

**THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND THE  
REGIONAL ECONOMIC COMMUNITIES: THE NEED FOR CO-OPERATION**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS OF THE LLM (HUMAN RIGHTS AND DEMOCRATISATION IN  
AFRICA) OF THE UNIVERSITY OF PRETORIA**

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**30 OCTOBER 2009**

## **DEDICATION**

To Nuria Mummad

You are everything for me.

## DECLARATIONS

I, **ABDI JIBRIL ALI**, declare that this research is my own original work and where other people's works have been used, references have been provided. It has not been submitted or is not currently being considered for submission at any other university or institution. I assume personal responsibility to the correctness of facts contained herein and to the presentation thereof. I hereby present in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa of the University of Pretoria.

**SIGNED AT ACCRA THIS 30<sup>th</sup> DAY OF OCTOBER 2009.**

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I, **E K QUASHIGAH**, being the supervisor, have read this research paper and approved it for partial fulfilment of the requirements of the Masters of Law Degree in Human Rights and Democratisation in Africa of the University of Pretoria.

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**PROF E K QUASHIGAH  
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## **List of abbreviations**

ACERWC	African Committee of Expert on the Rights and Welfare of the Child
ACP Countries	African, Caribbean, and Pacific Countries
ACRWC	African Charter on the Rights and Welfare of the Child
AEC	African Economic Community
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AGOA	African Growth and Opportunity Act
AMU	Arab Maghreb Union
AU	African Union
AUC	African Union Commission
CEN-SAD	Community of Sahel-Saharan States
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
ECA	Economic Co-operation for Africa
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
ECOWAS Court	ECOWAS Community Court of Justice
EU	European Union
HRC	Human Rights Council
IACHR	Inter-American Commission on Human Rights
IGAD	Intergovernmental Authority on Development
IGADD	Intergovernmental Authority on Drought and Development
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
PAP	Pan-African Parliament
RECs	Regional Economic Communities
SACU	South African Customs Union

SADC	Southern Africa Development Community
SADC Tribunal	Southern Africa Development Community Tribunal
SADCC	Southern Africa Development Co-ordination Conference
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review
USAID	United States Agency of International Development



## CHAPTER ONE

# THE AFRICAN COMMISSION AND REGIONAL ECONOMIC COMMUNITIES: INTRODUCTION

### 1.1 Background

African states have been putting in place supranational institutions to deal with the promotion and protection of human rights in Africa with the establishment of the African Commission on Human and Peoples' Rights (African Commission) in accordance with the African Charter on Human and Peoples' Rights (African Charter).<sup>1</sup> The Commission was followed by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)<sup>2</sup> and the African Court on Human and Peoples' Rights (African Court)<sup>3</sup> which is being merged with the African Court of Justice. Supranational institutional development for the promotion and protection of human rights in Africa was begun at the regional level. Recently, some Regional Economic Communities (RECs) have started dealing with human rights.

RECs were established with the goals of achieving increased trade and improved economic links.<sup>4</sup> They were intended to serve as the building blocks for the economic integration of Africa.<sup>5</sup> The African Economic Community (AEC) and the Pan-African Parliament (PAP) were entrusted with the co-ordination and harmonisation of activities of the RECs.<sup>6</sup> Out of 14 major regional economic groupings,<sup>7</sup> the Assembly of Heads of State and Government of African Union (AU Assembly) recognised eight RECs in July 2006.<sup>8</sup>

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- <sup>1</sup> The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev.5, 21 *I.L.M.* 58 (1982) adopted in Nairobi, Kenya on 27 June 1981 by the Organization of African Unity (OAU) and entered into force on 23 October 1986.
  - <sup>2</sup> Established in accordance with the African Charter on the Rights and Welfare of the Child, ACERWC held its first meeting in 2002.
  - <sup>3</sup> Established in accordance with the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, the first judges were sworn in during the July 2006 Summit of AU.
  - <sup>4</sup> See F Viljoen *International human rights law in Africa* (2007) 495.
  - <sup>5</sup> Art 88 (1), Treaty Establishing the African Economic Community, adopted in 1991 in Abuja, Nigeria and entered into force in 1994.
  - <sup>6</sup> Art 88 (3) of AEC Treaty; art 3(9) & art 11(7) of the Protocol to the Treaty Establishing the African Economic Community relating to Pan-African Parliament, adopted in Sirte, Libya on 2 March 2001 and entered into force on 14 December 2003.
  - <sup>7</sup> UNCTAD *Economic development in Africa report 2009: Strengthening regional economic integration for Africa's development* (2009) 9; Viljoen (n 4 above) 488.
  - <sup>8</sup> Decision Relatif au Moratoire sur la Reconnaissance des Communautés Economiques Regionales (CER), Assembly/AU/Dec.112 (VII) Doc. EX.CL/278 (IX). See Viljoen (n 4 above) 488.

RECs were not intended to deal with human rights.<sup>9</sup> After little success in their economic objectives, they 'began a process of self-reconstruction' which in some RECs included amendment of their establishing treaties to include the promotion and protection of human rights according to the African Charter among their fundamental principles.<sup>10</sup> Some RECs have gone further and provided an institutional framework for protection of human rights. In the Economic Community of West African States (ECOWAS), the Community Court of Justice has a jurisdiction to adjudicate human rights cases.<sup>11</sup> In *Ernest Francis Mtingwi v SADC Secretariat*<sup>12</sup> and *Campbell and 78 Others v Zimbabwe*,<sup>13</sup> the Southern African Development Community (SADC) Tribunal demonstrated itself as a forum of human rights.<sup>14</sup> The East African Court of Justice (EACJ) is waiting for a protocol that would trigger its human rights jurisdiction.<sup>15</sup>

The multitude of institutions concerned with human rights shows the commitment of the African states although they had not seriously considered the relationship of these institutions among themselves and with other African institutions until recently. The AU policy organs and the African Commission are making efforts towards establishing a formal relationship among human rights institutions. The AU Assembly has repeatedly requested the African Commission to co-operate with other organs that have human rights mandate.<sup>16</sup> As a result, the African Commission has been holding series of brainstorming sessions to seek ways of establishing a framework for co-operation.<sup>17</sup> However, the demand of the Assembly and the efforts of the African Commission seem limited to the regional institutions although both the African Commission and RECs operate under the supervision of the AU Assembly.<sup>18</sup>

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<sup>9</sup> Viljoen (n 4 above) 495.

<sup>10</sup> ST Ebobrah '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* 308. See Consolidated Text of the Treaty of the Southern African Development Community (as Amended), art 4(c); Treaty Establishing the East African Community, art 6(d); Treaty of ECOWAS, art 4(g); COMESA Treaty, art 6(e).

<sup>11</sup> Art 9(4) & 10(d) of Supplementary Protocol A/SP1/01/05 to Protocol on the Community Court of Justice (1991) adopted in 2005 and provisionally came into force upon signature in 2005.

<sup>12</sup> SADC (T) Case 1/2007, judgement delivered on 27 May 2008.

<sup>13</sup> SADC (T) Case 2/2007, judgement delivered on 28 November 2008.

<sup>14</sup> S T Ebobrah 'Human rights development in sub-regional courts in Africa in 2008' (2009) 9 *African Human Rights Law Journal* 333.

<sup>15</sup> Art 27(2) of Treaty Establishing East African Community, signed on 30 November 1999, came into force 7 July 2000, and amended on 14 December 2006 and 20 August 2007.

<sup>16</sup> See Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights, Doc. Assembly/AU/7 (II), para 3; Decision on the 18th Annual Activity Report, Doc. EX.CL/199 (VII), para 4; Decision on the 19th Activity Report, (Doc. EX.CL/236 (VIII)), para 8.

<sup>17</sup> See M Hansungule 'African courts and the African Commission on Human and Peoples' Rights' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 268.

<sup>18</sup> See Rule 34(2) of Rules of Procedure of the Assembly of the Union.

## **1.2 Statement of the Problem**

The African Commission has not established a framework for collaboration with RECs despite its mandate to co-operate with African institutions concerned with the promotion and protection of human rights at subregional level. Besides, the AU Assembly has not directed the African Commission and RECs to co-operate with each other. The lack of co-operation has its own repercussions on the promotional activities of human rights, on the consistent development of jurisprudence on the African Charter and on the legal integration in Africa.

Uncoordinated promotional activities of human rights carried out by African Commission and RECs would inevitably result in duplication of activities and inefficient utilisation of scarce resources. Some courts of RECs have jurisdiction to adjudicate human rights complaint based on the African Charter. The overlapping jurisdiction of the African Commission with the Courts of RECs might lead to divergent interpretation of the African Charter which inhibits consistent development of jurisprudence on the latter. The lack of co-operation would also allow the proliferation of bills of rights in each REC which potentially hampers legal integration in Africa.

## **1.3 Thesis statement**

The co-operation between the African Commission and RECs to co-ordinate their human rights activities would achieve better promotion and protection of human rights, consistent development of jurisprudence on the African Charter, and harmonious development of human rights laws. The African commission is mandated by the African Charter to co-operate with institutions concerned with human rights. Recently, RECs are involved in human rights. As a result they qualify as institutions concerned with human rights. By co-operating with RECs the Commission will avoid the possibility of divergent interpretation of the African Charter by organs of RECs. Subregional allies of the Commission will reinforce the efforts of the Commission.

## **1.4 Objectives of the study**

This study proposes to explore the interplay of RECs and the African Commission. In this regard, the objectives of this study are to:

- a) Examine the causes of proliferation of RECs in Africa and the rationale for their involvement in human rights matters
- b) Expound the contribution of RECs to the promotion and protection of human rights in Africa

- c) Find out the causes for the failure of the African Commission to co-operate with RECs,
- d) Explore the advantages and modes of the co-operation between the African Commission and RECs

### **1.5 Significance of the study**

This study seeks to contribute to the literature of institutional engineering for the better promotion and protection of human rights in Africa. It may create interest to conduct further research in these areas. The recommendations from the analysis inform African states that the co-operation between the African Commission and RECs is indispensable in legal integration process of Africa. It informs African Commission and RECs to co-ordinate their efforts for more effective promotion and protection of human rights in Africa.

### **1.6 Research questions**

There seems to be sufficient reasons for establishment of RECs in Africa and their involvement in human rights issues. The engagement of these communities in the promotion and protection of human rights raises numerous questions vying for answers. The main research question is: does the co-operation between the African Commission and RECs improve the promotion and protection of human rights in Africa?

In order to answer this question, the following questions also press for answers. Why RECs proliferated in Africa? Why are they involved in the promotion and protection of human rights? How different organs of RECs contribute to the promotion and protection of human rights? Why the African Commission has not made efforts to co-operate with RECs? Does the co-operation have any benefit for the African Commission and RECs? How the African Commission should co-operate with RECs?

### **1.7 Literature survey**

To begin with the relationship between regional integration and human rights, Quashigah found a bipolar relationship between human rights and regional integration<sup>19</sup> while Musungu concluded that there is a conceptual linkage between economic integration and human rights in

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<sup>19</sup> E K Quashigah 'Human rights and integration' in R Lavergne (ed) *Regional integration and cooperation in West Africa: A multidimensional perspective* (1997).

Africa.<sup>20</sup> In analysing ECOWAS as human rights instrument, Nwogu concluded that economic integration regimes are mechanisms for achievement of human rights within the normative framework of the African human rights system.<sup>21</sup>

The contributors in a compilation edited by Wachira addressed human rights issues in the courts of RECs.<sup>22</sup> After discussing the conflicts of jurisdiction of various regional courts in Africa, Nyaga called for 'co-ordination and coherence among the existing institutions.'<sup>23</sup> Mureithi assessed the impact of regional courts in Africa on the development of international human rights jurisprudence and concluded that the multiplicity of courts could lead to growth of international law jurisprudence.<sup>24</sup> Oziegbe recommended ECOWAS Court to 'find a way of reconciling its competence with the African Court.'<sup>25</sup> Mooki discussed the role of the SADC Tribunal in the promotion and protection of human rights.<sup>26</sup>

The works of Ebobrah also address human rights issues in the Courts of RECs. Ebobrah explored the issue of access to justice and the human rights competence of the ECOWAS Court.<sup>27</sup> In another publication, he proposed 'exchange of information and ideas' between courts of RECs and African Court as a solution to the problem of overlapping jurisdiction.<sup>28</sup> Ebobrah also offered rationale for litigating before courts of RECs.<sup>29</sup> Lamin figured out absence of enforcement mechanisms as one of the problems facing courts of RECs.<sup>30</sup>

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<sup>20</sup> SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 1.

<sup>21</sup> N Nwogu 'Regional integration as an instrument of human rights: Reconceptualizing ECOWAS' (2007) 6 *Journal of Human Rights* 345.

<sup>22</sup> GM Wachira (ed) *Judiciary watch report: regional and sub-regional platforms for vindicating human rights in Africa* (2007).

<sup>23</sup> JM Nyaga 'Conflict and overlaps of jurisdiction of various regional courts in Africa' in GM Wachira (ed) *Judiciary watch report: Regional and sub-regional platforms for vindicating human rights in Africa* (2007).

<sup>24</sup> M Mureithi 'The Impact of regional courts in Africa in fostering regional integration and the development of international human rights jurisprudence' in GM Wachira (ed) *Judiciary watch report: Regional and sub-regional platforms for vindicating human rights in Africa* (2007).

<sup>25</sup> J Oziegbe 'An overview of the ECOWAS Community Court of Justice: challenges and prospects' in GM Wachira (ed) *Judiciary watch report: Regional and sub-regional platforms for vindicating human rights in Africa* (2007) 33.

<sup>26</sup> M Mooki 'African regional courts and their role in the promotion and protection of human rights: The Southern African Development Community Tribunal' in GM Wachira (ed) *Judiciary watch report: Regional and sub-regional platforms for vindicating human rights in Africa* (2007).

<sup>27</sup> Ebobrah (n 10 above).

<sup>28</sup> ST Ebobrah 'Addressing sub-regional challenges to the unity of African International Human Rights Law' 22 at <[http://www.jus.uio.no/forskning/grupper/intrel/arrangementer/seminarer/oslo\\_conference\\_2009/drafts/ebobrah.pdf](http://www.jus.uio.no/forskning/grupper/intrel/arrangementer/seminarer/oslo_conference_2009/drafts/ebobrah.pdf)> (accessed 19 June 2009).

<sup>29</sup> ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: prospects and challenges' (2009) 17 *RADIC* 79.

<sup>30</sup> AR Lamin 'African sub-regional human rights courts: The ECOWAS Court of Justice, the SADC Tribunal and the EAC Court of Justice in comparative perspective' in J Akokpari & DS Zimble (eds) *Africa's human rights architecture* (2008).

Viljoen identified RECs as one of the four levels of human rights protection in Africa.<sup>31</sup> He dealt with the formation of RECs and how they promote and protect human rights.<sup>32</sup> He identified some possible problems such as divergent interpretation of the Africa Charter, overlapping jurisdiction and forum shopping that might arise in endeavour to promote and protect human rights at both regional and subregional levels.<sup>33</sup> In a volume edited by Bösl and Diescho,<sup>34</sup> Ruppel<sup>35</sup> and Nwauche<sup>36</sup> have discussed the promotion and protection of human rights in RECs. Ruppel analysed establishing treaties and other instruments of RECs in East and Southern Africa and concluded that 'RECs have a clear mandate to promote and protect human rights.'<sup>37</sup> The work of Nwauche covers RECs in West Africa and the African Arabic countries.

A book edited by Evans and Murray deals with the relationship of the African Commission with other institutions in some of its chapters.<sup>38</sup> In one of the chapters, Mbelle dealt with the co-operation of the African commission with NGOs and NHRIs and touched upon the issue of the mandate of the African Commission to co-operate with other institutions.<sup>39</sup> While discussing the subsidiary mechanisms of the African Commission in other chapters, Murray recommended appointment of independent experts as special rapporteurs instead of the serving commissioners<sup>40</sup> and Nyanduga showed the involvement of civil society in the working groups of the African Commission.<sup>41</sup>

However, these works do not address the role of the African Commission in RECs, the causes for the involvement of RECs in human rights, the benefits of the co-operation between the African Commission and RECs, modes of their co-operation and the reasons for the failure of the African Commission to make efforts to co-operate with RECs despite its mandate to co-operate with them. Therefore, this study is unique in that it handles these issues and seeks to

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<sup>31</sup> Viljoen (n 4 above).

<sup>32</sup> As above.

<sup>33</sup> As above.

<sup>34</sup> A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009).

<sup>35</sup> OC Ruppel 'Regional economic communities and human rights in East and southern Africa' in A Bösl & J Diescho (eds) *Human rights in Africa: legal perspectives on their protection and promotion* (2009).

<sup>36</sup> ES Nwauche 'Regional economic communities and human rights in West Africa and the African Arabic countries' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009).  
<sup>37</sup> Ruppel (n 35 above) 282.

<sup>38</sup> M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: the system in practice 1986–2006* (2008).

<sup>39</sup> N Mbelle 'The Role of Non-governmental Organisations and National Human Rights Institutions at the African Commission' in Evans & Murray (n 38 above).

<sup>40</sup> R Murray 'The Special Rapporteurs in the African System' in Evans & Murray (n 38 above).

<sup>41</sup> BTM Nyanduga 'Working Groups of the African Commission and their Role in the Development of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 38 above).

find solution for better promotion and protection of human rights in Africa in the way the African Commission works with RECs. It is a theoretical investigation of a nexus that should exist between RECs and the African Commission.

## **1.8 Research Methodology**

In this research, a non-empirical research methodology will be employed. The issues are critically approached based on consultation of primary and secondary data. Documented facts are explored through literature surveys and desktop research in a library.

## **1.9 Limitations of the study**

This research is an overview of the relationship that should exist between RECs and the African Commission. It is neither an in-depth analysis of the all functions of RECs and the African Commission, nor a historical account of the evolution of these institutions in Africa. It does not cover all the economic groupings in Africa. It focuses only on RECs that are recognised by the African Union in 2006. Except when it is incidental, the study does not seek to deal with the relation between RECs and other continental human rights institutions including the African Court and ACERWC. Another limitation is the unavailability of some information in the library and on the internet.

## **1.10 Overview of chapters**

**Chapter one** introduces the study. It provides research questions and justification for the research. **Chapter two** answers the questions: “What are the contributions of RECs to promotion and protection of human rights in Africa?” In addition, it seeks to discover the causes for the proliferation of RECs and their involvement in human rights. **Chapter three** is concerned with the co-operation between the African Commission and RECs. It gives the background and mandate of the African commission to co-operate with other institutions before it seeks to answer the question ‘why has the African Commission failed to co-operate with RECs?’ It also explores the advantages and modes of this co-operation. **Chapter four** presents the conclusion and recommendations of the study.

## CHAPTER TWO

### HUMAN RIGHTS IN REGIONAL ECONOMIC COMMUNITIES

#### 2 Introduction

The previous chapter highlighted that there are at least 14 economic groupings eight of which are recognised by African Union (AU). This is a huge number in a continent of 53 states hinting the proliferation of RECs. Besides, the chapter indicated the interest of some of them in the promotion and protection of human rights. This chapter seeks to find causes of the proliferation of RECs, causes for their involvement in human rights and the contributions or potential contributions of their organs to the promotion and protection of human rights.

#### 2.1 Causes for proliferation of RECs

Regional integration initiatives are traced back to colonial era predating the Organisation of African Unity (OAU). In Southern Africa, South African Customs Union (SACU) was established in 1910.<sup>42</sup> In Eastern Africa, the East African Community was established in 1919.<sup>43</sup> Regional integration in Central Africa also began in colonial period with the formation of federation of "Afrique Equatoriale Française".<sup>44</sup> In the West, integration initiatives started with the conclusion of trade agreement between Ghana and Upper Volta (now Burkina Faso) in 1962.<sup>45</sup> Some states from North Africa joined some West African states to form African Common Market in 1962.<sup>46</sup> Generally 'Africa experienced proliferation of regional groupings' since 1960s.<sup>47</sup> Today, Africa has more regional organizations than any other continent.<sup>48</sup>

Understanding why there is a proliferation of RECs is one of the core challenges in African integration.<sup>49</sup> Still, a number of factors that caused proliferation of RECs can be identified. These factors may broadly fall into internal and external factors. Among the internal factors, the fact that 'regional integration has been part of Africa's strategy for economic transformation for

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<sup>42</sup> A Geda & H Kebret 'Regional economic integration in Africa: a review of problems and prospects with a case study of COMESA' (2007) 17 *Journal of African Economies* 358.

<sup>43</sup> As above.

<sup>44</sup> JM Gankou & MN Ntah 'Is The Regional Integration in Central Africa in Question?' (2008) 2 *African Review of Integration* 1.

<sup>45</sup> Economic Commission for Africa *Assessing Regional Integration in Africa* (2004) 27.

<sup>46</sup> As above.

<sup>47</sup> OI Nzewi 'The role of the Pan-African Parliament in African regionalism (2004 - 2006): an institutional perspective' unpublished PhD thesis, University of Pretoria, 2008 123.

<sup>48</sup> UNCTAD (n 7 above) 8.

<sup>49</sup> Nzewi (n 47 above) 125.



more than three decades,<sup>50</sup> is one of the major causes of proliferation of RECs in Africa. By 1979, the OAU had already passed various resolutions on the setting-up of sub-regional economic groupings.<sup>51</sup>

For the decade of 1980s, the African leaders committed themselves to 'strengthen existing regional economic communities and establish other economic groupings in the other regions of Africa, so as to cover the continent as a whole.'<sup>52</sup> From the Final Act of Lagos and from Resolution on the Lagos Plan of Action, it could be implied that the OAU Secretary-General was mandated to assist member states 'to create and to strengthen regional economic communities.'<sup>53</sup>

The Treaty Establishing African Economic Community (AEC) entrenched the role of RECs in African integration. It provides for '[t]he strengthening of existing regional economic communities and the establishment of other communities where they do not exist' as a means for achieving the objectives of economic integration.<sup>54</sup> Of the six stages of establishing AEC, the first stage is the establishment of RECs.<sup>55</sup> The Constitutive Act of the African Union (AU) envisages the establishment of even more RECs as one of its objectives is to 'coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.'<sup>56</sup> Pan-African Parliament (PAP) is tasked to coordinate RECs.<sup>57</sup> It seems, however, that there is a policy shift since 2006 as African Ministers responsible for Integration recommended AU Assembly to halt recognizing other RECs.<sup>58</sup>

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<sup>50</sup> ECA (n 45 above) 27. See also UNCTAD (n 7 above) 8.

<sup>51</sup> Resolution on the progress of the proposed setting-up of a conference of African interconventional organizations adopted by the Council of Minister of the OAU on its thirty-second ordinary session in Nairobi, Kenya, from 23 February to 4 March, 1979, CM/Res. 709 (XXXII). Other examples include Resolution on Regional Economic Groupings adopted by the Council of Ministers of the OAU, Ninth Ordinary Session in Kinshasa, Congo, from 4 to 10 September 1967, CM/Res. 125(IX); and Resolution on regional groupings and market integration adopted by the Council of Ministers of the OAU, eleventh ordinary session in Algiers, Algeria, from 4 to 12 September 1968, CM/Res.159 [XI]. See Z Červenka *The Organisation of African Unity and its Charter* (1969) 164.

<sup>52</sup> Final Act of Lagos adopted by Assembly of Heads of State and Government of OAU on its Second Extraordinary Session in Lagos, Nigeria, April 1980 para 1(a).

<sup>53</sup> RM D'Sa 'The Lagos Plan of Action—Legal Mechanisms for Co-operation between the Organisation of African Unity and the United Nations Economic Commission for Africa' (1983) 27 *Journal of African Law* 4.

<sup>54</sup> AEC Treaty, art 4(2)(a).

<sup>55</sup> AEC Treaty, art 6(2)(a).

<sup>56</sup> Art 3(l) of the Constitutive Act of the African Union adopted in Lome, Togo on 11 July 2000 and entered into force on 26 May 2001.

<sup>57</sup> Art 3(9) of Protocol on the Pan-African Parliament.

<sup>58</sup> Declaration adopted at First Conference of African Ministers of Integration on Rationalisation of RECs in Ouagadougou, Burkina Faso on 31 March 2006 at < [http://www.africa-union.org/Economic%20Affairs/RECS%20Rationalization/AU%20site5/hm/site\\_agl.htm](http://www.africa-union.org/Economic%20Affairs/RECS%20Rationalization/AU%20site5/hm/site_agl.htm) > (accessed 24 August 2009).

Another internal factor is the support of 'a wide range of politicians and policy-makers, think tanks and researchers, businesses and corporations, private sector alliances and other agents' to market integration.<sup>59</sup> Moreover, regional groupings offered newly independent African countries an opportunity 'to interact based on common ideologies and principles.'<sup>60</sup> Nzewi attributes the 'proliferation of continental and sub continental regional groupings' to the desire of African countries to foster this opportunity.<sup>61</sup>

External factors like donor institutions and globalisation have also contributed to the proliferation of RECs in Africa. Donors influenced the rapid increase in number of RECs as 'the most influential donor agencies in the world are actively promoting ... barrier-dropping market integration.'<sup>62</sup> For example, USAID has special initiative for Southern Africa which is intended to encourage the region to expand economic and political cooperation.<sup>63</sup> The European Union (EU) proposed to set up one billion euro facility for the Economic communities in Eastern and Southern Africa and Indian Ocean.<sup>64</sup> The World Bank followed an ambition 'to create a sub-regional, unified, open economic space for the free movement of goods, services, capital and people.'<sup>65</sup>

RECs are proliferated as a response to the pressure created by economic globalisation. Since the late 1980s subregional organizations have become more common all over the world as a response to the fragmentation of great-power blocs and the pressures created by economic globalization.<sup>66</sup> For example, at the beginning of 2003, there were 179 regional trade agreements in the world.<sup>67</sup>

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<sup>59</sup> F Söderbaum *The Political Economy of Regionalism The Case of Southern Africa* (2004) 75.

<sup>60</sup> Nzewi (n 47 above) 116.

<sup>61</sup> As above.

<sup>62</sup> Söderbaum (n 59 above) (2004) 93.

<sup>63</sup> USAID 'Initiative for Southern Africa' at <[www.usaid.gov/pubs/bj2001/afr/isa/](http://www.usaid.gov/pubs/bj2001/afr/isa/)> (accessed 7 September 2009). See also Söderbaum (n 59 above) 93.

<sup>64</sup> Joint Communiqué of the High Level Meeting on "Accelerating Regional Integration in Eastern and Southern Africa and Indian Ocean" 17 July 2008 at <[http://www.iss.co.za/dynamic/administration/file\\_manager/file\\_links/COMHIGHLEVEL170708.PDF?link\\_id=4057&slink\\_id=6333&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.iss.co.za/dynamic/administration/file_manager/file_links/COMHIGHLEVEL170708.PDF?link_id=4057&slink_id=6333&link_type=12&slink_type=13&tmpl_id=3)> (accessed on 24 August 2009). EAC, IGAD, SADC, COMESA & IOC participated in the meeting.

<sup>65</sup> World Bank 'Moving beyond Borders: the Bank's Role in African Regional Integration', Board Presentation, 8 February 2001 Washington, DC: World Bank cited in Söderbaum (n 59 above) 92.

<sup>66</sup> R Väyrynen 'Regionalism: Old and New' (2003) 5 *International Studies Review* 26. See also Haas 'The Challenge of Regionalism' (1958) 12 *International Organization* 440.

<sup>67</sup> J Ravenhill 'Regionalism' 117 at <<http://explore.up.ac.za/search~S1?Xregionalism&SORT=D&searchscope=1/Xregionalism&SORT=D&searchscope=1&SUBKEY=regionalism/1,158,158,B/1962@info&FF=Xregionalism&50,50,,0,0,0,0>> (accessed 21 October 2009)

Africa witnessed the increasing number of RECs since 1960s due to the above internal and external factors. As the number of RECs has grown, their scope has been widened beyond economic matters. One of the new additions to their agenda was the promotion and protection of human rights. The question is what are their reasons for adding human rights to their agenda?

## 2.2 Why RECs are involved in human rights?

The causes for the involvement of RECs in human rights can be divided into broad category of internal and external factors. To begin with the internal causes, RECs have embraced the paradigm shift in development thinking from the focus on 'growth and development at the macro-economic level' to 'micro-level perspective which takes into account individual well-being'.<sup>68</sup> They realised an enhanced role of human rights as a means to their objective of economic development.<sup>69</sup> Protection of human rights, particularly civil and political rights, has been considered as a necessary requirement for 'democratic governance which promotes trade and market access'.<sup>70</sup> That position is clear from the Algiers Declaration which identified a political environment in which human rights are observed and effective resolution of disputes as a precondition to economic growth.<sup>71</sup>

The respect for human rights nurtures a sense of community 'that is essential to the pursuit of regional integration'.<sup>72</sup> That sense of community cannot exist in conflict ridden areas. A conflict may arise from human rights violations<sup>73</sup> and the African leaders have recognised that causal relationship.<sup>74</sup> Thus, to expand trade, the need to contain conflict and its spill over to neighbouring countries provided 'some motivation for collective implementation of human rights at the sub-regional level'.<sup>75</sup>

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<sup>68</sup> M Sepúlveda et al *Human rights reference handbook* (2004) 402 - 403.

<sup>69</sup> See Sepúlveda (n 68 above) 403; Ruppel (n 35 above) 279. Respect for human rights immensely contributes to economic development. See Nwogu (n 21 above). Nwogu argues that the regional integration projects are mechanisms for the realisation of human rights.

<sup>70</sup> Musungu (n 20 above) 94.

<sup>71</sup> Declaration on Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World (the Algiers Declaration), OAU Doc AHG/Decl.1(XXVI), para 10 - 11.

<sup>72</sup> Quashigah (n 19 above) 276. See Mureithi (n 24 above) 91. EAC recognised the importance of human rights in integration.

<sup>73</sup> M Parlevliet 'Bridging the divide — exploring the relationship between human rights and conflict management' (2002) 11 *Track Two: Constructive Approach to Community and Political Conflict* 8 reproduced in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: a reader* (2006) 82.

<sup>74</sup> R Murray *Human rights in Africa: from the OAU to the African Union* (2004) 126.

<sup>75</sup> Ebobrah (n 29 above) 87.

Another explanation to the promotion and protection of human rights in RECs is the 'perception that the regional mechanism has not been completely effective.'<sup>76</sup> The African Commission is viewed as a toothless bulldog.<sup>77</sup> The Commission has totally failed in its mandate to protect human rights.<sup>78</sup> The Commission faced structural problems such as lack of effective access to the Commission by individuals, lack of power to enforce its findings, confidentiality requirement, lack of independence and lack of resources.<sup>79</sup>

However, this does not mean that the existence of the African Commission has no impact and therefore useless. The Commission has made progress and it is expected to be 'more successful at accomplishing its largely non-confrontational promotional mandate.'<sup>80</sup> It has had 'some impact, however modest, within the executive, legislative, and judicial branches of government in a number of African countries.'<sup>81</sup> This impact together with commitment of states to respect 'human rights by acceding to specific human rights treaties, conventions or declarations on the international, regional and subregional level' seems to have caused African leaders to seek solution for protection of human rights in RECs.<sup>82</sup>

The determination of RECs to deal with human rights may also be partly attributed to the changes brought about by the establishment of the AEC and the transformation of the Organisation of African Unity (OAU) into the African Union (AU).<sup>83</sup> While the OAU had no objective of promoting and protecting human rights, one of the principles of AEC and one of the objectives of AU are the promotion and protection of human and peoples' rights in accordance with the African Charter.<sup>84</sup>

The concern of RECs with the defense of human rights would greatly reinforce their legitimacy.<sup>85</sup> All rules 'derive their democratic legitimacy from protecting human dignity and inalienable human rights.'<sup>86</sup> These rules include economic liberalisation agreements.<sup>87</sup> Since

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<sup>76</sup> As above.

<sup>77</sup> NJ Udombana *Human rights and contemporary issues in Africa* (2003)125.

<sup>78</sup> Viljoen (n 4 above) 415.

<sup>79</sup> Udombana (n 77 above) 128.

<sup>80</sup> Viljoen (n 4 above) 415.

<sup>81</sup> OC Okafor *The African human rights system, activist forces, and international institutions* (2007) 272.

<sup>82</sup> Ruppel (n 35 above) 278 - 279.

<sup>83</sup> Ebobrah (n 29 above) 87.

<sup>84</sup> Art 3(h) of the Constitutive Act of the African Union; art 3(g) of the EAC Treaty.

<sup>85</sup> Quashigah (n 19 above) 276.

<sup>86</sup> EU Petersmann 'Time for a united nations 'global compact' for integrating human rights into the law of worldwide organizations: lessons from European integration' (2002) 13 *European Journal of International Law* 635.

<sup>87</sup> Petersmann (n 86 above) 635.

regional economic communities are based on economic liberalisation agreements, they lose democratic legitimacy if they fail to protect human rights.

Among the external causes, the development cooperation policy of donors contributed to the involvement of RECs in human rights matters. One of the conditions that the western partners in the New Partnership for Africa's Development (NEPAD) required has been human rights.<sup>88</sup> The EU and the US have conditioned economic aid and trade privileges to improvements in human rights.<sup>89</sup> African, Caribbean and Pacific (ACP) countries receive substantial amount of aid from the European Community.<sup>90</sup> In its development co-operation with ACP countries, EU 'defined human rights, democratic principles, and rule of law as the three essential elements of all development cooperation.'<sup>91</sup> The US conditioned participation in the African Growth and Opportunity Act (AGOA) framework on the protection of private property rights, recognition of workers' rights and others.<sup>92</sup>

### 2.3 Human rights account of RECs

Among the RECs recognised by the AU Assembly, three RECs, namely Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD) and the Economic Community of Central African States (ECCAS), do not itemise human rights as their objectives or fundamental principles in their establishing treaties. The Treaty establishing AMU was concluded among Algeria, Libya, Mauritania, Morocco, and Tunisia.<sup>93</sup> The Judicial Authority of AMU is inaccessible to private individuals. As a result, the protection of human rights in AMU can only be indirect.<sup>94</sup>

ECCAS was established in 1983. Human rights do not feature in ECCAS Treaty as goals or principles of the community. Though the Treaty envisaged a court of justice with a power to render judgment that binds the member states under article 16, it remained on paper.<sup>95</sup> CEN-SAD was established in 1998. Human rights are not itemised as objectives or principles of CEN-

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<sup>88</sup> BC Smith *Good governance and development* (2007) 7 - 8.

<sup>89</sup> Musungu (n 20 above) 94.

<sup>90</sup> DJ Marantis 'Human rights, democracy, and development: the European Community Model' (1994) 7 *Harvard Human Rights Journal* 4.

<sup>91</sup> P Uvin *Human Rights and Development* (2004) 58 - 59.

<sup>92</sup> EL Ngugi 'The impact of globalisation on the promotion and protection of human rights in Africa' (2007) 1 *Malawi Law Journal* 159. Musungu (n 20 above) 95.

<sup>93</sup> Viljoen (n 4 above) 488; Nwauche (n 36 above) 342.

<sup>94</sup> Nwauche (n 36 above) 344.

<sup>95</sup> Ruppel (n 35 above) 311.

SAD. It is still at an embryonic stage, as it has no dispute resolution mechanisms.<sup>96</sup> Human rights can only be realised indirectly through realisation of CEN-SAD objectives.

The remaining five RECs included the promotion and protection of human rights among their fundamental principles. In the next sub-section, a discussion of contribution or potential contribution of these RECs and their organs to the promotion and protection of human rights is in order.

### **2.3.1 The Common Market for Eastern and Southern Africa**

In November 1993, the Common Market for Eastern and Southern Africa (COMESA) succeeded the Preferential Trade Area for Eastern and Southern Africa which was established in September 1981.<sup>97</sup> Article 6(e) of COMESA Treaty included 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter' among its fundamental principles. The COMESA Treaty also addresses issues that have close relation with human rights such as environment, gender issues and protection of human life.<sup>98</sup>

The COMESA Treaty establishes eight organs some of which have a potential to contribute to the advancement of human rights.<sup>99</sup> The Authority consisting of Heads of States or Governments can use its position as supreme policy organ to make policy and direction concerning human rights.<sup>100</sup> Thus, it may play a norm setting role. The Council of Ministers can 'make regulations, issue directives, take decisions, make recommendations and give opinions' on compliance with the principles of human rights within the meaning of article 6(e) of the treaty.<sup>101</sup>

The Intergovernmental Committee can develop programs and action plan for the promotion and protection of human rights for which the Technical Committee on legal affairs can prepare implementation programmes.<sup>102</sup> The Secretary-General can investigate a presumed breach of the provisions of the COMESA Treaty and report to the Council of Ministers.<sup>103</sup> Thus, it can investigate failure of member states to promote and protect human rights as a breach of

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<sup>96</sup> Nwauche (n 36 above) 345.

<sup>97</sup> See Viljoen (n 4 above) 491; Geda & Kibret (n 42 above) 365; Ruppel (n 35 above) 284.

<sup>98</sup> Ruppel (n 35 above) 285 - 288.

<sup>99</sup> Art 7(1), COMESA Treaty.

<sup>100</sup> Art 8, COMESA Treaty.

<sup>101</sup> Art 9(2)(d), COMESA Treaty.

<sup>102</sup> Art 14(2)(a) & art 16(a), COMESA Treaty.

<sup>103</sup> Art 17(8)(f), COMESA Treaty.

provisions of the Treaty. Upon the direction of the Council of ministers, the Secretary-General can refer to the Court when a Member State has infringed a provision of the COMESA Treaty, particularly article 6(e).<sup>104</sup>

The Treaty establishes a court of justice that has a power to render final and conclusive judgements.<sup>105</sup> Despite its lack of human rights jurisdiction, it is argued that ‘the COMESA Court of Justice has the potential to contribute to the protection and promotion of human rights.’<sup>106</sup> Article 26 of the COMESA Treaty provides a fertile ground for questioning failure of a Member State in promoting and protecting human rights as it enables any resident to refer for determination by the Court the legality of any act of a Member State on the grounds that such act is an infringement of the provisions of the Treaty.

### 2.3.2 The East African Community

After dissolution of the old East African Community in 1977, it took 23 years to re-establish the present East African Community (EAC).<sup>107</sup> The areas of co-operation among members of EAC extend to political, social and cultural fields, research and technology, defence, security and legal and judicial affairs.<sup>108</sup> To govern the achievements of these objectives, the EAC Treaty sets out fundamental and operational principles that include the promotion and protection of human rights.<sup>109</sup>

EAC Treaty establishes seven organs some of which potentially contribute to the promotion and protection of human rights.<sup>110</sup> The Summit consisting of Heads of State or Government of member states can give general directions and impetus on human rights issue.<sup>111</sup> It can also establish an organ that deals with promotion and protection of human rights in the Community.<sup>112</sup>

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<sup>104</sup> Art 17(8)(h) cum art 25, COMESA Treaty.

<sup>105</sup> Art 31(1), COMESA Treaty.

<sup>106</sup> Ruppel (n 35 above) 289.

<sup>107</sup> n 15 above. The EAC Treaty was concluded among Kenya, Tanzania and Uganda. Rwanda and Burundi acceded to the Treaty on 18 June 2007. See also Viljoen (n 4 above) 490; Ebobrah (n 14 above) 314; Ruppel (n 35 above) 301.

<sup>108</sup> Art 5(1), EAC Treaty.

<sup>109</sup> Art 6(d) & 7(2), EAC Treaty.

<sup>110</sup> Art 9(1), EAC Treaty.

<sup>111</sup> Art 11(1), EAC Treaty.

<sup>112</sup> Art 9(1)(h), EAC Treaty.

The Council consisting of the ministers responsible for regional cooperation of each member state is the policy organ of the Community.<sup>113</sup> It can recommend bills on the promotion and protection of human rights to Legislative Assembly.<sup>114</sup> It can establish a sectoral committee to deal with human rights.<sup>115</sup> It can 'make regulations, issue directives, take decisions, make recommendations and give opinions' which bind member states on matters affecting human rights.<sup>116</sup> It may budget promotional and protective activities of human rights.<sup>117</sup> It may implement decision of the Summit on human rights.<sup>118</sup> The role of the Council in human rights is clear from its Plan of Action on Promotion and Protection of Human Rights adopted in March 2008 whose strategic objectives include:<sup>119</sup>

establishment of an EAC Bill of Rights with mechanisms for enforcement; establishment of an EAC Human Rights Policy forum; Capacity building for national institutions through development of National Action Plans; capacity building to comply with their reporting obligations in compliance with regional and international human rights instruments; and creation of awareness and understanding of human rights through education and training.

The judicial function of EAC is exercised by the East African Court of Justice (EACJ) with first instance and appellate division.<sup>120</sup> EAC Treaty vests human rights jurisdiction in the EACJ, but postpones its operation to some future date until a protocol authorizing the commencement of the human rights jurisdiction.<sup>121</sup> In *Katabazi & 21 Others v Secretary-General of the EAC & Another*, the Court held that:<sup>122</sup>

It [is] very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*.

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<sup>113</sup> Art 13 & 14(1), EAC Treaty.

<sup>114</sup> Art 14(3)(b), EAC Treaty.

<sup>115</sup> Art 14(3)(j), EAC Treaty.

<sup>116</sup> Art 14(3)(d) & art 16, EAC Treaty.

<sup>117</sup> Art 14(3)(e), EAC Treaty.

<sup>118</sup> Art 14(3)(k), EAC Treaty.

<sup>119</sup> Laying the Foundation and Institutional Development for Political Integration at <<http://www.eac.int/component/content/article/123-political-federation/204-laying-foundation.html>> (accessed on 4 September 2009); See Ruppel (n 35 above) 305.

<sup>120</sup> Art 9(1)(e) & 23(2), EAC Treaty.

<sup>121</sup> Art 27 (2), EAC Treaty,.

<sup>122</sup> *Katabazi & 21 Others v Secretary-General of the EAC & Another* Ref 1 of 2007 14 -15.



However, the court showed some judicial activism by deciding cases dealing wholly or partly with human rights.<sup>123</sup> In *East African Law Society and 3 Others v Attorney-General of Kenya and 3 Others*, the applicant challenged the procedure of amending the EAC Treaty on the ground that it did not consult the people.<sup>124</sup> The Court held that:<sup>125</sup>

[T]he lack of people's participation in the impugned amendment process was inconsistent with the spirit and intendment of the Treaty in general, and that in particular, it constituted infringement of principles and provisions in Articles 5(3) (g), and 7(1) (a).

In essence, the Court upheld the right to participation of the people.

The legislative organ of the EAC is the East African Legislative Assembly (EALA).<sup>126</sup> It can establish committees that are concerned with human rights.<sup>127</sup> Thus, the EALA can legislate on the promotion and protection of human rights. The Secretariat, the executive organ of EAC,<sup>128</sup> is another important organ from the perspective of human rights. It can contribute to the development of human rights norms by forwarding human rights bills to the EALA and by 'initiating, receiving and submitting recommendations to the Council.'<sup>129</sup> It can undertake investigation relating to human rights matters.<sup>130</sup> While proposing the draft agenda, the Secretariat can introduce human rights matters for discussion by the Summit or by the Council.<sup>131</sup> The Secretariat implements whenever the Summit and the Council pass decisions respecting human rights.<sup>132</sup>

The Secretariat can co-ordinate and harmonise human rights policies and strategies.<sup>133</sup> The Secretariat is fully engaged with the National Human Rights Commissions and other national institutions in order to harmonize policies and standards for the EAC region.<sup>134</sup> It convened

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<sup>123</sup> Ebobrah (n 14 above) 315.

<sup>124</sup> Reference 3 of 2007 at 11.

<sup>125</sup> *East African Law Society and 3 Others v Attorney-General of Kenya and 3 Others* 42.

<sup>126</sup> Art 49(1), EAC Treaty.

<sup>127</sup> Art 49(3), EAC Treaty.

<sup>128</sup> Art 66(1), EAC Treaty.

<sup>129</sup> Art 71(1)(a), EAC Treaty.

<sup>130</sup> Art 71(1)(d), EAC Treaty.

<sup>131</sup> Art 71(1)(k), EAC Treaty.

<sup>132</sup> Art 71(1)(l), EAC Treaty.

<sup>133</sup> Art 71(1)(e), EAC Treaty.

<sup>134</sup> Speech by Hon Beatrice Kiraso, Deputy Secretary General for Political Federation, at the Consultative Meeting of Parliamentary Committees.

meeting of national human rights institutions of member states.<sup>135</sup> It was said that the meeting 'will definitely set the pace for integration in the human rights sector for the region.'<sup>136</sup>

### 2.3.3 The Economic Community of West African States

The Economic Community of West African States (ECOWAS) was established in 1975 with the objective of economic integration.<sup>137</sup> In July 1993, the member states revised its Establishing Treaty.<sup>138</sup> One of the reasons for the revision seems to be the developments in the field of human rights in ECOWAS and the continent.<sup>139</sup> For example, ECOWAS adopted a Declaration of Political Principles in which member states pledged to promote and encourage full enjoyment of human rights in 1991.<sup>140</sup> The state parties to the Treaty of ECOWAS declared to adhere to some principles that include 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.'<sup>141</sup> Further, the signatory states to the African Charter on Human and Peoples' Rights agreed to co-operate to achieve the objectives of the Treaty of ECOWAS.<sup>142</sup>

The Treaty of ECOWAS establishes eight organs and empowers the Authority of Heads of State and Government to create other institutions not provided for in the Treaty.<sup>143</sup> Some of these institutions deal with human rights issues.<sup>144</sup> To begin with, the Authority of Heads of State and Government, the highest body with a power to oversee other institutions,<sup>145</sup> plays a norm-setting role. The Authority is mandated to 'determine the general policy and major guidelines of the Community.'<sup>146</sup> Under similar mandate, the Authority adopted some instruments concerned with human rights including the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security and its

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<sup>135</sup> Press release 'EAC intensifies co-operation in promotion and protection of human rights' at <<http://www.eac.int/images/stories/press%20release%20ea%20human%20rights%20150208.pdf>> (accessed on 4 September 2009)

<sup>136</sup> Address by Beatrice Kiraso, Deputy Secretary-General in charge of Political Federation cited in press release (n 135 above).

<sup>137</sup> Ebobrah (n 10 above) 309.

<sup>138</sup> Ebobrah (n 10 above) 310.

<sup>139</sup> The Preamble to the Treaty of ECOWAS, adopted by the Heads of State and Government of the Member States of ECOWAS in Cotonou on 24 July 1993. The preamble refers to African Charter on Human and Peoples' Rights and the 1991 Declaration on Political Principles of the Economic Community of West African States.

<sup>140</sup> Declaration of Political Principles of the Economic Community of West African States, A/DCL 1/1/7/91, para 5. See Nwauche (n 36 above) 322.

<sup>141</sup> Art 4(g), Treaty of ECOWAS.

<sup>142</sup> Art 56(2), Treaty of ECOWAS.

<sup>143</sup> Art 6(1), Treaty of ECOWAS.

<sup>144</sup> See generally Nwauche (n 36 above).

<sup>145</sup> Art 7(3)(b), Treaty of ECOWAS.

<sup>146</sup> Art 7(3)(a), Treaty of ECOWAS.

Supplementary Protocol on Democracy and Good Governance.<sup>147</sup> The authority can also adopt a decision binding on the ECOWAS institutions and member states.<sup>148</sup> As the highest decision-making body of the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, the Authority can pass a binding decision pertaining to the promotion and protection of human rights.<sup>149</sup>

The Council of Ministers of ECOWAS, an executive organ, can play roles in the promotion and protection of human rights.<sup>150</sup> It acts through regulations which are binding on the ECOWAS institutions under its authority and which become binding on member states upon approval by the Authority.<sup>151</sup> Thus, it can pass regulations relating to promotion and protection of human rights as it has to act in accordance with the African Charter.<sup>152</sup> It can also contribute to the normative guidance on human rights by making recommendations to the Authority.<sup>153</sup>

The ECOWAS Parliament is empowered to consider issues relating to human rights and fundamental freedoms of citizens.<sup>154</sup> It has a standing committee that deals with human rights issues.<sup>155</sup> It can make recommendations to other institutions of the Community such as the Authority Though it cannot legislate on human rights matters.<sup>156</sup>

The Treaty of ECOWAS establishes the Executive Secretariat.<sup>157</sup> In 2006, the Authority transformed the Executive Secretariat into a Commission headed by the President.<sup>158</sup> The ECOWAS Commission executes the decisions of the Authority and regulations of the Council of Ministers.<sup>159</sup> Thus, the Commission is the appropriate institution to implement decisions or regulations concerning promotion and the protection of human rights. In addition, it can also initiate a text on the promotion and protection of human rights in member states to be adopted

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<sup>147</sup> See Nwauche (n 36 above) 323 - 328.

<sup>148</sup> Art 9(4), Treaty of ECOWAS.

<sup>149</sup> See Nwauche (n 36 above) 324.

<sup>150</sup> See Nwauche (n 36 above) 328.

<sup>151</sup> Art 12(3), Treaty of ECOWAS.

<sup>152</sup> Art 4(g), Treaty of ECOWAS.

<sup>153</sup> Art 10(3)(a), Treaty of ECOWAS.

<sup>154</sup> Nwauche (n 36 above) 329; Institute of Security Study 'The ECOWAS parliament at a glance' available at <[http://www.issafrica.org/AF/RegOrg/unity\\_to\\_union/pdfs/ecowas/parlyglance.pdf](http://www.issafrica.org/AF/RegOrg/unity_to_union/pdfs/ecowas/parlyglance.pdf)> (accessed on 31 August 2009).

<sup>155</sup> ECOWAS Parliament: Standing Committees, available at < <http://www.parl.ecowas.int/english/index.htm> > (accessed on 31 August 2009)

<sup>156</sup> Nwauche (n 36 above) 329.

<sup>157</sup> Art 6(1)(f), Treaty of ECOWAS.

<sup>158</sup> The ECOWAS Newsletter (Issue 1) of October 2006 cited in Ebobrah (n 10 above) 310.

<sup>159</sup> Art 19(3)(a), Treaty of ECOWAS.

by the Authority or the Council of Ministers.<sup>160</sup> The Commission has a duty to adopt at national and regional levels practical modalities for the enforcement of human rights.<sup>161</sup>

An important organ for the protection of human rights re-established by the Treaty of ECOWAS is the ECOWAS Community Court of Justice.<sup>162</sup> The ECOWAS Court was established in 1991.<sup>163</sup> The Protocol establishing the ECOWAS Court did not confer human rights jurisdiction on it.<sup>164</sup> It acquired the jurisdiction to receive human rights complaints in 2005 by a Supplementary Protocol amending the establishing Protocol of 1991.<sup>165</sup> Nwauche classifies the human rights jurisdiction of the ECOWAS Court into the power to hear cases for violations of 'the so-called Community rights endowed on ECOWAS citizens' and the power of the court to receive cases on violations of the African Charter.<sup>166</sup> Ebobrah compares the former with inter-state complaint mechanism of the African Charter and opines that:<sup>167</sup>

It also creates a novel situation where the ECOWAS Commission acquires access to bring human rights case against a member state where the state fails to perform its human rights obligations under the ECOWAS legal regime.

Individuals can also bring complaints before ECOWAS Court for the violation of the African Charter and arguably other human rights instruments.<sup>168</sup> For example, in *Hadijatou Mani Koraou v Niger* the Court found violations of a number of international human right instruments including the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child.<sup>169</sup>

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<sup>160</sup> See Art 19(3)(i), the Treaty of ECOWAS.

<sup>161</sup> Art 34(1), Protocol A/Sp1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security adopted in Senegal on 21 December 2001.

<sup>162</sup> Art 6(1)(e) & art 15, the Treaty of ECOWAS.

<sup>163</sup> A Banjo 'The ECOWAS Court and the politics of access to justice in West Africa' (2007) 32 *Africa Development* 73.

<sup>164</sup> Protocol A/P/1/7/91 on the Community Court of Justice adopted on 6 July 1991 in Lagos, Nigeria and entered into force on 5 November 1996.

<sup>165</sup> Supplementary Protocol A/SP1/01/05 to Protocol on the Community Court of Justice (1991) adopted in 2005 and provisionally came into force upon signature in 2005.

<sup>166</sup> Nwauche (n 36 above) 332.

<sup>167</sup> Ebobrah (n 10 above) 314.

<sup>168</sup> See Nwauche (n 36 above) 332; Ebobrah (n 10 above) 314.

<sup>169</sup> Unreported Suit ECW/CCJ/APP/08/08, judgment ECW/CCJ/JUD/06/08, judgment delivered on 27 October 2008.

### 2.3.4 The Southern African Development Community

The Southern Africa Development Co-ordination Conference (SADCC), a loose association of states, was created in 1980 in Lusaka, Zambia.<sup>170</sup> SADCC was transformed into the Southern African Development Community (SADC) in 1992 in Windhoek, Namibia.<sup>171</sup> The state parties to the Treaty establishing SADC were aware of the need to observe human rights to involve their people in regional integration.<sup>172</sup> The Treaty requires SADC and its Member States to act in accordance with 'human rights, democracy and the rule of law.'<sup>173</sup> It establishes eight institutions some of which may play roles in promotion and protection of human rights.<sup>174</sup>

The supreme policy-making institution of SADC is the Summit that consists of the Heads of State or Government of all member states.<sup>175</sup> The Summit has the power to adopt legal instruments and create new institutions.<sup>176</sup> Thus, the Treaty empowers the SADC Summit to adopt binding human rights instruments or create institutions that deal with human rights matters. For example, the Summit adopted the SADC Protocol on Gender and Development in 2008.<sup>177</sup> It has also adopted non-binding instruments such as the Charter of Fundamental Social Rights in SADC and the Principles and Guidelines Governing Democratic Elections.<sup>178</sup> Within the meaning of article 11(2)(l) of the SADC Treaty, the Summit can assign human rights duty to the Council of SADC.

The Council of SADC can contribute to promotion and protection of human rights in the region as it is the organ responsible for the implementation of the policies.<sup>179</sup> The Council has a power to create its own committee on human rights issues or to recommend the Summit to establish human rights institutions, as it is an appropriate organ of the Community to recommend 'the establishment of directorates, committees, other institutions and organs.'<sup>180</sup> It can convene conferences on human rights within the meaning of article 11(2)(k) of the SADC Treaty.

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<sup>170</sup> M Madakufamba 'SADC in the twenty-first century' (2007) 2 *Open Space: a digest of Open Society Initiative for Southern Africa* 90. See also Viljoen (n 4 above) 492; Ebobrah (n 14 above) 327 - 328.

<sup>171</sup> Mureithi (n 24 above) 84; Madakufamba (n 170 above) 91.

<sup>172</sup> Preamble to SADC Treaty.

<sup>173</sup> Art 4 (c), SADC Treaty.

<sup>174</sup> Art 9 (1), SADC Treaty.

<sup>175</sup> Art 10 (1), SADC Treaty.

<sup>176</sup> Art 10 (3) & (6), SADC Treaty.

<sup>177</sup> Final Communiqué of the 28th Summit of SADC Heads of State and Government, para 16 (ii), at <<http://www.sadc.int/index/browse/page/203>> (accessed 24 July 2009).

<sup>178</sup> See Viljeon (n 4 above) 496; Ruppel (n 35 above) 294.

<sup>179</sup> Art 11(2)(b), SADC Treaty.

<sup>180</sup> Art 11(2)(f) & (g), SADC Treaty.

The Secretariat is another important organ from human rights perspective. It has the responsibility to implement decisions of the Summit and the Council respecting human rights because the Secretariat has the duty to implement the decisions of these organs and decision on human rights is of no exception.<sup>181</sup> The Secretariat is one of the institutional mechanisms for the implementation of the SADC Protocol on Gender and Development.<sup>182</sup> It has a duty to 'facilitate and monitor reporting by States Parties on implementation of the Protocol.'<sup>183</sup> It should 'coordinate the implementation of the Protocol.'<sup>184</sup> Furthermore, the Executive Secretariat of SADC has the responsibility to submit progress report of the implementation of the Protocol to the Summit and Council for consideration.<sup>185</sup> The Secretariat should also follow up the implementation of Charter of Fundamental Social Rights in SADC by receiving reports from state members.<sup>186</sup>

The Judicial power of the Community is vested in the SADC Tribunal.<sup>187</sup> The SADC Tribunal was established to interpret the provisions of the SADC Treaty and subsidiary instruments.<sup>188</sup> It has both contentious and advisory jurisdiction.<sup>189</sup> The SADC Treaty and the Protocol on Tribunal and Rules of Procedure thereof do not provide that the Tribunal has jurisdiction on specific disputes.<sup>190</sup> It does not exclude from jurisdiction of the Tribunal any disputes under any fields of law.<sup>191</sup>

To ascertain whether the Tribunal has the jurisdiction over certain disputes, one needs to know whether SADC has legal instruments governing the area over which the dispute arose because the jurisdiction of the tribunal is basically over the Community instruments.<sup>192</sup> Thus, the Tribunal has jurisdiction over human rights because SADC has human rights instruments that include the Charter of Fundamental Social Rights and the Protocol on Gender and

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<sup>181</sup> Art 14(1)(b), SADC Treaty.

<sup>182</sup> Art 34(1)(c), SADC Protocol on Gender and Development.

<sup>183</sup> n 182 above, art 34(4)(a).

<sup>184</sup> n 182 above, art 34(1)(b).

<sup>185</sup> n 182 above, art 35(5).

<sup>186</sup> Art 16(3), Charter of Fundamental Social Rights in SADC.

<sup>187</sup> Art 9, SADC Treaty.

<sup>188</sup> Art 16(1), SADC Treaty; art 14, Protocol on Tribunal and the Rules of Procedure thereof.

<sup>189</sup> Art 16(1) & (4), SADC Treaty.

<sup>190</sup> See generally the SADC Treaty & the Protocol on Tribunal and the Rules of Procedure Thereof.

<sup>191</sup> Compare art 27 (2), EAC Treaty where the Treaty confers human right jurisdiction on the court and suspends it.

<sup>192</sup> See art 16 of SADC Treaty and art 14 of the Protocol on Tribunal and the Rules of Procedure Thereof.

Development.<sup>193</sup> The Tribunal itself held that it has jurisdiction on human rights in *Campbell and 78 Others v Zimbabwe*.<sup>194</sup> The Tribunal held that:<sup>195</sup>

It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application.

According to some commentators, the SADC Tribunal has competence to interpret even non-SADC instruments.<sup>196</sup> The subject-matter jurisdiction of the SADC Tribunal, according to Odinkalu, 'clearly covers human rights issues, including the interpretation and application of the African Charter.'<sup>197</sup> The Tribunal confirmed this position in the *Campbell* case in which it held that:<sup>198</sup>

[T]he Tribunal first referred to Article 21 (b) which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so "*having regard to applicable treaties, general principles and rules of public international law*" which are sources of law for the Tribunal.

In this holding, the Tribunal made clear that its sources of law are not limited to SADC instruments. Regarding its sources of law, the Tribunal situated itself in the position similar to the African Court on Human and Peoples' Rights.<sup>199</sup> Thus, like any other treaty, the African Charter is one of the sources of law for the SADC Tribunal.

The recognition of human rights violations as one of the sources of conflicts prompts any organisation concerned with defence and security to deal with human rights violations.<sup>200</sup> It is for this reason that the Organ on Politics, Defence and Security Co-operation of SADC was established to 'encourage the observance of universal human rights as provided for in the

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<sup>193</sup> See Ebobrah (n 14 above) 328. Ebobrah argues that the Tribunal has no clear human rights mandate.

<sup>194</sup> *Campbell and 78 Others v Zimbabwe* SADC (T) Case 2/2007, judgement delivered on 28 November 2008.

<sup>195</sup> The *Campbell* case (n 194 above) 25.

<sup>196</sup> Mooki (n 26 above) 39. Mooki concluded that the use of treaties which promotes and protects human rights by the SADC Tribunal is inevitable. CA Odinkalu 'Complementarity, Competition or Contradiction: The Relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa' (Unpublished) (Presentation to Conference of East and Southern African States on the Protocol Establishing the African Court on Human and Peoples' Rights, Gaborone, Botswana, 9-10 December 2003) at <[http://www.africancourtcoalition.org/listDocuments.asp?page\\_id=27](http://www.africancourtcoalition.org/listDocuments.asp?page_id=27)> (accessed on 16 July 2009).

<sup>197</sup> Odinkalu (n 196 above) 9.

<sup>198</sup> The *Campbell* case (n 194 above) 24.

<sup>199</sup> Compare art 7, Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and People's Rights, adopted in Addis Ababa, Ethiopia, on 10 June 1998, OAU DOC. OAU/LEG/EXP/AFCHPR/PROT (III).

<sup>200</sup> Parlevliet (n 72 above) 82; Murray (n 74 above) 126.

Charters and Conventions of the Organisation of African Unity and United Nations.<sup>201</sup> Article 11(2)(b)(i) of the Protocol on Politics, Defence and Security Co-operation classifies gross human rights violations as significant intra-state conflict and empowers the Organ to resolve it.

### **2.3.5 The Intergovernmental Authority on Development**

The Agreement establishing the Intergovernmental Authority on Development (IGAD) incorporates in its principles the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter.<sup>202</sup> The Agreement does not envisage judicial body to adjudicate disputes. As a result, individual human rights cannot be judicially enforced in IGAD.

However, other organs of IGAD can potentially contribute to the promotion and protection of human rights. The IGAD Assembly of Heads of State and Government, as a supreme policy organ, can make decisions affecting human rights.<sup>203</sup> In its 12<sup>th</sup> summit, for example, the Assembly noted that it is necessary to bring to justice persons responsible for violation of human rights in Somalia.<sup>204</sup> Regarding human rights matters, the IGAD Council of Ministers can make recommendations to the Assembly and monitors implementation of the decisions of the Assembly.<sup>205</sup> The Secretariat can also implement the decision of the Assembly concerned with human rights matters.<sup>206</sup>

## **2.4 Concluding Remarks**

From the forgoing it is clear that one way or another the majority of RECs recognised by AU are concerned with human rights and different organs of RECs can at least potentially contribute to the promotion and protection of human rights among their member states. This concern with human rights can be attributed to both internal and external factors. Regarding the level of involvement in human rights, they are at different stages. The difference is very wide. On the one end are found RECs that have not included human rights among their fundamental principles while on the other end are RECs that established an organ to handle human rights

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<sup>201</sup> Art 9(1)(b) & art 10A the SADC Treaty; Art 2(g), Protocol on Politics, Defence and Security Co-Operation, adopted in Blantyre on 14 August 2001.

<sup>202</sup> IGAD Agreement, art 6A.

<sup>203</sup> Art 9 cum art 6A(f) of IGAD Agreement.

<sup>204</sup> *IGAD News: A Newsletter of the Intergovernmental Authority on Development* Bumper Issue no.32/33 (2008) 12.

<sup>205</sup> Art 10(2)(a)&(g) cum art 6A(f) of IGAD Agreement.

<sup>206</sup> Art 12(2)(a) cum art 6A(f) of IGAD Agreement.



complaints. This may suggest that some RECs are more committed to the promotion and protection of human rights than other RECs.

## CHAPTER THREE

### CO-OPERATION OF THE AFRICAN COMMISSION WITH REGIONAL ECONOMIC COMMUNITIES

#### 3 Introduction

It is argued in chapter two that RECs have the mandate to deal with human rights matters. It showed how different organs of RECs can contribute to human rights. In addition to causes for proliferation of RECs, the chapter provided causes for the involvement of RECs in human rights matters. This chapter, after providing the mandate of the African Commission and the background of the relationship between the Commission and other institutions in general, uncovers the reasons for the failure of the African Commission to co-operate with RECs. It seeks to find out the benefits of the co-operation for both the African Commission and RECs. Finally, it explores some possible modes of this co-operation.

#### 3.1 Co-operation of the African Commission with other institutions in general

##### 3.1.1 The mandate to co-operate with other institutions

The African Commission is mainly mandated to promote and protect human and peoples' rights and to interpret the provisions of African Charter together with any tasks that may be assigned to it by the AU Assembly.<sup>207</sup> The promotional mandate of the Commission is mainly concerned with examining state reports while its protective mandate mainly relates to consideration of complaints submitted to it by individuals, NGOs, and others.<sup>208</sup> But the distinction between protective and promotional activities is not watertight.<sup>209</sup>

Under the promotional mandate, the African Charter enjoins the African Commission to 'co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.'<sup>210</sup> The Charter is broad enough to accommodate any institutions irrespective of their nature. It does not matter whether the institution is governmental,

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<sup>207</sup> Art 45 the African Charter. See G Baricako 'Introductory preface: the African Charter and African Commission on Human and Peoples' Rights' in Evans & Murray (n 38 above) 10.

<sup>208</sup> See Viljoen (n 4 above) 317; R Murray *The role of national human rights institutions at the international and regional levels: The experience of Africa* (2007) 47 - 48.

<sup>209</sup> Viljoen (n 4 above) 317.

<sup>210</sup> Art 45(1)(c) the African Charter.

intergovernmental or non-governmental because the word 'institutions' in article 45(1)(c) is not qualified by these adjectives. The level at which an institution operates is not an obstacle to the Commission for co-operating with it since the said provision has no such restrictions. Thus, an institution with which the Africa Commission is mandated to co-operate may operate at national, subregional, regional or international level.

Besides, the text of article 45(1)(c) does not require that the institution should exclusively be concerned with human rights. Had that been the case, the African Charter would have used words like 'human rights institutions' instead of 'other African and international institutions.' Thus, an institution is fit to co-operate with African Commission so far as such institution deals with the promotion and protection of human rights. Therefore, governmental institutions, intergovernmental institutions, non-governmental institutions, irrespective of the level at which they operate, fall within the purview of article 45(1)(c). Moreover, the Commission co-operates with international institutions, regional institutions, NGOs, and National Human Rights Institutions (NHRIs) in practice.

### **3.1.2 Co-operation with international institutions**

Regarding international institutions, the Commission participated in UN Human Rights Council (HRC) and it is seeking to collaborate with the HRC and contribute to Universal Periodic Review (UPR).<sup>211</sup> Its relation with the office of the United Nations High Commissioner for Human Rights (OHCHR) is fledging.<sup>212</sup> OHCHR's representatives always attend the ordinary session of the Commission.<sup>213</sup> For example, the Representative of the OHCHR made statement on the 44<sup>th</sup> ordinary session of the Commission on human rights situations in Africa.<sup>214</sup> The Special Rapporteurs of the Commission collaborate with their UN Counterpart.<sup>215</sup> However, the absence of institutional co-operation is clear from Commissioner Bitaye's recommendation to the African Commission 'to take up the challenge and opportunity to reach out and establish the necessary institutional linkages with the UN Human Rights System, starting with the OHCHR and the

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<sup>211</sup> 26th Annual Activity Report, para 39; Commissioner Musa N Bitaye 'Activity Report' 1 - 2, at <<http://www.achpr.org/english/Commissioner's%20Activity/45th%20OS/Commissioners/Com%20Bitaye.pdf>> (accessed 17 September 2009)

<sup>212</sup> 26th Annual Activity Report, para 40.

<sup>213</sup> Bitaye (n 211 above) 2.

<sup>214</sup> 25th Annual Activity Report, para 48.

<sup>215</sup> See 23rd Annual Activity Report, para 88. Special Rapporteur on Freedom of Expression has strengthened her working relationship with her UN counterpart. See also 25th Annual Activity Report, para 79(vi). Special Rapporteur on Human Rights Defenders carried out a joint Mission to Togo with her United Nations counterpart from 28 July to 5 August 2008. See also 26th Annual Activity Report, para 58. Special Rapporteur on Human Rights Defender published declaration with her UN, European and American Counterparts.

HRC.<sup>216</sup> The Commission signed memorandum of understanding with United Nations High Commissioner for Refugees (UNHCR).<sup>217</sup>

The relation of African Commission with its counterpart in Europe and the Americas is flourishing.<sup>218</sup> Inter-American Commission on Human Rights (IACHR) through its representative to 44<sup>th</sup> ordinary session of the African Commission expressed its willingness to strengthen its relationship with the African Commission.<sup>219</sup> The African Commission held a meeting with IACHR just before its 45<sup>th</sup> ordinary session to exchange ideas and best practices and to enhance understanding of both Institutions.<sup>220</sup> Although one can argue that the regional human rights systems like European or Inter-American system do not fall under the African Charter as article 45(1)(c) requires the Commission to co-operate with 'African and international' institutions excluding regional institutions from its text, the practice of the Commission overcomes such interpretation. The meaning of the word 'international' as everything beyond national also buttresses this argument.<sup>221</sup>

### 3.1.3 Co-operation with regional institutions

The African Commission is working to establish a framework for the relationship with other AU Organs.<sup>222</sup> The African Union Commission (AUC) facilitates the meeting of the Commission with other AU Organs.<sup>223</sup> The Directorate of the Women, Gender and Development of the AUC while making statements on a session of African Commission indicated the need to continue co-operation with the Commission.<sup>224</sup>

The Executive Council Resolution requesting the African Commission and the ACERWC to work in a close partnership initiated the two institutions to device a framework for co-operation

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<sup>216</sup> Bitaye (n 211 above) 3.

<sup>217</sup> Kigali Declaration adopted by the AU Ministerial Conference on Human Rights in Africa, May 2003 in Kigali, Rwanda, para 15. The Conference commended the Commission for the co-operation.

<sup>218</sup> The Mauritius Plan of Action 1996-2001, para 57 reproduced in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 588.

<sup>219</sup> 25th Annual Activity Report, para 50.

<sup>220</sup> 26th Annual Activity Report, para 4(vi), 23, 54, 75 & 121.

<sup>221</sup> *The Cambridge Advanced Learner's Dictionary* defines the word 'international' to mean 'involving more than one country.'

<sup>222</sup> 25th Annual Activity Report, para 64(vi), 76(vi) & 84(vi). Members of the African Commission attended the meeting on the establishment of the framework for the relationship between the African Commission and other AU Organs with human rights mandate held in September 2008 in Ouagadougou, Burkina Faso.

<sup>223</sup> 22nd Annual Activity Report, paras 27, 43, 59 & 63. The AUC organised a brainstorming meeting between the Permanent Representatives Committee (PRC) and the African Commission from 4 - 5 May 2007 in Maseru, Lesotho.

<sup>224</sup> 26th Annual Activity Report, para 9.

between them.<sup>225</sup> In her statement on 44<sup>th</sup> ordinary session of the African Commission, the Chairperson of the ACERWC proposed the organization of periodic meetings, joint missions, and experience sharing as some of the instances through which the Commission and the ACERWC could co-operate.<sup>226</sup> Consequently, the Commission introduced joint session in consultation with ACERWC, African Court 'or any other African regional human rights organ' in its Interim Rules of Procedure.<sup>227</sup> In addition, the African Commission came up with a resolution that establishes a formal relationship with the ACERWC.<sup>228</sup> The Resolution mandates the Special Rapporteur on the Rights of Women in Africa to report on the status of co-operation between the two institutions.<sup>229</sup>

The African commission is establishing a co-operative relationship with the Pan-African Parliament (PAP).<sup>230</sup> It invited the PAP to establish a framework for co-operation.<sup>231</sup> Based on that invitation, the Committee on Justice and Human Rights of the PAP recommended that 'this gesture of co-operation should continue and relations should be strengthened with all the organs dealing with human rights, especially the Council of Peace and Security in Africa.'<sup>232</sup>

#### **3.1.4 Co-operation with NGOs**

The Commission co-operates with NGOs whether they operate at national, regional or international level.<sup>233</sup> NGOs fall under category of 'other African and international institutions concerned with the promotion and protection of human and peoples' rights' stipulated by article

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<sup>225</sup> 25th Activity Report, para 47.

<sup>226</sup> 25th Annual Activity Report, para 47.

<sup>227</sup> Rule 30(3) of Interim Rules of Procedure of the African Commission on Human and Peoples' Rights. The Interim Rules were adopted at the 44th ordinary Session pending harmonisation with the Rules of Procedure of African Court on Human and Peoples' Rights. The first meeting to harmonise the rules was held on 14 – 17 July 2009 in Arusha, Tanzania.

<sup>228</sup> Resolution on Cooperation between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child in Africa, 45th ordinary session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 13 to 27 May 2009 [ACHPR/Res144(XXXV)09] in 26th Activity Report, annex 5.

<sup>229</sup> n 228 above, last para.

<sup>230</sup> Report of the Committee on Justice and Human Rights of the Pan-African Parliament presented during the sixth ordinary session Midrand, South Africa, 13 – 24 November 2006 2. A member of the Committee on Justice and Human Rights of the PAP attended a brain storming Session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia from 9 to 10 May 2006.

<sup>231</sup> n 230 above, item 8.

<sup>232</sup> As above.

<sup>233</sup> Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission, ACHPR /Res.30(XXIV)98, para 7. See 25th Activity Report, para 57; 26th Annual Activity Report, para 9. The Commission grants international NGOs observer status. For example, out of 12 NGOs granted observer status on 44th ordinary session five NGOs were from Europe. See Mbelle (n 39 above) 291.

45(1)(c) of the Charter.<sup>234</sup> An NGO establishes its co-operative relationships by obtaining an observer status with the Commission. An NGO working in the fields of human rights should have objectives and activities that are in consonance with the fundamental principles and objectives of the Constitutive Act of AU and the African Charter to get an observer status.<sup>235</sup> By 27 May 2009, 403 NGOs have observer status with the Commission.<sup>236</sup>

The African Commission co-operates with NGOs by allowing them to participate in its public sessions and in its special mechanisms.<sup>237</sup> It grants NGOs a privilege to access its documents.<sup>238</sup> It encourages NGOs to propose an agenda item for the sessions of African Commission.<sup>239</sup> The Commission organises seminars and conferences in collaboration with NGOs.<sup>240</sup> The co-operation with NGOs is so important that it is hailed as one of the non-State actors that made the activities of the African Commission effective and visible.<sup>241</sup>

### 3.1.5 Co-operation with National Human Rights Institutions

At national level the Commission co-operates with National Human Rights Institutions (NHRIs) that have affiliate status.<sup>242</sup> The Commission grants affiliate status to a national human rights institution of a state party to the African Charter if such institution is established by law or constitution and conforms to the Paris Principles.<sup>243</sup> Twenty-one NHRIs have affiliate status with the Commission by the end of May 2009.<sup>244</sup> The NHRIs that have affiliate status have the right to participate in public sessions of the Commission and its subsidiary mechanisms.<sup>245</sup> They can propose agenda items for the Commission.<sup>246</sup>

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<sup>234</sup> The African Commission Resolution (n 233 above) para 2.

<sup>235</sup> Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human Rights with the African Commission on Human and Peoples' Rights, ACHPR/Res.33(XXV)99. See also rule 73(1) of Interim Rules of Procedure.

<sup>236</sup> Final Communique of the 45th ordinary session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 13 to 27 May 2009, at

<sup>237</sup> [http://www.achpr.org/english/communiqués/Final%20Communique\\_45.pdf](http://www.achpr.org/english/communiqués/Final%20Communique_45.pdf) (accessed 17 September 2009).

<sup>238</sup> Rule 75 Rules of Procedure of the African Commission on Human and Peoples' Rights 1995 reproduced in Murray & Evans (n 218 above) 21.

<sup>239</sup> Rule 63(1) Interim Rules of Procedure.

<sup>240</sup> Rule 34(3)(e) Interim Rules of Procedure.

<sup>241</sup> Rule 76 of Rules of Procedure. See Mbelle (n 39 above) 295.

<sup>242</sup> Mbelle (n 39 above) 289.

<sup>243</sup> Resolution on the Granting of [Affiliate] Status to National Human Rights Institutions in Africa (1998), ACHPR/Res.31(XXIV)98, reproduced in Murray & Evans (n 218 above) 701.

<sup>244</sup> n 242 above, para 4. See also rule 72(2) & (5) Interim Rules of Procedure.

<sup>245</sup> 26th Annual Activity Report, para 14.

<sup>246</sup> n 242 above, para 4(b). See also rule 72(3)(b) Interim Rules of Procedure.

<sup>246</sup> Rule 34(3)(e) & rule 68(1) Interim Rules of Procedure.

The NHRIs have corresponding duties such as assisting the Commission in the promotion and protection of human rights at national level.<sup>247</sup> They receive state reports from the Commission and are informed of the date of examination of reports so that they can submit shadow reports or any information relating to human rights situation in state concerned.<sup>248</sup> The Commission includes summary of activities carried out in co-operation with NHRIs in its activity reports.<sup>249</sup>

## 3.2 Co-operation of the African Commission with RECS

### 3.2.1 The Mandate of the African Commission to co-operate with RECs

The African Charter mandates the African Commission to co-operate with some RECs under article 45(1)(c) for the following reasons.<sup>250</sup> First, RECs are *African*. All the eight RECs that were recognised by AU in 2006 are African organisations because all the contracting parties to treaties establishing these RECs are African states. All of these states are also members of AU except Morocco, which is member of AMU.<sup>251</sup> Moreover, the headquarters of these RECs are based on the African continent.

Secondly, RECs can also qualify as international *institutions* because they fulfil the three elements 'namely, establishment (1) by international agreement between states; (2) of at least one organ distinct from member states and capable of so acting; and (3) under international law,' which are widely agreed upon as characteristics of international organisations.<sup>252</sup> RECs were constituted by treaties. They have organs that are distinct from member states. The organs of RECs act under international treaties, which are sources of international law.

Finally, they are *concerned with the promotion and protection of human and peoples' rights* though human rights are not their sole concern. As argued in chapter two, RECs have human rights mandate. They are concerned with protection of human rights as some courts of RECs

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<sup>247</sup> n 242 above, para 4(d). See also rule 72(3)(e) Interim Rules of Procedure.

<sup>248</sup> Rule 76(1)(c) & (2) & Rule 63(1) Interim Rules of Procedure.

<sup>249</sup> Rule 63(2)(f) Interim Rules of Procedure.

<sup>250</sup> Not all RECs qualify as institutions concerned with human rights.

<sup>251</sup> Morocco withdrew from OAU in 1984.

<sup>252</sup> JE Alvarez *International organisations as law-makers* (2005) 6. MN Shaw *International Law* (2003) 1161. Shaw uses 'international institution' instead of 'international organisation.' Thus, the words 'organisation' and 'institution' are interchangeable used.

have human Rights jurisdiction.<sup>253</sup> They are also concerned with the promotion of human rights as some organs of RECs mandated to receive reports of state on the implementation of human rights.<sup>254</sup> They also hold workshops on human rights.<sup>255</sup>

Some organs of RECs are also mandated to co-operate with other organisations. For example, the Executive Secretary of SADC is responsible for the 'promotion of co-operation with other organisations for the furtherance of the objectives of SADC.'<sup>256</sup> Thus, African Commission can clearly be classified under other organisations with which SADC Executive Secretary has a duty to co-operate. Similarly, the vision and mission of ECOWAS Court included 'harmonisation of relationships with relevant International Organisations' which possibly include the African Commission.<sup>257</sup> In addition, RECs are among intergovernmental organisations called upon to co-operate and harmonise their activities with organs of OAU, which include the African Commission.<sup>258</sup>

There are instances where the African Commission is involved with organs of RECs on human rights issues despite the lack of framework for formal relationship. For example, the Commission 'sent correspondences to COMESA and ECOWAS regarding collaboration on gender issues in Africa.'<sup>259</sup> The Commission drew the attention of RECs to human rights situations in their member states.<sup>260</sup> It had discussion with an organ of RECs.<sup>261</sup> There are also cases where the Commission and organs of RECs met in seminar or conference.<sup>262</sup> Apart from these and other coincidences, the African Commission has no formal framework for co-

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<sup>253</sup> ECOWAS Community Court of Justice and SADC Tribunal have human rights jurisdiction. EACJ upheld human rights though it has no jurisdiction.

<sup>254</sup> SADC Secretariat has mandate to receive state reports on Fundamental Social Charter and Protocol on Gender Development.

<sup>255</sup> The Secretariat of EAC held workshop of NHRIs. ECOWAS organised workshop on the gains of the establishment of a Network of National Human Rights Institutions in West Africa.

<sup>256</sup> Article 15 (1)(c) SADC Treaty.

<sup>257</sup> Banjo (n 163 above) 75.

<sup>258</sup> Grand Bay (Mauritius) Declaration and Plan of Action, 12–16 April 1999, para 18, adopted by the First OAU Ministerial Conference on Human Rights, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 120.

<sup>259</sup> 23rd Activity Report, para 40.

<sup>260</sup> 22nd Activity Report, para 29. The Chairperson of the African Commission drew the attention of the ECOWAS Chairperson to human rights situation in Guinea.

<sup>261</sup> 25th Activity Report, para 64(xi). Commissioner Angela Melo had discussions with the judges of the SADC Regional Tribunal on 3 November 2008.

<sup>262</sup> See 25th Activity Report, para 63(xiii). Commissioner Sanji Mmasenono Monageng, attended a seminar organized by Interights and the MacArthur Foundation which brought together RECs, Courts, Tribunals and the African Commission from in November 2008 in Abuja, Nigeria. See also 26th Annual Activity Report, para 27. Commissioner Catherine Dupe Atoki attended a conference organised by the ECOWAS on the gains of the establishment of a Network of National Human Rights Institutions in West Africa in February 2009 in Cotonou, the Republic of Benin.



operation with RECs in spite of its mandate to co-operate with them. Then, the question is Why has the African Commission failed to co-operate with RECs.

### 3.2.2 Reasons for lack of co-operation between African Commission and RECs

The lack of co-operation between African Commission and organs of RECs concerned with human rights can be attributed to a number of factors. First, it is evident from the treaties establishing RECs that their aim is the promotion of mainly economic co-operation among member states rather than promotion and protection of human rights.<sup>263</sup> Only some RECs recognised by AU featured promotion and protection of human rights among their fundamental principles.<sup>264</sup> Even these RECS succeeded the organisations that did not envisage promotion and protection of human rights. For example, the predecessor of SADC, the Southern Africa Development Co-ordination Conference, was not concerned with human rights.<sup>265</sup> Similarly, the Intergovernmental Authority on Drought and Development (the predecessor of IGAD), the old East African Community, the Preferential Trade Area for Eastern and Southern Africa (an organisation preceding COMESA), and pre-1993 ECOWAS did not express their concern with human rights.<sup>266</sup> These 'parent' institutions, apart from old East African Community, continued to exist after the establishment of the African Commission. Thus, they did not qualify as 'institutions concerned with the promotion and protection of human and peoples' rights' under article 45(1)(c) of the African Charter.

Second, the involvement of RECs in human rights matters is very recent in terms of establishment of courts of RECs and their engagement with human rights cases. The ECOWAS Court of Justice, which began its function in 2001, has been empowered to receive human rights complaints only since 2005.<sup>267</sup> The members of the SADC Tribunal were appointed on 18 August 2005 and were sworn in on 18 November 2005.<sup>268</sup> There were doubts as to jurisdiction on human rights matters until the Tribunal itself came up with the decision that it has human rights jurisdiction in 2008 in the *Campbell* case.<sup>269</sup> In EAC, the protocol that triggers the human

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<sup>263</sup> See art 3 of ECOWAS Revised Treaty; art 5 of EAC Treaty; art 4 of ECCAS Treaty; art 7 of IGAD Agreement; art 5 of SADC Treaty. See Viljoen (n 4 above) 495.

<sup>264</sup> AMU, CEN-SAD and ECCAS do not include promotion and protection of human rights among their fundamental principles.

<sup>265</sup> See Madakufamba (n 170 above) 91.

<sup>266</sup> These organisations were formed when African states considered human rights as a domestic matters.

<sup>267</sup> Supplementary Protocol A/SP1/01/05 to Protocol on the Community Court of Justice (1991) adopted in 2005 and provisionally came into force upon signature in 2005 cited in Ebobrah (n 10 above) 312.

<sup>268</sup> SADC Tribunal: Establishment at <<http://www.sadc.int/tribunal/>> (accessed 28 September 2009).

<sup>269</sup> The *Campbell* case (n 194 above). See Ebobrah (n 29 above) 84.

rights jurisdiction of the EAC Court of Justice has not come into being yet. The Court's decisions respecting human rights, which have taken the form of violation of the rule of law or violation of the provisions of EAC Treaty, were decided as of 2007.<sup>270</sup> The COMESA Court of Justice has not pronounced any decision on human rights matters.<sup>271</sup> Despite the undertaking of the member states of IGAD to promote and protect human rights in accordance with the African Charter, IGAD has no dispute settlement mechanisms.<sup>272</sup>

Third, the achievements of RECs in the field of human rights are insignificant. Regarding the protection of human rights, the judgments of courts of RECs that directly addressed violations of human rights are too scanty to demonstrate themselves as human rights fora and attract substantial number of human rights violation complaints. In addition, '[t]he enforcement of judgments from these courts remains problematic' as they lack institutional framework for the enforcement of their decisions.<sup>273</sup> Inaccessibility of these courts to ordinary citizens of state members is another obstacle inhibiting them from properly carrying out their human rights mandate.<sup>274</sup> Regarding the promotion of human rights, RECs did not go beyond organising few workshops that have bearings on human rights. The secretariats of RECs are also dragging their feet to carry out their mandate. For example, the Commission of ECOWAS did not bring cases of human rights violations before ECOWAS Court of Justice.<sup>275</sup>

Fourth, the African Commission has 'severely underperformed its mandate.'<sup>276</sup> The Commission has not implemented its mandate to promote the African Charter.<sup>277</sup> The duty of the African Commission to take initiatives to co-operate with African institutions concerned with promotion and protection of human rights is part of this mandate. With the exception of co-operation with NGOs and NHRIs,<sup>278</sup> the Commission has not taken meaningful steps. Let alone co-operation with RECs whose objectives are mainly economic integration, the African Commission began co-operative relationship with ACERWC at the request of the Executive Council of the AU with a push from the chairperson of ACERWC.<sup>279</sup> The activities of the

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<sup>270</sup> *Katabazi* case (n 122 above).

<sup>271</sup> Ruppel (n 35 above) 289.

<sup>272</sup> Art 8 of IGAD Agreement.

<sup>273</sup> Lamin (n 30 above) 238-239.

<sup>274</sup> Lamin (n 30 above) 239.

<sup>275</sup> Ebobrah (n 10 above) 314.

<sup>276</sup> M du Plessis & L Stone 'A court not found?' (2007) 7 *African Human Rights Law Journal* 522.

<sup>277</sup> Hansungule (n 17 above) 256.

<sup>278</sup> Co-operation with NHRIs needs to be strengthened. See generally BR Dinokopila 'Beyond affiliate status: extrapolating the participation of National Human Rights Institutions in the workings of the African Commission on Human and Peoples' Rights' unpublished LLM thesis, University of Pretoria, 2008.

<sup>279</sup> 25th Activity Report, para 47.

Commission to co-operate with other institutions focused on international organisations and donor agencies.<sup>280</sup>

Fifth, the trend towards establishing co-operation among continental human rights institutions is recent. The AU felt the need to establish co-operation between the African Commission and other organs of AU with human rights mandate since 2004<sup>281</sup> because of proliferation of institutions with human rights mandate that accompanied the transformation of OAU to AU.<sup>282</sup> The African Commission has been holding series of brainstorming session to work out a formal framework through which continental human rights institutions co-operate.<sup>283</sup> Thus, one should not expect the African Commission to have a long-standing relationship of co-operation with RECs while such relations do not exist among continental human rights institutions.

Finally, the way international and other regional human rights systems function has some impact on African Commission, however small. The main actors in international and other regional human rights systems are NGOs and NHRIs. Thus, the African Commission also focused on these institutions. The peculiarity of RECs to the African continent deprived African Commission of a model from which it draws inspiration as a younger institution modelling its activities on older regional human rights systems in the Americas and Europe and on the UN human rights system. The institutional architecture of Africa is different from other regional organisations as the African integration project is centred on harmonising and unifying activities and policies of RECs.<sup>284</sup>

### 3.2.3 The advantages of the co-operation

The co-operation of the African Commission with RECs, in my view, has a number of advantages for the promotion and protection of human rights in Africa. The Current number of commissioners is not enough to carry out the mandate of the Commission as a part time job because the workload of the commission is increasing because of the rising backlog of Periodic

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<sup>280</sup> See The Mauritius Plan of Action 1996-2001, para 57 – 59 reproduced in Murray & Evans (n 218 above) 588.

<sup>281</sup> AU Assembly Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights, Doc. Assembly/AU/7 (II).

<sup>282</sup> See E Baimu 'Human rights mechanisms and structures under NEPAD and the African Union: emerging trends towards proliferation and duplication' (2002) *Occasional Paper No 15* Centre for Human Rights, University of Pretoria, at <[http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ15.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ15.html)> (accessed 15 September 2009)

<sup>283</sup> Brainstorming sessions of the African Commission were held in Addis Ababa (Ethiopia), Banjul (The Gambia), Maseru (Lesotho), and Ouagadougou (Burkina Faso).

<sup>284</sup> Art 3(l) of the Constitutive Act; art 88(1) of AEC Treaty.

State Reports, Mission Reports as well as Communications.<sup>285</sup> It was recommended that the number of commissioners be increased from 11 to between 15 and 18.<sup>286</sup>

However, increasing the number of Commissioners requires amendment of the African Charter, which takes long time to take effect.<sup>287</sup> Instead, the co-operation with RECs may help the African Commission to share some of its burdens with its subregional allies. The Commission can cause deflection of some communications towards courts of RECs thereby having more time to deal with other matters.<sup>288</sup> For this purpose, the Commission needs to convince its litigants, mainly NGOs, to bring Communications before courts of RECs.<sup>289</sup> The following points buttress this argument. First, the African Commission together with other continental institutions does not claim monopoly over the African Charter.<sup>290</sup> Second, once a complaint is settled in accordance with the provisions of the African Charter, it would be inadmissible before the African Commission.<sup>291</sup> Third, RECs can request the advisory opinion of the African Commission.<sup>292</sup> Finally, the establishment of the African Court does not replace the protective mandate of the Commission as per article 2 of the Protocol establishing the African Court.

In addition, the Commission will have assistance from RECs in its promotional activities particularly in organising workshops and conferences jointly. Co-operating with RECs, which are already organising workshops on human rights, will double the efforts of the Commission in promoting the African Charter.<sup>293</sup> The joined efforts of the African Commission and RECs will complement the limited number of commissioners while it also enables the Commission to access greater number of audience. The co-operation contributes to 'a more co-ordinated approach to the implementation of human rights' adopted in Grand Bay Declaration.<sup>294</sup> It will

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<sup>285</sup> 26th Activity Report, para 128.

<sup>286</sup> 20th Activity Report, Annex II, Report of the meeting of the Brainstorming Meeting on the African Commission on Human and Peoples' Rights: 9-10 May 2006, Banjul, The Gambia.

<sup>287</sup> See art 31 and 68 of the African Charter.

<sup>288</sup> Most of the cases to the African Commission come from member states of ECOWAS and SADC. These RECs have courts that can settle human rights complaint according to the African Charter. See Viljoen (n 4 above) 322. The deflection of cases is more probable due to physical proximity of courts of RECs to complainants. See Ebobrah (n 29 above) for other advantages of litigating before subregional courts.

<sup>289</sup> A perusal of African Human Rights Law Reports reveals the participation of NGOs in bringing communications before the African Commission. e.g more than 60% of cases reported in 2000 were brought by NGOs.

<sup>290</sup> Mureithi (n 24 above) 91; Ebobrah (n 28 above) 7.

<sup>291</sup> Art 56(7) of the African Charter.

<sup>292</sup> Art 45(3) of the African Charter. RECs are recognised by AU.

<sup>293</sup> n 255 above.

<sup>294</sup> Grand Bay Declaration (n 264 above), para 18.

also cause the programmes and initiatives of the African Commission and RECs to have a maximum effect<sup>295</sup> by utilising resource effectively and by avoiding duplication of efforts.

Concerning resources, the African Commission had been plagued by understaffing and underfunding.<sup>296</sup> It relied on external donors implying the unwillingness of AU to make the Commission more effective and forceful.<sup>297</sup> Fortunately, the Commission has been presenting and defending its budget since 2008<sup>298</sup> though it could not fully utilise the budget allocated to it.<sup>299</sup> However, resource remains scarce irrespective of the fact that the African Commission presents and defends its budget. The co-operation with RECs could help the Commission to allocate effectively its resources to its activities. Before entry of RECs into the field of human rights, all supranational human rights activities were left to the African Commission together with other nascent regional human rights bodies.<sup>300</sup> Now, it is high time for the African Commission to reconsider the changed circumstances. This approach will also be beneficial to African states that sustain the regional and the subregional systems, as they will avoid allocating resources twice for the same activities.

The co-operation of the Commission with RECs will help to avoid the probable duplication of promotional activities. If RECs have undertaken to conduct promotional activities, there would inevitably be duplications since the audience is the same, the African peoples. Thus, there is a probability that in some areas there could be duplication while there are no promotional activities in other areas given the incapacity of the African Commission to carry out fully its promotional mandate.<sup>301</sup>

The co-operation with RECs that are not involved in the promotion and protection of human rights enables the Commission to advocate for the mainstreaming of the African Charter into their activities. In its advocacy, the Commission can use the examples of RECs that have undertaken promotion and protection of human rights in accordance with the African Charter to

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<sup>295</sup> As above.

<sup>296</sup> K Kindiki 'The African human rights system: unnecessary overlap or useful synergies?' (2006) 12 *East African Journal of Peace and Human Rights* 332; Nyaga (n 23 above) 76. The Commission in its report had been complaining about the insufficiency of the resources at its disposal and AU Assembly had been requesting the AUC to supply the African Commission with sufficient resources. See e.g 22nd Activity report, para 96; Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights, Doc. Assembly/AU/7 (II), para 2.

<sup>297</sup> See Viljoen (n 4 above) 416. See also J Biegon & M Killander 'Human rights developments in the African Union during 2008' (2009) 9 *African Human Rights Law Journal* 296.

<sup>298</sup> 24th Activity Report, para 67. Biegon & Killander (n 297 above) 297.

<sup>299</sup> 26th Activity Report, para 125.

<sup>300</sup> This refers to only African efforts as UN system was in place before African Commission.

<sup>301</sup> Hansungule (n 17 above) 257.

convince other RECs. The importance of human rights to economic development is another incentive that the Commission can use in its advocacy.

The idea of bills of rights in every REC will be divisive by increasing the diversity of human rights laws and be a waste of resources by creating a task for harmonisation since RECs are going to merge to form AEC.<sup>302</sup> For example, SADC has Fundamental Social Charter and recently adopted SADC Protocol on Gender and Development and EAC is on the way to come up with East African Bill of Rights. As an organ of the AU, the Commission can avoid this tendency towards proliferation of subregional bill of rights and contribute to the move towards uniting Africa by collaborating with PAP to harmonise human rights law.<sup>303</sup> If the Commission succeeds in convincing all RECs to adopt the African Charter as their common human rights standard, it will immensely contribute to the project of uniting Africa.<sup>304</sup> This also means a successful promotion of the African Charter.

The co-operation between the African Commission and RECs facilitates a uniform development of jurisprudence on the African Charter. The courts of RECs, particularly ECOWAS Court and SADC Tribunals, have jurisdiction to adjudicate human rights complaints based on the African Charter.<sup>305</sup> In the absence of co-operation between the African Commission and these courts, the African Charter would inevitably be interpreted divergently.<sup>306</sup> The courts of RECs and the African Court may also differ in interpreting the Charter.<sup>307</sup>

The co-operation between the African Commission and RECs is also beneficial to RECs. The organs of RECs that are concerned with human rights can take advantages of the human rights expertise of the African Commission to carry out their activities. For example, the SADC Secretariat can take lessons from African Commission on how to deal with the reports that it receives from member states.<sup>308</sup> The ECOWAS Commission, which has the power to bring

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<sup>302</sup> F J Viljoen 'Realisation of human rights in Africa through inter-governmental institutions' unpublished PhD thesis, University of Pretoria, 1997 380.

<sup>303</sup> Viljoen (n 302 above) 380. Viljoen also provides arguments in favour of subregional bill of rights.

<sup>304</sup> See Viljoen (n 4 above) 500. Some RECs have already adopted African Charter as their common standard.

<sup>305</sup> See Nwauche (n 36 above) 332; Ebobrah (n 10 above) 314; *Campbell* case (n 194 above) 24; Odinkalu (n 196 above) 9.

<sup>306</sup> Viljoen (n 4 above) 501.

<sup>307</sup> As above.

<sup>308</sup> Art 16(3) of Charter of Fundamental Social Rights in SADC & art 35(4) of SADC Protocol on Gender and Development empowers SADC Secretariat to receive reports from member states.

cases of human rights violations against member states, may use the report of fact-finding mission of the African Commission to prove its cases against member states.<sup>309</sup>

The African Commission can transplant its regional co-operation with NGOs and NHRIs to subregional level. NGOs and NHRI are playing an important role for the effectiveness and visibility of the African Commission.<sup>310</sup> African human rights NGOs adopted enforcing human rights through international treaty bodies as one of their strategies.<sup>311</sup> Most of the communications brought before the African Commission were initiated by NGOs.<sup>312</sup> If NGOs participate in subregional mechanisms by bringing cases before the courts of RECs and by popularising the activities of RECs in human rights, robust human rights mechanisms will develop at subregional level.<sup>313</sup> To encourage the co-operation of NGOs with organ of RECs, the Commission can make use of Forum of NGOs.<sup>314</sup>

African countries, as argued above, realised that the observance of human rights is a pre-condition to development.<sup>315</sup> Thus, strengthening the capacity of organs of RECs concerned with human rights, in co-operation with African Commission, to effectively promote and protect human rights contributes to the development objectives of RECs meaningfully. Moreover, the co-operation between the Commission and RECs will help the latter to avoid duplication and concentrate on activities that are not carried out by the African Commission.

### **3.2.4 The modes of the co-operation and procedure of its establishment**

The African Commission and the RECs have the latitude to choose the modes of their co-operation. Some possible modes include undertaking joint promotional activities and involving RECs in subsidiary mechanisms of the Commission. The Commission has a duty to undertake studies and researches and to organize seminars, symposia and conferences under its mandate to promote human and peoples' rights.<sup>316</sup> The duty entails 'undertaking sustained research in human rights, and then disseminating the research findings to the general public

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<sup>309</sup> Ebobrah (n 10 above) 314.

<sup>310</sup> Mbelle (n 39 above) 289.

<sup>311</sup> CE Welch *Protecting human rights in Africa: roles and strategies of non-governmental organizations* (1995) 56.

<sup>312</sup> A perusal of African Human Rights Law Reports reveals the participation of NGOs in bringing communications before the African Commission. e.g more than 60% of cases reported in 2000 were brought by NGOs.

<sup>313</sup> See Oziegbe (n 25 above) 32. Oziegbe recommended ECOWAS Court to collaborate with civil society organisations. See Ebobrah (n 29 above) 100. According to Ebobrah, NGOs are not competent to bring cases before the ECOWAS Court but a lawyer who is not even based in Africa can appear as agent.

<sup>314</sup> See Mbelle (n 39 above) 294.

<sup>315</sup> Resolution on the African Commission on Human and Peoples' Rights, AHG/Res. 198 (XXVI), Preambular para 3. The Algiers Declaration (n 71 above) para 10-11. See also Viljoen (n 4 above) 170.

<sup>316</sup> Art 45(1)(a) of the African Charter.

through lectures, workshops, conferences, etc.<sup>317</sup> The Commission may follow two methods in carrying out this duty. It may organise seminars, symposia and conferences jointly with RECs in each economic community. Otherwise, it may organise them continentally and ensure the participation of RECs.

The African Commission can co-operate with the RECs by involving persons from the latter in its subsidiary mechanisms. The subsidiary mechanisms include special rapporteurs, committees and working groups.<sup>318</sup> The Commission has so far appointed six special rapporteurs.<sup>319</sup> All the rapporteurs are serving members of the Commission itself.<sup>320</sup> If the Commission reforms its current appointment practice as recommended by its own member and scholars, it may consider appointing some special rapporteurs from RECs.<sup>321</sup> The Commission can also include people from RECs in Follow-up Committee on the Implementation of the Robben Island Guidelines that has currently five independent members.<sup>322</sup>

The Commission has different working groups some of which cannot involve outsiders, for example, Working Group on Communications.<sup>323</sup> The other working groups which were 'established to deal with other matters under the Charter can include members and other persons who are not members of the African Commission.'<sup>324</sup> Some of the working groups have 'included members from civil society and NGOs.'<sup>325</sup> Thus, the Commission can ensure the participation of the RECs in these working groups.

The African Commission can establish the above modes of co-operation through number of procedures including passing resolution, signing memorandum of understanding, revising Rules of Procedure, re-assigning commissioners for promotional responsibilities and harmonising plan of action. The African Commission establishes co-operative relationship with institutions concerned with human rights through resolutions. It has adopted resolutions to co-operate with

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<sup>317</sup> Hansungule (n 17 above) 256.

<sup>318</sup> Rule 28 of Rules of Procedure; rule 23 Interim Rules of Procedure.

<sup>319</sup> Murray (n 40 above) 344. The mandate of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions fell into disuse in 2000.

<sup>320</sup> See 23rd Activity Report, para 92. See also Murray (n 40 above) 345.

<sup>321</sup> See Murray (n 40 above) 377.

<sup>322</sup> 23rd Activity Report, para 91.

<sup>323</sup> Rule 115 and rule 120 of Rules of Procedure; Rule 100 of Interim Rules of Procedure. See Nyanduga (n 41 above)

<sup>324</sup> Nyanduga (n 41 above) 384. For the composition of the working groups see 23rd Activity Report, para 91; see also 26th Activity Report, annex 5.

<sup>325</sup> Nyanduga (n 41 above) 384.



NGOs, NHRIs and ACERWC.<sup>326</sup> Similarly, it can pass resolution that deals with the establishment of co-operation between African Commission and RECs.<sup>327</sup> Such resolution may indentify a working group from the existing working groups or establish new one to deal with the co-operation between the Commission and the RECs as it thinks fit.<sup>328</sup>

The African Commission can conclude Memorandum of understanding with each regional economic community concerned with human rights.<sup>329</sup> The Memorandum of understanding may provide for such matters as invitation of RECs to sessions of African Commission and in advance notification of the African Commission about the human rights activities of RECs. The Commission may revise its Rules of Procedure to include its relationships with RECs. The Interim Rules of Procedure provides only mechanisms for dealing with NGOs, NHRIs, and other human rights organs. After establishing legal relationship by resolution and the details of co-operation in Memorandum of understanding the Commission can include those into its Rules of Procedure.

The African Commission assigns four to six countries to each member for the purpose of promoting the African Charter.<sup>330</sup> The Commission can re-assign commissioners to the RECs taking the number of members in each regional economic community and the overlapping membership of some countries in different RECs into consideration. The African Commission adopts and implements plans of action or strategic plans.<sup>331</sup> Some RECs have also Plan of Action for human rights activities.<sup>332</sup> The RECs can harmonise their plan of action with the Strategic Plan of the African Commission to coordinate their promotional activities and other matters of common interest. The African Commission may include in its strategic plan the activities that it will undertake in each regional economic community. Such course of action requires communication between RECs and the African Commission. One method of

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<sup>326</sup> See resolutions on NGOs (n 235 above), NHRIs (n 242 above) and ACERWC (n 228 above).

<sup>327</sup> Art 45 of the African Charter. See Murray (n 208 above) 48.

<sup>328</sup> The Working Group on Specific Issues Relevant to the Work of the African Commission seems appropriate for this purpose.

<sup>329</sup> e.g the Commission was commended for signing memorandum of understanding with UNHCR. See n 218 above.

<sup>330</sup> See e.g 23rd Activity Report, para 93. See Hansungule (n 17 above) 249.

<sup>331</sup> Since 1988, the African Commission has been adopting plan of actions. e.g Preliminary Plan of Action adopted in 1988, A Plan of Action of the African Commission on Human and Peoples' Right for 1992-1996, The Mauritius Plan of Action 1996-2001 etc. The Commission is currently implementing its 2008-2012 Strategic Plan.

<sup>332</sup> e.g. see *Laying the Foundation and Institutional Development for Political Integration* at <<http://www.eac.int/component/content/article/123-political-federation/204-laying-foundation.html>> (accessed on 4 September 2009). See also Ruppel (n 35 above) 305. The EAC adopted Plan of Action on Promotion and Protection of Human Rights in March 2008.

communication could be the sending of the Commission's Strategic Plan document to RECs for harmonisation.

### **3.3 Concluding Remarks**

The African Commission has a good practice of co-operating with its partners which include institutions concerned with promotion and protection of human rights. The co-operation is mainly focused on donor agencies, NGOs and NHRIs. As a result, the Commission limited its co-operating partners to national or international level. Recently, it showed some interest in co-operating with African continental institutions. However, the Commission has not made effort to co-operate with RECs, nascent institutions that have been emerging between continental and national level, despite their concern with the promotion and protection of human rights and their (potential) contribution towards the objectives of the African Commission.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

#### 4.1 Conclusion

RECs are concerned with the promotion and protection of human rights though their primary objective is promotion of economic co-operation among member states. The degree of involvement of RECs in human rights varies from one economic community to another. Some RECs established courts that have jurisdiction to receive human rights cases and determine them in accordance with the African Charter on Human and Peoples' Rights. Thus, some RECs have taken human rights more seriously than others.

While the concern of RECs with human rights is a positive development for a better promotion and protection of human rights in Africa, it is accompanied by some side effects that may occur in the near future. The overlapping jurisdiction of courts of RECs with the African Commission may lead to divergent interpretation of the African Charter thereby inhibiting consistent development of jurisprudence on the African Charter. The promotional activities by the African Commission and RECs may result in duplication in some areas and lack of promotional activities in other parts of Africa. Besides, the tendency of some RECs to adopt their own bill of rights increases the diversity of human rights law in Africa and thereby creating a task for harmonisation as Africa is moving towards unity.

The African Commission has underperformed its mandate mainly due to lack of resources. Despite the recent attempt by AU to improve funding and staffing of the Commission, some problems persist. Eleven Commissioners, who conduct their job on part time basis, are not enough to carry out promotional activities in all the 53 African countries. In addition, the workload of the Commission is increasing because of the rising backlog of communications and others.

Through the co-operation with RECs, the African Commission can overcome, to certain extent, some of its own problems and the problems accompanying the involvement of RECs in human rights. The Commission and courts of RECs can adopt common interpretation of the African Charter through frequent workshops and seminars. The Advocacy by the Commission at subregional level helps to avoid the tendency towards divergent human rights law. By using the relation it commands with NGOs and NHRIs, the African Commission can channel some of its

workloads particularly communications to courts of RECs. The African Commission will have allies at sub-regional levels for its promotional activities besides avoiding the possibility of duplication. The co-operation will also help RECs to obtain the expertise of the African Commission on human rights matters.

However, the African Commission has not made effort to co-operate with RECs for various reasons despite its mandate under the African Charter to co-operate with other institutions concerned with the promotion and protection of human rights. This mandate includes the co-operation of the African Commission with RECs. Instead, the Commission limited its co-operation with other institutions to NGOs, NHRIs, and donor agencies.

On the other hand, the African States realised the need to adopt a more co-ordinated approach to the implementation of human rights and called upon intergovernmental organisations like RECs and others to co-operate and harmonise their programs and initiatives with organs of the AU such as the African Commission in the Grand Bay Declaration.<sup>333</sup> Moreover, some organs of RECs have treaty power to co-operate with institutions like the African Commission. However, RECs have not responded to the call of the Declaration by making efforts to co-operate with the African Commission.

## **4.2 Recommendations**

The African Commission should engage RECs in its activities. For RECs that have not expressed their concern with human rights, the African Commission should advocate for adoption of African Charter as their standard and for their contribution to respect for human rights. The establishment of mechanisms for promotion and protection of human rights contribute to the objectives of RECs to promote development through economic co-operation given the relationship of human rights with regional integration and development.<sup>334</sup> It also helps member states to carry out their obligations under African Charter and other instruments.

The commission should co-operate with RECs that are concerned with the promotion and protection of human rights. The Commission and RECs have the latitude to determine modes of their co-operations. The Commission may include persons from RECs into its subsidiary mechanisms. It may organise conferences, seminars, or workshops to familiarise the RECs with

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<sup>333</sup> n 258 above.

<sup>334</sup> Quashigah (n 19 above) 276; Mureithi (n 24 above) 91; Sepúlveda (n 68 above) 403.

its work and jurisprudence. The Commission may make reports of states available to RECs and request their comment on them. It may invite RECs to attend public sessions of the Commission. They may agree to conduct joint promotional activities.

The African Commission should consider including rules governing its co-operation with RECs in its Rules of Procedure. The Commission recently adopted Interim Rules of Procedure. Its harmonisation with Rules of Procedure of the African Court is pending. The Interim Rules of Procedure provide for the relationship of African Commission with other institutions but provisions governing the relations of the Commission with RECs are not included.

The Organs of RECs that deal with human rights matters in accordance with the African Charter should follow the interpretation of the African Commission and the African Court. Such practice will allow the development of uniform jurisprudence on the African Charter at regional and subregional level though organs of RECs are not bound to follow the interpretation of the Commission. Moreover, RECs should harmonise their plan of action with strategic plan of the African Commission.

The AU Assembly should request the African Commission and RECs to co-operate with each other. Such request would not be for the first time as the AU Assembly has already requested the African Commission to co-operate with regional institutions.<sup>335</sup> The request is bearing fruits as the African Commission has been holding brainstorming sessions to establish co-operative relationship with other organs of AU with human rights mandate. Such request will also have positive effect on RECs as the regulations and the directives of the AU Assembly bind them.

NGOs and NHRIs should participate in human rights activities at subregional level by bringing cases before courts of RECs. The African Commission owes its visibility to the participation of NGOs, NHRIs and other partners. The effect of such participation of NGOs and NHRIs in RECs is three fold. It brings speedy justice to the victims of human rights violations.<sup>336</sup> It plays important role in improving human rights in RECs. It will also reduce backlog of communications from the African Commission.

Word count 17 927 (excluding bibliography and preliminaries)

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<sup>335</sup> n 16 above.

<sup>336</sup> Ebobrah (n 29 above) 87.

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