

Chapter Six

Comparative perspectives in Africa: human rights in the EAC and SADC

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6.1 Introduction

The long-standing experience of the EU and the more recent practice of ECOWAS arguably provide sufficient bases to contend that human rights protection can, and does take place within the framework of international organisations that were originally conceived as vehicles for economic integration. However, the EU and ECOWAS do not have perfectly matching practices and have been loosely held out as two divergent models for human rights protection within economic integration initiatives. While ECOWAS has been presented in this study as an African model for human rights realisation in the context of economic integration, ECOWAS is not the

only African REC that engages in human rights protection. Facing similar challenges of having to build peaceful, secure and stable environments upon which to pursue integration, other RECs have also been involved in the field of human rights. Thus, the issues that emerge in relation to the involvement of ECOWAS of human rights protection would also be germane in relation to these RECs. Despite the similarity in their justifications for engaging in human rights protection, there is no guarantee of uniformity in practice. Thus, there is some chance that actual human rights practice in these RECs could differ from the ECOWAS practice already considered.

Using ECOWAS and the EU as comparators, this chapter analyses the treaties, instruments and practices of the East African Community (EAC) and the Southern Africa Development Community (SADC) in relation to human rights protection. The analysis aims to show that as presently established, African RECs other than ECOWAS are involved in the promotion and protection of human rights. It will be demonstrated that the treaties of these RECs contain provisions similar to those upon which the ECOWAS and EU human rights regimes are hinged. Consequently, it will be contended that similar to the experiences already considered, anchoring human regimes on such treaty provisions would not conflict with the original objectives of the RECs. Proceeding on the assumption that the human rights practices of the EAC and SADC do not necessarily replicate the ECOWAS and the EU practices, the chapter will highlight how the practices of the EAC and SADC differ from the other models, paying particular attention to existing mechanisms for regulating organisational relations. In so doing, it is further intended to identify best practices for human rights realisation where these exist in the practice of the EAC and SADC. The chapter will also try to establish whether these practices can be reconciled with the ECOWAS practice and whether aspects of ECOWAS and EU practices can fit in the framework of the RECs for the purpose of finding an ideal model for rights protection in the context of economic integration in Africa.

The EAC and SADC are used in this study as representative of other RECs because these two organisations have generated some human rights practice, albeit, only to a limited extent. These RECs are evaluated separately, with an introductory section and an overview of the organisation preceding the actual discussion. An analysis of the human rights provisions in each of the founding treaties is followed by an assessment

of the current human rights practice of the RECs. Following the approach adopted in the previous chapter, the current human rights practice of each of the RECs is considered under three sub-headings: standard-setting, judicial protection and non-judicial protection of rights. This chapter concludes that there is sufficient legal basis for African RECs other than ECOWAS to be involved in the field of human rights realisation. The chapter will also show that in their limited human rights practice, the RECs have a potential to influence and be influenced by the practices of the older regimes to collectively contribute to a non-disruptive model of REC participation in the African human rights system.

6.2 Human rights in the East Africa Community

Ordinarily, the primary responsibility for the protection of human rights in East Africa rests on national governments in the region. As this responsibility is generally complemented by the African regional human rights system and the UN human rights system, the need for a subregional human rights system is not so obvious, if it exists at all. However, despite the existing national and international mechanisms for human rights protection in the region, the EAC appears poised to position itself as a layer of protection between the national legal systems and the African regional human rights system. Hence, it has been recognised that the EAC has shifted its focus from strict economic integration and has extended to areas of good governance and human rights as integration in the Community deepens.¹⁰⁷⁰

While the justifications for the involvement of the EAC in the field of human rights may not be very different from those upon which the development of the ECOWAS human rights regime is hinged, the EAC has been more hesitant in expanding its involvement in this issue area. Most of its activities in the field of human rights are still at a formative stage. Consequently, the degree of involvement and the processes of the EAC in this area are relatively scanty. Notwithstanding its limited involvement, the EAC has set the stage to emerge as one of the more advanced human rights

¹⁰⁷⁰ The Secretary General of the EAC at a meeting with a delegation of the Kitua Cha Katiba organisation on 3 September 2007 (as quoted by OC Ruppel, 'Regional economic communities and human rights in East and Southern Africa' in *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) Konrad Adenauer Stiftung 302) Available at http://www.kas.de/proj/home/php/8/1/-/dokument_id-16347 (accessed 29 June 2009).

regimes among the RECs in Africa. Thus, the EAC provides a basis for assessing the viability of the ECOWAS and EU models for human rights protection.

6.2.1 The East African Community

Although attempts at social and economic integration in East Africa can be traced to the late 19th century when the Kenya Uganda Railway line was constructed,¹⁰⁷¹ formal regional integration in the modern sense first occurred in the region in 1967 with the founding of the original East African Community (EAC) by Kenya, Tanzania and Uganda. In 1977, the original EAC was dissolved following disagreements among the member states over a number of issues.¹⁰⁷² While human rights issues and concerns were not part of the reasons directly behind the dissolution of the old EAC, there is some human rights connection in the sense of a perception that differences in ideology and leadership style may have contributed to the dissolution.¹⁰⁷³ Despite the collapse of the old EAC, the original member states left room for future cooperation, leaving open the possibility for continued engagements.¹⁰⁷⁴

Efforts to revive the EAC began in 1991 and culminated in the signing of a new EAC Treaty in 1999.¹⁰⁷⁵ As presently established, the main objective of the EAC is to develop policies and programmes that would widen and deepen cooperation among the converging states in areas such as political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs.¹⁰⁷⁶ In pursuit of this objective, the EAC envisages the successive establishment of a Customs Union, a Common Market, a Monetary Union and finally an East African Political

¹⁰⁷¹ See para 2 of the preamble to the 1999 EAC Treaty (as amended).

¹⁰⁷² In para 4 of the preamble to the 1999 EAC Treaty (as amended), the EAC identifies lack of strong political will, inadequate private sector and civil society participation, disproportionate benefit sharing and lack of adequate conflict resolution policies as main causes for the dissolution of the original EAC. See also W Braude, *Regional integration in Africa, lessons from the East African Community* (2008) 63.

¹⁰⁷³ C Clapham, 'The changing world of regional integration in Africa' in C Clapham, G Mills, A Morner & E Sidiropoulos (eds) (2001) *Regional integration in Southern Africa* 61.

¹⁰⁷⁴ Para 6 of the preamble to the 1999 EAC Treaty (as amended). See also Braude (2008) 63.

¹⁰⁷⁵ The 1999 Treaty of the EAC which was adopted and ratified by Kenya, Tanzania and Uganda entered into force on 7 July 2000. The EAC was launched in January 2001. Burundi and Rwanda acceded to the EAC Treaty on 18 June 2007. The EAC Treaty is available at <http://www.eac.int> (last accessed 20 March 2009). The EAC Treaty has been amended twice since its adoption in 1999. These amendments occurred in December 2006 and August 2007.

¹⁰⁷⁶ Art 5(1) of the 1999 EAC Treaty (as amended). By art 3 of the EAC Treaty, member states of the EAC are referred to as 'Partner States'. Where necessary, this term would be used in this study to refer to the member states of the EAC.

Federation.¹⁰⁷⁷ In view of these expansive goals, it can be argued that the EAC goes beyond the narrow definition of an economic integration initiative. However, even though its long term vision is a political federation, the immediate scope of the EAC is economic integration to the extent that it foresees ‘accelerated, harmonious and balanced development and sustained expansion of economic activities’. As such, it equates with other RECs in Africa.

In order to achieve the main objective set out in article 5(1) of the 1999 EAC Treaty, the Community aims at ensuring cooperation in agreed fields to facilitate equitable economic development that will ‘raise the standard of living and improve the quality of life of their populations’.¹⁰⁷⁸ The EAC also seeks to ensure gender mainstreaming and the promotion of peace, security and stability as well as undertake other activities that will further the objectives of the Community.¹⁰⁷⁹ The main objectives and the means of achieving the objectives are to be undertaken in accordance with certain fundamental and operational principles.¹⁰⁸⁰ In this regard, integration in the EAC is to take place with respect for the principles of asymmetry, complementarity, subsidiarity and variable geometry.¹⁰⁸¹ EAC partner states further undertake generally to take measures within their states to ensure the realisation of the objectives of the Community.

Despite the fact that the EAC Treaty foresees significant roles for partner states in the realisation of the Community’s objectives, the Treaty establishes certain Community organs to carry out activities at the Community level. These include the Summit; the Council; the Co-ordination Committee; Sectoral Committees; the East African Court of Justice; the East African Legislative Assembly and the Secretariat. The organs of the EAC are required to act within the limits of the powers expressly conferred on them by the Treaty.¹⁰⁸²

¹⁰⁷⁷ Art 5(2) of the 1999 EAC Treaty (as amended).

¹⁰⁷⁸ Art 5(3)(b) of the 1999 EAC Treaty (as amended).

¹⁰⁷⁹ Art 5(3)(e)(f) and (h) of the 1999 EAC Treaty (as amended).

¹⁰⁸⁰ See generally arts 6 and 7 of the 1999 EAC Treaty (as amended).

¹⁰⁸¹ See generally, art 7 of the 1999 EAC Treaty (as amended). These operational principles have been included to guide economic integration. However, some can arguably be applicable to other aspects of EAC activities.

¹⁰⁸² Art 9(1) and (4) of the 1999 EAC Treaty (as amended).

6.2.2 Human rights in the EAC Treaty framework

Similar to the treaty regimes of ECOWAS and the EU, the EAC Treaty does not include promotion and protection of human rights in the statement of the main objective of the Community. However, like the other two regimes, the EAC Treaty makes somewhat generous allusions to human rights. By article 3(3)(b), the EAC Treaty predicates admission of an intending state to the Community on evidence of ‘adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice’. This provision is similar to the EU regime and seeks to set respect for human rights as a condition precedent for EAC membership. However, the quality of the region’s human rights culture compares more to that which prevails in West Africa than what prevails in Europe. Accordingly, there is the danger of creating a disconnect between ideal and reality. It also leaves open the question whether non-adherence of an existing partner state of the EAC can lead to expulsion from the organisation. Under article 5 relating to the objectives of the Community, the EAC Treaty enumerates certain human rights-related activities that the EAC undertakes to pursue as part of its programmes. In this regard, mainstreaming of gender in Community endeavours and the promotion of peace, security and stability are aspects in the Treaty framework that have consequences for human rights.¹⁰⁸³

In its declaration of fundamental principles on the basis of which integration is expected to take place, article 6 of the EAC Treaty makes unambiguous reference to:

good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.¹⁰⁸⁴

The declaration in article 6 is further reinforced by an undertaking by partner states in the statement of operational principles to respect ‘principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights’.¹⁰⁸⁵

¹⁰⁸³ See also Ruppel (2009) 303.

¹⁰⁸⁴ Art 6(d) of the 1999 EAC Treaty (as amended).

¹⁰⁸⁵ Art 7(2) of the 1999 EAC Treaty (as amended).

Taken together, human rights related provisions in the EAC Treaty are comparable to the provisions in the treaty frameworks of ECOWAS and the EU to the extent that none of the latter organisations expresses human rights realisation as a main organisational objective. In fact, in formulating the provisions to cover good governance, democracy, the rule of law, social justice and human rights in that sense, the drafters of the EAC Treaty depict an understanding of human rights in the EAC that is as wide as the ECOWAS conception of the term advanced earlier in this study.¹⁰⁸⁶ More importantly, the generous references to human rights in the EAC Treaty provide ample material for determining whether the EAC is envisaged by its partner states as an avenue for the promotion and protection of human rights. This is essential to address the question whether involvement in the field of human rights has the potential to conflict with the objectives of the Community. Even though, as this chapter will show, the EAC has not carried the promised in the treaty much further since it has failed to make specific protocols to further treaty based human rights-related provisions, analysing treaty provisions would pre-empt possible challenges to increased EAC involvement in the field of human rights.

Applying the general rule of attributed competence,¹⁰⁸⁷ there should be no difficulty in conceding that the provisions of the EAC Treaty demonstrate an intention on the part of the partner states to pursue some, albeit limited, human rights-related activities in the form of gender mainstreaming and the promotion of peace, security and stability. These activities can loosely be located in the objectives of the EAC and to that extent defeats any challenge to the Community's competence in those areas. Thus, the EAC has a more compelling basis than ECOWAS to promote gender related rights. The inclusion of the more regular statements of human rights realisation in the declarations of fundamental and operational principles resembles the practices of ECOWAS and the EU. Consequently, the arguments relating to the implications of statements of principles in those models apply to the EAC. In that regard, while it is acknowledged that principles on their own do not impose obligations, in the context of a treaty, principles are not completely insignificant and may contextually provide the basis for involvement in an issue area.¹⁰⁸⁸ In the face of the provisions in the 1999

¹⁰⁸⁶ See chapter 3 of this study.

¹⁰⁸⁷ See generally Schermers & Blokker (2003) 155.

¹⁰⁸⁸ Rama-Montaldo (1970) 154 as discussed in chapter three of this study.

Treaty, one writer has observed that ‘concern for human rights is ... an integral part of the 1999 EAC regime’. For him, this is a departure from the 1967 Treaty regime of the EAC which was silent ‘about human rights and constitutionalism’.¹⁰⁸⁹ Thus, it is arguable that in the presence of treaty provisions that recognise the promotion and protection of human rights as principles upon which integration is to proceed, EAC involvement in the field of human rights does not conflict with the wider objectives of the Community and is supported by the practices of other similar international organisations.

6.2.3 Current human rights practice

The rhetoric of good governance, democracy, the rule of law and respect for human rights as contained in the EAC Treaty can only be beneficial for citizens of EAC partner states where there is actual protection of human rights within the institutional framework of the Community. However, it is in such actual practice that the potential for disruption of national and regional mechanisms for human rights protection emerges. Since the Treaty does not confer express human rights mandates on any of the organs of the EAC, it is not possible to tie the human rights practice of the EAC with any particular organ. This is different from the ECOWAS regime where at least the ECCJ and the ECOWAS Parliament can claim some express human rights mandate. The absence of human rights competence in the mandate of EAC organs and the resulting lack of coordination complicates investigation of the practice but need not be interpreted to mean that no system for protection exists.

As would be shown shortly, notwithstanding that no organ can claim competence in the area, human rights realisation in the EAC is not restricted to judicial protection of rights as is the general situation under the (O)AU. Thus, an analysis of the practice has to embrace both judicial and non-judicial aspects of rights protection. As already suggested, EAC engagement in this field is still relatively new and none of the organs of the Community has sufficient practice to warrant an institutional approach to the analysis. Hence, the current human rights practice of the EAC will be considered along broad categories of standard-setting, judicial protection and non-judicial protection.

¹⁰⁸⁹ Viljoen (2007) 498.

6.2.3.1 Standard-setting and sources of rights

Standard-setting in the field of human rights can be done either through direct norm creation or the adoption and adaptation of norms from other systems to regulate conduct within a given system.¹⁰⁹⁰ Both forms of standard-setting can be found in the practice of the EAC.

The African Charter as a source of rights in the EAC

With respect to the adoption of norms from other systems, the most apparent evidence in the EAC framework is the adoption of the African Charter by reference to it in the EAC Treaty. Although there is only one reference to the African Charter in the Treaty, the fact that it is specifically mentioned has to be significant as no other human rights instrument is mentioned in the Treaty. Existing practice from other regimes demonstrate that specific mention of a regional human rights instrument translates into recognition of such an instrument as a source of rights in the given system.¹⁰⁹¹ However, it has to be pointed out that in the EAC, reference to the African Charter has not been translated into any form of concrete recognition of the Charter as a source of right for citizens. This contrasts sharply with the ECOWAS practice where the African Charter has acquired a central position.

Notwithstanding the fact that reference to the African Charter in the EAC Treaty has not resulted in its usage as a veritable source of rights in the Community, there is some feeling that such reference is positive to the extent that it portrays the African Charter as ‘a common standard’ in Africa. This is even more significant in view of the expectation that the RECs such as the EAC would merge with the AEC.¹⁰⁹² Against such positive views, there should be incentive for more concrete usage of the African Charter as a source of rights in the EAC. There are at least two possible ways in which the Charter can be applied in the EAC. On the one hand, there is the ECOWAS model of usage in which the adopted instrument is totally appropriated as if it were the result of the law-making processes of the organisation. On the other hand, there is the EU model by which the regional human rights instrument, the ECHR, is applied as a source of inspiration for the definition of fundamental rights.

¹⁰⁹⁰ See generally Finnis (1980) 148.

¹⁰⁹¹ The practices of ECOWAS and the EU are similar in this regard and both provide persuasive precedent for the EAC system.

¹⁰⁹² Viljoen (2007) 500.

Under the ECOWAS model, as demonstrated by the ECCJ's application of the African Charter in its case law, the Charter is perceived as a catalogue of rights for ECOWAS and its substantive provisions are directly invoked in actions before the Court.¹⁰⁹³ In this model, the African Charter confers rights on citizens and imposes obligations on ECOWAS member states and ECOWAS institutions even though ECOWAS is not a formal party to the Charter. There are two important points to be made with regards to this model. The one is that such appropriation and expansive use of the African Charter would necessarily require that all member states of the applying international organisation are also parties to the instrument that is being applied. Where this is the case, the application of the instrument can be justified as the performance of treaty obligations that each member state owes to the other member states that are parties to the instrument. This is illustrated in some way by the provisions of article 56(2) of the revised ECOWAS Treaty.¹⁰⁹⁴

Conversely, if not all member states of an international organisation have ratified the instrument that is being applied, direct application would amount to imposing treaty duties on a state that is not a party to that treaty.¹⁰⁹⁵ The second point touches on the relationship between the RECs and the AU. Proceeding on the grounds that the RECs are building blocks for the AEC and are expected to converge ultimately in the establishment of the AEC, the African Charter should apply to the RECs as of right in their capacity as institutions of the AU/AEC. That would make the necessity to accede superfluous just as it would defeat the need for adoption of organisation specific human rights instruments by the RECs. As is the case with the ECOWAS model, adoption of this approach would probably increase the risk of competing jurisdiction and conflicting decisions or interpretation of the Charter.

With respect to the EU model, the approach adopted towards the ECHR is that the instrument is applied essentially as an interpretative aid, pending formal accession to

¹⁰⁹³ See eg, the decision of the ECCJ in *Essien v the Gambia* (n 457 above); *Koraou v Niger* (n 71 above).

¹⁰⁹⁴ Art 56(2) of the 1993 revised ECOWAS Treaty provides that 'The signatory states to ... the African Charter on Human and Peoples' Rights agree to cooperate for the purpose of realising the objectives of these instruments'.

¹⁰⁹⁵ Specific to the African Charter in the African context, an argument could be made that the African Charter can be loosely regarded as continental customary international law which requires no formal ratification by states for it to be binding. However, it would also be recalled that similar arguments in relation to the UDHR have not escaped criticism.

it by the EU as an organisation.¹⁰⁹⁶ The advantage of this approach is that the ‘borrowed’ instrument does not directly give rise to rights and obligations even though it can be useful for the purpose of fleshing out the idea of rights that is imprecisely provided for in a treaty document. However, some commentators hold the view that such uncommitted use of the ECHR allows the ECJ to ‘make a rather selective use of the ECHR’.¹⁰⁹⁷ An apparent disadvantage of this approach would therefore be the level of uncertainty that would result if citizens are unable to positively identify provisions of the adopted instruments that could be relied upon to vindicate rights. There is also the risk of conflicting interpretation of rights in this model of usage. However, the possibility of conflicting interpretation with a treaty-supervisory organ that could emerge from this interpretative usage arguably exists in relation to the ECOWAS model of complete appropriation as well.

No matter the model the EAC chooses to adopt in its use of the African Charter, reference to it can loosely be taken as a form of standard-setting by adoption and there would be need to apply the Charter as a source of rights for the benefit of citizens of EAC partner states. In so doing, the EAC needs to ensure that the approach adopted carries a limited risk for disrupting the relations between its organs and the African Charter supervisory bodies.

EAC-specific sources of rights

While the EAC may not have engaged fully in setting standards in the field by way of human rights norm creation, there is some evidence of activity in this area. As most of the activities in this regard are still in early and formative stages, there is very little material for constructive analysis.¹⁰⁹⁸ In November 2004, the EAC authorised the preparation of a region-specific HIV and AIDS Workplace policy.¹⁰⁹⁹ Although this is only a policy document, it is one of the earliest evidence of standard-setting by the EAC in the field of human rights. Two years later, in November 2006, the EAC

¹⁰⁹⁶ See eg Betten & Grief (1998) 62 who argue that in its usage of the ECHR, the ECJ has not suggested that any particular provision of the ECHR forms part of EU or Community law.

¹⁰⁹⁷ Scheeck (2005) 853.

¹⁰⁹⁸ There is some difficulty in finding copies of the documents developed by the EAC. Thus, the analysis in this part of the study is based essentially on the records of the meetings of the policy and law-making organs of the Community.

¹⁰⁹⁹ Decisions of the EAC Council of Ministers available at http://www.eac.int/council_decisions/decisions.php (accessed 18 June 2009)

adopted a final draft of a Community Framework on Gender and Community Development.¹¹⁰⁰ In March 2008, the EAC referred a Regional Strategic Plan on Sexual and Reproductive Health for review ‘to obviate the promotion of homosexuality and other forms of undesirable sexual practices’.¹¹⁰¹ The EAC also adopted a proposed EAC Plan of Action on Promotion and Protection of Human Rights in East Africa and directed the EAC Secretariat to consult with partner states for the purpose of developing a model Employment Policy and a Model Labour Legislation for East Africa. Finally in this regard, the EAC also directed the Secretariat to ‘collaborate with the ILO and consult with social partners’ in partner states to develop a Regional Decent Work Programme.

Most, if not all of these activities would not qualify as standard-setting in the actual sense of the word. However, in the absence of any other elaborate human rights catalogue, these can loosely be branded as standard-setting activities. It is also important to note that virtually all these policies and documents have been adopted in the labour and employment sector of the EAC. Thus, the EAC has set standard within the ambit of its competence vis-à-vis the partner states. Neither ECOWAS nor the EU has engaged in expansive organisation-specific standard-setting. ECOWAS does not have any specific rights catalogue though policy documents and some of its protocols contain some forms of rights that citizens can enjoy. Such consequential rights contained in general policy documents and protocols have very little potential for challenging the centrality of regional or global human rights instruments. Hence, it is unlikely that any of the standards set by the EAC through its policy documents would result in fragmentation of human rights law in Africa. In this regard, the practices of the EAC and ECOWAS are almost at par. In relation to the EAC Plan of Action on Promoting and Protecting Human Rights in East Africa, the EAC arguably goes further than ECOWAS since the latter organisation does not boast of such a comprehensive policy document for human rights realisation.

¹¹⁰⁰ As above.

¹¹⁰¹ Decisions of the EAC Council of Ministers available at http://www.eac.int/council_decisions/decisions.php (accessed 18 June 2009) Whether or not this document qualifies as a human rights source-document is subject to debate. However it is beyond debate that the document has the potential to affect the enjoyment of rights in East Africa, either positively or negatively.

In the area of human rights standard-setting, there have also been allusions to an intention to draft a comprehensive human rights catalogue for the EAC.¹¹⁰² As has been noted earlier in this study, the EU also boasts of an organisation specific rights catalogue. The drafting of the catalogue was preceded by consultation and the catalogue is yet to have binding force. For these two reasons, the potential for the existence of conflicting standards on the basis of the catalogue is reduced. Yet, commentators have not been convinced of the need for such an additional catalogue.¹¹⁰³ The threat posed by the EU specific catalogue is amplified by the possibility of it becoming a binding instrument.¹¹⁰⁴ Although, as shown in this part of the study, the EAC envisages consultation with partner states and other stakeholders in at least some of its policy formulation processes, it is not clear whether such consultations would extend to the proposed EAC Bill of Rights.¹¹⁰⁵ Even if consultation takes place, to the extent that it does not involve specialised continental institutions concerned with human rights promotion and protection, the threat of conflict and fragmentation of standards would still exist. However, similar to the EU, the adoption of an EAC Bill of Rights could enhance legal certainty though its use in the event of a merger with the AEC would be extremely limited.¹¹⁰⁶ Thus, the EU model and the lack of a region-specific catalogue in the ECOWAS model presents two options for EAC policy makers to choose from.

6.2.3.2 Judicial protection of rights

Judicial protection of human rights at the EAC level is the responsibility of the East African Court of Justice (EACJ) as it is the judicial organ of the Community. The

¹¹⁰² As recently as March 2008, the EAC's Council of Ministers directed the EAC Secretariat to convene a meeting of heads of National Human Rights Commissions of the partner states to examine national bills of rights with a view to developing an EAC Bill of Rights. See http://www.eac.int/council_decisions/decisions.php. (accessed 18 June 2009). Perhaps linked to this in some way, there has also been civil society attempt to initiate a Bill of Right for the EAC. The activities of the Kituo Cha Katiba organisation in this regard resulted in several consultative meetings and the production of a collection of articles. See generally, C Mania (ed) *The protectors, Human Rights Commissions and accountability in East Africa*. (2008).

¹¹⁰³ See eg, Polakiewicz (2001) 91.

¹¹⁰⁴ Perez de Nanclares (2009) 784.

¹¹⁰⁵ As there has been a lull in activities around the proposed Bill of Rights, it could be that the process has been suspended, even if temporarily.

¹¹⁰⁶ See eg SB Bossa, 'A critique of the East African Court of Justice as a human rights court' Paper presented to a conference organised by Kituo cha Katiba on Human Rights Institutions in East Africa on 26 October 2006, 13. Justice Bossa takes the view that the EAC needs to enact a region-specific rights catalogue similar to the African Charter as fundamental and operational principles in the EAC Treaty would be inadequate guidance for making a decision on human rights standards that the EACJ should apply.

EACJ is established by article 9 of the EAC Treaty and is mandated to ensure adherence to law in the interpretation and application of and compliance with the Treaty.¹¹⁰⁷ The right of access granted is linked to article 27 of the Treaty, which article defines the jurisdiction of the Court. By article 27, the EACJ has an initial competence to interpret and apply the Treaty and an envisaged competence which includes jurisdiction over human rights cases.¹¹⁰⁸ The envisaged competence of the EACJ is made subject to the adoption by the partner states of a protocol to operationalise it. The EACJ consists of a First Instance Division and an Appellate Division.¹¹⁰⁹ Access to the EACJ is open to the partner states,¹¹¹⁰ the Secretary General of the EAC¹¹¹¹ and to natural and legal persons.¹¹¹² National courts of EAC partner states may also refer questions involving Community law to the EACJ for its preliminary ruling.¹¹¹³

Although, it is acknowledgment that the references to human rights and rights related issues in the EAC Treaty is a demonstration of the acceptance of the significance of human rights in the EAC framework,¹¹¹⁴ the protocol that would trigger the human rights competence of the EACJ is yet to be adopted.¹¹¹⁵ In 2005, a so-called Zero draft of a protocol to trigger the human rights jurisdiction of the EACJ had emanated from the Secretariat of the EAC.¹¹¹⁶ However, as at 2007, the so-called Zero draft had not been approved by the EAC Council of Ministers.¹¹¹⁷ The implication is that, under the current legal regime, the EACJ does not have any express mandate to receive and determine cases alleging violations of human rights under the framework of the EAC.¹¹¹⁸ The absence of a clearly defined mandate contrasts with the ECOWAS

¹¹⁰⁷ Art 23(1) of the 1999 EAC Treaty (as amended).

¹¹⁰⁸ See art 27(1) and (2) of the 1999 EAC Treaty (as amended).

¹¹⁰⁹ Art 23(2) of the 1999 EAC Treaty (as amended).

¹¹¹⁰ Art 28 of the 1999 EAC Treaty (as amended).

¹¹¹¹ Art 29 of the 1999 EAC Treaty (as amended).

¹¹¹² Art 30 of the 1999 EAC Treaty (as amended).

¹¹¹³ Art 34 of the 1999 EAC Treaty (as amended).

¹¹¹⁴ Bossa (2006) 3.

¹¹¹⁵ As at July 2009, there was no indication that such a protocol was even close.

¹¹¹⁶ Bossa (2006) 5, Ruppel (2009) 307.

¹¹¹⁷ Ruppel (2009) 307 quoting the Secretary General of the EAC.

¹¹¹⁸ Hence, Ruppel (2009) 314 comes to the conclusion that the EACJ is not a body that is currently able to accept human rights related cases. See also TO Ojienda, 'Alice's adventure in wonderland: Preliminary reflections on the jurisdiction of the East African Court of Justice' (2004) 2 *East African Journal of Peace and Human Rights* 180 (cited by JM Nyaga, 'Conflicts and overlaps of jurisdiction of various regional courts in Africa' in GM Wachira (ed) (2007) *Regional and Sub-regional platforms for vindicating human rights in Africa* Nairobi: Kenyan Section of the International Commission of Jurists).

model and creates room for activism. It raises the question whether, along the lines of the ECJ, the EACJ can rely on the concept of general principles of law to found some form of human rights jurisdiction.

Despite the express provisions of article 27(2) of the EAC Treaty and the literal implications of those provisions, some commentators have expressed the view that the EACJ can still accept and determine human rights related cases on the basis of its existing mandate. Nyaga has argued for example, that the provisions of article 27(2) need to be read in context with other provisions of the EAC Treaty. Such a contextualised reading it is argued further, would illustrate that the EACJ's interpretative mandate extends to the provisions of articles 6 and 7 of the Treaty and thus stimulates an implied human rights jurisdiction.¹¹¹⁹ Viljoen holds a similar view and argues that 'to the extent that the Treaty itself contains references to human rights ... current law does not foreclose the individual referrals on the basis of human rights'.¹¹²⁰ The views expressed by these commentators appear to have received some form of judicial vindication as the EACJ has received at least one case with obvious link to, and implications for human rights. In *Katabazi v Secretary General of the East African Community (Katabazi case)*¹¹²¹ the EACJ took the position it had a duty to interpret the provisions of the EAC Treaty including articles 5(1), 6(d), 7(2) and 8(1) and 'it will not abdicate from exercising its jurisdiction of interpretation ... merely because the Reference includes allegations of human rights violations'.¹¹²²

It would be noticed that the fact that it lacked an expressed human rights mandate pushed the EACJ to make a liberal interpretation of the duty conferred on it to interpret the EAC Treaty. While the Court could have relied on a claim to some form of inherent jurisdiction in order to dispose of the dispute that came before it, international institutional law does not seem to give room for inherent jurisdiction in

¹¹¹⁹ Nyaga (2007) 72.

¹¹²⁰ Viljoen (2007) 504; see also Ruppel (2009) 307 who relies on actual practice to state that the EACJ has an option to accept human rights related cases on the basis of an implicit jurisdiction.

¹¹²¹ *Katabazi and 21 Others v Secretary General of the East African Community and The Attorney General of the Republic of Uganda* (2007) AHRLR 119. The EACJ has also heard other cases with some implication for human rights but the *Katabazi* case is the one case where obvious human rights issues were raised. See also *Prof Nyoung'o & 10 others v The Attorney General of Kenya & others*, Ref No. 1 of 2006 and *The East African Law Society and 3 others v The Attorney General of Kenya and 3 others* (Reference No 3 of 2007)

¹¹²² *Katabazi* case (as above) 126, para 39.

view of the operation of the principle of attributed powers. A resort to general principles of law may trigger the question whether such a principle trumps the express provisions of a treaty such as is expressed in article 27(2) of the EAC Treaty, especially if no violation of customary international law is involved. The uncertainty of jurisdiction and the potential for EAC Partner states' resistance is an undesirable challenge that the EACJ would continue to face under the existing regime.

The quagmire in taking a position on a matter not provided for in the Treaty, such as that which the EACJ faced in the *Katabazi* case had previously been faced by the ECJ and the ECCJ at different times and in different forms. Confronted with a challenge to the doctrines of direct application and supremacy of European Community law as developed through its case law, the ECJ had to find a human rights jurisdiction where none had been expressly granted.¹¹²³ In a different context, the ECCJ declined to judicially grant individual access to allow an individual to litigate human rights before it because the ECOWAS Treaty and the Protocol that established the ECCJ had not granted the court the competence to receive cases from individuals.¹¹²⁴ Although the ECJ and the ECCJ were faced with different kinds of challenges and the two situations do not qualify as polar opposites, these cases illustrate two different approaches to judicial interpretation. Apparently, while the ECJ opted for teleological interpretation of the EU/EC treaty documents,¹¹²⁵ the ECCJ preferred a literal interpretation of the ECOWAS Treaty and the Protocol. The approach adopted by the ECCJ has not escaped criticism as it was thought that a more teleological approach would have enabled the ECCJ to take a different position than it took at the material time.¹¹²⁶ However, it cannot be denied that the ECCJ faced a difficult challenge as it was not simply asked to assume jurisdiction on the basis of some universal principle but to grant specific access that the Community legislators had not granted. The danger of illegality loomed in that context. Hence, the important point is that in these examples, ECOWAS and the EU present different models to treaty interpretation in relation to human rights.

¹¹²³ See *Geitling v High Authority*, joined cases 36-38/59 and 40/59 [1960] ECR 857,889]. Compare *Stauder v City of Ulm- Sozialamt*, Case 29/69 [1969] ECR 419.

¹¹²⁴ *Olajide v Nigeria* (n 634 above).

¹¹²⁵ See generally, Hexner (1964) 129 – 130 on the teleological approach to treaty interpretation.

¹¹²⁶ Viljoen (2007) 507.

Arguably, it is the approach of the ECJ that has resulted in the inclusion of human rights in the agenda of the EU. However, the maturity of the Western democracy in Europe allows for such activist and progressive posture by a court without necessarily raising the threat of resistance by member states of the organisation. The same cannot be said of African states that are more protective of state sovereignty and less willing to give unrestricted powers to international organisations. In fact, from the perspective of the law of international organisations and especially, the principle of attributed competence, there is legal support for the position that the ECCJ took in the *Olajide* case.¹¹²⁷ The attractiveness of the ECJ approach for the purpose of promoting human rights cannot be denied, however, there is greater danger of conflict with member states in this approach. The path chosen by the ECCJ was to pile pressure on member states of ECOWAS to expand access to the court.¹¹²⁸ This it did successfully, leading to the adoption of the 2005 Protocol supplementary to the 1991 Protocol that established the ECCJ. The 2005 Protocol was used by the ECOWAS member states to open individual access to the court and thereby prevent conflict that could have arisen had the ECCJ taken the alternative approach. In the face of the express provisions of article 27(2), the better choice in the EAC context might be to encourage legislative decision to open access.

As the experience of the ECCJ shows, legislative grant of human rights competence is insufficient to prevent threats of legal uncertainty and conflict if there is inadequate definition of material, temporal and personal jurisdiction. Specific to the EACJ, in anticipation of a mandating protocol, concerns have already been raised in relation to procedural issues.¹¹²⁹ Thus, for example, lack of clarity on procedure can amplify confusion.¹¹³⁰ The same risk does not appear in the practice of the ECJ as most cases get to the ECJ from national courts of EU member states through the preliminary

¹¹²⁷ Schermers & Blokkers (2003) 153 argue that allegations of *ultra vires* conduct are more common in relation to organs of international organisations than it is of the international organisations themselves. This could be interpreted to mean that the direction of the organisation lies with the converging states who can exercise their sovereign powers to amend treaties to grant additional powers to an organisation. But an attempt by an organ to take on additional powers without the consent of the member states is bound to be resisted.

¹¹²⁸ In the same judgment, the ECCJ pointed out the obvious urgency and desirability of granting individual access for litigation before it.

¹¹²⁹ See Bossa (2006) 14 who raises the question whether the African Charter is a desirable source of law for human rights litigation before the EACJ.

¹¹³⁰ The *Koraou* case (2008) is illustrative of this point as the action was filed before the ECCJ while proceedings were pending before courts in the national legal system.

ruling process.¹¹³¹ While both the ECCJ and the EACJ have the preliminary ruling provisions, it is doubtful whether national courts will utilise those provisions and allow cases to get to the subregional courts as no such reference has occurred until now. Further, if the subregional courts continue to enjoy expansive material jurisdiction as the ECCJ currently enjoys, the preliminary ruling procedure would be inapplicable as that provision relates basically to referral of issues arising from treaties and other Community legislations rather than human rights instruments. Indeed, the claim to specialised competence over the African Charter, for example, would lie elsewhere and therefore reduce the relevance of the EACJ. The better option would therefore be to clearly define the relation between national courts of EAC partner states and the EACJ vis-à-vis competence over human rights cases and to emphasize the requirement to exhaust local remedies.

With regard to threats of forum shopping and conflicting decisions as between subregional courts and the continental human rights supervisory bodies, the ECJ's practice of cooperation and coordination with institutions of the CoE presents the best practice as the ECCJ (and indeed, ECOWAS) have little or nothing in this area. On the part of the EACJ, there is some evidence that the EACJ and the SADC Tribunal signed a Memorandum of Understanding to enable the two institutions to share information on judicial issues, exchange programmes and hold joint workshops to enhance harmonisation of laws and jurisprudence.¹¹³² This trend, if extended to continental human rights supervisory bodies, would definitely enhance cooperation and coordination along the lines of the EU and the CoE, and thereby reduce the risk of conflict. ECOWAS and the ECCJ may very well adopt this approach to improve relationship with other international judicial and quasi-judicial bodies involved in human rights work in Africa. The human rights work of the EACJ is still at infancy but this provides excellent opportunity for the grey areas to be clarified in order to ensure effective judicial protection of rights at the EAC level.

¹¹³¹ Craig (2001) 559.

¹¹³² e-EAC Newsletter Issue no 2008/19, 8 available at <http://www.eac.int> (accessed 19 June 2009).

6.2.3.3 Non-judicial protection of rights

Just as there has been very limited judicial protection of human rights in the EAC, the Community's involvement in non-judicial protection of rights is also scanty. However, considering the growing importance of non-judicial protection of rights, the efforts already made by the EAC in this sphere cannot be overlooked. Non-judicial protection of rights can occur in different ways, including by way of non-judicial monitoring and observation, facilitation of meetings, conferencing and other forms of capacity-building as well as by direct intervention in given areas. Against the backdrop that integration in the EAC is pursued with due regard to the principle of subsidiarity, some of the Community's interventions in the field of human rights are apparently implemented by bodies other than the organs of the Community themselves. Intervention may not, in all cases, be the result of a deliberate decision to protect rights. Thus, consequential protection of rights have also been loosely included here as examples of the EAC's non-judicial protection of rights.

From the perspective of the right to health, the EAC has been used as a platform to call upon partner states to 'take joint action and to cooperate in addressing diseases such as HIV and AIDS'.¹¹³³ Consequently, in 2004, the EAC agreed to negotiate as a bloc to facilitate local manufacture of ARVs on the basis of compulsory licensing.¹¹³⁴ Such actions enable communal tackling of human rights challenges without necessary resulting in conflict with national initiatives.¹¹³⁵ At a general level, the EAC appears to be laying the foundation for greater involvement in promoting the protection of rights in the region. As at March 2008, under the auspices of its Council of Ministers, the EAC urged ministries responsible for human rights in partner states to include implementation of the EAC Plan of Action on the Promotion and Protection of Human Rights in their annual budgets. The Council of Ministers also urged the introduction of mechanisms for the development of national Action Plans on the protection and promotion of human rights.¹¹³⁶ The EAC has also authorised its

¹¹³³ See Viljoen (2007) 511.

¹¹³⁴ Decisions of the EAC Council of Ministers (available at http://www.eac.int/council_decisions/decisions.php)

¹¹³⁵ It is possible to locate such Community actions within article 2(1) of the International Covenant on Economic, Social and Cultural Rights (CESCR) which encourages cooperation of states to fulfil rights guaranteed in the covenant.

¹¹³⁶ Decisions of the EAC Council of Ministers available at http://www.eac.int/council_decisions/decisions.php (accessed 18 June 2009).

Secretariat to ‘follow-up’ with member states on the status of ratification and domestication of international human rights instruments, with a view to encouraging partner states to improve action in that regard.¹¹³⁷ These initiatives can best be categorised as advocacy efforts on the part of the EAC, but carry strong persuasive force for the realisation of rights within the East Africa region. This it can do without necessarily contradicting or conflicting with national efforts as it essentially pushes the task of rights protection through reinforcement of the duty that is already incumbent the partner states by reason of treaty obligations. While these efforts are similar to the African Commission’s promotional measures, there is no negativity in duplicating such measures.

At another level, the EAC through the Council of Ministers has also authorised the EAC Secretariat to host bi-annual meetings of heads of National Human Rights Commissions (NHRCs) of partner states. These meetings are aimed at enhancing cooperation and constructive exchange between NHRCs using the structure of the EAC as a platform.¹¹³⁸ The EAC Council of Ministers has further urged partner states to establish mechanisms to ensure the involvement of national parliaments in the work of NHRCs, particularly through the receipt, consideration and debate of annual reports of NHRCs with the ultimate goal of involving national parliaments in the implementation of recommendations by the NHRCs.¹¹³⁹ This form of involvement reinforces the promotional aspects of human rights realisation in Africa, without bringing the EAC in conflict with either Partner States and their institutions or the continental human rights supervisory bodies. Encouraging greater involvement of national parliaments in human rights work has the potential to give some muscle to NHRCs while ensuring that this occurs within the national space and does not require the EAC to venture fully into the field.

The EU practice does not extend to such deep interventions in the affairs of national human rights institutions. However, such interventions are evident in the ECOWAS practice and both EAC and ECOWAS interventions duplicate the African

¹¹³⁷ As above.

¹¹³⁸ Decisions of the EAC Council of Ministers available at http://www.eac.int/council_decisions/decisions.php (accessed 18 June 2009).

¹¹³⁹ As above.

Commission's initiatives in this area.¹¹⁴⁰ It is however doubtful whether the duplication is negative. Notwithstanding whether it is negative duplication or not, there is reason to encourage coordination between the subregional bodies and the African Commission in this area.

In terms of promoting capacity building in the field of human rights, the EAC Secretariat has been mandated to initiate projects aimed at strengthening the work of NHRCs and other national human actors. The targeted actors include national judges, electoral commissions, policy makers, national legislators and civil society actors.¹¹⁴¹ The Secretariat's remit also includes a mandate to develop training manuals and guidelines for human rights actors and agencies, to develop best practice guidelines to integrate human rights in national policies and to formulate a mechanism of liaison with other regional and international organisations and civil society.¹¹⁴² The on-going and proposed actions of the EAC in these areas are similar to interventions by ECOWAS in West Africa. While it is conceded that the link between these capacity building activities and the objectives of regional integration may appear remote, the interventions are arguably justified by the need for improvement of national awareness. This would probably not apply to the EU, given the long history of the culture of human rights in Europe and the high level of awareness among national actors. Thus, the ECOWAS model is the available practice in this area and it apparently coincides with the promotional mandate of the African Commission. However, in the absence of a claim of exclusivity and without any evidence that subregional involvement would limit the scope of action by the African Commission, there is no compelling reason to discourage EAC action. The entire non-judicial protective measures of the EAC touch on areas that traditionally would be ascribed to other actors. But the measures mostly tilt towards advocacy in areas where more advocacy is needed and they are not disruptive of the work of other actors. The complementary nature of these measures should justify continued involvement of actors like the EAC.

¹¹⁴⁰ Currently, the African Commission provides a platform for NHRCs in Africa to meet during the Commission's sessions.

¹¹⁴¹ Decisions of the EAC Council of Ministers available at http://www.eac.int/council_decisions/decisions.php (accessed 18 June 2009).

¹¹⁴² As above.

6.2.4 Fertile grounds for improved subregional protection of rights

Provisions in the EAC Treaty suggest that the partner states of the EAC are not against the idea of promoting and protection human rights within the framework of the Community. In fact, to some extent, the EAC Treaty is more sympathetic to the cause of human rights than the ECOWAS Treaty. For example, whereas the EAC expressly stipulates that respect for human rights is a condition precedent for accession to the EAC Treaty, no such requirement is associated with ECOWAS.¹¹⁴³ The EAC Treaty further sets out gender mainstreaming as a major aspect of integration and thereby links to a major human rights concern in Africa. In addition, whereas the ECOWAS system adopts protocols to steer the organisation towards peace and security, the EAC Treaty categorically obligates the EAC to promote peace, security and stability. All of these provisions in the main treaty suggest that the EAC has a very fertile ground for the development of a human rights regime. However, it is also apparent that the EAC needs to further the treaty promise of human rights through the adoption of relevant protocols.

One conclusion that can be drawn from the analysis of the EAC's treaty framework is that, like ECOWAS and the EU, pursuit of human rights within the Community's framework would not conflict with the original objectives of the organisation. Yet, it has been demonstrated that the actual involvement of the EAC in the field of human rights is at an early stage. In such formative stages, the EAC provides fertile ground for growing a complementary brand of subregional intervention that contributes to the improvement of rights protection in East Africa without conflicting with, or disrupting the work of specialised continental human rights institutions. This is where the experiences of older systems like the EU human rights regime and the ECOWAS regime should provide valuable lessons. Both systems have best practices that the EAC can adopt but certain practices of the EAC also stand out. For example, the EAC favours a deeper degree of consultation with citizens and institutions of its Partner States that the ECOWAS regime cannot boast of. The EACJ's coordination with the SADC Tribunal is almost akin to the EU practice and has a potential to be expanded for better organisational balancing. Another apparent best practice in the EAC system is the practice of encouraging national implementation of human rights initiative in a

¹¹⁴³ However, it is important to note that the current ECOWAS Treaty does not envisage the possibility of new accessions to the organisation.

manner that favours negative application of the principle of subsidiarity. These are practices that can address some of the concerns linked with the ECOWAS regime. A workable model for subregional involvement in human rights protection should therefore involve a melange of practices from each of the older models without completely discarding the experiences of the EAC.

6.3 Human rights in the Southern Africa Development Community

Owing to the chequered colonial history of Southern Africa, the region has a longer engagement with human rights issues than other parts of Africa. With most Southern African countries battling colonisation and foreign domination till the later parts of the twentieth century, the region was riddled with internal conflicts and liberation battles and thus, provided a rallying point for the initial human rights interventions of the defunct OAU.¹¹⁴⁴ Some of these conflicts continued after independence and in extreme cases, even resulted in civil wars.¹¹⁴⁵ Consequently, human rights has always been a concern for states in the region.

While human rights issues continue to plague some countries in the region, Southern African states refrained from interfering in the domestic affairs of neighbouring countries. They also have not created region-specific mechanisms for the promotion and protection of human rights. However, the recognition that ‘economic growth and development will not be realised in conditions of political intolerance, the absence of the rule of law, corruption, civil strife and war’ has forced Southern African states to add human rights and rights-related issues to the agenda of SADC.¹¹⁴⁶ Thus, the questions associated with REC involvement in the field of human rights are also triggered in relation to SADC. Although it has a relatively limited rights practice, SADC is another potential source of best practices and a comparator by which the ECOWAS human rights regime can be assessed. SADC will also be used to test the comparative value of the EU human rights regime in the African context.

¹¹⁴⁴ Art 2(d) of the Charter of the OAU was the organisation’s reaction to minority governments in South Africa, Namibia and Zimbabwe just as much as it was a platform for addressing colonial rule in countries like Angola and Mozambique.

¹¹⁴⁵ Civil wars in Angola and Mozambique are illustrative of this point.

¹¹⁴⁶ See the RISDP; GH Oosthuizen (2006) *The Southern African Development Community: The organisation, its policies and prospects* 280; P Ramsamy, ‘SADC: The way forward’ in Clapham *et al* (2001) 39.

6.3.1 The Southern Africa Development Community

In 1980, the Southern Africa Development Coordination Conference (SADCC) was founded as an alliance of Southern African states to respond to the challenges raised by the policies of the then minority government in the Republic of South Africa.¹¹⁴⁷ By the early 1990s, it became clear that the end of minority government in the Republic of South Africa was imminent. This paved the way for the dissolution of SADCC and resulted in the establishment of SADC in 1992.¹¹⁴⁸ At inception, SADC aimed, among other things, to ‘achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration’.¹¹⁴⁹ Thus, SADC provided a forum for its member states to shift from regional cooperation to regional integration.¹¹⁵⁰

The project of regional integration in SADC is guided by certain fundamental principles expressed in the SADC Treaty.¹¹⁵¹ In addition to the fundamental principles listed in the Treaty, Oosthuizen identifies subsidiarity, additionality and variable geometry as implementation principles that occur frequently in the discourse of integration under SADC.¹¹⁵² The combined effect of the implementation principles is to ensure that SADC only undertakes and prioritises programmes that would add value to integration and this should be done at the level where programmes would be

¹¹⁴⁷ See Viljoen (2007) 492; also see generally, Oosthuizen, (2006). The founding members of the SADCC were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

¹¹⁴⁸ The Treaty of SADC was signed in Windhoek, Namibia on 17 August 1992 but was amended in 2001. The current member states of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Mozambique, Swaziland, South Africa, Tanzania, Zambia and Zimbabwe. Seychelles opted out but rejoined the Community in 2008.

¹¹⁴⁹ Art 5(1)(a) of the 1992 SADC Treaty. The other founding objectives of SADC include to evolve common political values, systems and institutions; promote and defend peace and security and to promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states. SADC also aimed to achieve complementarity between national and regional strategies and programmes; promote and maximise productive employment and utilisation of resources of the region; achieve sustainable utilisation of natural resources and effective protection of the environment and to strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region. Three additional objectives were added by the 2001 treaty amendment. The additional objectives include to combat HIV and other deadly and communicable diseases, ensure that poverty eradication is addressed in all SADC activities and programmes and to mainstream gender in the process of community building.

¹¹⁵⁰ M Schoeman, ‘From SADCC to SADC and beyond: The politics of economic integration’ available at <http://eh.net/XIIICongress/Papers/Schoeman.pdf> (accessed 26 June 2009).

¹¹⁵¹ Art 4 of the Consolidated SADC Treaty.

¹¹⁵² Oosthuizen (2006) 124.

most effective.¹¹⁵³ Responsibility to drive the integration is thus spread between SADC as an organisation and the SADC member states. To this end, SADC member states have made a treaty undertaking to work towards achieving the objectives of the organisation, expressing a commitment to provide legal force for SADC at the national levels.¹¹⁵⁴ Although national institutions of member states have roles to play in the SADC project, the SADC Treaty establishes the Summit of heads of state and government, the organ on Politics, Defence and Security Cooperation, the Council of Ministers, the Integrated Committee of Ministers, the Standing Committee of Officials, the Secretariat, the Tribunal and the SADC National Committees as the main drivers of regional integration.¹¹⁵⁵ Thus, these SADC institutions are primarily responsible for the formulation and implementation of policies of the organisation, including in the area of human rights.

6.3.2 Human rights in the SADC Treaty framework

Although SADC is generally presented as an initiative for economic integration, the objectives listed in the SADC Treaty demonstrate that the organisation was never intended to be confined to the narrow stripe of economics. In the 1992 SADC Treaty as well as in the Consolidated SADC Treaty (as amended in 2001), SADC member states agreed to a collection of objectives that cover a wide range of issue areas. While some of these objectives indicate links to human rights,¹¹⁵⁶ SADC was not conceived as a human rights institution and human rights protection is not a listed objective of the organisation. However, the SADC Treaty also contains certain references to human rights and rights-related issues that provide a basis for the human rights work of the organisation.¹¹⁵⁷

The first mention of human rights in the Consolidated Treaty is an acknowledgment in the preamble that involvement of people of the region in the integration process

¹¹⁵³ See also Ramsamy (2001) 39.

¹¹⁵⁴ Art 6 of the Consolidated SADC Treaty.

¹¹⁵⁵ See art 9 of the Consolidated SADC Treaty. The Organ on Politics, Defence and Security Cooperation was added as an institution of SADC in 2001 following the amendment of the 1992 SADC Treaty.

¹¹⁵⁶ J Cilliers, 'The SADC Organ for Defence, Politics and Security' ISS Occasional Paper No 10 1996, 3 interprets the SADC objective of promoting political cooperation and common political values and institutions as a commitment to the promotion of democracy and an observance of human rights. Available at http://www.iss.za/static/templates/tmp1_html (accessed 27 June 2009).

¹¹⁵⁷ As the Consolidated Treaty is the operational Treaty, it will be the focus at this point.

presupposes the ‘guarantee of democratic rights, observance of human rights and the rule of law’.¹¹⁵⁸ This formulation provides a basis for an understanding that reference to human rights in the body of the Treaty is premeditated and intended to serve as a foundation for popular involvement in a process that would otherwise become an elitist venture. The Treaty further contains a commitment by SADC and its member states to respect ‘human rights, democracy and the rule of law’ as a principle guiding integration.¹¹⁵⁹ This provision differs from the equivalent provisions in the ECOWAS Treaty and the EAC Treaty in two fundamental ways.

First, it would be noticed that whereas this provision commits both SADC as an institution and its member states to respect human rights, the equivalent provisions in the other two RECs only commit member states to respect human rights in the pursuit of integration. In the latter formulations, it is possible to argue that any duty to respect human rights that arises from the statement of fundamental principles would apply to the member states but not to the organisation per se. By implication, there is a stronger case for human rights realisation under the SADC provision. The second important difference is that the provision in the SADC Treaty does not link human rights to the African Charter while this link is present in the ECOWAS Treaty and the EAC Treaty. The omission could be read to mean that there is no limit to the sources from which human rights obligations can be drawn. However, it can also water down the force of the provision for legal uncertainty.

In the statement of objectives, reference to the promotion of ‘common political values’ is tied to transmission through ‘institutions which are democratic, legitimate and effective’.¹¹⁶⁰ Further, SADC expresses an objective to ‘consolidate, defend and maintain democracy, peace, security and stability.’¹¹⁶¹ These provisions, with emphasis on democracy and peace, reinforce the argument that a wide and liberal understanding of human rights can be found in the constitutive instruments of the

¹¹⁵⁸ Para 5 of the preamble to the Consolidated SADC Treaty.

¹¹⁵⁹ Art 4(c) of the Consolidated SADC Treaty.

¹¹⁶⁰ Art 5(1)(b) of the Consolidated SADC Treaty.

¹¹⁶¹ Art 5(1)(c) of the Consolidated SADC Treaty. It would be noticed that the provisions in art 5(1)(b) and (c) are expanded versions of similar provisions contained in the 1992 SADC Treaty. The equivalent provisions in the earlier Treaty were vague to the extent that they did not contain clear reference to concepts like democracy. Thus, the provisions in the amended Treaty apparently support the view expressed by Cilliers (1996).

RECs. Other objectives of SADC that have links to human rights include combating HIV/AIDS and other deadly and communicable diseases and mainstreaming gender in the process of community building.¹¹⁶² The Treaty also contains an undertaking by SADC member states not to discriminate against ‘any person on ground of gender, religion, political views, race, ethnic origin, culture, ill health, disability or any other ground as may be determined by the Summit’.¹¹⁶³

Admittedly, it is open to debate whether the objectives to combat HIV and AIDS and to mainstream gender in community building are expressions of intention to guarantee any particular rights. However, the connection to rights such as the right to health and the rights of women cannot be denied. It is also debatable whether the undertaking not to discriminate translates into a concrete form of human rights guarantee. However, viewed from the perspective that there is a correlation between rights and duties, and read together with the preamble, it is possible to find an intention to provide some form of human rights guarantees in these provisions.

As already canvassed, the competence of an international organisation need not only be found in the listed objectives in the Treaty of the organisation.¹¹⁶⁴ The cumulative effect of reference to human rights in the preamble, the statement of principles, the objectives and the general undertaking of member states in the SADC Treaty should be that human rights is realisable within the framework of the organisation. In this context, promoting and protecting human rights would not be contrary to the stated objectives of SADC, especially when compared to the practice of other organisations such as ECOWAS and the EU.

6.3.3 Current human rights practice

Notwithstanding the fact that human rights protection does not feature very prominently in the treaty framework of SADC, the reality is that economic development and integration in the region can only be successfully executed against sufficient guarantee of rights. This has ensured that SADC pays some attention to human rights issues, sometimes even beyond the expectations raised by the limited

¹¹⁶² Art 5(1)(i)(k) of the Consolidated SADC Treaty.

¹¹⁶³ Art 6(2) of the Consolidated SADC Treaty.

¹¹⁶⁴ As argued in chapter three of this study. Art 31 of the Vienna Convention of the Law of Treaties supports this argument.

rights related treaty provisions. Thus, for example, whereas no mention of the African Charter can be found in the SADC Treaty, the SADC Summit had no qualms in setting ‘observance of the principles of democracy, human rights, good governance and the rule of law in accordance with the African Charter’ as criteria for accession to the organisation.¹¹⁶⁵ Effectively therefore, SADC has some practice in the field of rights protection that potentially affects its relationship with member states systems and the African human rights system.

As the SADC Treaty does not confer an express human rights mandate on any of the organisation’s institutions, the SADC human rights practice also spreads across the functions of the various institutions. Accordingly the SADC practice in judicial and non-judicial protection will be evaluated for best practices and to determine the applicability of the models previously discussed.

6.3.3.1 Standard-setting and sources of rights

As already noted above, a significant feature of the SADC Treaty in terms of human rights, is that it does not link reference to human rights in its statement of principles to the African Charter or any other specific regional or global human rights instrument. Thus, unlike ECOWAS and the EAC in relation to the African Charter, and the EU in relation to the ECHR, SADC has not created norms by adoption. Although the 2001 SADC Protocol on Politics, Defence and Security Cooperation which codifies the SADC Summit’s 1996 decision to establish the Organ on Politics, Defence and Security (OPDS) makes reference to ‘the observance of universal human rights as provided for in the Charters and Conventions of the (O)AU and the United Nations’ it is safe to conclude that neither the African Charter nor any other international human rights instrument holds a central place as a standard-setting document or a source of rights within the SADC institutional framework. It follows therefore, that if the promise of human rights realisation contained in the SADC Treaty has to be fulfilled, the organisation is bound to engage in direct standard-setting in this issue-area. The value of adopting the African Charter as a ‘common standard’ and the persuasive ECOWAS model of the Charter’s use would thus be valuable here.

¹¹⁶⁵ This was set out in the organisation’s 2003 amendment of admission criteria developed in 1995. See Oosthuizen (2006) 135; Viljoen (2007) 499.

Attempts at human rights standard-setting in SADC has been traced back to 1994 when a call for the adoption of a SADC Bill of Rights was made by a Ministerial workshop.¹¹⁶⁶ Although that call did not bear any concrete fruits, it was probably the motivation behind the drafting of a SADC Human Rights Charter by a meeting of NGOs from SADC member states.¹¹⁶⁷ The idea of a SADC specific human rights instrument was also unsuccessfully muted in the process towards the establishment of the SADC Tribunal.¹¹⁶⁸ As the question of a region-specific human rights catalogue has not yet been raised in the context of ECOWAS, the SADC experience equates more to the EAC experience in this regard. Perhaps, the question (which applies to the EAC as well) that arises is whether SADC has the competence to adopt such a human rights catalogue. It would be recalled that in relation to the EU, the ECJ concluded that no Treaty provision gave the EU authority to engage in such an activity without prior treaty amendment.¹¹⁶⁹

Considering that the adoption of such a rights catalogue by SADC would have been by treaty making process embarked upon member states in their capacity as states, it is open to debate whether such a project could truly have been unlawful or *ultra vires* the states. The more pressing concerns may have related to the risk of conflicting normative grids applying within the region as a SADC catalogue would have existed side-by-side with the African Charter. As already noted, the adoption of such a general human rights catalogue by a REC would be an unnecessary venture considering that there is a possibility of RECs converging in the AEC. Despite these concerns, SADC has embarked on human rights standard-setting by adopting certain instruments. In that regard, SADC has gone further than ECOWAS.

The SADC Charter of Fundamental and Social Rights

Although the debate on the adoption of a SADC specific human rights catalogue was not successful, in 2003, SADC member states adopted the Charter of Fundamental Rights in SADC (the SADC Charter).¹¹⁷⁰ The SADC Charter is not a binding

¹¹⁶⁶ Ruppel (2009) 291 (citing Viljoen (1999)).

¹¹⁶⁷ Ruppel (as above).

¹¹⁶⁸ As above.

¹¹⁶⁹ See the ECJ Opinion 2/94 of March 1996.

¹¹⁷⁰ The Charter of Fundamental Rights in SADC is available at <http://www.sadc.int/index> (accessed 28 May 2009)

instrument and is therefore only open for signature but not ratification.¹¹⁷¹ However, it is regarded as ‘an important human rights document’,¹¹⁷² and creates clear rights and duties. It is important to note that the focus of the SADC Charter is on labour and employment issues, hence the document speaks essentially to the relationship between governments, employers of labour and workers.¹¹⁷³ In that regard, the SADC Charter is not a general human rights catalogue and it covers an area in which SADC has been given competence by the member states. While it makes reference to more general human rights instruments like the UDHR and the African Charter, the SADC Charter provides basically for the rights of workers and draws inspiration largely from ILO Conventions.¹¹⁷⁴

Notwithstanding the fact that the SADC Charter restricts itself to the rights of workers, the threat of conflict and competition with other international human rights instruments emerges. Arguably, the SADC Charter builds on the right to work under equitable and satisfactory conditions as guaranteed in article 15 of the Africa Charter. In that regard, it might be possible to perceive the African Charter provision as a minimum standard over which SADC can validly legislate.¹¹⁷⁵ As between the African Charter and the SADC Charter, some form of conflict arises in relation to the reporting duty contained in the SADC Charter.¹¹⁷⁶ Considering that one of the challenges facing the African Commission is the difficulties that member states to the African Charter have in performing reporting duties under article 62 of the African Charter, creating further reporting duties would prompt issues of prioritising reporting duties. This is similar to the threat of conflicting reporting duties that is linked with the ECOWAS practice of requiring its member states to report on measures taken to address human trafficking at the national level. While it is difficult to assert that the ability of states to report under the African Charter correlates to the existence of reporting obligations under RECs, the risk of such a relation cannot also be ignored.

¹¹⁷¹ By art 17, the SADC Charter entered into force upon signature by the SADC member states.

¹¹⁷² Ruppel (2009) 294.

¹¹⁷³ See art 3 of the SADC Charter.

¹¹⁷⁴ See arts 3, 5 and 7 of the SADC Charter.

¹¹⁷⁵ This analysis is based on Nuyen’s opinion that the EU CFR can be justified as an improvement on the minimum standards set in the ECHR. See Nuyen (2007). The same argument can be put forward with respect to the ILO Conventions which could not be seen as minimum standards vis-à-vis the SADC Charter.

¹¹⁷⁶ See art 16(3) of the SADC Charter.

In view of the threats of conflicts with the normative framework of the African human rights system, the view has been expressed that encouraging subregional standards such as the SADC Charter 'is likely to enhance and accentuate differences' and thereby undermine 'the movement towards African unity and legal integration'.¹¹⁷⁷ Perhaps, as has been argued in relation to the EU CFR, it makes some difference that the SADC Charter is not a binding document.¹¹⁷⁸ However, to the extent that SADC member states see themselves as being under obligation to implement the SADC Charter, the envisaged conflicts would remain. It may well have been more profitable to assert the supremacy of the regional instruments as was the case in the EU CFR.¹¹⁷⁹

The SADC Protocol on Gender and Development

The SADC Protocol on Gender and Development (SADC Gender Protocol) is another illustration of standard-setting by SADC. Adopted in August 2008, the SADC Gender Protocol is a binding legal instrument made pursuant to the Community's objectives and the undertaking by member states to tackle discrimination.¹¹⁸⁰ Developed out of an earlier SADC Declaration on Gender and Development, the SADC Gender Protocol builds on the gains of several regional and global instruments that promote the rights of women and the girl child.¹¹⁸¹ By adopting a binding human rights instrument, SADC has gone further than all other RECs and the EU in terms of human rights standard-setting. Thus, it represents a real case study for understanding whether or not standard-setting by subregional organisations in the field of human rights presents a real threat.

Considering that the African Women's Protocol covers the field that the SADC Gender Protocol seeks to regulate, there is at the very least, the risk of conflicting

¹¹⁷⁷ Viljoen (2007) 500; see also CFJ Doebbler, 'A complex ambiguity: The relationship between the African Commission on Human and Peoples' Rights and Other African Union initiatives affecting respect for human rights' (2003) 13 *Transnational Law & Contemporary Problems* 7 – 31. Though not specific to the SADC Charter, Doebbler's position is that it is not beneficial to create additional bodies to compete with the African Commission and the African Charter.

¹¹⁷⁸ Perez de Nanclares (2009) 784.

¹¹⁷⁹ See arts 52 and 53 of the EU CFR.

¹¹⁸⁰ See paras 1 and 2 of the Preamble to the SADC Gender Protocol. See also arts 5(1)(k) and 6(2) of the Consolidated SADC Treaty.

¹¹⁸¹ In the preamble and in art 3, the SADC Gender Protocol expressly alludes to an intention to harmonise the implementation of instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women Protocol) among others.

standards. An example of this can be found in article 8(2)(a) of the SADC Gender Protocol which sets the age of marriage at 18 years but adds a proviso that allows the age to be lowered ‘by law which takes into account the best interests and welfare of the child’. This provision conflicts with article 6(b) of the African Women’s Protocol which also sets the age of marriage at 18 years and does not leave room for states to lower this age. Since the SADC Gender Protocol is also a binding instrument, SADC member states that are state parties to the African Women’s Protocol are faced with two different standards. This arguably creates room for watering down the normative strength of human rights law in Africa as it would allow states to pick and choose standards that are most favourable to them. Similar to the SADC Charter, the SADC Gender Protocol imposes an obligation on SADC member states to submit reports once in every two years to the SADC Secretariat.¹¹⁸² The threat of conflicting reporting obligations also arise in this regard.¹¹⁸³

In view of the fact that the SADC Gender Protocol does not contain internal mechanisms to address potential conflict with older instruments applicable in the subject area, the threats identified may appear bigger than they actually are. However, the points raised in relation to this instrument seem to demonstrate the desirability of preserving normative unity in relation to human rights in Africa. In this regard, the relative safety of the current ECOWAS and EU regimes may be preferable as no binding human rights catalogue presently exist in those regimes. Notwithstanding this position, it has to be noted that region-specific instruments allow for the creation of standards that take region-specific concerns into account and enables cluster of neighbouring states facing similar challenges to collectively address such challenges. Such regional efforts enable pressing regional concerns to be addressed without necessarily involving other states with relatively insufficient interest in the issues at stake.

¹¹⁸² Art 35(4) of the SADC Gender Protocol.

¹¹⁸³ As compared to the African Women’s Protocol which requires states to merge reporting obligation under that instrument with African Charter reporting obligation, the SADC Gender Protocol increases the reporting obligations of SADC member states.

Declarations and other soft law

Standard-setting by SADC in the field of human rights also takes the form of declarations and other forms of soft law.¹¹⁸⁴ In relation to gender and issues of HIV and AIDS, SADC has had to rely more on declarations, policy documents and plans of action than hard law for the purpose of setting human rights standards. In 1997, SADC member states signed a Declaration on Gender and Development (Gender Declaration) in which commitments were made to promote gender equality, repeal discriminative laws and address violence against women and children.¹¹⁸⁵ The Gender Declaration was followed by an Addendum to the Declaration on the Prevention and Eradication of Violence against Women and Children which aimed at strengthening SADC member states response to the challenge of violence against women and children in the region.¹¹⁸⁶ A Plan of Action for Gender in SADC was also adopted in 1998 to guide Community action in the field.

In relation to HIV and AIDS, soft law developed on the platform of SADC include the SADC Code of HIV/AIDS and Employment, the Health Sector Policy Framework Document as developed by the SADC Health Ministers and the SADC HIV/AIDS Strategic Framework (2000 – 2004).¹¹⁸⁷ In 2003, SADC member states also signed a Declaration on HIV/AIDS which recognises the ‘human rights and fundamental freedoms’ of people living with HIV and AIDS and commits member states to combat the scourge.¹¹⁸⁸ While these documents and policy papers on gender rights and HIV and AIDS are not binding legal instruments, they are useful normative instruments as they give ‘guidance to the various SADC institutions within the manifold of decision-making processes’.¹¹⁸⁹ As they relate to objectives of the organisation as laid out in article of the SADC Treaty, it is arguably within the competence of the law-making organs of SADC to set standards on these issues.

¹¹⁸⁴ Soft law is used here loosely to refer to all non-binding instruments of the Community.

¹¹⁸⁵ The SADC Declaration on Gender and Development is available at <http://www.sadc.int/index> (accessed 28 May 2009). Also see ‘Background: SADC Policy instruments on Gender Equality’ available at <http://www.sadc.int/archives> (accessed 28 May 2009).

¹¹⁸⁶ The Addendum to the Declaration on the Prevention and Eradication of Violence against Women and Children was signed in 1998.

¹¹⁸⁷ See generally Viljoen (2007) 511.

¹¹⁸⁸ The Declaration on HIV/AIDS is available at <http://www.sadc.int> (accessed 28 May 2009). Also see Ruppel (2009) 295.

¹¹⁸⁹ Ruppel (2009) 296.

It would be noticed that the level of ‘informal’ standard-setting by SADC in the human rights issue area is as robust as it is in the ECOWAS practice. This differs from the EU practice where very little activities can be noticed. However, the challenges that confront the African RECs as they pursue integration are fundamentally different from those that face the EU. Thus, the EU practice in this respect can hardly be effective in the context of African integration. As normative grid set by these documents are vague and do not raise any specific obligations on member states, the risk of with standards in the national systems and the African system is greatly reduced. Further, the activities of the RECs in this regard merely reinforce the work of other actors and to that extent, they are complementary.

6.3.3.2 Judicial protection of rights

The SADC Treaty establishes the SADC Tribunal as one of the institutions of the organisation.¹¹⁹⁰ As the principal judicial organ of SADC, the SADC Tribunal is mandated to ‘ensure adherence to and the proper interpretation’ of the Treaty and other subsidiary instruments of SADC.¹¹⁹¹ By article 14 of the Protocol of the Tribunal and the Rules of Procedure thereof (SADC Tribunal Protocol), the Tribunal is competent to exercise jurisdiction over matters relating to the interpretation and application of the Treaty as well as interpretation, application or validity of Protocols and other legal instruments of SADC and of acts of the Community’s institutions.¹¹⁹² The Tribunal is also authorised to ‘develop its own jurisprudence’, giving due consideration to ‘applicable treaties, general principles and rules of public international law and any rules and principles of the law of States’. Such ‘developed Community jurisprudence’ constitutes ‘applicable law’ along with the Treaty, Protocols and other instruments of SADC.¹¹⁹³ The Tribunal’s jurisdiction extends to disputes between member states and between natural or legal persons and member states of SADC.¹¹⁹⁴ Access to the Tribunal is open to member states as well as to individuals.

¹¹⁹⁰ See art 9 of the 1992 SADC Treaty and art 9 of the Consolidated SADC Treaty.

¹¹⁹¹ Art 16(1) of the Consolidated SADC Treaty.

¹¹⁹² Art 16(2) of the Consolidated SADC Treaty mandates the SADC Summit to adopt a protocol for the purpose of defining the composition, powers, functions, procedures and other matters to govern the Tribunal. The SADC Tribunal Protocol was adopted in 2000.

¹¹⁹³ Art. 21 of the SADC Tribunal Protocol.

¹¹⁹⁴ Art. 15 of the SADC Tribunal Protocol.

Considering that the primary focus of SADC is not human rights protection, competence over cases of human rights violations was not expressly granted to the SADC Tribunal despite the provisions relating to human rights in the Treaty. The decision not to grant an express human rights mandate to the SADC Tribunal was deliberately made as the idea of such a mandate was proposed and rejected during the process of drafting the Protocol that established the Tribunal. Thus, although it was argued by the proponents of such competence that treaty provisions obligating states not to discriminate against any person warranted individual access on claims of human rights violation, it was concluded that a human rights jurisdiction would only be granted should SADC adopt a separate human rights instrument.¹¹⁹⁵ By necessary implication, the SADC Tribunal lacks the express human rights jurisdiction that the ECCJ is endowed with. However, the exercise of such jurisdiction is not positively postponed or hindered as is the case with the EACJ. The position of the SADC Tribunal is thus closer to the ECJ under the post-Maastricht Treaty regime. Accordingly, judicial protection of human rights by the SADC Tribunal is dependent on the willingness of the Tribunal to engage in liberal and teleological interpretation of its treaty mandate. Some even express doubt as to whether the member states of SADC would be keen to allow the Tribunal to exercise jurisdiction over human rights matters.¹¹⁹⁶

The SADC Tribunal appears to have opted for a teleological interpretation of its treaty mandate as it has taken the view that it is competent to hear cases alleging violation of human rights contrary to the provisions of the SADC Treaty. In *Campbell and 78 others v Zimbabwe (Campbell case)*,¹¹⁹⁷ the Tribunal was faced with a case alleging discrimination on the grounds of race, contrary to article 6(2) of the SADC Treaty. In its final judgment on the matter, the Tribunal stressed that ‘It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law’.¹¹⁹⁸ The Tribunal apparently took this position on the

¹¹⁹⁵ Viljoen (2007) 505.

¹¹⁹⁶ Oosthuizen (2006) 212.

¹¹⁹⁷ SADC (T) Case No.2/2007 in which judgment was delivered on 28 November 2008. The *Campbell* case was filed in 2007 and became famous with an interim ruling by the Tribunal in December 2007.

¹¹⁹⁸ *Campbell* case (as above) 25.

basis of its interpretation of article 4(c) of the SADC Treaty.¹¹⁹⁹ The Tribunal's statements in this regard were a defence to the attack launched by the affected member state against its competence.¹²⁰⁰ Arguably, SADC member states are entitled to challenge the competence of the Tribunal to hear human rights matters since no agreement was reached to grant such a competence. As Rama-Montaldo notes, a member state should be 'entitled to do so on the simple ground of legality' because the limitation of sovereignty can only be applied in the line of activities that they have subscribed to in signing the constitutional document of the organisation.¹²⁰¹ The critical point here is the risk of conflict between the intentions of the SADC member states and the actions of the Tribunal in relation to judicial protection of human rights. As the experience of the ECJ demonstrates, judicial organs of international organisations can and do take initiatives in interpreting treaties in a 'living' manner where treaty amendment is not an immediate option.¹²⁰² However, as already canvassed above, state practice in Africa tilts heavily towards over-protection of sovereignty and leaves little scope for judicial activism that exceeds express powers granted to international organisations. A possible consequence of judicial activism by subregional courts in the field of human rights would be refusal by states to comply with the judgments of these courts.¹²⁰³ If human rights judgments of the SADC Tribunal are habitually ignored by SADC member states, the very essence of the process would be defeated as there would only be ineffective judgments. The ECOWAS model becomes attractive in this respect as the express grant of human rights competence by member states through a treaty denies ECOWAS member states the option of ignoring the ECCJ on grounds of *ultra vires* action.¹²⁰⁴ Instead, the

¹¹⁹⁹ As above, 24 where the Tribunal stated that in view of art 4(c) of the SADC Treaty, it did not consider that a separate protocol on human rights was needed to enable it exercise jurisdiction over human rights matters.

¹²⁰⁰ See the *Campbell* case at 23 where counsel for Zimbabwe argued that in the absence of a SADC human rights protocol, 'the Tribunal appears to have no jurisdiction to rule on the validity or otherwise of land reform programme carried out in Zimbabwe'.

¹²⁰¹ M Rama-Montaldo (1970) 123.

¹²⁰² See also Hexner (1964) 124.

¹²⁰³ Zimbabwe's insistence that it would not comply with or implement the decision of the SADC Tribunal in the *Campbell* case is a clear illustration of this point. See 'Vacate the farms: SADC Tribunal ruling has no effect – President' in *The Sunday Mail*, 1-7 March 2009.

¹²⁰⁴ At the very least, the principle of *pacta sunt servanda* as codified in art 26 of the Vienna Convention on the Law of Treaties would be applicable against an offending state.

relatively lower threat of non-compliance with its decisions makes judicial protection of rights in the ECOWAS regime fairly effective.¹²⁰⁵

However, it has to be pointed out that there are other threats associated with judicial protection of human rights by the SADC Tribunal. These include the risk of conflict with the national legal systems of SADC member states and possibility of competition with continental human rights institutions.¹²⁰⁶ In relation to the risk of conflict with national legal systems, the requirement to exhaust local remedies as contained in article 15(2) of the SADC Tribunal Protocol could be an effective safeguard. To the extent that cases before the Tribunal have previously been heard by the national courts, the chances of *lis pendens* vis-à-vis the national courts would be avoided. In this regard, the SADC option is preferable to the ECOWAS regime. It does not arise so much in the ECJ practice as the process of preliminary ruling serves a similar purpose. Although there is room for preliminary rulings in the SADC Tribunal Protocol,¹²⁰⁷ chances of its use are rather slim though it exists since the rights to be claimed are based on the SADC Treaty. With regards to competition with continental human rights institutions, SADC and the SADC Tribunal do not appear to have any control mechanisms. This is even further complicated in the sense that the SADC Tribunal is not bound to apply African regional human rights standards even though it has declared itself able to rely on such instruments.¹²⁰⁸ However, the threat of conflicting human rights jurisprudence would favour adoption of the cooperation and coordination mechanisms as used in the ECJ.

Related to the issue of conflicting jurisprudence, the fact that the SADC Tribunal is not bound to apply the African Charter and other normative documents of the African human rights system has the potential to result in conflicting standards. As the Tribunal would have to apply region-specific norms without any obligation to measure such norms by continentally accepted norms, there is a prevailing risk of

¹²⁰⁵ Niger's compliance with the ECCJ's judgment in the *Koraou* case is illustrative. However, the refusal of the Gambia to comply with a judgment of the ECCJ against it acts as a caution against this position.

¹²⁰⁶ Also see Oosthuizen (2006) 212 on this latter point.

¹²⁰⁷ Art 16 of the Protocol on SADC Tribunal and the Rules of Procedure Thereof; see also Viljoen (2007) 508.

¹²⁰⁸ In the Campbell case, the action was exclusively based on the provisions of the SADC Treaty. Cf the ECOWAS practice where the African Charter is freely applied.

creating conflicting standards by judicial interpretation. The differences in allowable age of marriage in the SADC Gender Protocol (which the Tribunal is bound to apply) and the African Women's Protocol is an example of such a possibility. Both in the ECOWAS regime and the EU regime, reference to and use of existing normative standards by adoption contribute to reinforcing the existence of the relevant instruments as 'common standards' of their respective regions. Such an approach could be useful in the SADC framework.

6.3.3.3 Non-judicial protection of rights

Human rights work in the framework of SADC is not restricted to the SADC Tribunal as a greater part of the organisation's activities that impact on the promotion and enjoyment of rights takes place outside of the judicial context. In this regard, SADC institutions have also been involved in non-judicial observation and monitoring of aspects of human rights work at the Community level and in the member states, engaged in capacity building activities, conducted research and collaborated with national institutions of member states in human rights work. These activities are mostly in the areas of gender development and HIV and AIDS control. Thus, they are within areas of SADC competence as laid out in the SADC Treaty. However, as SADC does not have exclusive competence in these areas, the potential for conflict and overlap also exist here.

In 1998, a Gender Unit was set up in the SADC Secretariat to coordinate the organisation's work in the area of gender development and to advise SADC institutions and member states on gender issues.¹²⁰⁹ The SADC Gender Unit claims a mandate under the Regional Indicative Strategic Framework (RISDP) to 'coordinate and monitor activities in the region ... coordinate and monitor women's empowerment programmes' and to 'facilitate the acceleration of women's participation in ... social, economic and political participation'.¹²¹⁰ Although largely advisory, it would be noticed that the mandate does not appear to be restricted to SADC institutions. Hence, it could overlap with the work of national institutions of member states and the work of continental bodies. This is similar to the ECOWAS

¹²⁰⁹ Viljoen (2007) 512.

¹²¹⁰ 'Background: SADC Policy instruments on Gender Equality' available at <http://www.sadc.int/archives> (accessed 28 May 2009).

regime in the sense that no binding legal duty is involved yet the process is not optional in relation to member states. The EU practice as shown by the choice given to EU member states in relation to the FRA's observation and monitoring mandate could be more effective in addressing the possibility of overlap and conflict.

The SADC Secretariat has also conducted a study to assess gender capacity needs of ten member states and the Gender Unit.¹²¹¹ This is linked to SADC support programmes to enhance gender quality and promote national implementation of SADC and National Plans of Actions to combat violence against women and children. To this end, SADC envisages a reporting process to enable evaluation of national efforts.¹²¹² In order to facilitate all of these activities, the SADC Gender Unit has developed a Gender Resource Kit for Decision-makers in SADC as a tool for capacity building of stakeholders at various levels of the Community. Considering that continental initiatives in this area do not come close to what SADC has achieved, it is difficult to suggest that the SADC initiatives disrupt or have a potential to disrupt the work of such bodies. Instead, the activities of the SADC Gender Unit and the SADC Secretariat are essentially complementing national initiatives and would thus be justified under the positive aspect of the principle of subsidiarity.¹²¹³

Another area in which SADC has engaged actively in non-judicial promotion and protection of human rights is in the HIV and AIDS sector. Similar to the gender aspect, an HIV and AIDS Unit exists in the SADC Secretariat to coordinate SADC activities in that area.¹²¹⁴ Through the HIV and AIDS Unit, the SADC Secretariat supports member states initiatives aimed at combating the disease. Importantly, the Unit coordinates with the AU Commission in the fight against diseases and in constant review of Millennium Development Goals for which the AU Commission takes a leading role.¹²¹⁵ Collaboration with the AU Commission in SADC's activities that promote the right to health, especially in relation to HIV and AIDS is complementary and prepares the organisation for its role as a building block of the AEC. Similar complementary work is noticeable in areas where SADC acts as an

¹²¹¹ As above.

¹²¹² As above.

¹²¹³ See the arguments in this respect in chapter 5 of this work.

¹²¹⁴ Also see Viljoen (2007) 511.

¹²¹⁵ Oosthuizen (2006) 150.

implementing structure of NEPAD programmes. In this regard, the SADC practice is not different from the ECOWAS practice and collectively, they prepare the RECs for supportive rather disruptive roles.

An emerging area of non-judicial intervention by SADC is in the work of the OPDS. Originally launched in 1996, the OPDS was formally incorporated into the SADC institutional framework by the adoption of the SADC Protocol on Politics, Defence and Security Cooperation (SADC PDS Protocol) and by the 2001 treaty amendment.¹²¹⁶ Under the SADC PDS Protocol, the OPDS is empowered to intervene in SADC member states in the event of ‘large-scale violence between sections of the population or between the state and sections of the population, including genocide, ethnic cleansing and gross violation of human rights’.¹²¹⁷ The methods to be employed in the event of intervention include preventive diplomacy, negotiations, conciliation, mediation, good offices, arbitration and international adjudication.¹²¹⁸ As a last resort, the OPDS may engage in enforcement action with prior authorisation of the UN Security Council.¹²¹⁹ Like the equivalent ECOWAS regime for such an intervention, this aspect of the organisation’s work potentially conflicts with the sovereignty of member states and the mandate of the African Union Peace and Security Council (PSC).

Considering that intervention in member states under the SADC PDS Protocol would be based on treaty conferred powers, it is arguable that member states willingly limited their sovereignties in favour of SADC. Thus, the mechanism, like the ECOWAS equivalent, strengthens the position that operation of the responsibility to protect justifies limitation of state sovereignty.¹²²⁰ It therefore should not affect the legal relationship between SADC and the member states. In terms of the relation with

¹²¹⁶ See L Nathan, ‘“Organ Failure”: A Review of the SADC Organ on Politics, Defence and Security’ in L Laasko (ed) (2002) *Regional Integration for Conflict Prevention and Peace Building in Africa* Helsinki: Hakapaino Oy 71, 73; 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’, presented to the 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 9.

¹²¹⁷ See art 2(b) of the SADC PDS Protocol.

¹²¹⁸ Art 3 of the SADC PDS Protocol.

¹²¹⁹ Art 3(c) and (d) of the SADC PDS Protocol.

¹²²⁰ See J Sarkin ‘The Role of the United Nations, the African Union and Africa’s Sub-regional Organisations in dealing with Africa’s human rights problems: Connecting humanitarian intervention and the responsibility to protect’ (2009) 53 *Journal of African Law* 1 -33.

the AU mechanisms and institutions, particularly the PSC, the provisions of article 16 of the Protocol relating to the Establishment of the Peace and Security Council of the African Union¹²²¹ imposes an express duty on the institutions to cooperate and coordinate their activities. From the SADC side, treaties are being considered to spell out the relation between the AU Commission and the PSC on the one hand and the SADC OPDS on the other hand.¹²²² Such documents expressly outlining the relation between the RECs and the AU institutions are bound to enhance the constructive use of the REC structure for the collective good since those structures are closer to the national systems.

6.3.4 Sustaining processes for human rights protection

The human rights content in the SADC Treaty may not be the clearest statement of an intention by SADC member states to employ the organisation as a medium for collective regional promotion and protection of human rights. However, there is enough allusion to human rights in the SADC Treaty to prevent any claim that human rights realisation under the SADC framework contradicts the objectives and goals of the organisation. Thus, SADC has involved itself fairly deeply in the field of human rights in non-judicial context and in lightly in the judicial context. While the benefits of SADC engagement with human rights cannot be denied, it has been shown that such engagement has the potential to impact on the work of continental human rights institutions.

The threats of conflict with the mandate of continental institutions can be managed effectively to allow SADC structures constitute complementary rather than antagonising contributions to human rights protection in Southern Africa. In fact, SADC has done so successfully in some areas. However, non-recognition of the main African human rights instruments and the somewhat independent processes of the organisation are bound to affect the management of relations between SADC structures and continental institutions. In terms of relations with member states, the operational principles of SADC that favour subsidiarity seem to work well in sustaining cordiality in most areas. In relation to judicial protection of rights, lack of

¹²²¹ Adopted on 10 July 2002 and entered into force on 26 December 2003. Reprinted in Heyns & Killander (2007) 17.

¹²²² Oosthuizen (2006) 145. According to Oosthuizen, the SADC OPDS has been involved in AU activities.

clarity of the SADC Tribunal's mandate provides grounds for breeding tension between SADC and member states.

While their treaty regimes and the overall approach to human rights may differ, there is some similarity of practice between ECOWAS and SADC in this field. To the extent of its similarity with ECOWAS, the SADC practice is different from the EU regime. This can be explained by the fact that the challenges that SADC needs to address to push integration are closer to those facing ECOWAS. However, some of the mechanisms employed by the EU to regulate intra- and inter-organisational relation could be useful to SADC as they can be to ECOWAS. In essence therefore, none of the existing models can singularly constitute best practice for use in the SADC framework.

6.4 Towards non-disruptive subregional systems

Similar to ECOWAS and the EU, both the EAC and SADC have sufficient treaty provisions to support and sustain the development of human rights regimes within their respective communities. In fact, the forms in which some of the treaty provisions are couched are arguably more expansive than the equivalent provisions in the revised ECOWAS Treaty. Apart from the general statement of fundamental principles that economic integration initiatives now employ to express collective adherence or intention to adhere to human rights values, the EAC and SADC have clear statements of rights-related objectives that their respective member states propose to pursue collectively. On the bases of their respective treaty provisions, these RECs can legitimately engage in some or other form of human rights work without necessarily conflicting with founding objectives. The budding human rights regimes in the EAC and SADC are pointers to this fact. Although, the involvement of different RECs opens more space for the vindication of human rights, it also distorts the existing human rights architecture in Africa. While the treaty foundations for involvement in the field of human rights are similar, the actual practice of each REC differs in some ways and confronts actors in the African human rights system with competing and conflicting practices. However, it is in this divergence of practice that the potential for

finding best practices to support a non-disruptive African model of subregional human rights regime exists.¹²²³

Unlike the EU and more like the ECOWAS regime, the justifications that the EAC and SADC have for entering into the field of human rights include the need to confront rights-related conflicts in order to create suitable environments for integration. Accordingly, the depth of involvement by these RECs would be closer to the ECOWAS experience while attempting to maintain organisational balance along the lines of the EU practice. The mechanisms for regulating relations within these budding regimes constitute the best practices that contribute to an ideal model that is complementary rather than disruptive. In this regard, the first point to note is the presence of operational principles in treaty framework with potential to restrict overbearing central involvement in the field. The principles of asymmetry, complementarity, subsidiarity and viable geometry in the EAC Treaty,¹²²⁴ and subsidiarity, additionality and viable geometry in the SADC system¹²²⁵ are tools that ought to be applied positively to ensure that the functions of the international organisations do not impact negatively on their relations with their member states. Although the actual application of these principles, especially in the field of human rights is yet to be perfected, the fact that they exist creates best practice (or at least potential for best practice) that is non-existent in the revised ECOWAS Treaty framework. From a human rights perspective, the whole essence of these principles applied in conjunction with the principle of attributed competence would be that REC involvement should respect the boundaries of competence voluntarily ceded by the converging states.

In relation to actual practice, the level of consultation that the EAC encourages in the formulation of subregional human rights and rights-related policies is a tool that ensures the involvement of national stakeholders in its processes and reduces the risk of jurisdictional tension and consequent resistance at the national level. While the same level of consultation has not been associated with SADC, the involvement of

¹²²³ A non-disruptive subregional human rights regime as used here envisages a model that does not conflict with original objectives of the organisation, does not upset relations with member states of the organisation or continental institutions and does not jeopardise the work of continental human rights bodies.

¹²²⁴ Art 7 of the 1999 EAC Treaty (as amended).

¹²²⁵ As discussed by Oosthuizen (2006) 124.

civil society in discussions around proposals for a subregional human rights catalogue is indicative of acknowledgement of the need to consult. Such consultation also enhances the democratic credentials of the REC and brings them closer to Besson's criteria of a post-national human rights institution. Engaging in some constructive level of consultation with relevant national and continental stakeholders is essential for ECOWAS in its human rights work and is useful if emerging subregional regimes are to be complementary to the existing structures in the system.

Related to the practice of consultation, giving national institutions a greater role for implementing subregional policies and encouraging them in the implementation of global and continental human rights norms is another best practice in the emerging regimes of the EAC and SADC. To some extent, the ECOWAS regime could also be said to rely on national institutions for implementation. However, the level of active involvement by the EAC and SADC appears to be slightly lower and thereby reduces the risk of exceeding the legitimate boundaries of the subregional international organisations. Of course, as previously argued, the operation of the principle of subsidiarity should be both positive and negative and therefore does not necessarily exclude direct engagement in the manner that certain ECOWAS institutions engage in the field. Yet, giving the national institutions the first opportunity appears to be tidier and potentially less disruptive than a model that sets the subregional organisations at the forefront of executive action.

In terms of judicial protection, the ECOWAS model of setting out the human rights mandate of the court is safer in the African context. The best practices that the EAC and SADC bring are the conscious effort at coordinating with each other and the use of judicial dialogue that allows for reference to decisions of African Charter supervisory bodies including the African Commission. As already canvassed, while coordination promotes judicial diplomacy and by extension discourages negative duplication and competition for jurisdiction, judicial dialogue reduces the risk of conflicting decisions.

Notwithstanding these best practices, the eagerness to create new (and potentially conflicting) region-specific norms in the EAC and in SADC along the lines of the EU compare less favourably with the ECOWAS practice. As illustrated with the SADC

examples, the chances of conflicting standards and interpretation are higher in situations where the subregions attempt to create norms without little or no reference to the existing continental standards. On the basis of the earlier proposition that collective use of the African Charter as the central continental human rights instrument supports a contention that REC can claim to be sub-systems of the wider African human rights system, the creation of region-specific human rights catalogues would defeat such a claim and lead to a disruption of the existing system.

6.5 Interim conclusion

In this chapter, it has been shown that African RECs such as the EAC and SADC are involved in the promotion and protection of human rights within their various spheres of influence. In each case, it was demonstrated that member states created room in the founding treaty for human rights realisation by recognising respect for human rights as a fundamental principle upon which integration should be pursued. Based on these principles, other rights related provisions in their treaties and organisation specific documents that set standards in the field of human rights, RECs have engaged in judicial and non-judicial protection of rights. There is thus some similarity with the legal basis for human rights in the ECOWAS framework.

However, this chapter has further shown that although the degree and level of human rights practice in the EAC and SADC are different from the ECOWAS practice, the concerns that are linked with their involvement in the area are similar in all cases. In both the EAC and SADC, threats of tension and conflict with national and continental systems cannot be ruled out. Similar to the ECOWAS human rights regime, these RECs have not consciously developed adequate mechanisms to address these concerns even though some of their operational principles coincide with measures that have been identified with the EU human rights practice. However, it has also been shown that in their limited practices, the emerging regimes have developed some tentative practices that lower the risk of conflict with structures in the traditional African human rights architecture. Further, it has been demonstrated that whereas the EU practice has valuable lessons for tackling some of the challenges associated with the human rights involvement of these largely economic oriented organisations, a wholesale adoption of that practice would be ineffective in the contexts of these African RECs. Hence, there would be justification for recommending a modified

version of the current ECOWAS human rights practice as a model for adoption by other RECs in Africa. Such a modified model should imbibe aspects of the practices of the EU, but also of the EAC and SADC. The overall conclusions from this study and the prototype of a subregional human rights protection regime that is complementary of existing mechanisms will be laid out in the chapter that follows.

Chapter Seven

Conclusion and recommendations

- 7.1 Introduction
- 7.2 Synopsis of findings
- 7.3 Conclusions
- 7.4 An ideal model for subregional human rights regimes in Africa
- 7.5 Recommendations

7.1 Introduction

The promise made at the beginning of this thesis was to show that even though they were originally set up as vehicles for the pursuit of regional economic integration in different regions of the continent, African RECs can also be effective vehicles for the realisation of the human rights of the citizens of their various member states. Using ECOWAS as the major case study, the thesis aimed at demonstrating that adapting RECs for international human rights realisation at the subregional level can be achieved without necessarily conflicting with the main objectives of economic integration. It was also intended to show that REC involvement in the field of human rights realisation would not need to upset the relations between the given REC and its member states on the one hand and the RECs and the African Union or any of its institutions on the other hand. A further objective of the thesis was to demonstrate that the human rights activities of the RECs do not and would not jeopardise the work of the different continental institutions currently responsible for promoting and protecting human rights in the continent. In other words, the thesis aimed to put forward the contention that the human rights activities of RECs in Africa can operate to complement the traditional African human rights architecture without disrupting the system.

In order to achieve its promise, this thesis has employed a descriptive and comparative analytical approach in the previous six chapters to explore the theoretical bases for REC involvement in human rights realisation, assess the actual human rights regimes of African and European economic integration initiatives and identify the challenges that are linked with their involvement in the field of human rights. In the course of the analysis, an effort was also made to uncover mechanisms that have been

employed or that can be employed to meet some of the challenges associated with REC, especially ECOWAS involvement in the field. The aim of this chapter is to collate the findings of the entire thesis, draw out critical observations and make recommendations towards a non-disruptive model for human rights realisation in the RECs. This chapter presents a synopsis of the main findings in each of the previous six chapters, outlines the observations or conclusions and sets out the recommendations.

7.2 Synopsis of findings

The main findings in this study are centred on the broad questions posed at the beginning of the study. With respect to the question whether under its prevailing legal framework, taking into account the sources of Community law, there is a normative framework to support the realisation of human rights on the ECOWAS platform, this study has found that such a normative framework does exist. In chapter three, this study demonstrated that the ECOWAS legal framework is made up of primary and secondary sources of law.¹²²⁶ It is in these sources of ECOWAS Community law that the search for a normative framework to sustain a human rights regime was made. The study established that sufficient references to human rights existed in various instruments and documents of ECOWAS to warrant the hoisting of a human rights regime in the ECOWAS Community framework.

At the apex of the ECOWAS legal framework is the 1993 revised ECOWAS Treaty which replaced the 1975 founding Treaty of the organisation. Evaluation of the two treaty regimes showed that whereas the 1975 ECOWAS Treaty did not mention human rights, the 1993 revised ECOWAS Treaty makes clear references to human rights. Unambiguous reference to human rights in the 1993 revised ECOWAS Treaty was found in the Preamble to the Treaty, the statement of fundamental principles guiding the organisation and in chapter X of the Treaty dealing with cooperation in political, judicial and legal affairs, regional security and immigration.¹²²⁷ Although careful note was taken of the fact that the references to human rights in the 1993 revised ECOWAS Treaty were not contained in the aims and objectives of the

¹²²⁶ See sect 3.4 in chapter three of this study. The analysis in this regard drew largely from Ajulo's article on the source of ECOWAS Community law. See Ajulo (2001) 86.

¹²²⁷ Generally see para 4 of the preamble and arts 4 and 56(2) of the 1993 revised ECOWAS Treaty. Also see art 66(2) of the 1993 revised ECOWAS Treaty.

organisation, the study analysed the legal implications of the Treaty provisions relating to human rights, taking into account subsequent actions of organs and institutions as well as the member states of the organisation. The analysis in chapter three supported the assertion that the Treaty provisions relating to human rights could sustain Community action in the field of human rights.

Having established that a normative framework for human rights realisation could be located in the revised Treaty, the study advanced to investigate whether this claim could be supported by further Community legislative practice. By evaluating the conventions and protocols which form part of the primary sources of ECOWAS Community, the study found a pattern of increasing reference to human rights in Community legislations. Beginning with conventions and protocols adopted under the 1975 Treaty regime and continuing with instruments adopted under the revised Treaty regime, the ECOWAS Community legislators adopted the practice of either deferring to human rights by reference to traditional human rights instruments or providing for Community-specific rights in certain Community legislations.¹²²⁸ The same pattern was found in the subsidiary legislations, declarations and other soft law instruments that constitute secondary sources of ECOWAS Community law.¹²²⁹ The assessment of the various sources of ECOWAS Community law led to the interim conclusion that even though there is currently no Community-specific human rights catalogue, a normative framework exists for human rights realisation under the platform of ECOWAS.

Although the study established the existence of a normative framework for human rights realisation in ECOWAS, there was need to test the legality of such a framework against operative principles of international law. Accordingly, the study also sought to answer the question whether the normative framework for human rights in ECOWAS was legitimate and sustainable under the applicable principles of international law generally and the law of international institutions specifically. To arrive at an answer to this question, in chapter two, the study considered the implications of state sovereignty on the exercise of powers by international organisations. Setting out the principle of attributed competence and the intervening doctrine of implied powers in

¹²²⁸ See sect 3.4.2 in chapter three of the study.

¹²²⁹ Sect 3.4.3 in chapter three of this study.

chapters two and three, the study established that there is a legal basis for international organisations to undertake functions and exercise powers that are not expressly granted in the constitutive instrument. In chapter two, the study also identified the economic theory of spillover as a theoretical basis for REC engagement in issue-areas outside of enumerated founding objectives. Thus, the study found that there were legal and theoretical bases for international organisations to engage in activities that were not originally contemplated in their objectives.

Applying the legal and theoretical principles to the ECOWAS human rights regime, the study found that the normative framework for human rights realisation is legitimate and sustainable in international law. In terms of legitimacy, it was established that despite the absence of human rights in the statement of objectives, other treaty provisions were sufficient to empower the organisation to exercise competence in the field of human rights. The study concluded that a combined reading of the statement of fundamental principles and the omnibus provision of the revised ECOWAS Treaty provides legal support for the ECOWAS human rights regime. This finding was reinforced by the theory of spillover based on the argument that the need to create a conducive environment for economic integration warrants spillover into the issue-area of human rights. The study also found that similar to the process for development of customary international law, state practice in the form of active participation or acquiescence in human rights activities of ECOWAS played a crucial role in giving legal force to the otherwise empty statement of principles that commits the organisation to human rights in the Treaty. Such state practice was also recognised as crucial for sustaining the normative framework for human rights realisation in ECOWAS. Thus, against the background that the competence of an international organisation could be found in the treaty as much as in general international law principles, the study answered in the affirmative to the question whether the ECOWAS human rights regime was legitimate and sustainable in international law. Answering in the affirmative to this and the previous questions led to the conclusion in this study that under the existing legal framework, human rights realisation was a legitimate activity in ECOWAS.

Apart from dealing with the question of legitimacy, this study also considered the feasibility and by extension, the desirability of REC engagement in the field of human

rights realisation. In this context, the goal was to evaluate the complementary quality of the ECOWAS human rights regime in relation to national and continental components of the traditional African human rights architecture. Consequently, the study posed the question whether the ECOWAS human rights regime fits into the larger African human rights system or whether it could stand as an independent human rights system. In seeking to answer this question, the study understood the larger African human rights system to comprise of national structures and continental mechanisms for human rights realisation. To facilitate this evaluation, the central structures and documents of the system were set out in chapter two. First, in chapter two, and subsequently more deeply in chapter three, the study evaluated the relation between the budding regime and the traditional African human rights architecture and found that there was an insufficient link to support a claim that the ECOWAS human rights regime is an integral part of the African human rights system as it currently exist.

Notwithstanding the finding that the ECOWAS regime is currently not an integral part of the African human rights system, the study recognised the special status that the African Charter has been given in the regime. Taking into account the finding in chapter two that African RECs are linked to the AU as building blocks of the AEC, a remote connection was found between the ECOWAS regime and the continental component of the African human rights system. After evaluating the relation between the ECOWAS human rights regime, on the one hand, and national and global mechanisms respectively on the other, the study came to a further conclusion in chapter three that the regime is expected to exist side by side with the traditional human rights structures without being linked directly to these structures. Accordingly, the study adopted a qualified affirmative answer to the question of the relation between the ECOWAS regime and the African human rights system by taking the position that although it is not an integral part of the system, the ECOWAS human rights regime can be held out as a sub-system in the larger African human rights system. A fundamental feature of this position is that the mechanisms of the larger African system cannot claim or exercise direct judicial or non-judicial control over the workings of the regime. Consequently, even though this fact does not deny the feasibility of REC engagement in the field, it raised the challenge of potential conflict. It has to be conceded that insufficient attention was paid to the relation between the

ECOWAS regime and the global human rights system and further research would be necessary in that area.

In connection to the finding of the potential for conflict between the ECOWAS human rights regime and components of the larger African human rights system, the study investigated whether in the human rights activities of ECOWAS organs and institutions could result in tension vis-à-vis structures of the African system. By analysing the actual functioning of the main ECOWAS Community organs and institutions in the field of human rights, the study found that the operations of the ECOWAS regime has as yet not affected the functioning of other components of the African system. However, the study recognised the existence of the risk of conflict. In terms of inter-organisational conflict, it was discovered that judicial and non-judicial aspects of the ECOWAS regime operated in areas that traditionally fell within the jurisdiction of national institutions of member states. With respect to the continental human rights mechanisms, the study also found that as a result of the fact that continental mechanisms claim competence over the national space in which the regime operates, there was some potential for conflict between the continental structures and ECOWAS institutions. The analysis in chapter four exposed the threat but left open the question whether the threat was more apparent than real. Further, the analysis demonstrated that the impact of the ECOWAS human rights regime was not always negative as some aspect of the regime's operations indicated positive complementarity. It also became obvious that the threat of negative impact was more in the area of judicial protection of rights than in non-judicial protection and in promotional activities.

Against the background of the established potential for conflict, chapter four of the study was also applied to investigate whether the ECOWAS human rights regime had developed mechanisms for the purpose of regulating inter- and intra-organisational relations. The analysis showed that although there was some evidence of cooperation between Community institutions and certain national institutions in non-judicial aspects of human rights, there was no conscious coordination of activities. With respect to judicial protection of rights, the study found that, apart from the proposal to apply national judicial mechanisms for enforcement of the judgments of the ECCJ, there is an uneasy silence on the exact relationship between the ECCJ and national

courts. The absence of coordination was evident in the relationship between structures of the ECOWAS regime and continental human rights mechanisms. In the same vein, it was found that there was very little, if any cooperation or dialogue between regime institutions and continental human rights structures. Thus, the finding in this regard was that the ECOWAS regime has not developed relevant mechanisms to address the threat of conflict with the components of the larger African human rights system. The overall finding at this point was that the realisation of human rights on the platform of ECOWAS is legitimate and feasible but it also poses a threat to the unity of the African human rights system. The study made a passing consideration of the question whether engagement in the field of human rights has negatively affected ECOWAS potential to achieve its original economic objective. The finding was that there was nothing to indicate such a trend. However, there is room for deeper and more detailed research in that respect.

In order to demonstrate that human rights realisation in the context of economic integration is not completely novel and to search for best practices to guide the development of appropriate regulatory mechanisms for the ECOWAS regime, the study undertook a comparative evaluation of the EU human rights regime. In this context, the study sought to discover how the ECOWAS regime compared to the EU regime in terms of legitimacy and feasibility, with particular focus on mechanisms developed to regulate organisational relations. The investigation in chapter five of the study showed that human rights realisation evolved in the EU out of judicial interpretation but has gained treaty recognition. The study found that treaty foundations for human rights in successive EU treaties were similar to those upon which the ECOWAS regime was hinged. Thus, comparative analysis of the EU regime lent support to the assertion that statement of principles in a treaty could sustain a human rights regime if state practice exists to support organisational engagement in that field. The bases of a claim to legitimacy in both regimes were therefore found to be similar. The study also noted that as a result of differences in democratic culture, the need for express empowerment of international organisations in the field of human rights was higher in Africa and the ECOWAS regime than it is in the EU context.

Considering that the EU human rights regime has co-existed successfully with national and continental human rights structures in Europe for a longer period of time, the study examined the EU human rights practice to identify mechanisms applied for organisational regulations. The study showed that the EU regime made robust use of the ECHR in the identification of standards but has also developed regime-specific human rights catalogue. The study further found that the EU regime employed the principle of limited competence, the principle of subsidiarity and the practice of coordination and cooperation to regulate its relationship with national and traditional continental human rights structures. It is in this regard that the EU regime differed significantly from the ECOWAS regime. However, given the differences in contexts, the study also expressed the need for caution in the adoption of mechanisms from the EU regime.

Another question that was posed at the beginning of the study was whether the ECOWAS human rights regime was an isolated case of REC engagement in human rights realisation or whether it was representative of an emerging practice among subregional organisations in Africa. The analysis in chapter six of the study was dedicated to this inquiry. Taking the EAC and SADC as representative of other RECs, this study found that African RECs have relied on treaty provisions similar to those in the revised ECOWAS Treaty to engage in human rights realisation activities. The study found that these RECs were involved at varying degrees, in judicial and non-judicial promotion and protection of human rights. The analysis in chapter six indicated that despite not having express human rights jurisdiction similar to that associated with the ECCJ, judicial organs of these RECs have been confronted with some rights related claims. This finding provides a basis for an argument that any REC with similar treaty provisions could successfully promote a human rights regime. The reaction that has trailed the human rights engagement of the judicial organs of the RECs amplified the need for express conferment of human rights jurisdiction in order to sustain continued engagement in this field. Although to a lesser degree, the discourse in chapter six showed that RECs are increasingly empowering main organs and subsidiary institutions to engage in non-judicial promotion and protection of rights. The study also found that although there were treaty principles in both RECs that could be applied to regulate organisational relations, these RECs have also not

consciously developed mechanisms to regulate relations with the national and continental structures of the African human rights system.

Based on the finding in chapter six, the question arises whether the evolution of subregional human rights regimes in Africa has a potential to compromise the functioning of the traditional structures of the African human rights system. From the examination of the ECOWAS regime in chapters three and four and the consideration of the EAC and SADC human rights practices in chapter six, the study has found that adoption of the African Charter as a common standard by subregional regimes would not threaten or compromise the work of the traditional structures of the African human rights system as there is no evidence of an intention to enthrone exclusivity of usage in favour of the traditional structures. It also emerged from this study that adoption of region-specific human rights catalogues was a possibility with positive and negative potentials. With respect to the question of threat to the African human rights system, the study finds that standards could be compromised if region-specific standards were adopted without proper reference to the African Charter and other continent-wide human rights instruments. The study also found that there was a need for judicial cooperation and judicial dialogue to avoid jurisdictional conflicts between subregional courts and continental human rights supervisory bodies. However, it was found that the same threat of compromise does not loom in relation to non-judicial human rights realisation activities. Notwithstanding the position taken in this study, the infancy of the subregional regimes and the African human rights court makes it difficult to reach a firm conclusion on this point and would require a more detailed research at a latter stage.

After considering the practice of the ECOWAS human rights regime and the limited human rights practices of the EAC and SADC, the study has found that there are differences in these regimes. The most important differences include the fact that whereas the ECOWAS regime could boast of a practice of explicit conferment of human rights mandate on some of its main organs, organs of the other RECs have had to imply human rights competences in their mandates. Naturally, the risk of state party resistance is stronger in the other RECs than it is in the ECOWAS regime. Another significant difference is that whereas the ECOWAS regime centres on the use of the African Charter as its central human rights instruments, in each of the other two

RECs, adoption of region-specific rights catalogue has been or is being contemplated, bringing with it the threat of conflicting standards in Africa. The study also found that the other RECs have treaty mechanisms that can be applied to regulate organisational relations in a manner that the revised ECOWAS Treaty does not currently promise. Thus, to the question whether the ECOWAS regime and the budding regimes of the other RECs are comparable, this study also provided a qualified affirmative answer.

The last question that this study proposed to answer was whether best practices could be found and gathered from the different regimes considered in this work for the purpose of developing a non-disruptive model for subregional human rights realisation regimes in Africa. Against the background that some form of best practice could be linked to each actual or budding regime considered in this study, the answer would be that aspects of each regime can contribute to the development of an ideal model for subregional realisation of human rights in Africa.

The overall picture painted in the previous chapters of this thesis would therefore be that as presently constituted, African RECs, especially ECOWAS, have treaty and general legal frameworks to support legitimate human rights regimes that can be loosely regarded as a sub-system in the wider African human rights system. However, the emergence of such regimes has as much potential to complement the traditional system as it has to be disruptive of the system if left unregulated. In view of the gains or envisaged gains of the emerging regimes in the Africa context, it might be beneficial to support these regimes subject to the development of mechanisms to ensure that the emerging regimes remain complementary of the traditional human rights architecture.

7.3 Conclusions

From the perspective of the law of international institutions, a fundamental question that needs to be answered in relation to the exercise of powers is whether the powers exercised or sought to be exercised have been previously granted expressly or can be implied from the nature of the functions that the given international organisation is required to perform. Arguably, both in terms of the VCLT, international jurisprudence and state practice, the search for express or implied powers should begin at the level of organisational treaty but it need not stop there. Thus, even where human rights

realisation as an issue-area is not a stated objective in the treaty of an REC, that fact alone should not be a basis for dismissing the REC as a legitimate vehicle for human rights realisation in Africa. The critical question should be whether in the totality of the organisation's legal framework, there is a basis for employing the organisation as a vehicle for the realisation of human rights. In other words, the expression of intention by member states to engage a given REC for the realisation of human rights in addition to predetermined economic integration objectives need not be located in the statement of objectives but may very well be founded in a contextualised reading of several provisions of the treaty and non-treaty documents. This may be reinforced by reliance on omnibus provisions that allow for the exercise of functions and powers incidental to the realisation of set objectives.

In the revised ECOWAS Treaty and in the treaties of the EAC and SADC, the place of human rights is not in the main objectives, but in the statement of fundamental principles. On its own, inclusion in the statement of fundamental principles may not suffice to impose any concrete obligations on states and therefore may not exclusively support the hoisting of a human rights regime on these international organisations. However, the subsequent actions of member states of an international organisation can lend additional weight to the statement of fundamental principles. Such action could be by adoption of other treaties that reinforce the statement of principles, by mandating organs and institutions to act in the given field, or by endorsement of the previously unauthorised actions of organs and institutions in the given field. All or any of these actions would constitute state practice relevant to give legal force to statements of principles in a manner similar to the role of state practice in the development of customary international law. In relation to ECOWAS, the statement of principles obligating member states to integrate on the basis of respect for human rights contained in the African Charter has been subsequently reinforced by adoption of other treaties, conferment of human rights mandates on ECOWAS organs and institutions and by endorsement or approval of actions undertaken by organs and institutions in the field. On all of these bases, it can be concluded that there is an intention to apply ECOWAS as an organisation for the purpose of human rights realisation.

Even assuming that the statement of fundamental principles was insufficient to base the ECOWAS human rights regime, there is room in the omnibus provision in the revised ECOWAS Treaty to sustain a human rights regime insofar as it can be asserted that the realisation of human rights is vital for the realisation of the main objectives of the organisation. This thesis has shown that apart from the connection between social and economic rights and the objectives of raising the standards of living that ECOWAS has set for itself, the promotion and protection of human rights is essential for the creation of an environment conducive to the integration in West Africa. The difficulties that the organisation experienced following the eruption of rights-violation-triggered conflicts in the late 1990s is illustrative of this point and demonstrates that unless the human rights situation in member states is addressed, there is very little chance that ECOWAS would achieve its objectives. Thus, the realisation of human rights does not go against the economic objectives of ECOWAS. Further, there is nothing to indicate that the addition of human rights to integration discourse at the level of the REC has compromised or significantly altered the ability of the organisation to achieve its original objectives. Hence, the pursuit of human rights goals does not pose any danger to the continued existence of the organisation in its original context.

Since there is similarity in the statement of fundamental principles in the ECOWAS, EAC and SADC treaties, all of which replicate equivalent provisions in the EU treaties, there should ordinarily be no difficulty in finding the same legitimacy in the EAC and SADC for basing the evolution of human rights regimes. However, unlike the EU regime which existed successfully on the basis of a claim to human rights as general principles of law binding EU member states, the growth of human rights in African RECs depends on the willingness of states to further human rights rhetoric in the treaties through subsequent action as has occurred in the ECOWAS Community. While this is already happening to some extent in all the RECs considered, there is still ambiguity in all three RECs that creates room for some doubt as to the exact legal implications of the human rights rhetoric contained in the statement of principles and in other peripheral treaty provisions.

Notwithstanding any ambiguities that may exist in relation to the human rights regimes of African RECs, the nascent nature of the African human rights system

ensures that gaps exist in the architecture for the evolving regimes to fill. In fact the complexities of the human rights situation in Africa favour greater intervention from all quarters. Hence, even though the involvement of ECOWAS in human rights work in West Africa has been far-reaching, there is still much work to be done by other national and continental actors in the field. This can only mean that the human rights activities of subregional organisations have more potential to complement rather than jeopardise the realisation of human rights in Africa. Moreover, in the face of the many challenges that national and continental institutions encounter in the field, the limited practice of ECOWAS, but also of the other RECs, demonstrate that there is some potential to achieve more positive results in certain regards from the evolving regimes.

In terms of execution of human rights policies, the emerging RECs can claim a certain level of success that the continental structure of the African system cannot boast of. This is partly due to the fact that unlike the AU system where the African Commission, the African Committee of Experts and the emerging African Human Rights Court carry the greater part of the responsibility for human rights, the RECs manage to mainstream human rights at different levels in their organisational structures. Specific to the ECOWAS regime, the level of implementation extends even to the area of judicial protection and the regime can lay claim to a high percentage of compliance with the human rights decisions of its organs and institutions. This leads to a conclusion that African states tend to be more sympathetic to the cause of subregional integration and further, that political will in favour of integration is stronger at that level. Consequently, the potential for human rights realisation is relatively strong and stands to the advantage of the most vulnerable in society. However, even in the emerging regimes, compliance with human rights decisions of judicial organs is not total. This fact is demonstrated by the difficulties currently being experienced by ECOWAS with respect to the Gambia's refusal to implement the decision of the ECCJ in the *Manneh* case¹²³⁰ and SADC, with respect

¹²³⁰ *Manneh* case (n 591above) where the Gambia refused to take part in the proceedings and has refused to implement the decision of the ECCJ made against it.

to Zimbabwe's refusal to comply with the SADC Tribunal's decision in the Campbell case¹²³¹

While the potential to complement the traditional structures of the African human rights system is strong, there is also a compelling threat of jurisdictional inconsistencies and conflict that could arise from REC involvement in the system. This threat is greater where involvement in the field is deeper and more engaged. This should mean that regimes with deeper levels of engagement should be more conscious of the threat and develop the relevant mechanisms to address these threats. However, the ECOWAS regime which exhibits a relatively deeper level of engagement and involvement in the field of human rights does not have any mechanisms in place to regulate its relations with human rights institutions in its member states, on the one hand, and continental human rights bodies on the other. This is a significant shortcoming of the regime. For their part, the EAC and SADC have certain principles and practices that coincide with the regulation of relations between these organisations and their member states. In terms of mechanisms to regulate relations with the AU and its institutions, neither the EAC nor SADC has any significant measures. In the absence of clarity as regards the ultimate fate of the RECs in the context of their position as building blocks of the AU/AEC, the need for regulatory mechanisms similar to those developed in the EU regime is even more important.

In terms of norm creation and standard-setting, the approach of the ECOWAS regime is positive to the extent that it gives a central position to the African Charter because that extinguishes the potential for conflicting standards. Adoption of region-specific human rights catalogues have a potential to result in watering down the legitimacy and moral force of continental normative instruments. Thus, notwithstanding the likely benefits of region-specific catalogues, efforts in the EAC and SADC aimed at norm creation can have disruptive effects unless they are undertaken with care to ensure that standards are not lowered below the existing leverage of the African Charter and related instruments. However, judicial application of the African Charter by the ECCJ without any reference to the jurisprudence of the African Commission

¹²³¹ Campbell case (n 1197 above). As developments in July 2009 have shown, Zimbabwe has rather elected to challenge the competence of the SADC Tribunal to entertain human rights cases. See generally, 'Execution and Enforcement of Judgments of the SADC Tribunal, Opinion of the Government of the Republic of Zimbabwe on issues relating to International Law which were raised at the Meeting of Ministers of Justice/Attorneys-General which was held in Pretoria, South Africa from 30 July to 31 July 2009, 31 August 2009.

threatens the unity of the system. Although continental institutions cannot claim exclusivity over the African Charter, their position as Charter based institutions creates a presumption of specialisation in their favour. In that regard, the approaches of the EACJ and the SADC Tribunal are more attractive and sustainable as reference to the African Commission's jurisprudence in these courts is a form of judicial dialogue that contributes to unity of the system.

While the concerns relating to jurisdictional inconsistencies and conflict have been associated with both judicial and non-judicial aspects of the human rights work of RECs, they tend to be greater in relation to judicial protection of rights. Consequently, the sense of competition for jurisdiction is higher in the judicial and quasi-judicial sphere than it is in the promotional and other non-judicial sphere of human rights. This in turn results in a higher risk of national and continental resistance in the judicial and quasi-judicial sector while there is a greater degree of accommodation in the non-judicial sectors of human rights work.

Although the motivations for spillover to human rights in the EU are not applicable in the African context and therefore the actual practice in the EU regime differs from the regimes in Africa, the regulatory mechanisms developed by the EU regime can serve as useful examples for the subregional regimes in Africa. Accordingly, a suitable model for REC involvement in the African human rights scene should combine the best practices of the ECOWAS regime with best practices that have been identified in the EU regime as well as those of the EAC and SADC. Such a model can then be adopted by other RECs in Africa.

7.4 An ideal model for subregional human rights regimes in Africa

Taking into consideration the findings of this study and the conclusions drawn in the preceding section, there is need to illustrate the form that an ideal model for subregional realisation of human rights should take. As already demonstrated in this study, the legitimacy of a subregional human rights regime can be hinged on a combination of constitutive treaty provisions and provisions in other instruments adopted by the given organisation. However, the best possible scenario is one in which promotion and protection of human rights is recognised as an express, if peripheral objective of the REC. In the absence of such a best case scenario and in

situations where the main foundation for hoisting a human rights regime in an REC is expressed in provisions other than in the statement of objectives of the organisation, it is desirable that member states take further legislative action to flesh out their intentions in relation to human rights. Such an approach is important in order to prevent member states from challenging the competence of the REC to engage in the field of human rights. The best form that legislative action could take would be to adopt protocols conferring clear human rights competence in the mandates of relevant organs and institutions of the organisation. This would be necessary whether or not human rights or rights related provisions are contained in general protocols adopted by the REC. This is especially important in the African context where states are obviously more protective of sovereignty than European states are.

Although organs and institutions may adopt proactive and courageous approaches to read-in human rights competences in their mandate for the purpose of giving life to treaty provisions that guarantee human rights, such an approach opens up space for states with undemocratic leaders to challenge the exercise of such mandates. Such an approach is even more precarious where treaty provisions expressly exclude human rights competences. While it would be conceded that certain states can challenge the exercise of human rights competences even in the face of express conferment of competence, the chances of success in this regard would be slimmer. Accordingly, the ideal model for a subregional human rights regime is one that boasts of instruments that confer express human rights mandates on relevant organs and institutions for the purpose of giving life to treaty provisions that obligate states to respect, promote and protect human rights in the course of economic integration.

With respect to standard-setting, the ideal model would be one that recognises the African Charter as the central human rights instrument of its regime on the basis of the Charter's position as a common African standard. This is necessary to ensure the maintenance of common minimum human rights standard and for protecting the unity of African human rights law. In order to cater for region-specific concerns that have either not been addressed in existing continental instruments or have been insufficiently addressed, RECs could adopt region-specific human rights catalogues on given thematic areas. Such thematic instruments should be linked to the African Charter by reference to the Charter in the instrument. In addition, such thematic

instruments should contain provisions that require subregional implementing and supervisory bodies to interpret the instrument with due regard to the African Charter or any other applicable continental instrument. The benefit of such an approach is that entrenching such provisions would act to avoid the watering down of existing continental instrument by the adoption of region-specific instruments with significantly lower standards.

Considering the need to ensure that subregional regimes are complementary to the existing structures of the African human rights system, the ideal model should have mechanisms to regulate the REC's relationship with national and continental human rights institutions. In this regard, RECs must show respect for the principles of limited competence and subsidiarity in the areas of norm creation, in the establishment of institutions with human rights mandates and in the implementation of human rights policies. In situations where the principle of subsidiarity is applicable in its positive of favouring subregional involvement, the ideal model should have mechanisms to ensure coordination between relevant REC organs and institutions, on the one hand, and national and continental institutions on the other. The advantage in such an approach is that unnecessary duplication of functions would be avoided as would jurisdictional conflicts and inconsistencies.

In relation to judicial protection of rights, the ideal model should empower the judicial arm of an REC to exercise competence over human rights matters. The model should allow individual access to subregional courts for this purpose. However, the conferment of jurisdiction and the grant of individual access should all be subject to necessary sifting mechanisms such as the requirement to exhaust local remedies before admissibility in relation to national courts and respect for the principles of *res judicata* and *lis pendens* in relation to continental judicial and quasi-judicial bodies. While it may be attractive to prevent subregional judicial organs from exercising human rights jurisdictions, the absence of a functional continental human rights court has thus far created some difficulties for such a position. Even in the event that the African human rights court or its successor court becomes functional, the fact that individual and NGOs cannot access either court against a state party without prior

declaration by that state party makes it necessary for other international judicial fora to be available for prospective litigants.¹²³²

Furthermore, creating quasi-judicial bodies for human rights protection at the subregional level is not desirable for at least two main reasons. Firstly, it would lead to the proliferation of institutions and by extension, unnecessary waste of public funds as it would require the establishment of new institutions. Secondly, such a trend would amount to duplication of institutions as such institutions would have no advantage over the existing African Commission which also has no mandate to issue binding decisions. Hence, the ideal model would be to empower existing judicial organs of REC subject to strict regulatory mechanisms.

Based on the criteria for an ideal subregional human rights realisation regime listed above, the following recommendations are made for the restructuring of existing regimes.

7.5 Recommendations

As currently enacted, treaty provisions on of fundamental principles requiring states to integrate on the basis of respect for human rights constitute a sufficient legal foundation upon which RECs can build human rights regimes. In this regard, all RECs should maintain their existing provisions. These provisions in the revised ECOWAS Treaty and the EAC Treaty should attract teleological interpretations along the lines of the SADC Treaty, in order to impose duties of respect for human rights on the international organisation just as it obligates the states to respect human rights. That way, the organs, institutions and structures of these RECs that do not currently fall under any human rights supervisory regime can formally be brought under their own human rights regimes. In order to give reinforcement to the statements of fundamental principles, treaty provisions on human rights should be reinforced as and when necessary with protocols defining the scope of competence that organs and institutions have in the field. In the area of judicial protection especially, as ECOWAS has done to some degree, RECs that intend to encourage judicial protection of rights

¹²³² See generally, art 5(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Also see art 8(3) of the Protocol and art 30(f) of the Statute in the Protocol on the Statute of the African Court of Justice and Human Rights. The effect of these provisions is to require that individuals and NGOs can bring cases directly in these courts against state parties that have made a declaration to that effect upon ratification of these instruments. As the experience with the African Court on Human and Peoples' Rights has shown, state parties are not very eager to make such a declaration.

on the platform of their organisations should adopt relevant legal instruments (protocols, directives etc) to confer clear and unambiguous competence on judicial organs. In this regard, the promise in article 27(2) of the EAC Treaty regarding adoption of a Protocol to confer a human rights jurisdiction should be realised. Similarly, the SADC Authority should consider the adoption of a Protocol to confer express human rights jurisdiction on the SADC Tribunal. These Protocols should clearly define the scope of judicial competence that is granted, set out definite procedures for triggering the jurisdiction and define how the conferred mandate relates to other structures in the African human rights system.

Considering that there is a lower risk of jurisdictional inconsistency and conflict in the non-judicial sector of human rights realisation, REC human rights mechanisms in that sector should be emphasised. In this regard, promotional activities, coordination of national initiatives for the purposes of addressing common challenges and non-judicial and non-adversarial monitoring activities which continental efforts are too thinly spread to make appreciable and sustainable impact should be focused on.

In order to maintain the unity of international human rights law in Africa, the centrality of the African Charter as the continent's main human rights instrument needs to be sustained. Accordingly, the evolving subregional regimes should continue to adopt the African Charter as the main catalogue for human rights so as to reinforce its standing as a common African value since nearly all AU member states are parties to the Charter. In relation to other instruments of the African human rights system, their relevance should depend on whether an affected state is a party thereto and promotional focus at the REC level should include encouraging states to ratify all human rights instruments in the African human rights system. Where it is absolutely necessary for neighbouring states within a region to adopt a region-specific instrument without restrictions from states that do not face a common challenge, effort should be made in the drafting process to install the African Charter as the reference point, take other existing instruments into account and require that new instruments should be interpreted on the basis of minimum standards already set in the wider African human rights system.

Considering the obvious need to regulate relations, the operational principles in the various REC treaties, such as asymmetry, complementarity, subsidiarity, viable geometry and subsidiarity should be applied in the human rights work of the subregional regimes. Although these principles are not contained in the revised ECOWAS Treaty, they can be included in the adoption of new legislative instruments.¹²³³ As was discussed in relation to the EAC, the first opportunity at implementation of the human rights policies of RECs should be given to national institutions. Thus, in the ECOWAS regime, as in all the other REC regimes, the principle of subsidiarity should be applied first in the negative context, and then in the positive context if necessary.

To enhance cooperation and coordination with national institutions as well as continental human rights bodies, there should be a higher level of consultation and exchange of information between the REC regimes and other structures in the African human rights system. While this might be better if there were dedicated offices in the evolving regimes responsible for human rights, the challenges of funding would mean that REC Commissions and Secretariats can assign this duty to existing departments. From a judicial perspective, conscious effort needs to be made to enhance judicial dialogue, but also judicial diplomacy between REC regimes and national courts, between REC regimes themselves and as between REC regimes, the African Charter supervisory bodies and other continental human rights institutions.

It could be suggested that African RECs should be made to focus on economic integration and allow traditional structures to continue their work in the field of human rights. However, the task of ensuring a human rights friendly environment, free of conflict and suitable to sustain development is too important to leave with a handful of institutions with acute challenges of their own. It is therefore more beneficial to encourage and support the emerging regimes to act in the field but with proper guidance to ensure that they complement and not disrupt the existing system.

¹²³³ This is already happening though not specific to human rights. Supplementary Acts adopted by the ECOWAS Authority in 2008 contain statements expressing that implementation should respect certain principles such as the principle of subsidiarity.