

# Human rights developments in sub-regional courts in Africa during 2008

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## Summary

*The year 2008 saw very significant developments in the budding human rights activities of regional economic communities in Africa. This was especially prominent in the area of supranational judicial protection of human rights by sub-regional courts. In East Africa, Southern Africa and West Africa, sub-regional courts concluded cases with considerable implications for the protection of rights on the continent. As human rights litigation before sub-regional courts is still a new trend, the jurisprudence that emerged from these courts in 2008 provides opportunities for improving a popular understanding of the processes of the courts. It also allows for reflections on the real value of these developments.*

## 1 Introduction

The long-awaited supranational judicial protection of human rights in Africa is finally becoming a reality, not before the struggling African Court on Human and Peoples' Rights (African Court), but before judicial organs of regional economic communities (RECs) in different parts of the continent.<sup>1</sup> Originally founded as rallying points for progressive economic integration aimed at improving the living standards of their citizens, RECs have inevitably evolved to involve varying degrees of

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<sup>1</sup> The African Court on Human and Peoples' Rights, which was established to complement the protective mandate of the African Commission on Human and Peoples' Rights, had not heard a single case as at 31 March 2009, even though the judges of the Court took office in January 2006.

political integration. With the realisation that economic integration can succeed better in stable and conflict-free political environments, African RECs have found themselves increasingly drawn into different forms of human rights promotion and protection in order to prevent, address or contain conflicts directly or indirectly linked to human rights violations.

Similar to the configuration of domestic governments, RECs have organs that carry out legislative, executive and judicial functions. While they may be identified differently in different RECs, organs common to African RECs include plenary assemblies of heads of state and government, subsidiary plenary bodies, parliamentary bodies, administrative organs and judicial bodies. Plenary assemblies and subsidiary plenary bodies, which are political organs, usually exercise legislative powers and determine the general policy direction of the organisation.<sup>2</sup> These assemblies and bodies are thus crucial for the development of human rights content in the RECs. Parliamentary bodies in African RECs are still mostly consultative forums. Administrative organs exercise various degrees of executive powers and functions that have had varying implications for human rights. It is, however, the judicial bodies with original competence over the interpretation and application of founding treaties that have had the most obvious and far-reaching impact in the field of human rights. While the contributions of other organs to the development of human rights in the RECs are highlighted where they have occurred, this contribution focuses on the human rights developments in the sub-regional courts in the period under review.

The Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) set the ball rolling as far back as 2005 when it began to receive human rights cases on the basis of an expanded jurisdiction.<sup>3</sup> The growing role of the ECCJ in the realm of human rights protection continued in 2008 with the Court's decision in the case of *Ebrimah Manneh v The Gambia (Manneh case)*.<sup>4</sup> This was soon followed by another decision in the widely publicised case of *Hadijatou Mani Koraou v Niger (Koraou case)*.<sup>5</sup> In Southern Africa, the Southern African Development Community (SADC) Tribunal attracted attention with its judgments in *Ernest Francis Mtingwi v SADC Secretariat (Mtingwi*

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<sup>2</sup> The subsidiary plenary bodies consist mostly of national ministers.

<sup>3</sup> Since 2005, the ECCJ has handed judgment in no less than 16 cases, most of which touch on aspects of human rights. See generally ST Eboerah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307.

<sup>4</sup> Unreported Suit ECW/CCJ/APP/04/07, Judgment ECW/CCJ/JUD/03/08, judgment delivered on 5 June 2008.

<sup>5</sup> Unreported Suit ECW/CCJ/APP/08/08, Judgment ECW/CCJ/JUD/06/08, judgment delivered on 27 October 2008. The *Koraou* case received wide publicity in the media and on the internet and has brought attention to the work of the ECCJ.

case)<sup>6</sup> and *Campbell and 78 Others v Zimbabwe (Campbell case)*.<sup>7</sup> The East African Court of Justice (EACJ), for its part, recently concluded the case of *East African Law Society and 3 Others v Attorney-General of Kenya and 3 Others (East African Law Society case)*.<sup>8</sup>

Considering that human rights litigation before sub-regional courts is still a new phenomenon in Africa, these cases present invaluable opportunities for an understanding of this emerging trend. Focusing on procedural and substantive issues in the decisions, this contribution seeks to contribute to the understanding of the human rights processes of sub-regional courts by engaging in a critical analysis of these recent judgments of the EACJ, the ECCJ and the SADC Tribunal. Analysis of the issues in the decisions will be preceded by a brief factual background of each case.

## 2 The East African Community

Attempts at regional co-operation in East Africa apparently dates back to the colonial era under the management of British colonial authorities.<sup>9</sup> However, formal regional integration in the sub-region first occurred in 1967 with the founding of the original East African Community (EAC) by Kenya, Tanzania and Uganda. In 1977, the original EAC was dissolved following disagreements among the then member states over several issues.<sup>10</sup> Efforts to revive the EAC began in 1991 and culminated in the signing of a new EAC Treaty in 1999.<sup>11</sup> By article 5 of the EAC Treaty, the objectives of the Community 'shall be to develop policies and programmes aimed at widening and deepening co-operation ... in political, economic, social and cultural fields, research, defence, security and legal and judicial affairs ...' The EAC aims to ultimately result in the establishment of a political federation in East Africa.<sup>12</sup>

Under the 1999 Treaty establishing the EAC, member states of the EAC undertook to pursue integration, guided by the principles of good governance, democracy, the rule of law, social justice and human rights.<sup>13</sup>

<sup>6</sup> SADC (T) Case 1/2007, judgment delivered on 27 May 2008.

<sup>7</sup> SADC (T) Case 2/2007 in which judgment was delivered on 28 November 2008. The *Campbell* case was filed in 2007 and became famous with an interim ruling by the Tribunal in December 2007.

<sup>8</sup> Reference 3 of 2007.

<sup>9</sup> See F Viljoen *International human rights law in Africa* (2007) 490; W Braude *Regional integration in Africa* (2008) 62.

<sup>10</sup> Braude (n 9 above) 63.

<sup>11</sup> The 1999 Treaty of the EAC, which was adopted and ratified by Kenya, Tanzania and Uganda, entered into force on 7 July 2000. Burundi and Rwanda acceded to the EAC Treaty on 18 June 2007. The EAC Treaty is available at <http://www.eac.int> (accessed 20 March 2009).

<sup>12</sup> See art 5(2) of the 1999 EAC Treaty.

<sup>13</sup> See art 7(2) of the 1999 EAC Treaty.

However, the organs of the EAC have exercised restraint in the pursuit of human rights within the framework of the organisation.<sup>14</sup> Although the EAC Treaty indicates an intention by the Community to grant jurisdiction to the EACJ over human rights, this has not yet occurred.<sup>15</sup> While the political organs have not appeared too eager to engage in human rights issues, the EACJ has had opportunities to decide on cases dealing wholly or partly with human rights.<sup>16</sup> In 2008, the EACJ delivered judgment in the *East African Law Society* case, with implications for human rights in the administration of the Community.

### 2.1 *East African Law Society and 3 Others v Attorney-General of Kenya and 3 Others (EACJ)*

The East African Law Society, the Tanganyika Law Society, the Uganda Law Society and the Zanzibar Law Society brought this action against the Attorneys-General of Kenya, Tanzania and Uganda and the Secretary-General of the East African Community, claiming that amendments made to the EAC Treaty by partner states were unlawful.<sup>17</sup> Although the main thrusts of the application were that the Treaty amendments were done without compliance with procedural regulations in article 150 of the EAC Treaty and that the amendments were done in bad faith, issues of the right to participation and independence of the judiciary emerged. On the right to participation it was argued that the failure by the partner states to consult their citizens on the amendments deprived the citizens of their right to participate in the integration process.<sup>18</sup> The application also sought to demonstrate that the amendments to the EAC Treaty

<sup>14</sup> The organs of the EAC are the Summit, the Council of Ministers, the Co-ordinating Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat.

<sup>15</sup> See art 27(2) of the EAC Treaty.

<sup>16</sup> In the 2007 case of *Katabazi & 21 Others v Secretary-General of the EAC & Another*, Ref 1 of 2007, the EACJ had to deal with allegations of human rights violations contrary to the EAC Treaty. See also *Prof Nyoung'o & 10 Others v The Attorney-General of Kenya & Others*, Ref 1 of 2006 (*Nyoung'o* case). In the *Nyoung'o* case, the application was for invalidation of the process and the rules made by the Kenyan National Assembly for the purposes of selecting Kenyan representatives to the East African Legislative Assembly (EALA). The application was brought on the grounds that the process and the rules violated art 50 of the EAC Treaty, which requires the election of persons to the EALA by national assemblies. The EACJ found that there had been a violation of art 50 of the EAC Treaty.

<sup>17</sup> The amendments were made in 2007 by Kenya, Tanzania and Uganda while Rwanda was formalising its membership. The amendments were to restructure the EACJ into two divisions: a First Instance and an Appellate Division; to expand the grounds for removal of judges of the Court, to limit the jurisdiction of the Court, to set time limits for the filing of cases by individuals and legal persons, and to set grounds for appeal and deem current judges as First Instance judges and past decisions as First Instance decisions.

<sup>18</sup> *East African Law Society* case (n 8 above) 17.

were as a result of a reaction by a partner state to the proceedings in the *Nyounge'o* case and was intended to influence the EACJ in that case.<sup>19</sup>

Dealing with the preliminary question whether the case was properly before the Court in accordance with the EAC Treaty, the EACJ took the view that provisions in the Treaty that granted residents of partner states the right of access to the Court were added to ensure participation by the people. In this context, the Court reasoned that the people had a right to challenge an alleged infringement of the Treaty.<sup>20</sup> In taking this position, the EACJ did not allow itself to be forced into adopting a restrictive approach to the interpretation of the EAC Treaty. Further on the right to participation, the EACJ concluded that article 150(5) of the EAC Treaty did not expressly require EAC partner states to carry out consultations.<sup>21</sup> However, the Court was convinced that under article 7 of the EAC Treaty, participation by the people was an operational principle of the Community that required partner states to carry out consultations in relation to integration. To get to this conclusion, the Court reasoned that treaty interpretation had to be done in context, in accordance with article 31 of the Vienna Convention on the Law of Treaties.<sup>22</sup> The approach adopted by the Court suggests that, increasingly, fundamental principles contained in founding treaties of African RECs are seen as a sufficient basis for the enjoyment of rights at the sub-regional level in the absence of organisation-specific human rights catalogues.<sup>23</sup> Considering the novelty of this approach, perhaps the Court could have engaged in a more detailed analysis of the connection between fundamental principles and the enjoyment of human rights.

On the question of the independence of the judiciary and interference with the processes of the EACJ, the Court came to the conclusion that the amendment extending the grounds for the removal of judges of the EACJ violated the duty of EAC partner states not to disrupt the resolution of cases before the Court.<sup>24</sup> However, the Court was not satisfied that there had been sufficient evidence to indicate that the amendments were done in bad faith. In the face of the limited evidence presented before the Court, the difficulty that confronted the Court with respect to a finding of bad faith on this issue has to be appreciated, yet it is obvious that the issue raises questions on the propriety of the response of political organs of the EAC to the Court's engagement with cases involving human rights issues.

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<sup>19</sup> One outcome of the EACJ decision in the *Nyounge'o* case was that the East African Legislative Assembly could not be inaugurated. See *East African Law Society case* (n 8 above) 33–34.

<sup>20</sup> *East African Law Society case* (n 8 above) 14–16.

<sup>21</sup> *East African Law Society case* (n 8 above) 25.

<sup>22</sup> *East African Law Society case* (n 8 above) 23–25 28.

<sup>23</sup> As will be shown shortly, the SADC Tribunal also relied on fundamental principles to claim competence over human rights.

<sup>24</sup> *East African Law Society case* (n 8 above) 32–34.

Questions of popular participation are generally touchy issues in the realm of national politics in most African states. Despite the provisions of article 13 of the African Charter on Human and Peoples' Rights (African Charter) which guarantee the right to participation, issues around this area have remained largely domestic matters that have managed to avoid effective scrutiny by continental human rights supervisory bodies. With respect to regional integration, popular participation becomes even more difficult to monitor as integration has essentially been an elitist affair. Coupled with the fact that RECs are not parties to the African Charter and therefore ordinarily do not fall within the jurisdiction of its supervisory bodies, the decision by the EACJ takes on special significance for a vindication of the right to participation. In the absence of any other supranational judicial forum with competence over the issues raised, the opportunity presented by the EACJ is even more significant for East African peoples.

## 2.2 Enforcement and implementation

As the EACJ does not have judgment enforcement mechanisms of its own, the EAC Treaty saddles its partner states with the duty of implementing the judgments of the Court.<sup>25</sup> Effectively, implementation of the judgments of the Court depends on the political will of the partner states and, to some extent, the collective pressure of other partner states on the auspices of the political organs. Since the EACJ did not invalidate the amendments, the question of implementation does not immediately arise. However, the order to review the amendments would involve action by all the partner states and the political organs of the EAC. This is yet to take place. It is important to note that there was compliance with the decision in the *Nyungo'o* case.<sup>26</sup> There is therefore an expectation that partner states would comply with the present orders of the Court.

## 3 The Economic Community of West African States

ECOWAS came into existence with the signing of its founding treaty in 1975.<sup>27</sup> The main aim of ECOWAS under its 1975 Treaty was to 'promote co-operation and development in all fields of economic activity ... for the purpose of raising the standard of living of its peoples

<sup>25</sup> See art 38(2) of the EAC Treaty.

<sup>26</sup> This comes out in the *East African Law Society* case (n 8 above) 37.

<sup>27</sup> At inception, there were 15 member states that made up ECOWAS. These were Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone and Togo. Cape Verde subsequently acceded to the ECOWAS Treaty of 1975, bringing the membership to 16. In 2000, Mauritania withdrew its membership, bringing the membership of the organisation once again to 15.

... and contributing to the progress and development of the African continent'.<sup>28</sup> Faced with the challenge of pursuing economic integration in the midst of political instability in the region, often involving armed conflicts, ECOWAS was compelled to veer into the unpredictable field of politics and security.<sup>29</sup> These and other events led to the setting up of a committee to re-examine the foundations of ECOWAS.<sup>30</sup> The results of the various activities that took place in the late 1980s and the early 1990s were the drafting and subsequent adoption of a revised ECOWAS Treaty in 1993.<sup>31</sup> The aims of the organisation under the 1993 revised Treaty differ only to the extent that it envisages the establishment of an economic union in West Africa 'in order to raise the living standards of its peoples ... and contribute to the progress and development of the African continent'.<sup>32</sup>

While there is almost no reference to human rights in the 1975 ECOWAS Treaty, the 1993 revised ECOWAS Treaty has arguably mainstreamed human rights in the agenda of ECOWAS. Building on the inclusion of the promotion and protection of human rights as fundamental principles of ECOWAS integration, political, administrative and judicial organs of ECOWAS have severally been involved in the field of human rights.<sup>33</sup> The ECOWAS Authority of Heads of State and Government (Authority) has adopted instruments with human rights implications, one of the most prominent of which is a supplementary protocol that empowers the ECCJ to receive and determine human rights cases.<sup>34</sup> The ECOWAS Commission has been involved in aspects of human rights work, especially in the areas of conflict resolution, election monitoring and trafficking in persons.<sup>35</sup> It was in the exercise of its expanded mandate that the ECCJ heard the cases discussed below.

<sup>28</sup> Art 2(1) of the 1975 ECOWAS Treaty.

<sup>29</sup> The intervention of the ECOWAS Monitoring Group (ECOMOG) in Liberia and Sierra Leone in the late 1980s and the early 1990s illustrates this trend. See generally F Olonsakin & EK Aning 'Humanitarian intervention and human rights: The contradictions in ECOWAS' (1999) 3 *The International Journal of Human Rights* 17.

<sup>30</sup> In 1992, a Committee of Eminent Persons was appointed to review the 1975 ECOWAS Treaty. The report of the Committee is available at the ECOWAS Commission Abuja (on file with the author).

<sup>31</sup> The ECOWAS Revised Treaty was signed in Cotonou, Benin on 24 July 1993 and entered into force on 23 August 1995. The 1993 revised Treaty was signed by the then 16 member states of the organisation before the withdrawal of Mauritania in 2000.

<sup>32</sup> Art 3(1) of the 1993 revised ECOWAS Treaty.

<sup>33</sup> See art 4 of the 1993 revised ECOWAS Treaty on the principles of ECOWAS. The organs or institutions of ECOWAS include the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice and the ECOWAS Commission.

<sup>34</sup> Supplementary Protocol A/SP 1/01/05 Amending Protocol A/P 1/7/91 relating to the Community Court of Justice adopted in 2005.

<sup>35</sup> In 2008, the ECOWAS Commission was involved in election monitoring in Guinea, Guinea Bissau and Ghana. The ECOWAS Commission also organised workshops on trafficking in persons, including on issues of victim rehabilitation.



### 3.1 *Ebrimah Manneh v The Gambia* (ECCJ)

According to the facts placed before the ECCJ, in July 2006, Ebrimah Manneh, a Gambian citizen working as a journalist in The Gambia, was arrested by officials of the Gambian National Intelligence Agency in Banjul. The arrest was allegedly effected without any warrant of arrest and no reasons were given for the arrest. Between July 2006 and 16 March 2007, when a letter demanding his release was sent to the government of The Gambia by his lawyers, Manneh was denied access to his family, friends and lawyers. He was allegedly moved between police stations and detained under conditions that were 'dehumanising as detainees are made to sleep on bare floors in overcrowded cells'. Manneh was also said to have been held in solitary confinement and denied access to adequate medical care.<sup>36</sup>

In his action before the ECCJ, Manneh sought a declaration that his arrest and detention by the Gambian National Intelligence Agency violated articles 4, 5, 6 and 7 of the African Charter. He also asked the ECCJ for an order mandating The Gambia or its agents to release him immediately. Manneh further asked for compensation of US \$5 million for the violations of his rights to dignity, liberty and a fair hearing. Despite being served with the processes of the court, the government of The Gambia opted not to defend the action, without giving reasons for the decision.<sup>37</sup> Considering that the government of The Gambia had voluntarily participated in a previous case brought against it before the ECCJ, it is not clear why the decision was taken not to participate in this case.<sup>38</sup> The reasons for the refusal to participate can only be the subject of speculation, yet it is significant because it is the first time a member state of ECOWAS has refused to participate in proceedings before the Court.

Notwithstanding the refusal of The Gambia to participate in the proceedings, the ECCJ proceeded to hear the case. It would be noted that the *Manneh* case was brought directly before the ECCJ without any prior attempt to approach the domestic courts of the defendant state.<sup>39</sup> While the non-participation of the defendant meant that admissibility of the case could not be challenged by the state, article 90 of the Rules of Procedure of the ECCJ allows the Court to make an admissibility determination.<sup>40</sup> Thus, this case affirms that the exhaustion of local remedies is not a requirement for admissibility of cases before the ECCJ.<sup>41</sup> It has to be observed that, despite the refusal of the defendant state to react to the processes served on it in relation to the

<sup>36</sup> *Manneh* case (n 4 above) para 5.

<sup>37</sup> *Manneh* case (n 4 above) para 4.

<sup>38</sup> See *Essien v The Gambia*, unreported Suit ECW/CCJ/APP/05/05, judgment delivered on 14 March 2007.

<sup>39</sup> *Manneh* case (n 4 above) para 9.

<sup>40</sup> See art 90(4)(a) of the rules of procedure of the ECCJ.

<sup>41</sup> See Ebobrah (n 3 above) on this point.



case, the ECCJ did not defer to the state for too long before taking the decision to proceed with its determination of the case. This is a refreshing departure from the practice of the African Commission on Human and Peoples' Rights (African Commission) which waits for long periods to allow state parties to the African Charter to react to complaints filed against them.<sup>42</sup>

From a substantive perspective, attention has to be drawn to certain issues ignored or overlooked by the ECCJ. First, it would be noticed that in its summarisation of the plaintiff's claim, the ECCJ appears to have omitted the claims based on articles 4 and 5 of the African Charter while it added article 2 of the African Charter which does not appear in the Court's initial formulation of the claim.<sup>43</sup> Even though in the course of its determination of the issues, mention is made of the plaintiff's entitlement to the right to dignity,<sup>44</sup> the Court eventually still failed to consider the claim that the right to dignity of the plaintiff had been violated. In failing to determine the claims based on articles 4 and 5 of the African Charter, the Court missed the chance to pronounce on the human rights implications of overcrowded prisons and the *incommunicado* detention of persons. This contrasts with the practice of other institutions, such as the African Commission, that generally considers every single claim put forward by an applicant.<sup>45</sup> It is also arguable that the quantum of compensation ordered by the Court may have been higher had there been a determination and finding of liability for a violation of the right to dignity. This, it must be conceded, is now mostly academic.

The interpretation of article 2 of the African Charter by the ECCJ also makes for interesting reading. According to the ECCJ, article 2 'affirms the recognition and protection of the basic rights of the individual'.<sup>46</sup> While the Court's usage of article 2 to support the assertion that the African Charter confers rights on individuals and imposes duties on states is not novel,<sup>47</sup> it differs slightly from the common understanding of article 2 of the African Charter as a non-discrimination provision.<sup>48</sup>

<sup>42</sup> In certain cases, complaints before the African Commission are postponed for periods of three to six months or more to enable state parties to respond to the communication against them.

<sup>43</sup> Compare paras 3 & 11 of the *Manneh* case (n 4 above).

<sup>44</sup> See para 24 of the *Manneh* case (n 4 above). This, it can be argued, is based on art 5 of the African Charter.

<sup>45</sup> See *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003), eg, where the detention of persons *incommunicado* and solitary confinements were held to be gross violations of Charter-based human rights.

<sup>46</sup> Para 25 of the *Manneh* case (n 4 above). The ECCJ quotes the whole of art 2 in this para.

<sup>47</sup> See eg C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2004) 144–145. Heyns uses the same approach by severing the first limb of art 2 for that purpose.

<sup>48</sup> Compare *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 49, where the African Commission stated that arts 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the Charter.

The fact cannot be denied that the ECCJ is entitled to its own interpretation of the African Charter. However, the unity of human rights law in Africa would be protected if the ECCJ could take previous decisions of continental institutions such as the African Commission into account in its determination of cases. This is especially so as the Court itself recognises that 'it can draw useful lessons' from the judgments of other international courts.<sup>49</sup> It would further be observed, for instance, that the Court finds 'a presumption of innocence in favour of the liberty of the individual' in article 6 of the African Charter.<sup>50</sup> This is a strange formulation as the presumption of innocence is an express provision in article 7 of the African Charter relating to the right to a fair trial. It is thus not clear what the Court means by the formulation in question.

Another significant aspect of the *Manneh* case relates to reparation for a violation of rights in the event of a finding of state liability. The ECCJ seems to have gone into detailed research to support its resolve not to order punitive damages against the defendant state. Relying on jurisprudence from other international and municipal courts, the ECCJ came to the conclusion that the essence of human rights litigation was to terminate human rights abuses and restore rights where abuse has ended. Thus, reasoning that compensation under the African Charter is aimed at ensuring 'just satisfaction' rather than to punish violators, the Court awarded \$100 000 to the plaintiff.<sup>51</sup> Overall, the *Manneh* case is a demonstration of a new era for human rights litigation. It remains to be seen how the defendant state will react to the award against it.

### 3.2 *Hadijatou Mani Koraou v Niger (ECCJ)*

In pursuit of her action at the ECCJ, Hadijatou Mani Koraou told the Court that she was about 12 years old in 1996 when she was sold for 240 000CFA in a private tribal transaction to one El Hadj Souleymane Naroua. The tribal transaction, known as *Wahiya*, consists of the acquisition of young slave girls to serve dual purposes as domestic servants and concubines. In this practice, the slave girl is called *Sadaka* and does not acquire the status of a legal wife under Islamic recommendations, even though the *Sadaka* has to be at the service of her master. Under this condition, Hadijatou worked in the fields of Naroua and suffered sexual abuse from him for the first time when she was barely 13 years old. In the course of nine years as Naroua's *Sadaka*, Hadijatou bore four children for her master of which two children survived.

<sup>49</sup> Para 33 *Manneh* case (n 4 above). One wonders whether the fact that the African Commission is not a court in the strict sense of the word is partly responsible for the failure by the ECCJ to consider the jurisprudence of the Commission. This is because the court makes reference to decisions of other international courts in its judgments.

<sup>50</sup> Para 26 *Manneh* case (n 4 above).

<sup>51</sup> See para 39 *Manneh* case (n 4 above).

Some time in 2005, Naroua supposedly issued a slave liberation certificate to Hadijatou, but he refused to allow her to leave the household, insisting that she was from then on his lawful wife. These and other events led Hadijatou to file a complaint in the civil and customary tribunal of Konni for a declaration that she was free to lead her own life. The Konni Tribunal's finding that there was no proper marriage between Naroua and Hadijatou was subsequently, in 2006, overturned on appeal by the court of first instance of Konni. In response, Hadijatou brought an appeal before the Judicial Chamber of the Supreme Court of Niamey seeking 'application of the law against slavery and slavery-related practices'. By its decision of December 2006, the Supreme Court quashed the appeal decision of the court of first instance of Konni on grounds of a violation of the provisions of certain domestic procedural law without making a pronouncement on the slavery aspect of the application. The Supreme Court then referred the case back for review by a new panel of the lower court.

While the domestic legal processes were ongoing, Hadijatou married someone of her choice. This resulted in Naroua initiating bigamy proceedings. In May 2007, the parties to Hadijatou's marriage were found guilty of bigamy. Hadijatou and her brother were jailed despite an appeal having been lodged against the conviction. In response, counsel on behalf of Hadijatou filed a criminal complaint against Naroua for slavery in violation of Nigerian criminal laws. While this matter was still pending, the court of first instance of Konni in the returned proceedings reversed its previous position, granted Hadijatou 'a divorce', requiring a three month interval before she contracted another marriage. Soon after Naroua filed an appeal against this decision before the Supreme Court, the Criminal Division of the Niamey Court of Appeal suspended the bigamy conviction pending 'an absolute decision by the divorce judge'. It was in the face of this web of concluded and pending domestic proceedings that the action before the ECCJ was filed in September 2007.

At the ECCJ, Hadijatou sought a declaration that Niger was in violation of articles 1, 2, 3, 5, 6 and 18(3) of the African Charter. She also invited the Court to request Niger to adopt legislation to protect women against discriminatory customs, to empower courts to protect victims of slavery, to abolish harmful customary practices founded on the idea of the inferiority of women and to order the payment of fair reparation to her for the wrong she survived in the nine years of her captivity. For its part, Niger raised preliminary objections to the admissibility of the case on the grounds that domestic remedies had not been exhausted and that proceedings relating to the matter were pending before domestic courts. On the issue of the exhaustion of domestic remedies, Niger argued that the exclusion was an omission that the ECCJ ought to fill to comply with prevailing international practice.

The question of the exhaustion of domestic remedies has been a fascinating aspect of the human rights mandate of the ECCJ and this case revived the debate around this issue. In responding to the objection

raised by Niger, the Court reiterated that the non-inclusion of a requirement to exhaust domestic remedies before accessing the Court was a deliberate choice of the ECOWAS legislator.<sup>52</sup> To demonstrate that this was not an unknown practice, the Court had to resort to the jurisprudence of the European Court of Human Rights (European Court) in *De Wilde, Ooms and Verspy v Belgium*.<sup>53</sup> More importantly, however, the ECCJ expressed the view that the effect of article 4(g) of the revised ECOWAS Treaty was to empower the Court to protect rights on the basis of the African Charter without necessarily following the procedure recommended for the African Commission in the African Charter.<sup>54</sup> In a sense the ECCJ has been consistent in its position that it can make use of the primary rules in the African Charter without having to apply the secondary rules in the Charter as those rules are directed to the African Commission.<sup>55</sup> The pressing question, however, is whether the existing rules of procedure of the ECCJ are sufficient for its expanded competence. Although the Court may be right that states may elect in a treaty to exclude the requirement to exhaust domestic remedies, the long-term consequences of such a practice may not be very good.

Besides the question of the exhaustion of domestic remedies, the objection on grounds of *lis pendens* raises complications in the procedure of the ECCJ. As it has been previously argued elsewhere,<sup>56</sup> the ECCJ has given the impression that it would not be eager to entertain cases that have been previously decided by national courts of ECOWAS member states because the ECCJ is not a court of appeal over national courts.<sup>57</sup> Clearly, in this case, Hadijatou had several cases pending before the national courts on the issue. It is therefore not obvious whether the ECCJ is moving away from its initial approach with respect to its relationship with national courts. That having been said, it can still appear that the ECCJ found itself able to entertain this case only because the national courts all effectively avoided the aspect of slavery in the proceedings before them.<sup>58</sup> If this is so, then it can be argued

<sup>52</sup> Paras 40-45 *Koraou* case (n 5 above).

<sup>53</sup> European Court of Human Rights Applications 2832/66; 2835/66; 2899/66, judgment of 18 June 1971. See J Allain '*Hadijatou Mani Koraou v Niger* (2009) 103 *American Journal of International Law*. Allain takes issue with the Court's findings and especially the application of the European Court's decision.

<sup>54</sup> Para 42 *Koraou* case (n 5 above).

<sup>55</sup> See eg *Essien* case (n 38 above) para 27, where the ECCJ took the position that the requirement in art 56 of the African Charter is directed at the African Commission specifically.

<sup>56</sup> ST Ebobrah 'A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice' (unpublished research report submitted to the Danish Institute for Human Rights in December 2008) 15.

<sup>57</sup> See eg *Ugokwe v Federal Republic of Nigeria*, unreported Suit ECW/CCJ/APP/02/05 para 32 and *Keita* case (n 24 above) para 31.

<sup>58</sup> In para 83 of the *Koraou* judgment (n 5 above), the ECCJ expressed displeasure that the national courts did not denounce the slave status of Hadijatou.

that the Court has not moved away from an approach that will create difficulties for the creation of judicial hegemony in its favour.

Not for the first time, the case presented an opportunity for the ECCJ to exercise its authority to move from the usual seat of the court to locations within the ECOWAS community when the circumstances of a case so require.<sup>59</sup> The benefit this holds for indigent litigants cannot be overemphasised.

The ECCJ also used the chance to clarify the purport of article 10(d)(ii) of the 2005 Supplementary Protocol of the ECOWAS Court. The ECCJ emphasised that the provision was aimed at avoiding the exercise of conflicting jurisdiction by international judicial *fora*.<sup>60</sup> Effectively, this interpretation means that *lis pendens* can be raised as a bar in relation to international judicial proceedings but not in relation to national proceedings. Two important points arise here. First, one possible consequence of the absence of a requirement to exhaust domestic remedies is invoked in the sense that concurrent proceedings can emerge before national courts and the ECCJ on human rights issues in West Africa. This potentially may lead to the abuse of judicial processes. The second point is whether the approach adopted by the ECCJ will apply to proceedings before the African Commission since that body is a quasi-judicial body rather than an international court. If such an approach is adopted, the threat of fragmentation would certainly become bigger. There is therefore a need for the relevant institutions to address these concerns. Niger's final attempt to prevent the case from being determined was in the form of an argument that Hadijatou was not qualified to bring the claim as she was no longer a slave at the time she commenced the action.<sup>61</sup> Despite declaring the late objection inadmissible, the ECCJ went on to state that 'it should be underlined that since human rights are inherent to human beings, they are "inalienable, imprescriptible and sacred" and do not suffer any limitation'.<sup>62</sup> While the intention of the Court may be positive to the extent that the formulation is used to affirm Hadijatou's right to make the claim, the formulation is problematic. It fails to acknowledge the fact that human rights litigation may be limited in several ways, including by statutory limitation provisions.<sup>63</sup>

In terms of restricting itself to judicial powers granted under ECOWAS law, the ECCJ used this case to express its reluctance to exceed its mandate. Reacting to the invitation by Hadijatou for it to request Niger to engage in legislative reforms, the Court stressed that its mandate with

<sup>59</sup> The ECCJ applied art 26 of the 1991 Protocol of the Court when it moved to Mali in the case of *Keita v Mali*, unreported Suit ECW/CCJ/APP/05/06.

<sup>60</sup> Paras 49 to 53 *Koraou* case (n 5 above).

<sup>61</sup> This argument was raised in the final brief submitted by counsel for Niger. See para 54 *Koraou* case (n 5 above).

<sup>62</sup> Para 54 *Koraou* case (n 5 above).

<sup>63</sup> Art 56(6) of the African Charter is a good example of such statutory limitation.

respect to human rights was restricted to an examination of concrete cases in terms of article 9(4) of the 2005 Supplementary Protocol of the Court. The message being sent out here appears to be that the Court does not intend to replace the African Commission as a supervisory body over the African Charter. Restrictive as this may appear, it is consistent with the principle of limited powers in article 6(2) of the revised ECOWAS Treaty and in international institutional law generally. In the same vein, the ECCJ declined the invitation to interpret slavery as a crime against humanity in terms of the Rome Statute of the International Criminal Court.<sup>64</sup> In light of the possibility of state resistance to its enlarged competence, it is arguable that the approach of the Court in this regard is understandable and sustainable.

Having disposed of the state's objections to the admissibility of the case, the ECCJ had to address the complaints of discrimination on grounds of gender and social status, violations for slavery and slave-related practices as well as arbitrary arrest and detention. While finding that Hadijatou suffered discrimination, the Court took the view that the discrimination could not be attributed to the state of Niger. It would appear that the Court's finding of a violation in this regard was based on social origin rather than discrimination based on sex.<sup>65</sup> Thus, it may be that, in the Court's opinion, Hadijatou suffered inferior treatment as a result of her social status rather than as a result of her sex. The other aspect of the finding on discrimination that attracts attention is the question of state responsibility (or the lack of it) for the discrimination suffered by Hadijatou. It is difficult to justify the finding that the state had no responsibility for the discrimination suffered by Hadijatou. The obligation of states in respect of human rights includes the duty to protect people from a violation by third parties. This the state has to do by putting legislative and other measures in place for the benefit of individuals, including the most vulnerable.<sup>66</sup> In absolving the state of responsibility, there is nothing to indicate that the ECCJ made an assessment of the measures put in place by the state to protect Hadijatou from discrimination on grounds of her social origin. Such an assessment could have strengthened the finding on this ground.

On the issue of a violation for slavery and slave-related practices, the ECCJ had no difficulty in finding that the conditions in which Hadijatou found herself in the nine years of her forced stay in the household of Naroua satisfied the definition of slavery in various instruments. In reaching its decision, the Court had to resort to aspects of international criminal law to the extent that it referred to the case law of the

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<sup>64</sup> Paras 87 to 89 *Koraou case* (n 5 above).

<sup>65</sup> Para 96(1) *Koraou case* (n 5 above).

<sup>66</sup> See *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003) para 51, where the African Commission stated that a state violates art 1 of the African Charter only when it fails to enact relevant legislation to give force to Charter rights.

International Criminal Tribunal for Yugoslavia (ICTY).<sup>67</sup> In reaching its decision on this point, the Court searched deep for state responsibility for the violation caused by an individual. Hence, even though it found that Niger had appropriate legislation to criminalise *Wahiya* and related slave practices, the Court still found administrative and judicial protection provided by the state to be inadequate.<sup>68</sup> This is a significant departure from the approach adopted in relation to the issue of discrimination. Its importance is that it defines state obligation under article 1 of the African Charter beyond the mere enactment of legislation, and requires active enforcement of legislations so enacted.

In relation to the claim that Hadijatou's arrest and detention were arbitrary, the ECCJ once again demonstrated its reluctance to evoke judicial tension *vis-à-vis* national courts. The Court came to the conclusion that as far as detention is founded upon a judicial decision, it constitutes a legal basis that the ECCJ could not assess whether it was ill-founded or not.<sup>69</sup> The difficulty with this position is that the Court fails to take into account the possibility of domestic laws and domestic judicial proceedings failing to meet 'internationally laid down norms and standards'.<sup>70</sup> In this regard, it is submitted that the Court has to abandon the 'ostrich' approach to its relation with national courts if it wants to remain relevant for the protection of human rights in West Africa.

In a number of ways, the *Koraou* case represents one of the most complicated human rights cases that have come before the ECCJ. In terms of procedural and substantive issues, the case gives insights to some of the challenges that the ECCJ has to address in order to effectively exercise its expanded jurisdiction and live up to the expectation of people in West Africa.

The difficulties that exist with respect to human rights litigation before continental human rights supervisory bodies apparently amplify the importance of the decisions taken by the ECCJ. Delays, complications of the requirement to exhaust local remedies, the quasi-judicial nature of its decisions and difficulties with implementation are some of the issues that the African Commission has continued to struggle with. The African Court has not yet commenced full operations. Even when it does, the obstacle posed by qualified access to individuals and non-governmental organisations (NGOs) makes the African Court an unlikely forum for immediate human rights litigations of this nature. As such, the human rights competence of the ECCJ and its ability to deliver judgments of this nature are viable alternatives for victims of violations. The risk in the absence of the requirement to exhaust local remedies has been mentioned already. It remains a thorny issue with respect to the human rights work of the ECCJ. On the other hand, however, the

<sup>67</sup> See paras 77 to 79 *Koraou* case, (n 5 above).

<sup>68</sup> Paras 84 to 86 *Koraou* case, (n 5 above).

<sup>69</sup> Para 91 *Koraou* case (n 5 above).

<sup>70</sup> See *Purohit v The Gambia* (n 48 above) para 64.



benefits of ease of access to the human rights jurisdiction of the ECCJ cannot be overemphasised. For the most vulnerable and the very poor, the practice brings a ray of hope. The ability of the ECCJ to move to its sitting for the benefit of the poor and vulnerable is also a factor that improves access to judicial mechanisms.

### 3.3 Enforcement and implementation

Article 24 of the 2005 Supplementary Protocol of the ECCJ requires ECOWAS member states to implement judgments of the ECCJ in accordance with the civil procedure rules of the member state against which judgment has been given. Failure by a member state to fulfil obligations to ECOWAS attracts sanctions to be imposed by the Authority.<sup>71</sup> This provision arguably gives the Authority a role to play in ensuring compliance with decisions of the ECCJ. The *Manneh* case raised an opportunity for the Authority to apply its powers to sanction a member state as The Gambia has refused to comply with the judgment. Since there seems to be no procedure by which the Authority may be moved to act, counsel in the *Manneh* case resorted to sending a letter to the President of the ECOWAS Commission to act against The Gambia.<sup>72</sup> Despite the letter, there has been no indication that the Commission will seek to enforce the judgment as it has no role in the process. This raises the question of the will of the political organs to enforce the human rights judgment of the ECCJ, just as much as it raises issues around the procedure to move the Authority. Notwithstanding this challenge and in spite of its reinforcement of the enforcement difficulties of international tribunals, it has to be pointed out that this is not a peculiar problem of international tribunals. Much as it is argued that domestic courts do not have problems of enforcement, it has to be pointed out that ease of enforcement in domestic systems is usually in relation to judgments against individuals. Municipal law also lacks processes to compel pariah states to comply with decisions of their own domestic courts. Governments comply with judgments only because they deem it in their interest to comply. It is worth noting, however, that Niger indicated an intention to comply with the judgment in the *Koraou* case.<sup>73</sup>

## 4 The South African Development Community

In 1980, the Southern Africa Development Co-ordination Conference (SADCC) was founded as an alliance of Southern African states to

<sup>71</sup> Art 77 of the 1993 revised ECOWAS Treaty.

<sup>72</sup> 'Nigerian lawyer writes Chambas on detained Gambian journalist' *Panapress*, <http://www.panapress.com/newslatf.asp?code=eng045982&dte=05/08/2008> (accessed 12 April 2009).

<sup>73</sup> Niger's Minister of African Integration quoted in [portlandtribune.com/us\\_world\\_news/story.php?](http://portlandtribune.com/us_world_news/story.php?) (accessed 11 April 2009).

respond to the challenges raised by the policies of the then minority government in the Republic of South Africa.<sup>74</sup> It was the transformation of the SADCC that resulted in the establishment of the Southern African Development Community (SADC) in 1992.<sup>75</sup> Following the amendment of the SADC Treaty in 2001, the Community increased its objectives to include the promotion of<sup>76</sup>

sustainable and equitable economic growth ... that will enhance poverty alleviation ... enhance the standard of living and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.

SADC also aims to 'consolidate, defend and maintain democracy, peace, security and stability'; 'combat HIV and AIDS or other deadly and communicable diseases' and 'mainstream gender in the process of community building'.<sup>77</sup> In its present character, SADC is arguably not restricted to economic integration.

Similar to the EAC and ECOWAS, SADC recognises human rights, democracy and the rule of law as principles in accordance with which it will act in pursuit of integration.<sup>78</sup> Unlike the other RECs, however, SADC has adopted its own human rights catalogue in the form of a Charter of Fundamental Social Rights. Implementation of the Charter lies with national institutions and the regional structures.<sup>79</sup> While not much seems to have been achieved under the Charter, the SADC Summit of Heads of State and Government (Summit) adopted a Regional Protocol on Gender and Development in 2008.<sup>80</sup> Though it does not have a clear human rights mandate, the SADC Tribunal, in 2008, heard cases with implications for human rights.

#### 4.1 *Ernest Francis Mtingwi v SADC Secretariat (SADC Tribunal)*

Mtingwi brought this action against the SADC Secretariat alleging unlawful and unfair termination of a contract of employment. The main thrust of Mtingwi's case is that the decision to revoke or terminate the appointment violated the principles of natural justice as he

<sup>74</sup> See Viljoen (n 9 above) 492; also see generally GH Oosthuizen *The Southern African Development Community: The organisation, its policies and prospects* (2006). The founding members of the SADCC were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>75</sup> The Treaty of SADC was signed in Windhoek, Namibia, on 17 August 1992 but was amended in 2001. The current member states of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>76</sup> See art 5(1)(a) of the Consolidated SADC Treaty. The Treaty is available at <http://www.sadc.int/index> (accessed 11 April 2009).

<sup>77</sup> Generally see art 5 of the Consolidated SADC Treaty.

<sup>78</sup> Art 4 of the Consolidated SADC Treaty.

<sup>79</sup> Art 16 of the SADC Charter of Fundamental Social Rights.

<sup>80</sup> See Final Communiqué of the 28th Summit of SADC Heads of State and Government, <http://www.sadc.int/index/browse/page/203> (accessed 17 February 2009).

was not given an opportunity to be heard. He also argued that the decision amounted to unfair industrial or labour practices under the International Labour Organisation (ILO) Termination of Employment Convention. The main defence put forward by the Secretariat was that the appointment only took effect from the date that an employee arrives in the country where the duty station is located.<sup>81</sup> Thus, it was further argued, the contract of employment had not become effective. In its judgment, the SADC Tribunal concluded that the rights in the ILO Termination of Employment Convention 1982 could only be enjoyed by persons who are employees and as such could not be apply in favour of Mtingwi.<sup>82</sup>

Clearly, this case relates more to labour law and the law of contract than it does to human rights. However, it is important to observe the position that rights contained in the ILO Convention can be enjoyed by employees of SADC even though SADC as an organisation is not a party to the ILO Conventions. While it would be understandable to apply such international human rights instruments against member states that are parties to those instruments, the basis for the application of international instruments to the organisation as an entity is not clear. A considered pronouncement by the Tribunal in this direction would have been invaluable to the development of jurisprudence in this regard.<sup>83</sup>

#### 4.2 *Campbell and 78 Others v Zimbabwe (SADC Tribunal)*

The *Campbell* case is interesting for the issues that arise from the main judgment itself as well as from the rulings relating to the interim applications that were attached to the case.<sup>84</sup> The original application in the case was filed in October 2007 by Mike Campbell (PVT) Limited and William Michael Campbell (original applicants) against Zimbabwe (respondent). The application challenged the acquisition of applicants' farmland by the Zimbabwean authorities under section 16B of the Constitution of Zimbabwe as introduced by Amendment 17 of 2005.<sup>85</sup> Along with the main application, the original applicants filed an application for interim measures to maintain the *status quo* in

<sup>81</sup> This is based on a joint reading of the letter of employment and Rule 14.2.6 of the SADC *Administration Rules and Procedures handbook*.

<sup>82</sup> *Mtingwi* case (n 6 above) 15.

<sup>83</sup> Compare the arguments whether the European Union as an organisation should be bound by the European Convention on Human Rights (ECHR) without a formal accession to that instrument, separate from the ratification of the ECHR by individual member states.

<sup>84</sup> The *Campbell* case (n 7 above) is seminal in the sense that it is the first matter brought to the Tribunal by an individual seeking protection for human rights against a member state of SADC. Between October 2007 and November 2008 when final judgment was delivered, the SADC Tribunal entertained and gave its ruling in five different interim applications.

<sup>85</sup> See the *Campbell* case (n 7 above) 8.

respect of the land, the subject of the application.<sup>86</sup> These applications were made while a similar matter was pending before the Supreme Court of Zimbabwe. In addition to objections that the application missed procedural timelines, Zimbabwe argued at the hearing of the interim application that local remedies had not been exhausted so that the matter was not admissible.<sup>87</sup>

First satisfying itself that it had jurisdiction over the claim and overruling the objections raised by Zimbabwe, the Tribunal granted the interim order sought by the original applicants pending the determination of the main action before the Supreme Court of Zimbabwe. Soon after the grant of the order, an application was made by 77 other persons to intervene in the proceedings on grounds of similar interests against Zimbabwe. The new applicants also requested interim measures against Zimbabwe. On 28 March 2008, when the applications to intervene and for interim measures were granted in favour of the new applicants, the Tribunal also consolidated the new application with the original action.<sup>88</sup> On the same day, another application to intervene was filed by other persons claiming interest against the original applicants.<sup>89</sup> This application was dismissed on the grounds that the Tribunal did not have competence over disputes between individuals. On 17 June 2008, another application to intervene was filed by some others claiming interests against the original applicants and this was also dismissed on the grounds of being a dispute between individuals.<sup>90</sup> It was after this barrage of interim applications and rulings that the case was finally set for determination.

It has to be stated that the rulings themselves contain matters of great importance to clarifying human rights litigation before the SADC Tribunal. The granting of interim measures before the Tribunal was properly seized of the main matter demonstrates a preparedness not to make orders that would turn out to be academic. More interesting, however, is the Tribunal's position that in the decision to entertain an application for interim measures in urgent situations, the requirement to exhaust local remedies does not apply.<sup>91</sup> While it may appear controversial since a case has to be filed before an application for interim measures can be brought, the position of the Tribunal in this regard

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<sup>86</sup> *Campbell & Another v Zimbabwe (Campbell interim 2007)*, SADC (T) Case 2/2007, ruling of 13 December 2007 2.

<sup>87</sup> *Campbell interim 2007* (n 86 above) 7.

<sup>88</sup> See *Gideon Stephanus Theron v Zimbabwe & 2 Others*, Case SADC (T) 2/08; *Douglas Stuart Taylor-Freeme & 3 Others v Zimbabwe & 2 Others*, Case SADC (T) 03/08; *Andrew Paul Rosslyn Stidolph & 58 Others v Zimbabwe & 2 Others*, Case SADC (T) 04/08; and *Anglesea Farm (Pvt) Ltd v Zimbabwe & 2 Others*, Case SADC (T) 06/08 (consolidated) 8. The interim measure was not ordered in respect of the last three applicants as their eviction had been completed at the time of the application.

<sup>89</sup> *Albert Fungai Mutzie & Others v Campbell & 2 Others*, Case SADC (T) 8/08.

<sup>90</sup> *Nixon Chirinda & Others v Campbell & 2 Others*, Case SADC (T) 9/08.

<sup>91</sup> *Campbell interim 2007* (n 86 above) 7-8.

is logical as holding otherwise would have meant that states can use all available means to delay a pending matter in order to destroy the *res* in the matter before the Tribunal can properly be seized. It is also significant that the Tribunal found itself as lacking the competence to adjudicate in matters between individuals in two of the interim applications. If for nothing else, the lack of competence to hear disputes between individuals is part of what qualifies the Tribunal as an international court.<sup>92</sup> Another very important issue that arose as an interim matter in this case is the question of the enforcement of decisions of the Tribunal. Although the records indicate that the representative of the Zimbabwean government had undertaken to comply with the interim measures ordered by the Tribunal, the applicants adduced evidence to show the intention not to comply.<sup>93</sup> Following proceedings that established non-compliance by the government of Zimbabwe, the Tribunal took a decision in accordance with article 32(5) of the Protocol on the Tribunal to make a report of non-compliance to the Summit of SADC.<sup>94</sup> This procedure shows the handicap of international judicial institutions in terms of ability to enforce their own decisions, but it also demonstrates that political organs of international institutions are vital for the creation of a culture of compliance.

At the hearing of the substantive action, the applicants argued that the enactment and implementation of constitutional Amendment 17 by Zimbabwe were in breach of the state's obligation under the SADC Treaty. The applicants argued further that Amendment 17 also denied them access to court in relation to acquisition of their lands, subjected them to racial discrimination and denied them compensation in respect of the acquisition.<sup>95</sup> It is important to note that in the formulation of their claims, the applicants relied essentially on the SADC Treaty as the source of the rights. From a human rights perspective, the most important challenge raised by the respondent was that the Tribunal lacked jurisdiction to entertain the action under the SADC Treaty. In response to the claims, the state's approach was to deny that it violated the rights of the applicants by enacting and implementing Amendment 17.<sup>96</sup> This, arguably, is a recognition that compulsory acquisition of land on racially-discriminative grounds, without granting access to court for determination of the validity of the acquisition and payment of compensation, is a violation of rights.

Clearly, the most important question in this case as distilled by the Tribunal was whether or not the Tribunal had jurisdiction to entertain

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<sup>92</sup> Compare the ECCJ which entertained a dispute with only individuals as parties in *Ukor v Laleye*, unreported Suit ECW/CCJ/APP/01/04.

<sup>93</sup> See the ruling of 18 July 2007 in the *Campbell* case (on file with the author).

<sup>94</sup> By the organisational structure of SADC, the Summit of Heads of State and Government is the highest authority of SADC.

<sup>95</sup> *Campbell* case (n 6 above) 12-13.

<sup>96</sup> *Campbell* case (n 6 above) 15-16.

an application claiming the violation of human rights by a SADC member state. This is especially as, unlike the ECCJ, the Tribunal has no express statement of competence to determine human rights cases. As far as the Tribunal was concerned, its competence to determine disputes relating to the interpretation and application of the SADC Treaty was sufficient to cover human rights cases.<sup>97</sup> In this context, the Tribunal was not convinced that the absence of an instrument cataloguing human rights under the SADC framework constituted a bar to its jurisdiction. In determining whether the action of the state has violated the principles of human rights, democracy and the rule of law that member states were obliged to respect under the SADC Treaty, the Tribunal did not consider itself as 'borrowing standards from other treaties' or as 'legislating for the member states'.<sup>98</sup> The Tribunal even interpreted article 21(b) of its Protocol to mean that it can 'look elsewhere to find answers where the Treaty is silent'.<sup>99</sup> Considering that human rights protection is not listed as an objective of SADC and the Tribunal does not have a clear mandate in the field of human rights, a more detailed consideration of the objections by Zimbabwe would have been invaluable.

The approach taken by the Tribunal suggests that it considers the statement of fundamental principles contained in treaties as important tools to shape the conduct of member states and the organisation itself. The views of the Tribunal are also important to the extent that they give room for human rights claims based on the SADC Treaty to be linked with rights in instruments such as the African Charter. Other restatements of international law that emerge at this early stage of the judgment were the recognition of the requirement to exhaust local remedies and exceptions to the application of the rule,<sup>100</sup> and the fact that states cannot rely on national law to avoid international treaty obligations.<sup>101</sup>

It is also important to note that in the determination of the substantive issues in the matter, the Tribunal considered the jurisprudence of treaty supervisory bodies in the three main regional human rights systems as well as case law from certain national systems. In doing this, the Tribunal does not only give life to the otherwise empty obligation in article 4(c) of the SADC Treaty, but seemingly prepares itself to avoid a decision that would conflict with the interpretations of the other bodies. This is important for the purpose of preserving the unity

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<sup>97</sup> *Campbell case* (n 7 above) 17-18.

<sup>98</sup> See the arguments put forward by the respondent state on 23 of the *Campbell case* (n 7 above).

<sup>99</sup> As above. Art 21(b) of the Protocol on the Tribunal enjoins the Tribunal to develop its own jurisprudence 'having regard to applicable treaties, general principles and rules of public international law'.

<sup>100</sup> *Campbell case* (n 7 above) 19-21.

<sup>101</sup> See 25 of the *Campbell case* (n 7 above).

of international law, especially with regard to the African Commission. This attitude, it is submitted, is preferable to the approach of the ECCJ which does not appear eager to refer to decisions of the African Commission even though it applies the African Charter directly.

The Tribunal's consideration and pronouncements on the substantive issues of denial of access to court and non-payment of compensation are essentially straightforward and uncontroversial statements of applicable law. With regard to the question of racial discrimination, complications appear in the divergence of opinion among the judges.<sup>102</sup> While the majority of the judges seemed to recognise that affirmative action was permissible, they appeared to take the view that if land acquisition was undertaken to benefit few in the political class, that would amount to discrimination.<sup>103</sup> Clearly, like their dissenting brother judge, the majority did not find the Zimbabwean law under consideration discriminatory on face value. They therefore had to dig into General Comments of the Committee on Economic, Social and Cultural Rights to import and apply theories of formal and substantive equality as well as direct and indirect discrimination.<sup>104</sup> This, together with the robust reference to other human rights instruments ratified by Zimbabwe, demonstrates a recognition of the universality of human rights. However, taking into account the dissenting opinion on the issue of racial discrimination, perhaps the majority should have shown a stronger link between Amendment 17 of the Zimbabwean Constitution and an intention to subject the applicants to an unfavourable treatment by the simple reason of their race.

Notwithstanding the fact that the judges of the SADC Tribunal were not appointed by reason of specific qualifications in human rights, the Tribunal has shown strong judicial character in its determination of the *Campbell* case. It has clearly positioned itself as a forum to which citizens of SADC member states can turn when national courts are unable or unwilling to protect human rights. This layer of protection is vital and should be encouraged to grow. In the face of the difficulties already identified above in relation to human rights litigation before continental bodies and the peculiar circumstances of Zimbabwe, the courage of the Tribunal is commendable. It is also significant that fundamental principles and other provisions in the SADC Treaty have been brought to life in favour of human rights.

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<sup>102</sup> It is interesting that, unlike some other systems, there is room for dissenting judgments and the dissenting opinion of Judge OB Tshosa on whether Amendment 17 amounted to racial discrimination is relevant.

<sup>103</sup> See 53 of the *Campbell* case (n 7 above).

<sup>104</sup> See 49-50 of the *Campbell* case (n 7 above).



#### 4.4 Enforcement and implementation

Article 32 of the SADC Protocol on Tribunal and Rules of Procedure deals with enforcement and execution of the judgments of the SADC Tribunal. It places a duty on member states against which judgment is given to enforce such judgments in line with the municipal procedure for the enforcement of foreign judgments. The provision requires the Tribunal to make the determination whether there has been a failure to comply with its judgment. However, the duty to take measures to ensure compliance lies with states and their institutions, while the Summit has the ultimate duty to take appropriate action after a finding by the Tribunal of non-compliance. In the *Campbell* case, the Tribunal's finding that Zimbabwe had failed to comply with the interim measures was a litmus test for the Community, but especially for the Summit. The approach adopted by the Summit has been to request the Ministers of Justice of SADC member states to advise the Summit on the appropriate action to be taken. The result of this process is fundamental as it will determine how member states will react to judgments of the Tribunal. Short of sanctions, the only other tool at the disposal of the Summit may be political pressure. It would be interesting to see which way the Community will go in this regard.

### 5 Conclusion

The protection of human rights in Africa is an ongoing struggle that is inextricably linked to the wellbeing of Africans. The pursuit of the goals of economic integration on the continent would be meaningless if conflicts prompted by human rights violations at national levels are allowed to continue unabated. Thus, in moving into the field of the judicial protection of human rights, sub-regional courts are only contributing to the consolidation of economic integration. They have therefore not really deviated from their original purpose. If there were questions about their suitability for the role of guardians of human rights, they have not gone away completely but these cases are an indication that sub-regional courts are by no means capable protectors.

The challenges that emerge with RECs taking on greater and increasing powers similar to governmental powers of member states without being subject to judicial control in the exercise of these powers are ones that the traditional continental human rights bodies may not have been able to meet. In this regard, the involvement of sub-regional courts in the field of human rights is a positive development. Similarly, the clear difficulties that have trailed the functioning of the African Commission and the consequent effect on human rights protection in Africa had long demonstrated the need for alternative *fora* for supranational human rights litigation. The obvious benefits that the involvement of sub-regional courts in human rights litigation brings for the most

vulnerable in the context of easy access to justice, speed in the conclusion of cases, rendering of binding decisions and relative progress in implementation are attractive incentives for support of these emerging systems. In light of the continuing struggles of the African human rights court, the potential of these sub-regional mechanisms cannot be overemphasised. There are obvious difficulties in the practices and lessons to be learnt, but these systems can only get better as time goes by. It is only hoped that human rights practitioners, activists and lawyers will contribute to the proper growth of the sub-regional systems.