basis of respect for state sovereignty of its members, non-interference in domestic affairs and a strong bias towards the principle of domestic jurisdiction, the adoption of the African Charter was a fundamental landmark in the exercise of sovereign discretion. In fact, the African Charter created the African Commission on Human and Peoples' Rights (African Commission) as the main supervisory body of the African Charter since no other organ or institution of the OAU could serve that purpose. For some, the establishment of the African Commission in itself 'challenges a basic principle of

283 Naldi (1989) 180.

284 As above.

285 Naldi (1989)110

286 Mugwayna (2003) 45.

positivist international law on which the OAU has long based its policies: the sovereign domestic control of member states'.²⁸⁷ Not all African states were known to have fully embraced the potential for interference in domestic affairs that was apparent in the adoption of the African Charter. Resistance from member states was, for example, evident in the rejection of provisions that could have allowed the Charter to enter into force provisionally and others that could have empowered the Chairman of the OAU Assembly to take 'measures' in certain exceptional situations to ensure the protection of human rights.²⁸⁸ Against these facts, it can be argued that the transition of the OAU towards inclusion of human rights in institutional mandate for political integration was a deliberate and conscious choice that resulted in the evolution of a human rights catalogue, the creation of a supervisory body, the rejection of proposals that the converging states saw as threatening and was a reaction to internal and external stimuli such as pressure from donor nations.

It is widely accepted that ideally, the domestic level is the best arena for the protection of rights as the states hold the primary responsibility in this regard.²⁸⁹ Where the realities of modern society frustrate the protection of human rights at the domestic level, the international human rights system has evolved as 'an indispensable "last resort" or "safety net" for individuals' in relation to internationally recognised human rights.²⁹⁰ The international system for human rights protection therefore operates to either supplement or supervise domestic protection of human rights. With the acceptance of the regional human rights system, the mobilisation of international action for human rights protection developed as a two-tier structure: a universal or global system and regional systems based on recognised continental arrangements.²⁹¹ Under the two-tier arrangement, the regional systems became somewhat effective as a result of proximity to the loci of violations. Hence, the argument has been made that the African regional human system ought to 'ensure a more effective enhancement of human rights on the continent when massive violations are about to take place or are taking place' because the system is closer to the potential victims.²⁹² Yet, with the political instability that has trailed collective activity at the continental level, the OAU

287 Welch (2001) 53.

288 Naldi (1989)111.

289 Mugwayna (2003) 9.

290 Mugwayna (2003) 6.

291 Mugwayna (2003) 6.

292 Mugwayna (2003) 53.

failed to lead to continental integration and unity.²⁹³ This resulted in calls for substitution of the OAU as the vehicle for African unity but also left open the space for a resort to subregional integration schemes.

Some of the difficulties that arose generally with integration under the OAU also affected the pursuit of the human rights protection under that regime. Thus, the transformation of the OAU into the African Union (AU) in 2001 was viewed as a ‘visionary step towards greater integration, good governance and the rule of law in African countries’.²⁹⁴ The Constitutive Act of the AU introduced a new perspective to political integration in Africa. Unlike the OAU Charter, the Constitutive Act of the AU contained ample reference to human rights, including the addition of ‘promotion and protection of human rights in accordance with the African Charter’ as one of the objectives of the AU.²⁹⁵ The principles for continental integration were also expanded to include respect for several aspects of human rights and the collective right of the AU to intervene in member states in certain situations that violated aspects of human rights.²⁹⁶ Thus, it can be argued that the existence of the African Charter as a continental human rights instrument has impacted positively on the drafting and subsequent adoption of the Constitutive Act of the AU. Notwithstanding the greater presence of human rights in the AU regime, there has been scepticism about the potentials of the AU in pursuing continental integration and comprehensive protection of human rights in Africa, thereby emphasising the need to look up to subregionalism as the vehicle for regionalism in the continent.²⁹⁷

2.7.2 Regional integration and human rights

As previously noted, integration at the subregions in Africa was mostly for economic purposes. Accordingly, the founding instruments of the initial regional integration initiatives had little or no reference to human rights protection. In effect, the trend of African heads of state engaging in violating human rights with impunity continued without interference at the regional or subregional level as it was at the continental level. Not surprisingly, the difficulties that this posed for continental integration were

293 Sexana (2004) 181.

294 Murithi (2005) 34.

295 Art 3(h) of the Constitutive Act of the AU.

296 Art 4(h) and 4(m) of the Constitutive of the AU and Art 4 of the Protocol on Amendments to the Constitutive Act of the AU.

297 Bischoff (2004) 130.

duplicated at this regional level. Political instability arising from resistance to illegitimate and high handed governments hampered the integration process just as much as it severely affected economic growth and development in the respective states.²⁹⁸ Increasingly, states were forced to pay greater attention to managing internal threats to political power, resorting to policies that promised short term relief from the pressures that resulted from the lack of respect for human rights. Consequently, it was realised that strict adherence to the economic objectives of integration without addressing the challenges that arose from the internal political environment of the integrating states and the collective political environment of the region, did not augur well for the successful pursuit of integration. Thus, it can be argued that the difficulties (and in some cases failures) of regional integration initiatives could be the frustration that provided the need for the use of the spillover theory to introduce human rights in the various subregional integration schemes. This comes out in the sense that as against the original constitutive instruments of the various RECs, recognition and respect for human rights now appears institutional principles in the new constitutive treaties of almost all the RECs currently existing in the continent.²⁹⁹

Another factor that may explain the inclusion of human rights in the institutional agenda of African RECs is the growing connection between the RECs and the institution for continental integration. As previously noted, one of the high points of the AEC Treaty was the recognition of RECs as the building blocks for continental economic integration. This was further extended to make the RECs building blocks for other aspects of continental integration and thus amplified the need to ensure stability of the RECs through the creation of conditions for political stability in the converging states.³⁰⁰ The link created by the recognition of the RECs as building blocks of the AU and the AEC may be stretched to mean that the RECs needed to align themselves with the principles upon which the continental organisations are based. Consequently, RECs that were founded or re-established after 1991 have included the principle of recognition and respect for human rights. From another perspective, the fact that members of the various RECs are also members of the OAU facilitated the introduction of principles that required respect for the OAU-based

298 Takougang (2002) 181-182.

299 See eg art 4(g) of the 1993 revised ECOWAS Treaty, art 6(d) of the 1999 EAC Treaty, art 6A of the IGAD Agreement and art 4(c) of the 1992 SADC Treaty.

300 Bischoff (2004) 141.

African Charter. Essentially, this gives room for the RECs to also be positioned as the ‘building blocks’ for implementation of the African Charter. It is difficult to hinge this motivation on any of the theoretical explanations linked to the theory of spillover.

It is also possible to put forward the argument that internal and external pressures for change separately and jointly provided explanation for the introduction of human rights in economic integration discourse. On the one hand, pressure from civil society within the integrating states and need to ‘grant’ ownership of the regional institutions may have convinced political leaders that respect for human rights was essential for the success of the various integration projects. While this is linked to the theoretical question of frustration, it can be explained as an acknowledgement of the ‘lock-in effect’ in African integration. Stakeholders realised that integration could not move on except otherwise politically volatile issues such as human rights were addressed adequately in the process of integration. Failure to defer to the internal pressure for greater recognition and respect for human rights could have resulted in the total undoing of the integration process, thus creating the need for subtle introduction of human rights into the agenda of economic integration. On the other hand, calls for reform from donor countries and organisation provided the external stimuli for the expansion of organisational objectives. Here again, a possible consequence of refusal to defer to these demands could have been the stoppage of much needed aid to the regional organisation.

A case in point is the insistence on the part of European countries (acting on the platform of the European Communities) that human rights be addressed in discussions on the relation between them and the African-Caribbean-Pacific (ACP) states. Acting on their own experiences, European states emphasised the need for human rights to be properly addressed in economic integration initiatives and expressed unwillingness to continue to support economic programmes pursued by regimes with poor human rights records.³⁰¹ Although ACP states were reluctant to include human rights in the otherwise largely economic agenda, realisation that absolute refusal would lead to a completely termination of relations led to an agreement to some concession in this

301 RI Meltzer, ‘International human rights and development: Evolving conceptions and their application to Relations between the EC and the African-Caribbean- Pacific States’ in CE Welch & RI Meltzer (eds) (1984) *Human rights and development in Africa* 216 - 217.

regard.³⁰² This can also be viewed as an example of the ‘lock-in effect’ that forced the expansion of competence in order to avoid a complete abandonment of the integration programme.

Further, the desire to replicate the successes of the EC and the EU in economic integration could also have led to the introduction of human rights in the agenda of the African organisations. Seeing that economic integration under the EC and the EU did not exclude human rights considerations but succeeded because of the regime that insisted on political stability hinged on respect for human rights and the rule of law, African RECs may have consciously or unconsciously attempted to copy the approaches of the European regime. Proceeding on the assumption that this analysis is correct, it can be argued that spillover has occurred as a result of ‘imitation’. This is especially so because the EU has also sought to increase the ‘human rights content’ of European integration in spite of the fact that member states were already committed to human rights protection under the regime of the Council of Europe.³⁰³ If African RECs have to succeed as their European counterpart has done, the need for recognition, respect, promotion and protection of human rights can not be ignored. Thus, imitation provides a motivation for the expansion of competence to cover human rights issues not otherwise contemplated in economic integration.

While it may not be possible to identify all the reasons for the current trends in African economic integration and put them in neat theoretical compartments, it cannot be denied that human rights have seeped into the agenda of most of the RECs in the continent. Arguably, the nature and economic characteristics of the African state do not seem to provide a conducive environment for economic integration.³⁰⁴ Hence, the inclusion of so-called political issues such as human rights protection may well provide the bases for the continued existence of these subregional institutions, especially since they can continue as the supporting pillars of continental structures. Thus, there is a growing acceptance of the fact that ‘the new wave of regionalism has transcribed into changing mandates and priorities’ for the subregional

302 As above.

303 Rick Lawson, ‘The EU and human rights: Towards a third Convention?’ (2002) 20 *Netherlands Quarterly of Human Rights* 159 -161.

304 Hazelwood (1967) 6.

organisations.³⁰⁵ This observation is especially true of ECOWAS, despite the obvious difficulties that have been experienced with regard to the realisation of the economic goals and objectives of the organisation. The consequence of deliberate decision-making by the relevant organs of the various RECs is that human rights is now included in the organisation mandates of subregional institutions.

Having demonstrated that human rights concerns are currently accommodated at both continental and subregional levels of integration in Africa, there is reason to justify fears of the potential for conflict and duplication of duties in the field. The following section sets out the main continental human rights institutions by which the human rights work of the RECs need to be assessed.

2.8 The African human rights system: what place for subregional mechanisms?

Following similar, albeit earlier, developments in other parts of the world, Africa has also succeeded in putting in place a functional regional system for human rights promotion and protection. While the universal system for human rights realisation that evolved under the UN remains intact and continues to apply to Africa as it applies elsewhere, regional and subregional involvement in the realm of human rights has continued to grow, even attracting positive predictions of becoming more effective than the universal system.³⁰⁶ Although there is recognition of the existence of an African human rights system, it is becoming increasingly difficult to delineate what institutions make up the system. Within the framework of the OAU/AU, there is already a feeling that there is a proliferation of instruments, institutions and mechanisms for human rights protection resulting in calls for consolidation and coordination of activities and institutions involved in human rights realisation at the continental level.³⁰⁷ The conferment of human rights mandate on RECs would therefore serve to complicate existing confusion on the nature of the African human rights system. Against the background that legal clarity is necessary for the enjoyment

305 Bach (1999) 23.

306 K Kindiki, 'The increasing role of African Intergovernmental Organisations in issues of regional peace, security and the protection of human rights: Legal aspects' (2003) 35 *Zambia Law Journal* 74 – 103, 75.

307 A Lloyd & R Murray, 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 165. Also Viljoen (2007) 179.

of human rights,³⁰⁸ it is essential to determine whether the emerging framework for human rights realisation at the subregional level falls within the African human rights system.

Simply put, a system refers to ‘a set of things working together as a mechanism or network’.³⁰⁹ In the context of a human rights system, it would include the norms, principles, structures and institutions that exist for the protection of human rights in a given regime. Accordingly, the African human rights system would refer to all the instruments and other standard-setting mechanisms as well as the institutions for interpretation and implementation of human rights standards in the continent. The opinion has been expressed that the African human rights system ‘operates at a number of levels simultaneously’.³¹⁰ While this was in reference to political, judicial and quasi-judicial levels of operation, others have put forward the argument that the African human rights system should be understood to ‘encapsulate supra-national, pan-continental systems’ and includes domestic legal systems, the RECs and the continental mechanisms.³¹¹ Considering that the focus here is on the regional system, the mechanisms of the UN human rights system which apply to African states to the extent that such states are parties to the relevant UN regimes, would not be treated here.

2.8.1 Norm creating instruments in the African human rights system

Like every other human rights system, the African human rights system comprises of binding and non-binding norm creating instruments. To the extent that the non-binding norm creating instruments have little more than moral force in relation to states, the present discourse would focus on the binding instrument of the system.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Refugee Convention)³¹² is recognised as the first human rights instrument adopted by

308 Lloyd and Murray (2004) 164.

309 Oxford Dictionary, Thesaurus and wordpower guide (2001) 922.

310 C Heyns & M Killander, ‘The African human rights system’ in FG Isa & K de Feyter (eds) (2006) *International protection of human rights: Achievements and challenges* 509, 539

311 CA Odinkalu, ‘The role of case and complaints procedure in the reform of the African human rights system’ (2001) 1 *AHRLJ* 227.

312 Adopted in 1969 and entered into force in 1974. This convention has been ratified by 45 of the 53 member states of the AU.

African states. The Convention was adopted at a time when continental focus was on decolonisation and the termination of white minority rule in parts of Africa rather than on the wider field of human rights. As contained in its title, the Refugee Convention is concerned with issues relating to the refugee situation in Africa.

The African Charter is the most important human rights instrument in the African human rights system. Adopted in 1981 under the auspices of the OAU, the African Charter which entered into force in 1986 has been ratified by all current members of the AU. The Charter has thus been described as the ‘central document of the African human rights system’.³¹³ Being a treaty between states, no African REC is a party to the African Charter and it is unlikely that any would ever be a party.³¹⁴ However, member states of nearly all the major RECs in Africa are parties to the Charter.³¹⁵ Consequently, some RECs refer to the ‘recognition, promotion and protection of human and peoples’ rights in accordance with the African Charter’ as one of the principles for the pursuit of organisation goals.³¹⁶

Other norm creating instruments of the African human rights system include the Cultural Charter, the African Charter on the Rights and Welfare of the Child (African Children Charter), the OAU Convention on the Prevention and Combating of Terrorism, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol), the African Union Convention on Preventing and Combating Corruption, the Protocol to the OAU Convention on the Prevention and Combating of Terrorism, the African Youth Charter and the African Charter on Democracy, Elections and Governance. Each of the instruments mentioned above deals with specific aspects of human rights in Africa. Although the instruments were adopted within the framework of the OAU/AU, none has achieved the ‘universal’ ratification that the African Charter has. Since as with the African Charter, the RECs cannot be parties to the treaties, only general acceptance by member states could have conferred the status of ‘common human rights standard’ that the African Charter has.

313 Heyns & Killander (2006) 512.

314 Lawson (2002) 162.

315 Morocco, a member of AMU is not a party to the African Charter, having withdrawn its membership of the OAU in 1984.

316 See eg Viljoen (2007) 500.

2.8.2 Mechanisms and institutions for human rights realisation

Proceeding on the argument that the institutional structure of the AU increasingly follows the tripartite division in national systems yet conceding that the division at the AU level is not easily visible, Viljoen classifies institutions with human rights mandate along the lines of legislative, executive and judicial or quasi-judicial functions.³¹⁷ Explaining ‘legislative’ function to include the adoption of binding instruments and the making of non-binding advisory views and recommendations, Viljoen highlights three main institutions with legislative functions and powers in the African human rights system. These are the AU Assembly, the Permanent Representatives’ Committee (PRC) and the Pan African Parliament.³¹⁸ This excludes the organs and institutions of the various RECs which may be involved in law-making at the subregional level. However, while they may not have the competence to ‘make laws’ creating human rights norm with continental applicability, ‘law-making organs’ of the RECs could very well create binding human rights norm applicable at the various regions over which they exercise jurisdiction.

In relation to what he terms the ‘executive role’, Viljoen lists six organs and institutions as being involved in the African human rights system. They are the AU Assembly with about eight human rights related executive functions, the Executive Council of the AU (Executive Council), the PRC, the AU Commission (which is the secretariat of the AU and services several human rights supervisory institutions), the Peace and Security Council (PSC) and the APRM. The involvement of these organs and institutions may be either as a result of a direct human rights mandate or an applied mandate. The organs and institutions of the RECs that may be exercising ‘executive functions’ are also not included in the list. However, it has to be noted that certain human rights and human rights related instruments and initiatives of the AU recognise and give executive roles with respect to implementation of continent wide norms, to the subregional organisations.³¹⁹ To the extent that they are granted such roles, the RECs cannot easily be excluded from the framework of an African human rights system. To the extent that they operate independently, the possibility of duplication and hence, jurisdictional conflicts cannot be ruled out.

317 Viljoen (2007) 179.

318 Viljoen (2007) 181 – 183.

319 For eg art 44(2)(B) of the African Charter on Democracy, Elections and Governance.

The third category of institutions with human rights mandate relate to institutions that exercise judicial and quasi-judicial functions. From the perspective of enforcement and implementation, justiciability of human rights is crucial as it sparks off the chain of applying human rights to individual cases. Greater attention needs to be paid to the judicial and quasi-judicial organs and institutions of the African human rights system. At the continental level, there are two quasi-judicial bodies and a court currently recognised with clear human rights mandate. These are the African Commission, the Committee on the Rights and the Welfare of the Child (the African Children Committee) and the African Court on Human and Peoples' Rights (the African Human Rights Court which is expected to become the human rights Chamber of the enlarged African Court of Justice).³²⁰

2.8.2.1 The African Commission

The African Commission, established by article 30 of the African Charter is an independent quasi-judicial human rights supervisory body with a mandate to promote and protect human rights in Africa.³²¹ As the sole supervisory body established in the African Charter, the African Commission has variously been described as the 'primary body responsible for human rights in the AU',³²² and 'the principal body for promoting and protecting human rights on the continent'.³²³ Composed of 11 members elected for terms of five years by the OAU/AU Assembly, the African Commission in the course of its existence has exercised its mandate in the forms of receiving inter-state and individual complaints, receiving and considering state reports and engaging in fact-finding and promotional missions. The Commission does not have powers to give binding judgments but has increasingly developed the practice of making recommendations after the consideration of communications. Created after the adoption and entry into force of the Charter of the OAU, the African Commission is not contemplated in the Charter of the OAU but derives its authority from the African Charter. However, it existed as independent (albeit often over-isolated)³²⁴ institution within the framework of the OAU. With the transformation of the OAU into the AU, it would have been thought that the African Commission would formally

320 See Viljoen (2007) 225.

321 The African Commission was constituted and started functioning in 1987.

322 Viljoen (2007) 217.

323 Lloyd & Murray (2004) 166.

324 Lloyd & Murray 185.

be recognised in the main constitutive instrument of the AU by an inclusion as an organ or institution in the Constitutive Act of the AU but this was not to be, igniting a debate as to the legality of its continued existence.³²⁵ Notwithstanding the debate, subsequent instruments of the AU have continued to acknowledge and recognise the existence of the African Commission by reference and assignment of collaborative and other responsibilities. Despite its central role in the African Charter, the African Commission is not given an exclusive mandate with respect to supervision of the Charter. Rather, the African Commission is recognised as having competence over other human rights instruments in the African human rights system. There is currently no specific definition of the relationship between the African Commission and the mechanisms of the RECs.

2.8.2.2 The African Children's Rights Committee

Established by article 32 of the African Children's Charter, the African Children's Rights Committee is also composed of 11 members elected for terms of five years by the OAU/AU Assembly.³²⁶ In relation to children's rights contained in the African Children's Charter over which it has competence, the African Children's Rights Committee is also expected to exercise its quasi-judicial powers in the areas of receiving inter-state and individual communications, receiving and considering state reports and undertaking fact-finding missions to state parties.³²⁷ Similar to the African Commission, the African Children's Rights Committee does not have powers to deliver binding judgments. It may therefore resort to the practice of making strong recommendations on communications sent to it. The Committee also has the competence to interpret the African Children's Charter at the request of relevant parties.³²⁸ Although the African Children's Charter does not also give exclusive competence to the African Children's Committee with respect to the promotion and protection of the rights of children in Africa, the fact of specific establishment has resulted in the perception that the Committee should exercise those functions to the exclusion of other continental bodies. However, as a result of limited activity on the part of the African Children's Committee, there have been calls for the African

325 Compare Viljoen (2007) 218, and S Gutto, 'The reform and renewal of the African regional Human and Peoples' Rights System' (2001) 1 *AHRLJ* 175, 183 – 184.

326 The African Children's Rights Committee was elected in 2001 and held its first meeting in 2002. A few communications have been submitted to the Committee as at Sept 2009.

327 See Viljoen (2007) 220.

328 Art 42(c) of the African Children's Charter.

Commission to be mandated to assume responsibility for implementation of the African Children's Charter.³²⁹

2.8.2.3 The African Court on Human and Peoples' Rights

For a variety of reasons, the African Charter was adopted without provisions for the establishment of a court with judicial powers to implement the Charter. This was in contrast with the practice of the other regional human rights system, resulting in consistent criticisms of the African human rights system as one designed to be ineffective right from the onset. Following pressure from civil society in reaction to complaints against the attitude of states to the non-binding recommendations of the African Commission, concrete talks for the establishment of an African Court on Human and Peoples' Rights began to take shape. Consequently in June 1998, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Human Rights Court Protocol) was adopted by the OAU Assembly in Burkina Faso.³³⁰

The African Human Rights Court is composed of 11 judges elected by the OAU/AU Assembly. By article 2 of the African Court Protocol, the African Human Rights Court was established to 'complement' the protective mandate of the African Commission. This, the Court can do by exercising advisory and contentious jurisdiction over human and peoples rights contained in the African Charter. The Court may also exercise jurisdiction over rights contained in other human rights instruments ratified by relevant states.³³¹ As a judicial body, the African Human Rights Court is expected to reinforce the protective mandate of the African Commission by the nature of its powers. In contrast to the African Commission, the African Human Rights Court is empowered to deliver binding judgments and to make appropriate orders for remedies including orders for the payment of fair compensation and reparations.³³² Thus, the Court is expected to bring clarity, certainty and judicial force to the implementation of human rights in the African human rights system.

329 Viljoen (2007) 222 - 224.

330 The African Human Rights Court Protocol entered into force in 2004 and the first set of judges was inaugurated in 2006.

331 Art 3 of the African Human Rights Court Protocol.

332 Art 27 of the African Human Rights Court Protocol.

However, although the Court has been established since 2006 with the inauguration of judges, as at August 2009, the Court had not concluded all the preliminary issues necessary to facilitate the submission of cases. By its Protocol, cases can be submitted by state parties, the African Commission, other African institutions and (where the relevant declaration in article 34(6) has been made) by individuals and Non Governmental Organisations (NGOs). The Court is ultimately expected to be merged with the proposed African Court of Justice when the Protocol for that purpose comes into effect and would become a chamber in the larger Court.³³³

Whereas the judicial and quasi-judicial bodies highlighted above constitute the continental supervisory framework of the African human rights system, the fact remains that human rights protection in the continent goes beyond the work of these bodies. As Heyns and Killander have noted, ‘the African system operates on a number of levels simultaneously’.³³⁴ For them, these levels could mean the political level, the quasi-judicial level and the judicial level.³³⁵ But they seem to concede that there is a need to look beyond the continental stage when they argue that ‘On a continent as diverse as Africa, with its multi-layered landscape of human rights issues, employing an enforcement mechanism with diverse components seems to be a wise approach’. Hence, they come to a conclusion that ‘Each component of the collective mechanism plays a different and equally important role.’³³⁶ Placed side by side with Odinkalu’s contention that the African human rights system encapsulates the continental, subregional and national legal systems, the observations of Heyns and Killander could lend support to the argument that a complete African human rights system should be one that envisages the principles, norms and structures of systems other than the continental structures and institutions. This preliminary position does not exclude subregional mechanisms from operating within the territorial space of the African human rights system.

Under the new wave of regionalism, previously narrow organisational competences have been expanded to include issues touching on human rights, democracy and governance. The constitutive documents of the RECs have increasingly linked

333 See Viljoen (2007) 225.

334 Heyns & Killander (2006) 539.

335 As above.

336 As above.

organisational objectives with recognition, respect, promotion and protection of human rights. The RECs have gone further to create judicial bodies with competence to ensure the observance of law in the application and interpretation of their various treaties. To the extent that reference to human rights in the respective treaties are hinged on the African Charter, it has to be considered whether the judicial bodies of subregional organisations are competent to apply the African Charter and whether in doing so they become part of the wider African human rights system. Contentious as these issues may be, there are grounds to support the view that subregional courts could form part of the African human rights system to the extent that they apply the African Charter. Yet, the technicality around the definition of a system calls for a careful assessment of the possibility of fitting REC mechanisms within the framework of the African human rights system. This study will use the ECOWAS regime as a window for this inquiry.

As already noted previously, instruments and documents of the OAU/AU seem to increasingly incorporate the RECs and their organs and institutions for the purpose of implementing continent-wide instruments. Further, although the implementation plan of the AEC envisages the ultimate integration of the RECs into the AEC/AU, there is no provision in the AEC Treaty, the Protocol on the relation between the AEC and the RECs, or in any other document indicating an intention to dissolve the RECs upon the attainment of the goals of the AEC Treaty. In fact dissolution may be undesirable as the RECs as presently constituted could better serve as decentralised pillars of the continental integration structure. If this is so, then the need for coordination of the activities of the RECs in line with the continental processes becomes apparent. With respect to human rights, Lloyd and Murray have suggested that the African Commission be positioned to coordinate efforts at human rights protection in the continent.³³⁷ However, to the extent that the courts of the RECs are judicial bodies, they can serve as divisions of a human rights system to be coordinated by the African Human Rights Court. That way, the fears of conflicting judicial pronouncement that could arise would be addressed. As long as the existing system does not preclude the exercise of jurisdiction by regional courts over the African Charter, and indeed regional courts have begun to exercise such jurisdiction, the African human rights

337 Lloyd & Murray (2004) 185.

system may very well be expanding and it behoves stakeholders to accept the trend and apply it to positive use.

2.9 Interim conclusion

Conscious of the tension between state sovereignty and the exercise of powers ceded to international organisations and mindful of the strong attachment of African states to the idea of sovereignty, this chapter opened with an emphasis on the doctrine of implied powers. The doctrine was presented as a legal principle formulated to allow international organisations exercise powers and carry out functions that are not deliberately granted yet not expressly restricted by member states of the given organisation. This discourse was aimed at showing that international organisations can lawfully expand the scope of their activities in pursuit of their stated objectives. However, the discourse also acts as a reminder that international organisations are liable to act *ultra vires* if they take on powers and engage in activities that converging states have retained for action at the national level. The chapter has also outlined the history and process of continental integration to demonstrate that human rights realisation is an activity-area that was not originally contemplated but has increasingly appeared in different phases of continental integration. It has also been shown that because states have been more willing to cede sovereignty in pursuit of economic integration than they are in respect of political integration, there has been greater potential for effective human rights realisation under economic integration initiatives.

This chapter has also evaluated scholarly theories to explain how and why international organisations set up to undertake economic integration commonly engage in activity-areas that ordinarily fall outside narrow economic confines. These theories have been shown to apply to African RECs. Combined with the doctrine of implied powers, the theories have been used to show that REC involvement in human rights realisation is not necessarily unlawful. However, having exhibited the link between the continental body, especially the AEC and the RECs, the chapter has also raised the possibility of duplication and conflict between continental and subregional human rights mechanisms. In this regard, the chapter has briefly introduced the main continental human rights institutions as well as the main African RECs with a view to

showing the institutions against which subregional human rights practice can be measured. Thus, the chapter has set the tone for the overall study.

Integration for the sake of integration is worthless, whether this is in the area of political or economic integration. Integration only becomes useful when it brings or has the potential to bring about positive changes in the lives of the people of integrating states. It is probably partly in recognition of this fact that African RECs proclaim objectives of integrating for the purpose of bringing better lives to the citizens of their member states. However, the reality seems to be that African states are currently not structured to achieve success in the pursuit of economic integration.³³⁸ This reality is complicated by the further reality that political instability arising from governmental illegitimacy and continuous human rights violations creates an unwholesome environment for successful economic integration. Essentially, African states have come to a cross-road where political issues such as human rights need to be addressed effectively if economic integration must continue. This is the point of ‘reduction of alternatives’,³³⁹ where African governments can only solve the problems of economic integration by increasing the delegation of powers and expanding the mandates and competences of the regional organisations they have created to pursue integration. In this sense therefore, the pursuit of human rights realisation under the framework of RECs becomes a tool for the attainment of other goals.

Beyond being a tool, the pursuit of human rights goals on the platform of RECs is a good in itself. The better lives for African people that the RECs seek to pursue cannot be complete without respect for and protection of human rights. Human rights protection constitutes the non-material aspects of human needs that developmental efforts must address.³⁴⁰ In a continuously changing global environment with emerging new challenges for human rights, activists and advocates of human rights need to accept the trends that challenge traditional perceptions of the manner and means for

338 Hazelwood (1967) 6.

339 Nye (1965) 86.

340 Meltzer (1984) 210 - 212.

human rights realisation. Refusal to adapt to ‘novel constellations’ that ‘outpace our imaginations’ and ‘changes that move faster than ‘our conceptual reorientations’ would cause us to consistently hang on to ‘obsolete conceptual models’ that would prevent us from putting new models into appropriate use for the benefit of the cause of human rights.³⁴¹

The changes that have occurred and are still occurring in the African human rights landscape are the results of conscious, collective decision-making by those authorised to make those decisions. The consequences of these decisions are numerous, cutting across different fields but depend to a large extent on the change that they ignite in the domestic system. Hence, the quality of penetration, ‘compliance and distributive consequence’ of the decisions made by subregional bodies depends on ‘how much change has occurred at the national as a consequence’ of those decisions.³⁴² This in turn depends on how much people falling under the influence of these bodies apply the structures at their disposal. Thus, success or failure of integration is ‘dependent on the degree to which individuals adapt to the directives of political structures and the extent to which the actors are oriented toward and foster an orientation to the structures’.³⁴³ From a human rights perspective, the decisions made by the relevant authorities expanding the competence of their supra-national creations to cover human rights protection can only have practical relevance if those decisions are put to use by those affected by abuse. For as long as human rights advocates and practitioners resist the new structures and cling to traditional conceptions, the degree of success of the integrative effort in the new areas would not be properly accessed.

Having traced the history of integration from the continental plane to the regional level, and having stretched and explored the applicability of theories developed for economic purposes to explain the transition of RECs from exclusively economic focus to areas such as human rights which were previously perceived as matters outside the scope of economic integration, it is safe to conclude that there is a legal foundation for the realisation of human rights in the subregions. It may be debated

341 Caporaso (1972) 6.

342 Lindberg in Lindberg & Scheingold (1971) 55.

343 KW Deutsch et al (ed) (1966) 324



whether or not different human rights systems have been created by this trend or whether the African human rights system as it was previously known has been expanded by the new trend. What cannot be debated is the need to investigate and understand how the emerging structures can be applied for the benefit of human rights protection in Africa.