



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

**LEGITIMACY AND FEASIBILITY OF HUMAN RIGHTS
REALISATION THROUGH REGIONAL ECONOMIC
COMMUNITIES IN AFRICA: THE CASE OF THE
ECONOMIC COMMUNITY OF WEST AFRICAN
STATES**

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30 September 2009



DECLARATION

I, Solomon Tamarabrakemi Ebobrah hereby declare that this thesis is my original work and it has not been previously submitted for the award of a degree at any other university of institution.

Signed: _____

Date: _____

Place: _____



DEDICATION

This work is dedicated to the memories of my fathers: Late Dennis B. Eboerah (my biological father) who unfortunately, was not alive to see me grow up and Late Clement E. Okpokiti, who saw me through the early and formative stages of my life but unfortunately, was not alive to see how I turned out.

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Summary of thesis

Since 1981, when the African Charter on Human and Peoples' Rights was adopted on the platform of the Organisation of African Unity, one of the main challenges for players in the field of human rights in Africa has been to find effective fora in which the rights of the most vulnerable can be vindicated. The African Charter on Human and Peoples' Rights, together with other African human rights instruments, the global human rights instruments to which African states are parties and national bills of rights entrenched in the national constitutions of most African states make up the body of human rights norms that exist for the benefit of victims of human rights violation in the continent. This body of normative standards are expected to be given effect at the national level. However, given that the expectation has not always been met, international supervisory bodies have played an increasingly important role in the African human rights landscape.

At the continental level, the African Commission on Human and Peoples' Rights which was established under the African Charter was the original forum for the vindication of human rights for a number of years. Over the years, other continental human rights supervisory bodies have been established under the defunct OAU and the AU. National human rights institutions and these continental bodies have gained recognition as the structures of the African human rights architecture. However, since the early part of the new millennium, new institutional actors have begun to appear in the African human rights landscape. Originally established as vehicles for subregional economic integration, regional economic communities (RECs) in Africa have expressly or implicitly authorised their organs and institutions to engage actively in the field of human rights. This trend has been most evident in the operations of the Economic Community of West African States (ECOWAS).

The entry of African RECs in the continental landscape has raised several questions. From the perspective of international law, against the background of the principle of attributed competence that guides the existence and operations of international organisations, the question of legality and legitimacy is triggered. From the perspective of protecting the unity and continued existence of the African human

rights system, questions relating to the feasibility and desirability of REC involvement in the African human rights landscape emerge for determination.

Using ECOWAS as the main case study but also touching on the budding human rights activities of the East African Community and the Southern Africa Development Community, this study has sought to demonstrate that REC involvement in the field of human rights is legitimate and feasible. Combining descriptive, prescriptive and comparative analytical approaches, this study argues that African RECs, in particular ECOWAS, can be effective vehicles for human rights realisation in Africa without compromising their original stated objectives or upsetting the work of the structures in the traditional African human rights architecture. Extracting the challenges that can be associated with REC involvement in the field of human rights, this study sets up the criteria for a non-disruptive model for subregional realisation of human rights under the platform of RECs in Africa.

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SADC Protocol on Politics, Defence and Security Cooperation 2001

SADC Treaty 1992

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International Covenant on Economic, Social and Cultural Rights 1966

Statute of the International Court of Justice 1945

Universal Declaration of Human Rights 1948

United Nations Charter 1945

Vienna Convention on the Law of Treaties (1969)

List of abbreviations

| | |
|---------|---|
| AAPC | All African Peoples' Conference |
| ACP | African-Caribbean-Pacific |
| AEC | African Economic Community |
| AHRLJ | African Human Rights Law Journal |
| APRM | African Peer Review Mechanism |
| AMU | Arab Maghreb Union |
| AU | African Union |
| AUPSC | African Union Peace and Security Council |
| CEDAW | Convention on the Elimination of all forms of Discrimination Against Women |
| CEMAC | Central African Economic and Monetary Community |
| CEN-SAD | Community of Sahel Sahara States |
| CEPGL | Great Lakes River Basin |
| CESCR | International Covenant on Economic, Social and Cultural Rights |
| CFSP | Common Foreign and Security Policy |
| CFR | EU Charter of Fundamental Rights |
| CIAS | Conference of Independent African States |
| COMESA | Common Market for Eastern and Southern Africa |
| CoE | Council of Europe |
| CT | Consolidated Treaty of the European Community |
| EAC | East African Community |
| EACJ | East African Court of Justice |
| EC | European Communities |
| ECA | United Nations Economic Commission for Africa |
| ECCAS | Economic Community of Central African States |



| | |
|---------|---|
| ECCJ | ECOWAS Community Court of Justice |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECJ | European Court of Justice |
| ECOMOG | ECOWAS Monitoring Group |
| ECOWAS | Economic Community of West African States |
| ECSC | European Coal and Steel Community |
| ECtHR | European Court of Human Rights |
| EEC | European Economic Community |
| EGDC | ECOWAS Gender Development Centre |
| ESCRs | Economic, social and cultural rights |
| EU | European Union |
| Euratom | European Atomic Energy Community |
| FAL | Final Act of Lagos |
| FRA | EU Fundamental Rights Agency |
| ICJ | International Court of Justice |
| IDPs | Internally displaced persons |
| IGAD | Intergovernmental Authority for Development |
| IGADD | Intergovernmental Authority on Drought and Development |
| ILC | International Law Commission |
| IOC | Indian Ocean Commission |
| LPA | Lagos Plan of Action |
| MRU | Manu River Union |
| NEPAD | New Partnership for Africa's Development |
| NGOs | Non Governmental Organisations |

| | |
|----------------------|---|
| OAU | Organisation of African Unity |
| OAU/AU-RECs Protocol | OAU/AU Protocol on Relations Between the African Economic Community and the Regional Economic Community |
| PAP Protocol | Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament |
| PCIJ | Permanent Court of International Justice |
| PJCC | Police and Judicial Cooperation in Criminal Matters |
| PSC | Peace and Security Council |
| PSC Protocol | Protocol relating to the Establishment of the Peace and Security Council of the African Union |
| REC | Regional Economic Community |
| SACU | Southern African Custom Union |
| SADC | Southern Africa Development Community |
| SADC PDS Protocol | SADC Protocol on Politics, Defence and Security Cooperation |
| SADCC | Southern African Development Coordination Conference |
| SEC | Subregional Economic Communities |
| SMC | Standing Mediation Committee |
| TEU | Treaty of the EU |
| UDAO | <i>Union Douanière de L'Afrique de l'Ouest</i> |
| UDEAC | <i>Union Douanière et Économique de l'Afrique Centrale</i> |
| UDHR | Universal Declaration of Human Rights |
| UMA | <i>Union du Maghreb Arabe</i> |
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UNHCR | United Nations High Commission for Refugees |



| | |
|-------|---|
| VCLT | Vienna Convention on the Law of Treaties |
| WAHO | West African Health Organisation |
| ZaöRV | <i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i> |

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Chapter One

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1.1 Background to the study

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

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

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

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

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

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

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

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

⁵ Asante (1986) 47.

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

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

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

⁹ As above.

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

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

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

¹⁰ Viljoen (2007) 482.

¹¹ Asante (1986) 47.

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

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

¹⁴ Asante (1986) 44.

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

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

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

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

¹⁶ Asante (1986) 145.

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

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

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

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

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

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

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

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

²¹ Viljoen (2007) 496.

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

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

²² Asante (1986) 195.

²³ Asante (1986) 195 – 196.

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

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

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

²⁷ Cited by Robert (2005) 1.

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

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

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

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

²⁹ Robert (2005) 1.

³⁰ As above.

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

³² Odinkalu (2004) 665.

As Aryeetey notes:

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

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

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

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

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

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

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

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

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

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

1.2 Thesis statement and research questions

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

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

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

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

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

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

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

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

1.3 Clarification of terminology

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

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

‘Legitimacy’

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

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

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

³⁸ As above.

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

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

‘Feasibility’

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

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

⁴⁰ Clark (2005) 211 (emphasis supplied).

⁴¹ As above.

⁴² As above.

⁴³ Oxford Dictionary (2001).

⁴⁴ As above.

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

‘Realisation’

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

‘Human rights regime’

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

‘International organisation’

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

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

⁴⁶ Black’s Law Dictionary (2004).

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

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

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

'Intergovernmental organisation'

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

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

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

⁵⁰ Cited by Schermers and Blokker (2003) 22.

⁵¹ As above.

⁵² Schermers & Blokker (2003) 29.

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

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

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

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

⁵⁵ Schermers & Blokker (2003) 45.

⁵⁶ Archer (1992) 171.

‘Supranational organisation’

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

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

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

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

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

⁶⁰ As above.

⁶¹ Schermers & Blokker (2003) 46.

⁶² Schermers & Blokker (2003) 46 – 47.

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

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

‘Post-national organisation’

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

⁶³ Archer (1992) 171.

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

⁶⁵ Glencross (2008) 1.

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

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

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

'International', 'regional' and 'subregional'

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

1.4 Significance of the study

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

⁶⁸ As above.

⁶⁹ Viljoen (2007) 481.

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

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

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

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

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

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

1.5 Research methodology

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

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

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

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

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

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

1.6 Breakdown of chapters

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

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

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

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

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

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

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

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

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

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

1.7 Limitations and temporal delineation of the study

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

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

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

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

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

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

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

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

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



Chapter Two

Human rights and international integration in Africa

- 2.1 Introduction
- 2.2 States, sovereignty and international organisations
- 2.3 History of African integration
- 2.4 Human rights in continental integration initiatives in Africa
 - 2.4.1 Explaining integration
 - 2.4.2 The Organisation of African Unity
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- 2.5 Subregional institutions as foundational blocks for integration in Africa
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 - 2.5.2.8 The East African Community
- 2.6 Conceptualising the link between political and economic integration in Africa
- 2.7 Human rights in the discourse of institutions for integration in Africa
 - 2.7.1 Continental integration and human rights
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2.8 The African human rights system: what place subregional mechanisms?

2.8.1 Norm creating instruments in the African human rights system

2.8.2 Mechanisms and institutions for human rights realisation

2.8.2.1 The African Commission

2.8.2.2 The African Children's Rights Committee

2.8.2.3 The African Court on Human and Peoples' Rights

2.9 Interim conclusion

2.1 Introduction

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

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

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

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

2.2 States, sovereignty and international organisations

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

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

⁷⁵ Schermers & Blokker (2003) 9.

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

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

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

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

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

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

⁷⁹ Schermers & Blokker (2003) 156.

⁸⁰ Schermers & Blokker (2003) 155.

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

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

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

⁸² [1927] PCIJ, Series A, no 10.

⁸³ Schermers & Blokker (2003) 154.

⁸⁴ Archer (1992) 162.

⁸⁵ Amerasinghe (2005) 8.

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

2.3 History of African integration

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

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

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

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

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

89 As above.

90 Viljoen (2007) 158 – 159.

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

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

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

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

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

93 Hoskyns (1967) 355.

94 Naldi (1989) 3.

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

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

2.4 Human rights in continental integration initiatives in Africa

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

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

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

⁹⁷ Murithi (2005) 8.

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

2.4.1 Explaining integration

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

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

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

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

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

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

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

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

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

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

104 As above.

105 As above.

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

2.4.2 The Organisation of African Unity

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

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

106 Lindberg (1971) 59.

107 As above.

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

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

110 Murithi (2005) 24.

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

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

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

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

111 Sexena (2004)167.

112 Nkrumah (1963) 216 – 222.

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

114 Hazelwood (1967) 4.

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

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

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

115 Armah (1965) 47.

116 Naldi (1989) 4.

117 Art 1(b) of the OAU Charter.

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

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

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

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

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

120 As above.

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

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

123 Jonah (2001) 3

124 Cervenka (1977) ix.

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

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

125 Sexana (2004)175.

126 Cervenka (1977) ix.

127 Sexana (2004) 175.

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

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

2.4.3 The Lagos Plan of Action and Final Act of Lagos

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

129 Ankumah (1996) 4 -5.

130 Bischoff (2004) 127.

131 Cervenka (1977) 7.

132 Bischoff (2004) 128.

133 B Ndi-Zambo (2004) 128.

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

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

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

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

135 As above.

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

2.4.4 The African Economic Community (The Abuja Treaty)

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

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

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

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

138 Kouassi (2007) 5.

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

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

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

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

140 Rumumamu (2004) 8.

141 Art 5(3) of the Abuja Treaty.

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

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

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

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

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

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

145 Art 3(g) of the Abuja Treaty.

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

147 Viljoen (2007) 171.

148 Art 7 of the Abuja Treaty.

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

2.4.5 The African Union

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

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

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

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

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

153 Murithi (2005) 8.

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

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

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

154 Sexana (2004) 165.

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

156 CAA Packer & D Rukare (2002) 369.

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

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

159 Viljoen (2007) 173.

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

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

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

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

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

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

163 Art 5 of the Abuja Treaty.

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

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

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

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

166 Baimu (2001) 310.

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

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

2.5 Subregional institutions as foundational blocks for integration in Africa

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

168 Manby (2004) 988.

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

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

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

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

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

2.5.1 Nature and motivation for subregional integration

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

172 Murithi (2005) 7.

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

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

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

176 te Velde (2006) 3.

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

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

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

178 Bourenane (1997)51.

179 As above.

180 Bach (1999) 22.

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

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

181 Hazelwood (1967) 6.

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

183 Moore (2004) 5.

184 Joffé (2001) xiv.

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

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

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

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

186 As above.

187 Bischoff (2004) 122.

188 Murithi (2005) 24.

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

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

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

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

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

192 Maloka (2001) 2.

193 Art 88(1) of the Abuja Treaty.

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

195 Bischoff (2004) 141.

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

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

2.5.2 The main Regional Economic Communities in Africa

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

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

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

¹⁹⁸ South African DFA Document (2003) 4.

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

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

2.5.2.1 The Arab Maghreb Union

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

2.5.2.2 The Common Market for Eastern and Southern Africa

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

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

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

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

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

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

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

2.5.2.3 The Economic Community of Central African States

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

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

206 As above.

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

208 As above.

2.5.2.4 The Economic Community of West African States

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

2.5.2.5 The Intergovernmental Authority for Development

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

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

210 Art 3 of the revised 1993 ECOWAS Treaty.

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

212 As above.

2.5.2.6 The Southern African Development Community

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

2.5.2.7 The Community of Sahel Sahara States

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

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

214 Viljoen (2007) 492.

215 Ndulo (1999) 3.

216 Viljoen (2007) 489.

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

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

2.5.2.8 The East African Community

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

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

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

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

221 Ajulu (2005) 17.

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

223 Kaahwa (1999) 66.

224 Viljoen (2007) 491.

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

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

2.6 Conceptualising the link between political and economic integration in Africa

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

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

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

226 Caporaso (1972) 31.

227 Ndi-Zambo (2004) 29.

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

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

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

228 Caporaso (1972) 31.

229 Caporaso (1972) 24.

230 te Velde (2006) 3.

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

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

231 Caporaso (1972) 24.

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

233 Caporaso (1972) 27.

234 Bischoff (2004) 123.

235 As above.

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

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

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

236 Kufour (2006) X, XIV.

237 Lindberg & Scheingold (1971) 49.

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

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

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

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

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

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

238 Caporaso (1972) 31.

239 Haas (1968) 523.

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

241 Caporaso (1972) 32.

242 As above.

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

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

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

243 Caporaso (1967) 28.

244 Haas (1958) 523 - 524.

245 Nye (1965) 84 - 85.

246 As above.

247 Caporaso (1972) 32 - 33.

248 Schmitter (1969) 19.

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

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

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

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

249 Bach (1999) 240.

250 Claude (1971) 6.

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

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

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

251 Claude (1971) 7.

252 Haas in Lindberg & Scheingold (1971) 35.

253 As above.

254 Lindberg in Lindberg & Scheingold (1971) 49.

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

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

255 Haas in Lindberg & Sheingold (1971)13.

256 Caporaso (1967) 15.

257 Haas in Lindberg & Sheingold (1971) 12.

258 Bach (1999) 23.

259 As above.

260 Bach (1999) 23.

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

2.7 Human rights in the institutions for integration in Africa

2.7.1 Continental integration and human rights

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

261 Bach (1999) 240.

262 Bach (1999) 241.

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

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

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

264 Ankumah (1996) 4.

265 Murithi (2005) 29.

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

267 Murithi (2005) 26.

268 As above.

269 Welch (2001) 54.

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

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

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

271 Takougang (2002) 79.

272 Armah (1965) 47.

273 Takougang (2002)181.

274 Naldi (1989) 6.

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

276 Sexana (2004) 180.

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

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

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

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

278 Mugwana (2003) 22.

279 Mugwana (2003) 33.

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

281 Ankumah (1996) 136.

282 Welch (2001) 55.

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

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

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

283 Naldi (1989) 180.

284 As above.

285 Naldi (1989)110

286 Mugwayna (2003) 45.

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

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

287 Welch (2001) 53.

288 Naldi (1989)111.

289 Mugwayna (2003) 9.

290 Mugwayna (2003) 6.

291 Mugwayna (2003) 6.

292 Mugwayna (2003) 53.

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

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

2.7.2 Regional integration and human rights

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

293 Sexana (2004) 181.

294 Murithi (2005) 34.

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

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

297 Bischoff (2004) 130.

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

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

298 Takougang (2002) 181-182.

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

300 Bischoff (2004) 141.

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

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

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

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

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

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

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

302 As above.

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

304 Hazelwood (1967) 6.

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

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

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

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

305 Bach (1999) 23.

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

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

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

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

2.8.1 Norm creating instruments in the African human rights system

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

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

308 Lloyd and Murray (2004) 164.

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

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

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

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

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

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

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

313 Heyns & Killander (2006) 512.

314 Lawson (2002) 162.

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

316 See eg Viljoen (2007) 500.

2.8.2 Mechanisms and institutions for human rights realisation

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

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

317 Viljoen (2007) 179.

318 Viljoen (2007) 181 – 183.

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

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

2.8.2.1 The African Commission

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

320 See Viljoen (2007) 225.

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

322 Viljoen (2007) 217.

323 Lloyd & Murray (2004) 166.

324 Lloyd & Murray 185.

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

2.8.2.2 The African Children's Rights Committee

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

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

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

327 See Viljoen (2007) 220.

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

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

2.8.2.3 The African Court on Human and Peoples' Rights

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

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

329 Viljoen (2007) 222 - 224.

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

331 Art 3 of the African Human Rights Court Protocol.

332 Art 27 of the African Human Rights Court Protocol.

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

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

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

333 See Viljoen (2007) 225.

334 Heyns & Killander (2006) 539.

335 As above.

336 As above.

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

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

337 Lloyd & Murray (2004) 185.

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

2.9 Interim conclusion

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

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

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

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

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

338 Hazelwood (1967) 6.

339 Nye (1965) 86.

340 Meltzer (1984) 210 - 212.

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

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

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

341 Caporaso (1972) 6.

342 Lindberg in Lindberg & Scheingold (1971) 55.

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



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



Chapter Three

ECOWAS: A new vehicle for human rights realisation in West Africa?

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- 3.2 Towards integration in West African
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 - 3.7.1 Relation with national systems for human rights realisation
 - 3.7.2 Relation with African (continental) human rights system
 - 3.7.3 Relation with the global human rights system
- 3.8 Interim conclusion

3.1 Introduction

From the discussion in the previous chapter, it can safely be concluded that international organisations founded for economic purposes have legal and theoretical bases for engaging in non-economic activities such as the realisation of human rights in pursuit of their original objectives. This can occur at any stage of the organisation's existence but needs to be expressly or impliedly authorised by the member states through the instrumentality of residual treaty making powers or the decision and lawmaking processes of the organisation's organs and institutions. Thus, this chapter explores whether the necessary legal foundation exists in ECOWAS to sustain a contention that human rights can be validly realised under the framework of the organisation. In order to achieve this, the chapter undertakes an analysis of the treaties, instruments, documents and mandates of ECOWAS institutions to illustrate how human rights work has seeped into the agenda of the organisation.

Showing that there is an ECOWAS human rights regime that results from the considered policy decisions of the member states and is built on the regular legal framework of the organisation, this chapter aims to prove that the regime is legitimate and within the purview of organisational objectives. The chapter will also consider the impact of the Community's human rights regime on the legal relationship between ECOWAS and its member states on the one hand, and ECOWAS and the AU on the other hand. Linked to this latter aim, an attempt is made to determine the place of the emerging regime in the existing human rights architecture in the West African region.

There are eight sections in this chapter. After the introduction, a brief history of ECOWAS is given, followed by a section defining how human rights in ECOWAS is to be understood in the context of this study. The legal framework of the organisation is then analysed to show the sources from which human rights are derived in the regime and to determine how these impact on the international obligations of member states. The main institutions of the organisation are also analysed in order to extract the human rights content in their mandates. This is followed by a section that considers whether ECOWAS qualifies as an international human rights institution. The interim conclusion of the chapter is preceded by an evaluation of the place of an ECOWAS human rights regime in the existing African human rights architecture.

3.2 Towards integration in West African

It is generally agreed that integration efforts in West Africa date back to the 19th century when the idea of West African nationalism was prevalent and it was believed in some quarters that the creation of a unified West African state was vital for the emancipation of the African continent.³⁴⁴ However, when concrete attempts at integration began to take shape, it was on the basis of economic objectives rather than political unification. It is evident in the literature that first concrete attempts at subregional integration in West Africa related to a customs union in 1959 following the formation of a '*Union Douanière de L'Afrique de l'Ouest*' (UDAO) by seven former French colonies.³⁴⁵ After several failed attempts on the part of Francophone West African states as well as unsuccessful wider efforts supported by the United Nations Economic Commission for Africa (ECA), in the 1970s consolidation of subregional cooperation began to take root across linguistic barriers.³⁴⁶

In 1975, when the original Treaty founding ECOWAS was signed, the issues of convergence were essentially economic. Meeting in Lagos, Nigeria in May 1975, 15 West African heads of state and government adopted the 1975 ECOWAS Treaty with the aim of promoting cooperation and development in all fields of economic activity for the purpose of raising the standard of living of West African peoples, increase and maintain economic stability, foster closer relations among member states and contribute to the progress and development of the African continent.³⁴⁷ Decades after the adoption of the original ECOWAS Treaty and after the conclusion of several protocols aimed at actualising the lofty goals of integration, it is recorded in the literature that the objectives of ECOWAS did not appear any closer.³⁴⁸ Faced with the challenge of pursuing economic integration in the midst of political instability in the region, often involving armed conflicts, ECOWAS was compelled to veer into the

³⁴⁴ Early political actors like JA Beale Horton, Edward Blyden and Casely Hayford are identified as prime movers of the project of West African unification. See generally, Langley (1973); Asante (1986) and EM Edi (2007) *Globalization and Politics in the Economic Community of West African States*.

³⁴⁵ Edi (2007) 27.

³⁴⁶ Edi (2007) 28 records that President Eyadema of Togo (Francophone) and General Y Gowon of Nigeria (Anglophone) were instrumental to the successful emergence of ECOWAS.

³⁴⁷ Art 2(1) of the 1975 ECOWAS Treaty. The founding members of ECOWAS are Benin, Burkina Faso, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone and Togo. Cape Verde subsequently acceded to the ECOWAS Treaty of 1975 bringing membership to 16. In 2000, Mauritania withdrew its membership, bringing membership of the organisation to 15 once again.

³⁴⁸ Eg see generally Robert (2005).

unpredictable field of politics and security.³⁴⁹ These and other events led to the setting up of a committee to re-examine the foundations of ECOWAS.³⁵⁰ The result of the various activities that took place in the late 1980s and the early 1990s was the drafting and subsequent adoption of a revised ECOWAS Treaty in 1993.³⁵¹

Some of the high points of the 1993 Treaty revision included the expansion of the fundamental principles upon which integration was hinged and the structuring of institutional framework, all with a view to enhance integration, bring integration closer to West African peoples and to meet the demands of a changing international environment.³⁵² Theoretically, it can be argued that the 1993 treaty revision consolidated spill-over in the ECOWAS Community, resulting in more involvement in political issues. This in turn, it can be argued further, opened space for ECOWAS to pay greater attention to the question of human rights. This latter point is important considering that economic integration and greater political activities had brought ECOWAS into the field of human rights as a human rights actor. In reaction to its appearance in the field of human rights as an actor, ECOWAS seemed to have also gradually emerged as an arena for human rights realisation, subtly empowering some of its institutions in this regard. However, much of these were done in a haphazard and unplanned manner.

3.3 The idea of human rights in ECOWAS

Human rights as a term is dynamic. Finding the context in which human rights is understood in a given setting enhances an understanding of its significance in the overall scheme of things.³⁵³ No deeply philosophical enquiry into the meaning of human rights is intended to be engaged here, but it is necessary to identify how ‘human rights’ is to be understood when it is discussed in the context of ECOWAS, as

³⁴⁹ The intervention of the ECOWAS Monitoring Group (ECOMOG) in Liberia and Sierra Leone in the late 1980s and the early 1990s illustrates this trend. See generally F Olonsakin and EK Aning, ‘humanitarian intervention and human rights: The contradictions in ECOWAS’ (1999) 3 *The International Journal of Human Rights* 17

³⁵⁰ In 1992, a Committee of Eminent Persons was appointed to review the 1975 ECOWAS Treaty. The report of the Committee is available at the ECOWAS Commission Abuja (and on file with this writer).

³⁵¹ The ECOWAS Revised Treaty was signed in Cotonou, Benin on 24 July 1993 and entered into force on 23 August 1995.

³⁵² See the final report of the ECOWAS Committee of Eminent Persons (1992).

³⁵³ JJ Shestack, ‘The Philosophic foundations of human rights’ (1998) 20 *Human Rights Quarterly* 201

this will facilitate the task of locating and analysing provisions that touch on human rights in the mass of documents that make up the ECOWAS statutory framework.

3.3.1 Traditional human rights

The first possible understanding of human rights under the ECOWAS legal framework is in terms of the traditional conception of human rights as rights that accrue to human beings on the basis of humanity. In this sense, despite recent efforts to reinforce the interrelatedness and indivisibility of human rights, it is common to classify human rights in three broad categories of first, second and third generation rights.³⁵⁴ Further to this generational classification, it is possible to observe some dichotomy in the recognition of rights in different regional human rights system.³⁵⁵ However, considering that ECOWAS does not have a catalogue of human rights, the understanding of human rights under its legal framework is based on an interdependent and indivisible conception of rights on the basis of the human rights instruments adopted by reference. These references appear in the constitutive instruments and other documents of the Community.³⁵⁶ In this regard, the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights which are central in the ECOWAS definition of rights are significant in their guarantee of human rights across generational divides.³⁵⁷ Thus, human rights under ECOWAS would be understood as comprising of all generations of rights directly recognised or by reference in Community instruments and documents. The right to development occupies a special place in the context of ECOWAS to the extent that the right is a conglomerate of all socio-economic rights that are connected with the Community's objective to improve the standard of living of its peoples.

3.3.2 Democracy and good governance

It has to be conceded that ordinarily democracy and good governance do not appear as 'human rights' in international human rights instruments. In analysing the connection

³⁵⁴ K Vasak is credited for this generational classification of rights.

³⁵⁵ It is common to credit the African regional human rights system with innovative protection of the three generations of rights in a single binding instrument while different generations of rights enjoy varying degree of force in the European and Inter-American systems respectively.

³⁵⁶ See eg the preamble to the 1993 revised ECOWAS Treaty.

³⁵⁷ Nearly all the cases already decided by the ECOWAS Court were brought on the basis of either the African Charter or the UDHR.

between democracy and human rights, Tomuschat notes that despite the inclusion of attributes of democratic participation in the UDHR and the CCPR, the word ‘democracy’ itself is conspicuously avoided.³⁵⁸ However, even at the universal level, the link between democratic governance and human rights has gained recognition to the extent that the defunct Human Rights Commission stressed in 1999, that ‘democracy fosters the full realisation of all human rights and vice versa’.³⁵⁹ The link between good governance and human rights is even less direct. However, starting with the attention given to the concept of good governance by the World Bank in 1989, the concept has acquired an increasing significance in the field of human rights.³⁶⁰ With the clarification of the good governance by the defunct Human Rights Commission,³⁶¹ good governance and human rights have been described as mutually reinforcing.³⁶² On the basis of these links between democracy, good governance and human rights, it becomes easy to situate an ECOWAS understanding of human rights that envelopes these concepts. In this context, certain protocols of the ECOWAS Community promote a definition of human rights that encompasses these concepts. Perhaps the best example of this link can be found in the abundance of reference to human rights contained in the ECOWAS protocol relating to democracy and governance and interwoven use of aspects of democracy, governance and human rights in the same document.³⁶³ Such a comprehensive perception that incorporates democracy and governance thus represents the second understanding of the concept of human rights under the ECOWAS legal framework.

3.3.3 Peace, security and humanitarian law

Peace, security and humanitarian law are other concepts that do not fall within the common definition or understanding of human rights. Whereas peace and security fall within the realm of conflict studies, humanitarian law concerns the protection of vulnerable people and property in the midst of armed conflict. Thus, while human rights provide guarantees and safeguards at all times, humanitarian law apply

³⁵⁸ C Tomuschat (2003) *Human Rights: Between idealism and realism* 52 – 53.

³⁵⁹ See the observations of the Human Rights Commission, Spring 1999 meeting.

³⁶⁰ World Bank, *Sub-Saharan Africa: from crisis to sustainable growth*, Washington DC, World Bank 1999, cited by J Hatchard *et al*, (2004) *Comparative Constitutionalism and Good Governance in the Commonwealth 2*.

³⁶¹ Resolution 2006/64.

³⁶² Good governance and human rights (available at <http://www2.ohchr.org/english/issues/development/governance/index.htm>).

³⁶³ Protocol A/SPI/12/01 on Democracy and Good Governance.

essentially in the outbreak of armed conflict.³⁶⁴ Peace and security on their part connect to human rights to the extent that violent conflicts are often preceded by violations of human rights and conflict provides a fertile ground for massive violation of rights. Further, protection of rights constitutes a fundamental aspect of peace-building after armed conflicts. In fact, it has been suggested that the cross-cutting effect of conflict on human rights illustrates the indivisibility and interdependence of human rights.³⁶⁵ Thus, the 1993 World Conference on Human Rights, for example, affirms that there is a ‘crucial connection between international peace and security and the rule of law and human rights’ all within the context of democratisation and development.³⁶⁶

In view of the different conditions in which they operate, combining peace, security and humanitarian law on the one hand and human rights on the other hand ensures that rights are protected in every situation that a state finds itself. In the context of West Africa with its notorious armed conflicts,³⁶⁷ a broad understanding of human rights that encourages complementary application of aspects of humanitarian law as well as guarantees of peace and security appears suitable for the purpose of creating a proper environment for integration. In this regard, the ECOWAS Protocol relating to conflict prevention, for example, expresses a preambular connection between rights, good governance and conflicts,³⁶⁸ and recognises the ‘protection of fundamental human rights and freedoms and the rules of international humanitarian laws’ as principles for the realisation of the objectives of the protocol.³⁶⁹ Hence, these constitute the third understanding of human rights within the legal framework of the ECOWAS Community.

3.4 The sources of rights in the ECOWAS framework

As with other branches of law, the source of human rights law can have several meanings. It can generally refer to the formal source of rights, in this sense, meaning

³⁶⁴ See generally, FF Martin *et al* (2006) *International Human Rights and Humanitarian Law*.

³⁶⁵ ‘Human Rights and Conflicts’- United Nation policy document available at <http://www.un.org/rights/HRToday/hrcnfl.htm> (accessed 19 November 2008).

³⁶⁶ As above.

³⁶⁷ Apart from the Liberian and Sierra Leonean wars, there have been other conflicts in Cote d’Ivoire and internal conflicts in other African states like Nigeria.

³⁶⁸ Paras 8, 11 and 13 of the Protocol relating to the Mechanism for Conflict Prevention.

³⁶⁹ Art 2 of the Conflict Prevention Protocol.

the source of validity or force of human rights rules in the ECOWAS framework. It can also mean the material source of human rights, in which sense it would relate to tangible source from which the matter of rules can be derived.³⁷⁰ In terms of formal source, on the basis of the principles governing international law of institutions, it is arguable that the sovereignty of converging states as exercised by the ECOWAS Authority of Heads of State and Government is the source of force and validity of human rights in ECOWAS Community law. However, the material sources of human rights in ECOWAS are as dispersed as there are sources of general law in the ECOWAS Community.

Writing in 2001, Ajulo divided the sources of law in ECOWAS into two main categories of primary and secondary sources. He identified the ECOWAS Treaties, the protocols and conventions, treaties with third countries, legislative products of the ECOWAS parliament and other sources mentioned by the ECOWAS Treaty as primary sources of law in ECOWAS. He further classified subordinate legislations of ECOWAS Community organs, customary international law, general principles of law, judicial decisions and ‘ECOWAS internal law’ as secondary principles of ECOWAS law.³⁷¹

Ajulo’s enumeration of the sources of ECOWAS law generally tallies with the body of laws that the ECOWAS Community Court of Justice (ECCJ) is empowered to apply.³⁷² The ECCJ itself has taken the position that the material sources of law relevant for the determination of rights under ECOWAS law are ‘the Revised Treaty, the Protocols, Conventions and subsidiary legal instruments adopted by the highest authorities of ECOWAS’.³⁷³ Thus, it is in these documents of the ECOWAS Community that the applicable rules protecting human rights in the Community framework would be found.

³⁷⁰ GW Paton (1972) *Jurisprudence* (4th ed) 188 – 189 cited by SB Ajulo, ‘Sources of law in ECOWAS’ (2001) 45 *Journal of African Law* 77.

³⁷¹ Ajulo (2001) 86.

³⁷² Art 19(1) of Protocol A/P.1/7/91 On the Community Court of Justice (1991 ECOWAS Protocol) empowers the ECCJ to examine disputes in accordance with the Treaty, the Court’s rules of procedure and by application of the body of laws contained in Art 38 of the Statute of the International Court of Justice.

³⁷³ See *Keita v Mali*, Unreported Suit No. ECW/CCJ/APP/05/06 (Judgment No. ECW/CCJ/APP/03/07 on 22 March 2007) para 27.

3.4.1 The 1993 revised ECOWAS Treaty

The 1993 revised Treaty of ECOWAS can be referred to as the *Constitution* of the Community and to some extent, its provisions carry some weight that determines the power of the organs and institutions of the ECOWAS Community. The first express mention of human rights is contained in the preamble to the revised Treaty where the converging states alluded to the African Charter on Human and Peoples' Rights and the Declaration of Political Principles of ECOWAS as some of the background materials considered in the drafting of the revised Treaty.³⁷⁴ It is arguable that the allusion to these documents containing human rights by itself does not confer any particular rights on any body. However, read together with other provisions of the Treaty, it is possible to find some significance in the preambular mention.

Despite the acknowledgement of instruments protecting human rights in the preamble, the revised Treaty does not list the protection and promotion of human rights as part of the aims and objectives of the ECOWAS Community. However, in setting out the means for implementation of Community objectives, the revised Treaty sets out economic freedoms such as free movement of persons, goods, service and capital and the right of residence and establishment.³⁷⁵ The provisions on economic freedoms in article 3 are not couched in clear rights language and the guarantee of these freedoms may be as a result of their obvious instrumental value for the achievement of a common market. Yet it cannot also be denied that the freedoms have unambiguous links with traditional human rights such as the right to freedom of movement. This appreciation of Treaty economic freedoms from a human rights perspective is supported by further Treaty provisions reinforcing the freedoms, this time in the form of rights of ECOWAS Community citizens. Thus, article 59 of the revised Treaty guarantees the 'right of entry, residence and establishment' of 'citizens of the Community' and an undertaking by ECOWAS member states to recognise 'these rights of Community citizens'. There is therefore evidence of an intention to grant rights, albeit couched as economic freedoms.

³⁷⁴ Para 4 of the Preamble. The significance in mentioning the Declaration of Political Principles is that the Declaration itself makes ample reference to human rights protection.

³⁷⁵ Art 3(2)(d)(iii) of the 1993 revised ECOWAS Treaty.

Certain other significant human rights provisions in the revised Treaty are contained in the fundamental principles of ECOWAS expressed in article 4 of the Treaty. In article 4, the ECOWAS member states affirmed and declared adherence to principles such as the maintenance of regional peace, stability and security,³⁷⁶ accountability, economic and social justice and popular participation in development,³⁷⁷ and promotion and consolidation of a democratic system of governance in member states.³⁷⁸ Considering the opinion already expressed that the understanding of human rights in the context of ECOWAS includes democracy and good governance, as well as peace, security and humanitarian law, these provisions are vital in demonstrating the significance of human rights in the constitutional framework of the Community. The more direct statement of the place of human rights in these provisions is however contained in the expression that ‘recognition, protection and promotion of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’ constitutes a fundamental principle of the ECOWAS Community.

The significance of these provisions can best be appreciated by comprehending principles as ‘belief of fact, causation and rectitude’³⁷⁹ that are ‘modalities to which an organisation must adjust when attaining its purpose’.³⁸⁰ From this point of view, even though it has been contended that principles do not impose positive obligations on an international organisation since they are not ends in themselves,³⁸¹ such statement of principles could take on a special significance where they are vital for the realisation of organisational objectives. To that extent, the provisions of article 4 of the revised Treaty should amount to something and therefore should serve as an important foundation for the recognition, promotion and protection of human rights under the ECOWAS legal framework. This position apparently has judicial support since the ECCJ relied on it (read together with article 19 of the 1991 ECOWAS Court

³⁷⁶ Art 4(e) of the revised Treaty.

³⁷⁷ Art 4(h) of the revised Treaty.

³⁷⁸ Art 4(j) of the revised Treaty.

³⁷⁹ SD Krasner, ‘Structural causes and regime consequences as intervening variables’ (1982) 36 *International Organisations* No. 2, 185, 186.

³⁸⁰ M Rama-Montaldo, ‘International legal personality and implied powers of international organisations’ (1970) 44 *British Yearbook of International Law* 111, 123.

³⁸¹ Rama-Montaldo (1970) 154.

Protocol) as a basis for the application of African Charter guaranteed rights in cases brought before the Court.³⁸²

In addition to the provisions already discussed, the revised Treaty records an agreement by ECOWAS member states who are signatories to the Declaration of Political Principles and the African Charter, to cooperate for the purpose of realising the objectives of those instruments.³⁸³ This provision takes on a special significance because all member states of ECOWAS have ratified the African Charter and are signatories to the Declaration on Political Principles. In other words, all member states agree to cooperate under the auspices of ECOWAS to work towards the promotion and protection of human rights. Further, albeit with lesser force, the revised Treaty also contains an undertaking by ECOWAS member states to maintain freedom of access to information and to ensure respect for the rights of journalists.³⁸⁴ It cannot be contested that the 1993 revised ECOWAS Treaty is neither a fountain of human rights nor a catalogue of human rights. It may not also measure up as a human rights instrument in comparison to certain other more popular instruments. However, it contains adequate reference to human rights in ways similar to the constitutive instruments of other international organisation such as the United Nations Charter (UN Charter), the Charter of the defunct OAU and the Constitutive Act of the AU.

If legal foundation for the allocation of rights and obligations in the field of human rights could successfully be placed on the constitutive documents of these enumerated international organisations, it is submitted that the provisions identified in the revised ECOWAS Treaty would sufficiently sustain claims for, and institutional competence in human rights under the ECOWAS Community legal framework. Perhaps, more importantly, these provisions indicate that human rights realisation is not forbidden by the member states in the Treaty. Instead, the fact that most of the human rights provisions were added in the course of treaty amendment suggests that there is recognition by member states that economic objectives can be better achieved in an environment of respect for human rights.

³⁸² *Ugokwe v Nigeria*, Unreported Suit No ECW/CCJ/APP/02/05, para 29.

³⁸³ Art 56(2) of the revised ECOWAS Treaty.

³⁸⁴ Art 66 (2)(a)(b) of the revised Treaty.

3.4.2 Conventions and Protocols of the Community

Prior to the introduction of a new legislative regime in the ECOWAS Community, law-making was mostly by way of conventions and protocols.³⁸⁵ Whereas conventions were made as autonomous agreements between the member states, protocols were essentially employed to supplement, amend or extend the scope of the main constitutive treaty of the organisation. Consequently, the most elaborate provisions relating to human rights within the ECOWAS legal framework are contained in the protocols and supplementary protocols adopted for the purpose of extending the scope of the Community. The conventions on their part have generally been used by member states to agree on issues directly related to economic integration.³⁸⁶ In other words, protocols have been the medium for spill-over from purely economic issues into areas such as human rights.

The first traces of deference to human rights in ECOWAS can be found in protocols made pursuant to the 1975 Treaty even though the Treaty itself lacked any clear reference to human rights. However, these were basically in the realm of economic freedoms. Two categories of rights are evident in the body of protocols initially adopted by the ECOWAS Community. First, there are the economic freedoms which were couched in rights language and these were usually the subject matter of the protocols themselves.³⁸⁷ Subsequently, the protocols added traditional human rights guarantees to either supplement or regulate the enjoyment of the economic freedoms granted in these protocols. In this regard, the protocols provide that citizens are entitled to respect of their ‘fundamental human rights’ including property rights in situations where member states derogate from guaranteed economic freedoms.³⁸⁸ Fundamental human rights are defined in these protocols either as rights recognised in the UDHR,³⁸⁹ or as ‘the rights granted to any migrant worker by ...the Conventions of

³⁸⁵ Between 2006 and 2007, a new legal regime was introduced in ECOWAS to replace the regime that required treaty making for institutional governance.

³⁸⁶ See eg the 1982 Convention Regulating Interstate road Transportation between ECOWAS Member states.

³⁸⁷ Art 2 of Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment for instance provides for a right of ECOWAS Community citizens to enter, reside and establish in any member state. These rights are arguably for economic purposes.

³⁸⁸ In art 3 of the Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Rights of Residence and Establishment (Protocol A/SP.1/7/85), the term fundamental human rights appear at least five times. The art protects the rights of community citizens facing expulsion for illegal or clandestine immigration.

³⁸⁹ Art 1 of Protocol A/SP.1/7/85.

the International Labour Organisation ...on the protection of migrant workers'.³⁹⁰ The rights contained in this first set of protocols can generally be perceived as instrumental rights in the sense that they accrue to citizens actively engaged in economic activities (legal or illegal) in line with the goal of a common market.

The second set of protocols that emerge as sources of substantive rights in the ECOWAS framework are those adopted in furtherance of non-economic activities after spill-over into the political arena occurred in the ECOWAS Community. The two most important protocols in this category are the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (Conflict Management Protocol),³⁹¹ and the Protocol A/SP/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Democracy Protocol).³⁹² Both of these protocols allude to democratic governance and respect for human rights in the African Charter and the UDHR as principles fundamental to the implementation of set objectives and thus provide added impetus for the use of these instruments in the ECOWAS Community law.³⁹³ In addition, the Conflict Management Protocol creates rights and duties around the areas of peace, security and humanitarian law as linked to human rights. Also addressed are issues of ECOWAS competence on refugees, internally displaced persons and the question of child soldiers.³⁹⁴ The Democracy Protocol basically creates rights and duties from the angle of democracy and good governance but provides guarantees of women's rights,³⁹⁵ the rights of children,³⁹⁶ and rights protecting dignity of the person.³⁹⁷ The Democracy Protocol also contains provisions that oblige the

³⁹⁰ See art 1 of the Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (Protocol A/SP.1/7/86) and art 1 of the Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment (Protocol A/SP.2/5/90).

³⁹¹ Adopted on 10 December 1999 and temporarily entered into force on the same day.

³⁹² Adopted on 21 December 2001 and entered into force in 2005.

³⁹³ Art 2 of the Conflict Management Protocol and art 1(h) of the Democracy Protocol.

³⁹⁴ See arts 25, 30, 31, 40, 42, 44 and 45 of the Conflict Management Protocol.

³⁹⁵ Arts 30(5) and 40 of the Democracy Protocol.

³⁹⁶ Art 41 of the Democracy Protocol.

³⁹⁷ Art 22 of the Democracy Protocol.

establishment of national and Community institutions for the protection of human rights.³⁹⁸

Clearly, these protocols do not have any direct link to economic integration or the establishment of a common market for ECOWAS. However, it cannot be denied that the maintenance of political stability and the avoidance of conflict are essential for the pursuit of integration. The provisions in the protocols would therefore represent an acknowledgment by member states that respect for human rights was essential for building a conducive environment for integration. Whatever the motivation may have been, these protocols are sources of rights in the ECOWAS Community. It may be added that certain provisions of the Supplementary Protocol on the ECCJ also constitute a source of rights to the extent that it provides access to the Court for individuals who have need to seek judicial protection of their rights.³⁹⁹ An important point to take into account is that the adoption of protocols and conventions is an exercise of the sovereign right to make treaties. Thus, the human rights content in these instruments could be read as an agreement by member states to cede some part of their sovereignty in favour of human rights scrutiny under the ECOWAS platform.

3.4.3 Subsidiary legislation, declarations and other ‘soft law instruments’

A third source of human rights law in the ECOWAS legal framework is the collection of laws and other legal materials that can liberally be grouped under the class of ECOWAS subsidiary legislation. Under this omnibus title, it would be necessary to separate documents into binding and non-binding subheadings. This is necessitated by the fact that while they can all generally be classified as subsidiary legislations of the ECOWAS Community and therefore have the common quality of being direct products of the Community’s own legislative process, the legal effect or consequences attached to some documents are higher than others.

³⁹⁸ See eg, art 35 of the Democracy Protocol requires states to establish ‘independent national institutions to promote and protect human rights’ and seems to establish a human rights reporting system within the ECOWAS framework. Art 39 of the Protocol on its part prepared the ground for the expansion of the jurisdiction of the ECCJ to the area of human rights.

³⁹⁹ See *Ukor v Laleye*, Unreported Suit No. ECW/CCJ/APP/01/04, para 20 where the ECCJ took the view that to the extent that it provides the right of access to the ECCJ to individuals, the 2005 Supplementary Protocol is substantive law.

In 2006, the revised ECOWAS Treaty was amended by protocol to install a new legal regime for the Community.⁴⁰⁰ Under the new legal regime, legislative instruments of the ECOWAS Authority of Heads of State and Government are to be known as Supplementary Acts and shall be annexed to the Treaty. The ECOWAS Council of Ministers is also empowered by the amendment to enact regulations and issue Directives and Decisions.⁴⁰¹ Supplementary Acts, Regulations, Directives and Decisions of ECOWAS therefore replace protocols and conventions as legislative instruments for the pursuit of integration in the Community. Accordingly, Supplementary Acts are binding on ECOWAS Community institutions and member states while Regulations are binding and directly applicable in member states. Directives are binding on member states in terms of the objectives intended but member states are given the freedom to decide on the best strategies for the realisation of objectives laid out in the Directives. Decisions are binding on all those designated in the instrument.⁴⁰² The ECOWAS Commission is also empowered to adopt Rules for the purpose of executing the Acts of the Council and these Rules have the same legal quality as the instrument to be executed.⁴⁰³ In this regard, the ECOWAS Commission also has some legislative powers.

All categories of ECOWAS instruments would generally be applied for the purpose of implementing the economic integration objectives of the ECOWAS Community. However, where they contain human rights guarantees, such guarantees are effective and applicable against the duty bearers identified in the instrument. Thus, for example, in article 21 of the Supplementary Protocol Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS,⁴⁰⁴ member states are obligated to ‘provide for high levels of labour and human rights protection approximate to regional and international treaties’. Insofar as they are intended by member states to be binding and directly applicable in national territories, human rights provisions in these legislations should carry the same force that economic legislations carry. Thus, it is submitted that they signify an agreement by member states to also cede aspects of their sovereignty in favour of the Community in relation

⁴⁰⁰ Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty (Supplementary Protocol A/SP.1/06/06).

⁴⁰¹ See the new art 9 introduced by art 2 of Supplementary Protocol A/SP.1/06/06.

⁴⁰² As above.

⁴⁰³ New art 9(2) introduced in art 2 of the Supplementary Protocol A/SP.1/06/06.

⁴⁰⁴ A/SA.3/12/08 enacted by the ECOWAS Authority on 19 December 2008 at Abuja, Nigeria.

to subject matters of the legislations. As this regime was adopted to avoid the constitutional obstacles associated with treaty making, there is the promise of a better and easier mode of standard-setting and implementation.

Apart from the binding legislative powers outlined above, the new legal regime of the ECOWAS Community empowers the ECOWAS Council of Ministers and the ECOWAS Commission respectively, to ‘formulate’ non-binding Recommendations and Opinions.⁴⁰⁵ In a similar context, the ECOWAS Community Parliament is empowered to adopt non-binding ‘Resolutions of Parliament’ in conformity with the Treaty and other legal texts of general application to institutions of the ECOWAS Community. These resolutions of the Parliament would be forwarded to decision-making bodies of the ECOWAS Community for appropriate and further action.⁴⁰⁶ Together with Declarations of the Community, Recommendations, Opinions and Resolutions form the category of non.-binding sources of law in the ECOWAS legal framework. Considering that they ordinarily do not impose binding legal obligations even though they may appear to confer rights, these instruments can be generally seen as ‘soft-law’ in the ECOWAS Community framework.⁴⁰⁷

As soft law or in some cases as ‘non-binding treaties’,⁴⁰⁸ these latter subsidiary instruments of the ECOWAS Community often contain rules of conduct that regulate member state conduct without the rigidity of treaties or other binding subsidiary legislation. Consequently, the statements of conduct contained in them may create state obligations of a voluntary nature in the field of human rights without attracting the usual international law sanctions or reactions in the event of a breach.⁴⁰⁹ Thus, the value of instruments of this nature lies in the possibility of their usage either as

⁴⁰⁵ As above.

⁴⁰⁶ New art 16(3) of the Protocol of the ECOWAS Parliament introduced by art 3 of Supplementary Protocol A/SP.3/06/06 Amending Protocol A/P.2/8/94 Relating to the Community Parliament (Supplementary Protocol A/SP.3/06/06). It has to be noted however that by art 4 of Supplementary Protocol A/SP.3/06/06, the powers of the ECOWAS Parliament would be progressively enhanced to co-decision making in yet-to-be defined areas.

⁴⁰⁷ I have used the term ‘soft-law’ here with full consciousness of the controversies around its acceptance as a ‘source of international law’. See CM Chinkin, ‘The challenge of soft law: development and change in international law’ (1989) 38 *International and Comparative Law Quarterly* 850, J Klabbers, ‘The redundancy of soft law’ (1996) 65 *Nordic Journal of International Law* 167 and H Hillgenberg ‘A fresh look at soft law’ (1999) 3 *European Journal of International Law* 499. All of these commentators seem to doubt the relevance of soft law as a source of international law.

⁴⁰⁸ Hillgenberg (1999) 500.

⁴⁰⁹ As argued in a general context by Hillgenberg (1999) 515.

interpretative guides⁴¹⁰ or as tools of information and education ‘suited to non-judicial means of dispute settlement’.⁴¹¹ In the very best of situations, soft law documents could even transform into ‘hard law’ by legislative enactment.⁴¹² The ECOWAS Declaration on Political Principles,⁴¹³ the Accra Declaration on War-Affected Children in West Africa (Accra Declaration),⁴¹⁴ and the Code of Conduct for Armed Forces and Security Services of West Africa⁴¹⁵ are examples of such soft law instruments containing state obligations in the area of human rights.

The Declaration on Political Principles it would be observed, contains the initial commitment by ECOWAS member states to ‘respect human rights and fundamental freedoms in all their plenitude’.⁴¹⁶ The Declaration was subsequently referred to in the Protocol on Conflict Prevention. The Accra Declaration also contains provisions expressing commitment to protection of the rights of children in conflict situations while the Armed Forces Code of Conduct contains guide for military conduct ‘in accordance with the relevant provisions of international humanitarian law’ and ‘respect for human rights’. While these may not avail individuals opportunities for judicial implementation of human rights, they remain useful for non-judicial demand and implementation of rights. In the absence of human rights catalogues and against the background of a dearth in binding instruments with adequate human rights content in the ECOWAS legal framework, these soft law instruments should carry greater significance for the protection of human rights in the Community. As non-binding instruments, their potential for conflict with existing mechanisms should be lower.

⁴¹⁰ Klabbers (1996) 177.

⁴¹¹ Chinkin (1989) 862.

⁴¹² Chinkin (1989) 858.

⁴¹³ Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States. The view has been expressed that ‘integration’ of this Declaration in the revised ECOWAS Treaty has made the Declaration binding. See Justice T el Mansour ‘The Relationship Between the ECOWAS Court of Justice and the Future African Court of Human and Peoples’ Rights’ undated paper presented by the former Vice President of the ECOWAS Court at a forum organized by the African Court Coalition (available at http://africancourtcoalition.org/content_files/files (accessed 10 November 2008)).

⁴¹⁴ Reproduced in (2001) 45 *Journal of African Law* 136 (efforts made in 2008 to locate this document at the ECOWAS Commission were unsuccessful).

⁴¹⁵ See ‘Defence Chiefs Endorse Code of Conduct for Armed Forces, Security Services of West Africa’ online bulletin of the ECOWAS Commission available at <http://news.ecowas.int/pressshow.php?nb=108> (accessed 27/11/1008).

⁴¹⁶ Art 4 of Declaration A/DCL.1/7/91.

A common feature of the sources discussed above is that they are all instruments and documents that result from the actual exercise of law making powers by organs and institutions of ECOWAS. They do not necessarily fall under classification as primary and secondary sources of human rights in the ECOWAS Community. Distinct from the sources already examined are other sources which are not products of direct law making by ECOWAS but are adopted by reference in ECOWAS through the exercise of legitimate law making powers. Some of the sources in this category are universal and regional instruments the making of which ECOWAS member states may have participated in their individual capacities as member states of the legislating organisations. Others are either generally accepted principles to which ECOWAS member states have previously subscribed or instruments which ECOWAS states have independently acceded to. It is in this later category that multilateral human rights instruments that ECOWAS member states had previously committed to in agreement with other non-ECOWAS member states can become applicable.

3.4.4 General principles of law

The entry point for general principles of law as a source of human rights in the ECOWAS legal framework can be found in article 19(1) of the 1991 Protocol of the ECCJ. That provision empowers the ECCJ to apply, in addition to the provisions of the Treaty and the court's Rules of Procedure, 'as necessary, the body of laws as contained in Article 38 of the Statute of the International Court of Justice'. Although it is evident that article 19(1) of the 1991 Protocol was formulated at a time when human rights litigation by individuals was not envisaged, the provisions are applicable even under the current legal regime.

As a source of international law, the term 'general principles of law' has been trailed by controversies especially when taken together with the qualification 'recognised by civilised nations'. Commentators have consistently failed to agree on the exact meaning and content of the term.⁴¹⁷ There are at least two clear interpretations given on the nature of legal principles which may be included under the title of general principles of law. The one view is that they mean principles that 'can be derived from

⁴¹⁷ VD Degan, (1997) *Sources of International Law* 14; I Brownlie, *Principles of public international law* (2003) (6th ed) 16, traces the controversy surrounding general principles of law back to the drafting history of the of the ICJ Statute.

a comparison of the various legal systems of municipal law and the extraction of such principles as appear to be shared by all or a majority of them'.⁴¹⁸ The other view is that in addition to the legal principles shared by municipal legal systems, general principles of law 'applicable directly to international legal relations ...' would also be accommodated.⁴¹⁹ As a result of all the confusion, even the International Court of Justice (ICJ) has not been known to have enthusiastically applied the term in its determination of cases.⁴²⁰ It is against this prevailing confusion that the term 'general principles of law' has been imported into the ECOWAS legal framework.

Notwithstanding the imprecise nature of general principles of law, the ECCJ has referred to it now and again in determining cases relating to alleged violations of human rights under the ECOWAS legal regime. In the case of *Ugokwe v Nigeria*,⁴²¹ the ECCJ relied on general principles of law to sustain the position that ECOWAS was a community based on the rule of law, which in turn allowed for the measurement of member states' actions for compliance with the Community Treaty. The ECCJ also applied general principles of law to base its power to 'protect the rights of an individual in the interim'.⁴²² The ECCJ also resorted to general principles of law in *Lijadu-Oyemade v Executive Secretary of ECOWAS* to state that it has a duty to 'protect the rights of citizens that have been infringed upon or examine the allegation of infringement of such rights'.⁴²³ In *Executive Secretary v Lijadu-Oyemade*, the ECCJ again referred to general principles of law as the source of its power to 'import what entails in member states courts and regional courts in considering and deciding the legal principles that have been accepted and of international repute'.⁴²⁴ On this basis, the ECCJ took the view that in any case before it, the Court 'will look at the substance and not the form by jettisoning the strict adherence to technicality and

⁴¹⁸ H Thirlway, 'The sources of international law' in MD Evans (2003) *International law* 131. This approach seemed to have been followed by the European Court of Justice at the initial stage of the evolution of its human rights jurisdiction.

⁴¹⁹ As above.

⁴²⁰ Brownlie (2003) 17; Thirlway (2003) 131.

⁴²¹ *Ugokwe* case (n 382 above). para 31.

⁴²² AS above. The ECCJ relied on the ICJ case of *Aegean Sea Continental Shelf (Greece v Turkey)* ICJ Reports 1976 in this regard.

⁴²³ Unreported Suit No. ECW/CCJ/APP/01/05, judgment of 10 October 2005, para 79. The Court had earlier in the same case at para 49, taken the position that the grant of provisional measures was a general principle of law. In both situations, it relied on the *Aegean Sea Continental Shelf* case.

⁴²⁴ Unreported Suit No. ECW/CCJ/APP/01/05, judgment of 24 May 2006, para 3.03

doing justice’.⁴²⁵ It would be observed that the ECCJ has not made any attempt to source for rights commonly guaranteed in the national constitutions of member states. Thus, the argument could be made that the understanding of ‘general principles of law’ within the judicial context of ECOWAS (at least) is of principles of law derived from international relations and legal practice.

While the ECCJ may not have relied on general principles of law to base individual rights in favour of applicants, it has used the principles as supporting pillars to strengthen the enjoyment of rights. This is consistent with the way general principles of law have been applied in other judicial or legal systems. Thus, it has been noted that the former Permanent Court of International Justice in its Advisory Opinion of 21 November 1925 concerning the *Mosul* case, invoked the ‘well-known rule that no one can be judge in his own suit’.⁴²⁶ Such general principles can therefore be legitimately applied to sustain demands for human rights in the ECOWAS legal framework, albeit, mostly in a juridical context. To the extent that general principles of law bind states generally without necessarily hinging on express acceptance by the states in question, human rights standards derived from general principles should ordinarily not affect the member states relations with the Community.

3.4.5 The African Charter on Human and Peoples’ Rights

Despite the fact that it is not an exclusive instrument of the ECOWAS Community, the African Charter occupies a distinguished place as a source of rights within the ECOWAS legal framework. As a multilateral treaty, the African Charter equates with the protocols and conventions of ECOWAS in terms of its legal force. It is treated differently here because by its origin, the African Charter falls in Ajulo’s category of ECOWAS member states ‘Treaties with third countries’.⁴²⁷ As an instrument universally ratified by all member states of ECOWAS,⁴²⁸ the African Charter represents what Viljoen has termed ‘the basis of a common regional human rights standard’.⁴²⁹ Although its first appearance by way of reference in the instruments and documents of the ECOWAS Community was only as recently as 1991, the African

⁴²⁵ As above.

⁴²⁶ PCIJ Series B, No. 12, p 32 (cited by Degan (1997) 54.

⁴²⁷ Ajulo (2001) 84.

⁴²⁸ As at December 2008, all member states of ECOWAS were state parties to the African Charter.

⁴²⁹ Viljoen (2007) 500.

Charter has consistently been referred to in the major legislative documents of the ECOWAS Community since then.⁴³⁰ The most important references to the African Charter are however to be found in the 1993 revised ECOWAS Treaty.

As already indicated above, the revised ECOWAS Treaty refers to the African Charter in its preamble, in the statement of fundamental principles,⁴³¹ and in the undertaking to cooperate on political matters.⁴³² In this latter provision, the agreement to ‘cooperate for the purpose of realising the objectives’ of the African Charter holds a special significance since all member states of ECOWAS are parties to the African Charter. In that regard therefore, it is possible to stretch the undertaking by member states of ECOWAS to ‘honour ...obligations under this Treaty’ to cover the objectives of the African Charter.⁴³³ Since ECOWAS member states have previously undertaken obligations under the African Charter, the reference in the ECOWAS Treaty does not impose any new substantive obligation on the states. Apart from the Treaty provisions, reference to the African Charter based rights can be found in the Conflict Management Protocol⁴³⁴ and the Democracy Protocol.⁴³⁵ A consequence of the ample reference to the African Charter in the Treaty and other legislative documents of ECOWAS should be that the pursuit of economic integration and the exercise of peripheral powers by organs and institutions of the ECOWAS Community have to be done, taking into account the rights guaranteed in the African Charter. It would be noticed that the formulation in article 4 of the ECOWAS Treaty gives room for suggesting that the obligation to respect African Charter based rights is incumbent on member states but not on ECOWAS as an organisation or on its organs and institutions.

In spite of the constant reference to the African Charter in the ECOWAS Community legal framework, the 2005 Supplementary Protocol of the ECCJ does not mention the African Charter as the source of the rights to be applied by the Court in the determination of cases alleging violation of human rights. However, the practice and

⁴³⁰ The reference to the African Charter in Declaration A/DCL.1/7/91 is probably the first time the African Charter formally appears in the ECOWAS Community legal framework.

⁴³¹ Art 4 (g) of the revised ECOWAS Treaty.

⁴³² Art 56 (2) of the revised ECOWAS Treaty.

⁴³³ Art 5 (3) of the revised ECOWAS Treaty.

⁴³⁴ Art 2 of the Conflict Management Protocol.

⁴³⁵ Art 4 of the Democracy Protocol.

jurisprudence of the Court demonstrates that the African Charter is perceived by judges and by lawyers appearing before the Court as one of the two main human rights catalogues governing the enjoyment of rights in the ECOWAS framework. In fact, it is the jurisprudence of the ECCJ that lends credence to the observation that the African Charter occupies a distinguished place as a source of rights in the ECOWAS legal framework. The ECCJ has consistently maintained the position that the ‘inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court ... to bring in the application of those rights catalogued in the African Charter’.⁴³⁶ Thus, the African Charter has both legislative and judicial relevance as a source of rights in the ECOWAS Community framework.

To the extent that it stands as a source of rights and obligations in the field of human rights, there are two possible ways of interpreting the African Charter obligations in the ECOWAS framework. The first, as already demonstrated above, is the obligation incumbent on the individual member states of the Community. The other is the obligation on ECOWAS as an institution, especially in situations where its operations independent of the individual states positions the organisation as a human rights actor. It is probably in this latter genre that the significance of universal ratification of the African Charter becomes more relevant. In other words, since all member states of ECOWAS have ratified the African Charter, and there is consistent reference to respect for rights contained in the African Charter as a principle for the pursuit of integration objectives, both the organisation and the member states should remain under Charter obligations as a part of ECOWAS Community obligation. Reference to, and use of the African Charter also reinforces the Community’s place as a building block of the AU/AEC. It is on these foundations that the African Charter stands out as a source of human rights in ECOWAS.

3.4.6 Other relevant instruments of the OAU/AU

Apart from the African Charter, several other human rights instruments or instruments with obvious human rights flavour exist within the framework of the defunct OAU and the AU. These include the OAU Convention Governing the Specific Aspects of

⁴³⁶ For instance, the *Ugokwe* case (n 382 above) at para 29. It has to be noted that the ECCJ has referred to the African Charter in every single case decided by the Court as at November 2008. This has been done without distinction as to the so-called different generations of rights contained in the African Charter.

Refugee Problems in Africa,⁴³⁷ the African Charter on the Rights and Welfare of the Child,⁴³⁸ the OAU Convention on the Prevention and Combating of Terrorism,⁴³⁹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,⁴⁴⁰ the African Convention on Preventing and Combating Corruption⁴⁴¹ and the African Charter on Democracy, Elections and Governance.⁴⁴² While none of these instruments enjoy the sort of express reference that is given to the African Charter within the ECOWAS legal framework, these instruments would fall in Ajulo's category of 'Treaties with third parties' particularly if any of such instruments have received universal ratification by ECOWAS member states. It is possible to suggest that even in the absence of universal ratification by ECOWAS member states, any African human rights instrument ratified by a state can be applied judicially or otherwise against the given state but the challenge would be that it would be difficult to sustain an argument that the obligations contained in such an instrument is owed to all other member states as well. However, where continent wide instruments have been universally ratified by all ECOWAS member states, the obligations in those instruments are owed by each member state to the other, in addition to all other third states to which treaty obligations are owed. The other part of the argument is that it could be a consequence of non-universal ratification by ECOWAS states that an AU instrument would then not be binding on ECOWAS as an institution separate from the treaty obligation of individual states.

In the context of the position taken above, the human rights obligations contained in the AU Constitutive Act represent a good example of a continental document universally ratified by ECOWAS member states, which instrument should impose

⁴³⁷ Adopted in September 1969 and entered into force in 1974. Ratified by all ECOWAS member states.

⁴³⁸ Adopted in July 1990 and entered into force in 1999. This instrument has been ratified by all ECOWAS member states except Guinea Bissau.

⁴³⁹ Adopted in July 1999 and entered into force in 2002. Ten out of 15 member states of ECOWAS have ratified this instrument.

⁴⁴⁰ Adopted in July 2003 and entered into force in 2005. This instrument has also been ratified by ten member states of ECOWAS.

⁴⁴¹ Adopted in July 2003 and entered into force in 2006. Only eight member states of ECOWAS have ratified this instrument.

⁴⁴² Adopted in 2007 and is yet to entered into force. No state has ratified the Charter as at November 2008.

some sort of human rights obligations on ECOWAS member states.⁴⁴³ There is some reference to the African Charter on the Rights and Welfare of the Child (African Child Charter) in at least one document of ECOWAS.⁴⁴⁴ However, this is not sufficient to push an argument that the African Child Charter is an applicable source of rights only by reason of that mention. Further, it would be observed that in the jurisprudence of the ECCJ, African human rights instruments have not been relied upon by lawyers or applied by the Court itself. For example in the *Koraou v Niger* case,⁴⁴⁵ the claim that the applicant was discriminated against on the basis of her gender or sex was hinged on the Convention on the Elimination of All Forms of Discrimination Against Women.⁴⁴⁶

Considering the continent-specific nature of the human rights instruments of the OAU/AU and in view of the fact that ECOWAS member states often take active part in the formulation of the continental human rights standards, it would make sense to rely more on the rights guaranteed in these instruments. On the basis of the argument above on the possible effect of universal ratification of African human rights instrument, it is possible to pursue a course by which, instruments are applicable against member states of ECOWAS to the extent that such member states have ratified those instruments, but no obligation from such instruments accrue against ECOWAS as an organisation since there is no universal ratification by the member states. The important point is, however, that such African human rights instruments are likely sources of rights in the ECOWAS legal framework. To the extent that application on the platform of ECOWAS does not hoist additional obligations above treaty obligations already incurred by member states by reason of their being parties to these continental instruments, the chances of upsetting intra-organisational relations should be slim. However, the possibility of conflict with the jurisdiction with treaty bodies and continental institutions appears stronger in this regard.

⁴⁴³ The principles contained in the OAU Charter (and thus by implication, the AU Constitutive Act) is referred to in the Conflict Management Protocol as some of the principles upon which the protocol is hinged. See art 2 of the Conflict Management Protocol.

⁴⁴⁴ Accra Declaration (n 412 above).

⁴⁴⁵ *Koraou v Niger* (n 71 above).

⁴⁴⁶ The difficulty faced by the lawyers in this case is understandable considering that Niger is not a party to the Protocol on the Rights of Women in Africa.

3.4.7 The United Nations Charter, the Universal Declaration on Human Rights and other relevant global human rights instruments

Another category of sources of human rights in the ECOWAS Community is the global human rights instruments and documents with human rights content, adopted within the framework of the UN. These also fall within the class of ‘Treaties with third parties’. Similar to the AU Constitutive Act, the UN Charter, while not a human rights instrument and consequently not a catalogue of rights, contains certain obligations to respect the rights of individuals.⁴⁴⁷ As noted by some commentators, the UN Charter contains general provisions which have ‘the force of positive international law and create basic duties’ in the field of human rights.⁴⁴⁸ To the extent that all ECOWAS member states are members of the UN and have acceded to the UN Charter, the positive obligation to respect human rights that is found in the UN Charter binds the ECOWAS member states. Along the lines of the argument previously pursued, universal ratification of the UN Charter similarly places a binding obligation on ECOWAS as an international organisation, especially from the perspective of article 103 of the UN Charter. At the very minimum, there is a duty on ECOWAS and its member states to join in cooperation under the UN platform to promote and encourage respect for human rights ‘without distinction as to race, sex, language and religion’.⁴⁴⁹ This effectively guarantees a right against discrimination. The obligation is further expanded to include a duty not to legislate or conclude any treaty whose spirit and contents constitute a gross violation of human rights.⁴⁵⁰ In this limited regard, the UN Charter constitutes a source of human rights in the ECOWAS legal framework.

The UDHR has also become very important as a source of human rights in the ECOWAS Community law system. Although it was adopted by the UN General Assembly as a declaration without a binding legal ‘duty of immediate implementation’,⁴⁵¹ the UDHR was expressed as a ‘common standard of achievement for all peoples and all nations’.⁴⁵² The UDHR has been transformed over the years into various forms of ‘hard law’ either by inclusion in binding instruments or by

⁴⁴⁷ LB Sohn, ‘The human rights law of the Charter’ (1977) 12 *Texas International Law Journal* 129.

⁴⁴⁸ Sohn (1977) 131.

⁴⁴⁹ Art 1 of the UN Charter.

⁴⁵⁰ See Sohn (1977) 132.

⁴⁵¹ Sohn (1977) 132.

⁴⁵² See the preamble to the UDHR, G.A. Res.217A, U.N. Doc. A/810.

application in judicial and other fora as a source of human rights law.⁴⁵³ Consequently, it is common to find writers who hold the opinion that the UDHR now constitutes customary international law and thus binds all states.⁴⁵⁴ Notwithstanding the dispute on the customary law character of the UDHR, it has to be acknowledged that the UDHR or any of its contents can be transformed into binding law by positive enactment. It is apparently in this latter regard that the UDHR has come to have a central position as a source of rights in the ECOWAS Community.

In relation to ECOWAS, the status of the UDHR as a major source of rights and obligations in the field of human rights dates back to the constitutional epoch of the 1975 original ECOWAS Treaty. While the Treaty did not mention the UDHR, most of the protocols made pursuant to (and annexed to) the 1975 ECOWAS Treaty define human rights in terms of the UDHR.⁴⁵⁵ Despite its frequent mention in the protocols adopted under the 1975 Treaty epoch, the UDHR does not feature in the 1993 revised Treaty as one of the instruments on the basis of which respect for human rights could be hinged under the ECOWAS framework. However, the Conflict Management Protocol and the Democracy Protocol (both of which were adopted after 1993) make clear references to human rights in terms of the UDHR.⁴⁵⁶ In addition to these legislative mentions, a survey of the jurisprudence of the ECCJ indicates that the UDHR has featured significantly in the decisions of the Court.⁴⁵⁷ It is therefore arguable that legislative mention either in the preamble or in the interpretative sections of ECOWAS documents has led to judicial attitude that sees the UDHR as

⁴⁵³ Klabbers (1996) 175, observes that in the US case of *Filartiga v. Pena-Irala*, ‘the US Court of Appeals for the Second Circuit relied heavily on the Universal Declaration of Human Rights’.

⁴⁵⁴ See eg, LC Chen, ‘Restatement: protection of persons (1989) 14 *Yale Journal of International Law* 542, 546 – 547; KMG Nayar, ‘Human Rights: The UN and US foreign policy’ (1978) 19 *Harvard International Law Journal* 813, 816 -817. However, there are other equally prestigious commentators who, by challenging what they perceive as attempt by scholars to modernise the formation of customary international law, dispute the fact that the UDHR now constitutes Customary International Law. They suggest that the UDHR and other soft law built upon it can at best be seen as authoritative interpretation of the obligation contained in arts 55 and 56 of the UN Charter. See B Simma and P Alston, ‘The sources of human rights: Custom, Jus Cogens and General Principles’ (1988 -1989) 12 *Australian Yearbook of International Law* 82 – 108.

⁴⁵⁵ See eg arts 1, 3 and 7 of the Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment available at <http://www.sec.ecowas.int> (accessed 18 August 2008).

⁴⁵⁶ Art 2 of the Conflict Management Protocol and the preamble of the Democracy Protocol are instructive in this regard.

⁴⁵⁷ The UDHR was referred to in such cases as the *Ugokwe* case (n 380 above); *Keita v Mali* (n 373 above); *Essien v The Gambia*, Unreported Suit No ECW/CCJ/APP/05/05, Judgment No ECW/CCJ/APP/05/07 and the *Koraou* case (n 71 above).

enacted into ECOWAS law in a binding format. A combination of this argument, the fact that there is no requirement for ratification of the UDHR, and the growing influence of the UDHR as an ‘authoritative interpretation of the obligations contained in Articles 55 and 56 of the UN Charter’, is sufficient to sustain the perception of the UDHR as a source of human rights in the ECOWAS Community. On the presumption that the UDHR or at least some of its provisions now constitute customary international law, application of the UDHR as a source of rights in the ECOWAS framework ought not to impose additional obligations on member states.⁴⁵⁸

Certain protocols annexed to the 1975 ECOWAS Treaty also define human rights in terms of ILO Conventions.⁴⁵⁹ However, these ILO Conventions have not featured prominently in claims for right within ECOWAS. These ILO Conventions and other global human rights instruments adopted under the framework of the UN or any of its specialised institutions are other sources of human rights in the ECOWAS Community framework. Although there are at least eight core human rights instruments under the aegis of the UN, only the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) seems to have been expressly mentioned in any binding ECOWAS Instrument.⁴⁶⁰ It would be recalled that CEDAW was applied by the ECCJ in at least one of its decisions.⁴⁶¹ The International Covenant on Economic, Social and Cultural Rights (CESCR) has also been taken into consideration by the ECCJ in at least one of its judgments.⁴⁶² As previously argued, universal ratification by ECOWAS member states is essential for ECOWAS as an organisation to be bound by any of the global instruments. However, it is difficult to determine if universal ratification is necessary for a claim to be based on these instruments. This is because both global instruments applied by the ECCJ already enjoy universal ratification by ECOWAS member states.

⁴⁵⁸ See R Lillich, ‘Civil rights’ in T Meron (ed) (1984) *Human rights in international law: Legal and Policy Issues* vol 115, 133, who contends that certain provisions of the UDHR qualify as principles of customary international law.

⁴⁵⁹ For instance, see art 1 of A/SP.1/7/86 Supplementary Protocol on The Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, The Right of Residence and Establishment.

⁴⁶⁰ Para 7 of the Preamble to the Democracy Protocol.

⁴⁶¹ *Koraou* case (n 71 above).

⁴⁶² *Essien* case (n 457 above).

It is not intended to present the list of sources presented above as exhaustive of human rights sources applicable in the ECOWAS Community framework. Rights and obligations in the area of human rights can emerge from any source recognised by the law making organs of the Community. The sources or groups of sources treated above are thus merely representative and demonstrate the wide range of sources applicable in the absence of an ECOWAS human rights catalogue. However, the sources considered in this study all have the common feature of merely restating or adapting human rights obligations already incumbent on ECOWAS member states through their participation in treaty making. Accordingly, the legality of the obligations should withstand scrutiny since the Community has not been used as a platform to create new norms or new instruments. What needs to be investigated further is whether the implementation or monitoring of the restated or adapted human rights obligations fit in the traditional framework for human rights realisation. The argument being made here is that the risk of upsetting intra-and inter-organisational relations would be lower if the ECOWAS mechanism is able to fit properly within the existing human rights architecture.

3.5 Human rights in the mandates of the main institutions and organs of ECOWAS

The uncoordinated distribution of human rights norms applicable in the ECOWAS Community framework as laid out in the previous section creates a situation wherein it is difficult to get a prima facie indication of the institutions saddled with obligations to promote and protect human rights in the Community. An evident danger of such a situation is the potential for failure of relevant institutions to live up to their human rights obligations under ECOWAS Community law. There is also the potential for confusion on the part of prospective beneficiaries of protected rights to identify and demand for the realisation of rights. Even more crucial is the difficulty of coordination with member states and continental human rights bodies as a result of dispersal of implementation and monitoring effort in the ECOWAS framework. Thus, it is essential to investigate the mandates of the organs and institutions of ECOWAS for the purpose of identifying their human rights obligations. In this regard, the traditional functionalist but holistic approach rather than a focus on judicial mechanisms is adopted. A detailed analysis of the human rights mandates and obligations will follow in the next chapter of this work.

3.5.1 The Authority of Heads of State and Government

Article 7(1) of the revised ECOWAS Treaty establishes the Authority of Heads of State and Government (the Authority) as the ‘supreme institution of the Community’.⁴⁶³ The Authority is composed of Heads of State and (in some cases) Heads of Government of the ECOWAS member states. As a political institution and the highest decision-making body in the ECOWAS Community, the Authority is ‘responsible for the general direction and control of the Community’.⁴⁶⁴ In order to exercise its powers and functions, the authority has concluded treaties, issued declarations and decisions. The ECOWAS instruments do not give an express mandate to the Authority in the field of human rights. However, to the extent that it has the responsibility to determine the general policy direction of ECOWAS, the Authority has a general human rights obligation in the sense that it has to ensure that treaties, declarations, decisions and other law making documents of ECOWAS do not negate the Community’s human rights obligations arising from the UN Charter.⁴⁶⁵ In practice, even though ECOWAS does not have an original human rights objective, the Authority has aided the growth of a human rights culture by the adoption of documents with clear or implied human rights consequences. It can therefore be argued that the most important role of the Authority with respect to human rights is in the area of law making and overall policy coordination in the ECOWAS Community. These functions naturally would have to be carried out with due respect to national constitutional law requirements and respect for existing treaty obligations.

In addition to the general human rights obligations of the Authority, it is possible to identify other specific, albeit limited obligations and powers of the Authority in the documents of the Community. The first of such specific roles is the duty to ensure implementation of decisions with human rights implications through monitoring of member states compliance with Community obligations. This duty also includes ensuring that ECOWAS institutions act within the limits of their authority.⁴⁶⁶ On the basis of the duty arising from the UN Charter, the Authority may very well have responsibility to ensure that ECOWAS institutions act with respect for human rights. There are two aspects to the Authority’s implementation obligations. The one is the

⁴⁶³ See also art 6 of the revised ECOWAS Treaty which lists the institutions of ECOWAS.

⁴⁶⁴ Art 7(2) of the revised ECOWAS Treaty.

⁴⁶⁵ Art 103 of the UN Charter.

⁴⁶⁶ Art 7(3)(b) and (g) of the revised ECOWAS Treaty.

power to refer allegations of non-compliance to the ECCJ.⁴⁶⁷ The other aspect is the power of the Authority to impose sanctions for member states' failure to fulfil obligations arising from the ECOWAS Community framework.⁴⁶⁸ Competence to impose sanctions on member states for failure to comply with ECOWAS related human rights obligation is also conferred on the Authority in the Democracy Protocol.⁴⁶⁹ These, it is submitted, creates an expectation that human rights obligations under the community framework would have a stronger potential for implementation.

Another role for the Authority in the field of human rights is in the functions that the Authority takes on in the Conflict Management Protocol. By article 6 of that Protocol, the Authority has 'powers to act on all matters concerning conflict prevention, management and resolution, peace-keeping, security, humanitarian support, peace-building ...as well as other matters'. The Authority accordingly has a role to play in taking decision to initiate application of the mechanism established under the Conflict Management Protocol.⁴⁷⁰ Some remote human rights obligation of the Authority also exists in the realm of Community guaranteed economic freedoms in the sense that the Authority (through its Chairman) has a responsibility to act in the event of 'systematic or serious violations of the provisions of the Protocols on Free Movement of Persons, the Right of Residence and Establishment'.⁴⁷¹

3.5.2 The Council of Ministers

The Council of Ministers of ECOWAS (the Council) is established by article 10 of the revised Treaty.⁴⁷² It comprises of two Ministers from each member state (including the Minister in Charge of ECOWAS Affairs where such exists). There is no clear mandate and no express human rights obligations placed on the Council in the ECOWAS Community framework but it is possible to find links between the functioning of the Council and the human rights agenda of ECOWAS. This is

⁴⁶⁷ Art 7(3)(g) of the revised ECOWAS Treaty

⁴⁶⁸ Art 77 of the revised ECOWAS Treaty lays out the powers of the Authority to sanction erring member states.

⁴⁶⁹ See art 45 (2) of the Democracy Protocol.

⁴⁷⁰ Art 26 of the Conflict Management Protocol.

⁴⁷¹ Amended art 7 (in art 2) of the Supplementary Protocol A/SP.1/6/89 Amending and Complementing the Provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment.

⁴⁷² See also art 6 of the revised ECOWAS Treaty.

essentially as a result of the fact that there is room for the Council to impact on the human rights direction of the ECOWAS Community. According to the revised Treaty, the main function of the Council of Ministers is to bear responsibility for the ‘functioning and development of the Community.’⁴⁷³ The Council supports the Authority by making relevant recommendations on which the Authority acts to move the Community forward. Considering that the input of the Council plays a significant role in the exercise of law making powers by the Authority, the human rights disposition of the Council is vital in determining the policy trend of ECOWAS. In addition to this advisory role, the Council’s exercise of other functions enumerated in the Treaty can also have consequences for human rights.

By article 10(3)(g) of the revised ECOWAS Treaty, the Council has the responsibility to ‘approve the work programmes and budgets of the Community and its institutions’. In this provision also, there is potential for the Council to exert its influence on the human rights work of the ECOWAS Community. The Council can refuse to grant approval for programmes that weigh too much in favour of human rights realisation. It could also reject the budget of Community institutions aimed at expanding the human rights agenda of ECOWAS. While there is no reference to human rights in these provisions, the operation of article 4(g) of the revised Treaty on the processes and operations of ECOWAS institutions should place an obligation on the Council to, at the minimum, take human rights into account in the exercise of its powers. In these areas therefore, while human rights is not an express part of the mandate of the Council, the link between the duties and functioning of the Council on the one hand and the human rights agenda on the other hand cannot be denied. The Council further has powers to request for advisory opinion from the ECCJ on any legal question. Arguably, this creates space for the Council to bring questions of compliance of Community policies, programmes and budget with the principle of respect, promotion and protection of human rights.

3.5.3 The Community Parliament

One of the few institutions with express human rights mandate within the ECOWAS Community is the ECOWAS Community Parliament (the ECOWAS Parliament).

⁴⁷³ Art 10(3) of the revised ECOWAS Treaty.

Currently established by article 13 of the revised Treaty, the ECOWAS Parliament was formally constituted by Protocol A/P2/8/94.⁴⁷⁴ By article 6 of Protocol A/P2/8/94, the ECOWAS Parliament is empowered to consider issues ‘relating to human rights and fundamental freedoms and make recommendations to the institutions and organs of the Community’. Similarly, the ECOWAS Parliament ‘may be consulted for its opinion’ in areas including ‘Community citizenship’ and ‘respect for human rights and fundamental freedoms in all their plenitude’.⁴⁷⁵ Clearly, human rights in the mandate of the ECOWAS Parliament go beyond the general obligation imposed by article 4(g) of the revised Treaty. It should require that the ECOWAS Parliament gives prime attention to human rights as an issue area within the framework of the ECOWAS Community.

Against the backdrop that the ECOWAS Parliament was established as a ‘forum for dialogue, consultation and consensus for representatives of the peoples of West Africa’, there are at least two angles to the human rights mandate. The first is the aspect requiring the ECOWAS Parliament to open dialogue and discuss human rights issues affecting the ECOWAS Community and its citizens. The other angle is to raise these issues with the relevant Community institutions and organs either on the Parliament’s own initiative or upon request by the relevant authority.

3.5.4 The Economic and Social Council

The revised ECOWAS Treaty lists an Economic and Social Council as one of the institutions of the ECOWAS Community.⁴⁷⁶ The composition, functions and organisation of the Economic and Social Council was left to be defined in Protocol to be adopted by the ECOWAS Authority. As at July 2009, no protocol had been adopted for the constitution of the Economic and Social Council. There is therefore no statement of its competence and as at yet no means of determining human rights content in the mandate of the Economic and Social Council.

⁴⁷⁴ Also see art 6 of the revised ECOWAS Treaty. Protocol A/P2/8/94 which gave life to the ECOWAS Parliament was adopted in August 1994 and entered into force in March 2000. Although it was formally inaugurated in November 2000, it held its maiden plenary session in January 2001.

⁴⁷⁵ Art 6(2)(k) and (m) of Protocol A/P2/8/94.

⁴⁷⁶ Art 6 (1)(d) of the revised Treaty.

3.5.5 The ECOWAS Community Court of Justice

Originally conceived as a ‘Tribunal of the Community’ under the 1975 Treaty of ECOWAS,⁴⁷⁷ details relating to the composition, structure and competence of the ECCJ were left to be determined by the ECOWAS Authority.⁴⁷⁸ In 1991 the ECOWAS Authority concluded a protocol to constitute what became known as the Community Court of Justice.⁴⁷⁹ Under the present Treaty regime, the ECCJ is established by articles 6 and 15 of the 1993 revised Treaty of ECOWAS as one of the institutions of ECOWAS. The 1991 Court Protocol has since been amended by Supplementary Protocol A/SP.1/01/05 Amending the Protocol (A/P.1/7/91) relating to the Community Court of Justice (2005 Supplementary Protocol) and Supplementary Protocol A/SP.2/06/06 Amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs 1, 3 and 7 and Article 7 Paragraph 3 of the Protocol on the Community Court of Justice (2006 Supplementary Protocol).⁴⁸⁰ The competence and mandate of the ECCJ can be found in a combined reading of the revised Treaty, the 1991 Protocol of the ECCJ and the 2005 Supplementary Protocol of the ECCJ.

By article 9 of the 1991 Protocol of the ECCJ, the Court was empowered to ‘ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty’. This it had to exercise in disputes between member states or member states and Community institutions.⁴⁸¹ The intervention of the 2005 Supplementary Protocol of the ECCJ substitutes the original article 9 of the 1991 Protocol of the ECCJ with a new and expanded article 9.⁴⁸² Under the new article 9, the ECCJ has been given competence on disputes relating to the interpretation and application of the Treaty, Conventions and Protocols of ECOWAS⁴⁸³ and of the regulations, directives, decisions and other subsidiary instruments of ECOWAS.⁴⁸⁴ The ECCJ also has competence to determine the legality of ECOWAS Community legislation, the failure by ECOWAS member states to

⁴⁷⁷ See arts. 4(1)(d) and 11 of the Treaty of the Economic Community of West African States, signed in May 1975 and entered into force in June 1975. Reprinted in 14 *International Legal Materials* (1975) 1200.

⁴⁷⁸ Arts. 4 and 11 of the 1975 ECOWAS Treaty.

⁴⁷⁹ Protocol A/P.1/7/91, which was adopted and entered into force provisionally in July 1991. Reproduced in the official Journal of ECOWAS of July 1991.

⁴⁸⁰ Printed in Vol. 49, (2006) *Official Journal of the Economic Community of West African States*.

⁴⁸¹ Art 9(2) of the 1991 Protocol of the ECCJ.

⁴⁸² See art 3 of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸³ New art 9(1)(a) in art 3 of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸⁴ New art 9(1)(b) in art 3 of the 2005 Supplementary Protocol of the ECCJ.

honour obligations under the Community legal framework, interpret the provisions of the Community legislations and entertain actions arising from the actions and omissions of Community officials.⁴⁸⁵ Significantly, the ECCJ is also empowered to determine cases of violation of human rights that occur in ECOWAS member states.⁴⁸⁶ The expanded competence of the ECCJ can be exercised in disputes between states, between states and ECOWAS Community institutions as well as in disputes involving individuals and corporate bodies.⁴⁸⁷ Thus, the ECCJ is currently the other ECOWAS institution with an express human rights mandate. The ECCJ's competence over human rights cases coincides with the jurisdiction of the national courts of member states, the African Commission and the African Human Rights Court (or its successor). Notwithstanding this fact, there appears to be no clear definition of the relationship with these other judicial and quasi-judicial fora.

Considering the expanded competence of the ECCJ, human rights in the Court's mandate can take any of several forms. First, on the basis of the requirement to take human rights into consideration as a fundamental principle of the ECOWAS Community, the ECCJ would have to ensure respect for human rights in its interpretation and application of ECOWAS Community legislation. The Court also has to test the legality of Community legislation against applicable human rights standard. The ECOWAS Community obligation of member states that the Court is competent to determine would also include obligations to respect, promote and protect human rights. In addition to all of these is the actual competence to receive and determine concrete complaints of the violation of human rights from individuals and corporate bodies. It is thus arguable that human rights in the mandate of the ECCJ is both express and implied.

3.5.6 The ECOWAS Commission

What is now known as the ECOWAS Commission was established in the revised Treaty as the Executive Secretariat of ECOWAS.⁴⁸⁸ As a secretariat, this institution had no human rights mandate and there was little room for its functions to impact on the human rights agenda of the ECOWAS Community. However, even in that mould,

⁴⁸⁵ See generally the new art 9 (1) of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸⁶ Art 9(4) in art 3 of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸⁷ New art 10 in art 4 of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸⁸ Arts 6 and 17 of the revised ECOWAS Treaty.

there were certain aspects of the ECOWAS Secretariat's mandate that had apparent human rights implications. The Secretariat was to act as the legal representative of the ECOWAS Community in all situations and this included in cases of alleged human rights violations. The Secretariat was also responsible for the execution of all decisions of the ECOWAS Authority and the regulations of the Council. In carrying out these duties, the Secretariat could affect the human rights of ECOWAS citizens. It was the transformation of the Secretariat into a Commission that has however expanded the scope for greater impact on the Community's human rights agenda.

With a decision taken in January 2005, the Authority decided to transform the Executive Secretariat of ECOWAS into a Commission in order to 'enable ECOWAS focus better on the discharge of its core function'.⁴⁸⁹ The ECOWAS Commission is now established by a new article 17 of the revised Treaty.⁴⁹⁰ Under the new arrangement which took off in 2006, the ECOWAS Commission was endowed with enhanced powers distributed among Commissioners within clearly defined sectors.⁴⁹¹ The functions of the ECOWAS Commission have now been expanded to include coordination of the activities of the ECOWAS Community as well as strategic planning and policy analysis of regional integration activities.⁴⁹² In carrying out these functions, the ECOWAS Commission is empowered to submit recommendations to the Authority and the Council on matters it deems necessary for the promotion and development of ECOWAS. The ECOWAS Commission also has the role of formulating proposals to enable the Authority and the Council to take important decisions on the main orientation policies of the member states and the Community.⁴⁹³ The ECOWAS Commission also has powers to make rules for the purpose of implementing other legislative documents of the Community.

While it is obvious that human rights does not appear expressly in the enumeration of the functions and competences of the ECOWAS Commission, as with several of the

⁴⁸⁹ 'Summit Approves Conversion of ECOWAS Secretariat into Commission', ECOWAS bulletin available at <http://news.ecowas.int/pressshow.php?nb=5&lang=en&annee=2006> (accessed 3 November 2008).

⁴⁹⁰ See art 2 of Supplementary Protocol A/SP.1/06/06.

⁴⁹¹ 'ECOWAS Commission at a Glance' available at http://www.comm.ecowas.int/dept/stand.php?id=a_about&lang=en (accessed 3 November 2008)

⁴⁹² New art 19 of the revised Treaty as inserted by art 2 of Supplementary Protocol A/SP.1/06/06

⁴⁹³ As above.

other institutions, it is arguable that the general human rights obligations of the ECOWAS Community apply to the ECOWAS Commission. In the analysis of Community policies, in the formulation of proposal and in the making of rules, the ECOWAS Commission should be guided by the principles of respect, promotion and protection of human rights. Over and above this, in its actual functioning, ECOWAS Commission has delineated clear sectors involving human rights mandates for its Commissioners. In this regard, there are roles in human rights areas such as gender, youth and children affairs, humanitarian and social matters and political matters including good governance, human rights and democracy. There are also roles in the area of security, peace building and peace keeping. In all of these, the ECOWAS Commission impacts on human rights either as actor or as arena for the promotion and protection of right.

It has to be admitted that on the face of it, the human rights aspects in the mandates of the ECOWAS institutions are not obvious. In some cases, they may even appear to have been adopted without direct and clear legal foundation. Considering that the Treaty requires the ECOWAS institutions to act within the limits of conferred powers, it is essential to question whether ECOWAS as an organisation allows for the exercise of these human rights mandate. The following section of the work would therefore consider whether human rights now falls within the purview of ECOWAS and its institutions.

3.6 ECOWAS as a post-national human rights institution

The idea that RECs like ECOWAS could be involved in the realisation of human rights within the region in which they are set up presupposes that such organisations can add some value to the existing framework for human rights realisation. Generally, it should mean that there is a prospect that such mechanisms, as international institutions, would complement and fortify existing national mechanisms. In this regard, Besson pictures such institutions as ‘post-national human rights institutions’ and argues that they cannot be understood in the same light as national agencies for human rights realisation.⁴⁹⁴ Thus, Besson suggests that a post-national human rights institution should be ‘any collective institutional structure that purports to intervene in

⁴⁹⁴ Besson (2006) 323.

human rights matters regardless of jurisdiction and which, itself, regards human rights as its key principle of governance'.⁴⁹⁵ Besson's criteria for 'a good post-national human rights institutions' are institutional structure (which may mirror the tripartite governmental structure of a state), core competence in human rights that allows human rights to be placed at the core of internal and external governance, global know-how, publicity, transparency and democracy.⁴⁹⁶ From the perspective of international institutional law, perhaps the criterion of competence would be the most important consideration.

The competence of ECOWAS in the field of human rights represents the foundation upon which the exercise of jurisdiction by ECOWAS organs and institutions in that issue area is built. In fact, the question of organisational competence could be described as a 'central issue of principle' and it is unwise to 'take it for granted that the necessary legal principle and constitutional competence exists' in this area of activity.⁴⁹⁷ The significance of this inquiry is in the fact that international organisations, unlike states that create the organisations, do not have the freedom to engage in just any field of activity they desire. In the same vein, an international organisation can neither endow its organs and institutions with powers the organisation itself does not have, nor can it empower such organs and institutions to exercise powers the parent organisation does not have.⁴⁹⁸ Thus, some have argued that where an international organisation or any of its institutions acts beyond its specific powers, member states of the organisation should 'possess the right' to argue that the organisation has exceeded its purposes and functions. In this regard, an aggrieved member state should be able to 'refuse to collaborate finally or otherwise in implementing the obligation that comes with such action. Such 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.⁴⁹⁹ This right, it is argued further, should avail an aggrieved state without the need for such a state to withdraw

⁴⁹⁵ Besson (2006) 338.

⁴⁹⁶ Besson (2006) 341.

⁴⁹⁷ P Alston and JHH Weiler, 'An 'ever closer Union' in need of human rights policy' (1998) 9 *European Journal of International Law* 660.

⁴⁹⁸ See generally the *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion of 11 April 1949) ('*Reparation Case*') (1949) ICJ Reports, p. 174.

⁴⁹⁹ Rama-Montaldo (1970) 123.

from the organisation.⁵⁰⁰ In relation to ECOWAS, if member states regard the human rights activities as either unlawful or excessive, they should have a right to resist that line of activity. It is against this background that the foundation ECOWAS offers for the exercise of human rights competence by its institutions and organs will be assessed.

As already observed the 1975 ECOWAS Treaty did not make any mention of human rights and completely avoided any use of human rights language. Consistent with this posture, even the economic freedoms which could be seen as vehicles for economic integration were carefully couched to avoid any link with rights. Hence, while Article 2(1)(d) of the 1975 Treaty recognised the abolition of obstacles to free movement of persons, services and capitals between member states as a means to achieve the aims of ECOWAS, these were not drafted as rights of the citizens of the states concerned. By Article 27 of the 1975 ECOWAS Treaty, there was an undertaking by member states to abolish obstacles to freedom of movement and residence of those regarded as ‘Community citizens’, but this was not stated as a right of those citizens. However, as has been shown earlier, the protocols adopted on the platform of the 1975 Treaty contain some rights language and limited reference to specific human right instruments. From 1985, more frequent use of rights language and reference to human rights instruments became evident in the ECOWAS. By 1991, while still operating under the 1975 Treaty, ECOWAS adopted the declaration on political principles in which the Community fully alluded to human rights under ‘universally recognised international instruments on human rights and in the African Charter on Human and Peoples’ Rights’ without necessarily linking the rights to economic freedoms.⁵⁰¹ These represent the place of human rights in ECOWAS under the 1975 founding Treaty.

In contrast to the picture painted above, the 1993 revised ECOWAS Treaty arguably, has revolutionised the perception and reception of human rights in the constitutional framework of ECOWAS. Considering the wide differences in the form in which human rights finds expression in the constitutional epochs of ECOWAS (the 1975 and

⁵⁰⁰ Rama-Montado (1970) 143.

⁵⁰¹ Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States.

the 1993 constitutional epochs), it becomes interesting to engage the question whether ECOWAS had transformed from an economic integration initiative into a political integration scheme. In this sense, it becomes necessary to ask whether the objectives and purpose of the Community have changed or expanded to embrace Community competence in the field of human rights. In view of the fact that the law of international institution and indeed, the practice of international organisations indicate that a principle of limited powers prevails in that sphere, are the human rights provisions contained in the 1993 revised Treaty of ECOWAS sufficient to confer human rights competence on ECOWAS and to result in legally acceptable transfer of human rights competence to the organs and institutions of ECOWAS? Assuming the Treaty provisions are insufficient to base the presence of such competence, would the provisions in the protocols suffice to sustain an argument that ECOWAS does have a human rights competence? In answering these questions, it has to be noted that both the constitutional document of the given organisation and general international law may operate to confer competence on an international organisation.⁵⁰²

Generally, the treaty of an international organisation which is the constitutional document of the organisation is the most important source of the authority that the organisation has. The Treaty lays out the objectives, functions and powers of the organisation. Hence it has been argued that by the operation of the doctrine of delegated powers in the field of the law of international institutions, only powers ‘expressly enumerated’ in the treaty of an organisation can be exercised. The exception being that the theory of ‘implied powers’ could intervene to allow for the exercise of powers and functions, which though not expressly granted by enumeration in the treaty, can be deemed conferred by reason of being essential for the performance of enumerated powers and functions.⁵⁰³ Practical expression of the theory of implied powers comes in the form of an omnibus provision that allows international organisations to undertake ‘any other activity’ necessary for achieving set objectives.⁵⁰⁴

⁵⁰² T Ahmed and I de Jesus Butler, ‘The European Union and Human Rights: An International Perspective’ (2006) 4 *European Journal of International Law* 771, 776.

⁵⁰³ Rama-Montaldo (1970) 114.

⁵⁰⁴ See art 3(2)(o) of the 1993 revised ECOWAS Treaty and art 308 of the Treaty of the European Union.

Notwithstanding the operation of the theory of implied powers, Rama-Montaldo advises that caution has to be applied in order to avoid giving room for the enlargement of competence ‘by considering as a means for the fulfilment of its original purposes, tasks for which it was not created and are clearly outside the natural interpretation of its constitution and which are opposed by a minority’.⁵⁰⁵ Pushing his argument forward, Rama-Montaldo makes the point that there may just be a thin line between assuming a new competence and performing a task not authorised by the constitution but termed a ‘means’ to fulfil an enumerated competence.⁵⁰⁶ From this perspective, both treaties of ECOWAS do not enumerate the promotion and protection of human rights as a purpose or function of the organisation. Both treaties aim at promoting action to ‘raise the living standards’ of ECOWAS citizens. Further, both treaties do not expressly list the promotion and protection of human rights as means to achieve the goal of ‘raising the living standards of ECOWAS citizens. However, the revised Treaty and several other instruments of the organisation make frequent allusion to human rights protection, possibly as a means of creating conditions necessary to raise the living standards of citizens. In addressing the question whether failure to enumerate human rights protection as a purpose of ECOWAS is fatal to an ECOWAS claim to human rights competence, a basic challenge lies in delineating what should be included in defining constitutional authorisation, especially since treaties need to be interpreted in context, which context includes the preamble and annexes to the treaty.⁵⁰⁷

Looking beyond the enumerated aims in the treaties in order to contextualise interpretation, it is possible to identify clear differences in the two constitutional epochs of ECOWAS. Both in its preamble and in the statement of fundamental principles, the 1993 revised Treaty gives some status to human rights promotion and protection in the ECOWAS agenda. However, there is no *prima facie* basis to suggest that human rights realisation is suddenly one of the goals of ECOWAS as the purposes of an organisation can only be found in the constitutional instrument of the

⁵⁰⁵ Rama-Montaldo (1970) 115.

⁵⁰⁶ Rama-Montaldo (1970) 117.

⁵⁰⁷ Art 31(2) Vienna Convention on the Law of Treaties (1969) 8 *ILM* 679 (1969). Also see D Shelton, ‘The boundaries of human rights jurisdiction in Europe’ (2003) *Duke 13 Journal of Comparative and International Law* 95, 125.

organisation and cannot be implied.⁵⁰⁸ Nevertheless, it is difficult to dismiss an argument suggesting that human rights realisation constitutes a means for achieving the objectives of ECOWAS. It may even be necessary to undertake a further enquiry as to whether the economic goals of ECOWAS can be achieved without necessarily addressing the state of human rights in the Community and in the member states. The revised Treaty does not engage the link between human rights realisation and the goal of raising living standards through economic integration. However, the record of ECOWAS under the 1975 Treaty demonstrates the difficulties that the organisation faced in implementing its economic goals without attending to the political issues linked with domestic human rights situations. The effects of domestic conflicts directly or indirectly related to denial of, and demand for human rights protection prevented ECOWAS from achieving set goals and resulted in moving the organisation towards security ends. Thus, while the effect of donor pressure and the change that occurred in the international environment cannot be ignored, it is arguable that the significance of addressing the human rights question in the Community as a condition for achieving set goals was recognised within the era of the 1975 Treaty.

In the face of the link between human rights realisation and the goal of raising living standards through economic integration, recognition of the former as a fundamental principle of ECOWAS becomes even more relevant. Going by Krasner's definition of principles as 'belief of fact, causation and rectitude',⁵⁰⁹ it is possible to locate an ECOWAS understanding of an interface between rights realisation and goal attainment. This interface can even be stretched to base an argument that realising human rights is an essential means to pursue organisational goals. Such an understanding also fits with Rama-Montaldo's perception of principles as 'modalities to which an organisation must adjust when attaining its purpose'. Thus, despite the argument that principles do not impose positive obligations for the organisation since they are not ends in themselves,⁵¹⁰ principles could take on special significance in different contexts. In the context of ECOWAS, recognition of the promotion and protection of human rights as a fundamental principle of the organisation takes on the character of a means to the end of the organisation. The undertaking further expressed

⁵⁰⁸ Rama-Montaldo (1970) 154.

⁵⁰⁹ Krasner (1982) 186.

⁵¹⁰ Rama-Montaldo (1970) 154

by member states to cooperate to guarantee rights in the African Charter thus serves to amplify the significance of the principles.

Notwithstanding the line of argument pursued above, the position that principles in themselves do not impose obligations on member states cannot be taken lightly. As Seyersted observed, the exercise of authority by an organisation, to make decisions that are binding on member states or to claim and exercise direct or indirect jurisdiction over the territory, nationals or institutions of member states can only be sustained by a 'special legal basis'.⁵¹¹ However, the legal basis for this genre of authority need not be located in the constitutional instrument alone. It could be traced to any other legally acceptable lawmaking instrument recognised by the member states of the given organisation.⁵¹² This position has to be even weightier where the power of lawmaking resides in the usual representatives of the member states, acting in intergovernmental capacity. In such a capacity, the member states would be deemed to be exercising unlimited competence to enter into agreements of any sort that is not expressly illegal in international law. Seen from this perspective, the search for the human rights competence of ECOWAS cannot be restricted to aims enumerated in the constitutional instrument of the organisation but extends to the entire Treaty and all other validly adopted lawmaking instruments of the organisation. To that extent, there is evidence of human rights competence in ECOWAS under the 1993 constitutional epoch.

Having come to a conclusion that even though human rights realisation is not one of the goals of ECOWAS, the organisation can claim some competence in that area, it is necessary to explore whether there is sufficient coordinated activity in this area to suggest the presence of a human rights regime. The wisdom in taking a regime approach is that it becomes possible to see a clearer picture through a comprehensive visualisation of the collective that isolated and individualised assessment of provisions and instruments would not sustain.⁵¹³ The term 'regime' may take any of several meanings. Seen from the 'eyes' of Krasner, it may refer to 'principles, norms,

⁵¹¹ F Seyersted, 'Objective international personality of intergovernmental organizations: do their capacities really depend on the conventions establishing them?' (1964) 34 *Nordisk Tidsskrift for International Ret.* 29

⁵¹² Seyersted (1964) 29 - 30.

⁵¹³ See eg, M Brosig, 'Human Rights in Europe: An Introduction' in Brosig (ed.) (2006) *Human Rights in Europe: A fragmented regime?* 9.

rules and decision-making procedures around which actor expectations converge in a given issue-area'.⁵¹⁴ Regime may also be recognised as 'an international regulatory system promoting and enacting normative rules'.⁵¹⁵ A regime may further be understood as 'as norms and decision-making procedures accepted by international actors to regulate an issue-area'.⁵¹⁶ While there are minor differences in these definitions, they all agree to the extent that a regime requires the presence of rules and means of applying those rules. What is not clear is whether the rules that form part of a given regime need to be created exclusively within the regime set-up or such rules or a part thereof, could be 'borrowed' from another regime framework.

In the absence of a strict requirement, a liberal approach to the question of the source of regime rules may be adopted to sustain an argument that a regime could exist even if the applicable rules are a 'mixture' of original and borrowed norms. The critical determination being whether the rules are recognised by the actors within the system and the means of applying the rules operate to bring order to the specific issue-area in relation to the given community it seeks to regulate. From this point of view, ECOWAS under the 1993 revised Treaty has created an emerging human rights regime that consists of constitutional instrument provisions conferring rights, fundamental principles and normative guarantees in other treaties and lawmaking instruments. Taking a stricter approach would lead to undesirable results since overlap in norms and rules appear in all systems of human rights protection. Applying Besson's criteria, it can be concluded that ECOWAS qualifies as a post-national organisation for human rights realisation in West Africa. This is because ECOWAS operates on a tripartite state structure, currently adopts human rights as a governing principle, applies human rights on the basis of international instruments and exhibits some level of transparency, publicity and democracy in its application of human rights.⁵¹⁷

⁵¹⁴ Krasner (1982) 185.

⁵¹⁵ Brosig (2006) 9.

⁵¹⁶ J Donnelly, 'International human rights: a regime analysis' (1986) 40 *International Organisations* 602.

⁵¹⁷ Besson views global know-how as a 'constellation of instruments of trans-national or post-national trendsetting'. See Besson (2006) 341.

3.7 A new pillar in an old building: relation with existing human rights systems

As demonstrated in the previous sections of this chapter, the introduction of human rights realisation in the agenda of ECOWAS is a relatively recent occurrence. Prior to this introduction, there were at least three levels of human rights realisation mechanisms applicable to the West African region. These are the domestic or national legal systems, the African regional human rights system and the global (UN) human rights system.⁵¹⁸ Shelton suggests that a human rights system is a legal system that consists of a catalogue of internationally guaranteed rights, permanent institutions to supervise the application of the rights and procedures for compliance.⁵¹⁹ From this perspective, while a liberal understanding of the African human rights system could envelop the national human rights as a sub-system of a complete African human rights system,⁵²⁰ it is arguable that each of these three levels for human rights realisation is a separate and complete rights realisation system.

It would generally be agreed that the national systems are at the lower rung of an imaginary human rights pyramid as they provide the first port of call in the event of human rights violations. At the international level, it becomes a little more complicated since there is no formal hierarchy between the regional and global human rights realisation systems. The regional and global systems are independent, autonomous and self-sufficient within their specific spheres of influence. The complication arises partly from the fact that in terms of Africa, the global and regional systems exercise authority over the same geographical territory, peoples and issues. Notwithstanding this complication, all tiers of human rights realisation systems have existed without any crisis. With the emergence of an ECOWAS system for human rights realisation in West Africa, questions on how it would fit into the existing human rights architecture are raised. These questions are significant for reasons of intra- and inter-institutional relations, overlap of judicial jurisdictions and consequent threats of fragmentation of international human rights law in the subregion; risk of

⁵¹⁸ Citing P Licker (1987) *Fundamentals of System 5*. D Shelton, 'The Promise of Regional Human Rights System' in BH Weston and SP Marks (eds) (1999) *The Future of International Human Rights*, 352 defines system as 'a set of elements that are related and that, through this set of relationships, aim to achieve goals.

⁵¹⁹ Shelton (1999) 352. Reference to permanent institutions and procedures for compliance as used here are not restricted to courts and other forms of the judicial and quasi-judicial process. They cover all institutions, actors and processes involved in the implementation and supervision of human rights realization.

⁵²⁰ Odinkalu (2001) 227.

forum shopping and abuse of processes; risk of watering-down of human rights standards and implementation mechanisms; and the ultimate risk of self-destruction, arising from a crowded regulatory environment. What is obvious is that the ECOWAS regime is not part of the national systems. It is a post-national system operating at the international plane. However, it is also neither a central part of the African continental human rights system nor a part of the global human rights system. It leaves open the question whether it is any part, albeit a peripheral part, of the African continental human rights system. It is against this background that existing and potential relationship between the ECOWAS regime for human rights realisation and the older systems will be addressed.

3.7.1 Relation with national systems for human rights realisation

Fifteen West African states currently are member states of ECOWAS and each of these states has its national systems for human rights realisation. These systems usually comprise of parliaments and parliamentary bodies, national human rights institutions, the courts, the ministries of justice and any other institutions directly or indirectly responsible for aspects of human rights realisation. Despite the expected direct applicability of certain ECOWAS instruments within the member states,⁵²¹ the ECOWAS system does not replace the national systems. Apparently, the ECOWAS system does not also exist as a supervisory system over national systems of member states. At best, the ECOWAS system operates side by side with national systems as a complementary and reinforcing mechanism. In terms of norms, since ECOWAS does not have its own catalogue of rights and it is not a party to any international human rights instrument, it relies on the human rights commonly guaranteed by its member states as general principles of law and on the international instruments ratified by ECOWAS member states.⁵²² ECOWAS does not therefore create new rights but merely applies those already recognised by the member states.

In terms of institutions, there is no evidence of any law regulating the relation between ECOWAS institutions with direct or implied human rights roles and the

⁵²¹ New art 9 of the revised ECOWAS Treaty (introduced by art 2 of Supplementary Protocol A/SP.1/06/06

⁵²² Out of the two ECOWAS institutions with express human rights mandate, none has the power of actual lawmaking. The ECOWAS Parliament is merely a consultative forum and is not likely to make laws in the foreseeable future. The ECCJ has a mandate without a clear statement of applicable human rights instruments. See also Justice el Mansour (n 413 above).

institutions of the member states. The Democracy Protocol rather demonstrates an intention that victims of alleged human rights violations should have access to national mechanisms.⁵²³ This, it is submitted, agrees with the principle of subsidiarity in international law and international relations. Hence, the Democracy Protocol encourages ECOWAS member states to ‘establish independent national institutions to promote and protect human rights’.⁵²⁴ It is then envisaged that the President of the ECOWAS Commission (formerly the Executive Secretary) would take measures to strengthen these national institutions by helping them to establish a regional network on the basis of which national institutions may submit reports of rights violations in the member states to the President of the Commission.⁵²⁵ Interestingly, the Protocol makes use of the term ‘shall’ which creates the impression that there is a duty of sorts on national human rights institutions to report to the ECOWAS Commission.⁵²⁶ However, it is doubtful if this intended to create a binding obligation as indeed there is no evidence that such reports have ever been submitted. Further, there is no indication that the ECOWAS Commission itself anticipates a role in this regard.⁵²⁷ Thus, the provision discussed above seems to be the only one showing a link between an ECOWAS institution and national institutions of a non-judicial nature in the field of human rights.

Even from a judicial perspective, it can be reasonably argued that the ECCJ does not seek to replace nor supervise national judicial protection of human rights. There are at least two main reasons to support this position. First, even though the 2005 Supplementary Protocol of the ECCJ does not make any reference to prior attempts to address allegations of human rights violation at the domestic level, it does not also state that the ECCJ’s jurisdiction replaces the national jurisdiction. Further, if the intention expressed in the Democracy Protocol is any thing to go by, the ECCJ’s power to hear cases of alleged violations of human rights ought to arise only when ‘all

⁵²³ Art 1(h) of the Democracy Protocol.

⁵²⁴ Art 35(1) of the Democracy Protocol.

⁵²⁵ A network of national human rights institutions currently exists in West Africa and although, ECOWAS officials are known to participate in meetings of the network, it is not clear whether the founding of the network was facilitated by ECOWAS as an organisation.

⁵²⁶ Art 35(2) of the Democracy Protocol.

⁵²⁷ The Political Affairs Department of the ECOWAS Commission describes itself as a department to promote good governance, human rights, democracy, peace and security through the implementation of relevant protocols. But enquires made by this author in November 2008 did not yield any results on the appreciation of this role.

attempts to resolve the matter at the national level have failed'.⁵²⁸ In any event, the practice all over the world is that the international judicial mechanisms for human rights protection only come into play after attempts at the national level have failed. Would this then mean that the ECCJ's jurisdiction in the field of human rights is supervisory over the national systems? The answer forms the second reason to support the position taken above. There is no requirement to exhaust local remedies before a case alleging human rights violation can be brought before the ECCJ.⁵²⁹ The ECCJ has also stressed that it is not a court of appeal over the decisions of the national courts of the ECOWAS member states.⁵³⁰ Consequently the ECCJ does not seek to supervise the human rights jurisdiction of member states.⁵³¹ Instead, the ECCJ visualises itself as being in an 'integrated' relationship with the national courts, especially since it would require the assistance of the national courts to implement its decisions.⁵³² It can therefore be concluded that the judicial protection of human rights under the ECOWAS regime is expected to exist side by side with the national legal systems. However, it is desirable that the national systems should have primacy in the determination of cases alleging human rights violation.

The new legal regime of the ECOWAS Community envisages the introduction of supranationality and the direct application of ECOWAS instruments in the national systems of member states. It is arguable however, that this applies essentially in the core field of economic integration. In terms of human rights realisation, the ECOWAS system is silent on the nature of relationship with national mechanisms. The practice of the ECOWAS institutions and a careful scrutiny of the applicable documents may thus be applied to support the position that the ECOWAS mechanisms exist to complement and reinforce the national mechanism.

⁵²⁸ Art 39 of the Democracy Protocol.

⁵²⁹ See the *Essien* case (n 457 above) and the *Koraou* case (n 71 above).

⁵³⁰ See the *Keita* case (n 373 above).

⁵³¹ It is even doubtful whether the ECCJ as presently constituted is suitable for such a supervisory role in the area of human rights.

⁵³² *Ugokwe* case (n 382 above).

3.7.2 Relation with the African (continental) human rights system⁵³³

It is commonly agreed that the African continental human rights system refers to the norms and institutions developed around the framework of the OAU/AU, the central document of which is the African Charter.⁵³⁴ Seen from a holistic perspective, the African continental human rights system extends beyond the African Charter and its supervisory bodies⁵³⁵ and encompasses all other institutions and norm creating instruments and implementing institutions directly or remotely concerned with the recognition, promotion and protection of human rights.⁵³⁶ A consideration of the relation between the emerging ECOWAS human rights regime and the continental human rights system therefore necessarily implicates the relation with all such AU institutions and organs. It further requires reopening the question whether the ECOWAS regime is in any way a part of the African human rights system as is currently known.

In view of the stipulation in the Abuja Treaty that RECs, including ECOWAS, are building blocks for the AU/AEC, it would be necessary to explore the overall relationship between the regional and continental organisations as aid in this analysis. The 1998 Protocol on Relations Between the African Economic Community and the Regional Economic Communities (AEC/REC Protocol)⁵³⁷ contains the most comprehensive statement of the expectations in that regard. Pursuant to article 6 of the Abuja Treaty, the AEC has responsibility to strengthen existing RECs and to establish RECs in regions where none exist, with a view to integrating the RECs into the proposed African Common Market. This is translated in the AEC/REC Protocol to impose an obligation on RECs to ‘provide and umbilical link’ to the AEC.⁵³⁸ The ultimate intention is envisaged as the ‘eventual absorption’ of the RECs into the African Common Market ‘as a prelude to the Community’.⁵³⁹ It can be deduced from these statements that the RECs are perceived as pillars of the AEC structure. As pillars, they cannot be outside of the overall framework. The call to provide an

⁵³³ I have used ‘continental’ here to indicate as previously argued, that the African regional human rights system extends beyond the OAU/AU mechanisms for human rights realisation.

⁵³⁴ See generally Shelton (1999) 353; OC Okafor (2007) *The African Human Rights* 65.

⁵³⁵ The African Commission and the African Court of Human and Peoples’ Rights.

⁵³⁶ See eg A Lloyd & R Murray (2004) 173; Heyns & Killander (2006)

⁵³⁷ OAU Doc. Annex III-4, signed in Addis Ababa in 1998.

⁵³⁸ Art 5(1) of the AEC/REC Protocol.

⁵³⁹ Art 5(1)(c) of the AEC/REC Protocol.

umbilical link had earlier been answered in article 2(1) of the 1993 revised ECOWAS Treaty which stipulates that ECOWAS was established ‘for the purpose of economic integration and the realisation of the objectives of the African Economic Community’. There is therefore common understanding that ECOWAS, like other African RECs, should be part of the continental economic integration system. Accordingly, the AEC/REC Protocol envisages coordination to avoid duplication of efforts and action that jeopardise AEC objectives,⁵⁴⁰ exchange of information and cross-participation at meetings.⁵⁴¹

However, the actual nature of the relationship is not very evident in the different instruments. While the language in the AEC/REC Protocol gives the impression that the RECs would dissolve upon realisation of the African Common Market, the manner in which article 2(1) of the 1993 revised ECOWAS Treaty is couched does not support such an impression. Further, the AEC/REC Protocol does not contain a termination date. Although it is conceded that treaties can terminate by implication,⁵⁴² the omission of a termination clause in such a treaty can at best, be translated as an indication that there is no certainty of intention to terminate it. If this interpretation is correct, it would mean that RECs should continue to operate even after the coming into being of the African Common Market. Thus, RECs, including ECOWAS could operate as regional offices of the AEC. However it is analysed, the conclusion that can be drawn is that, in terms of economic integration, the RECs are either currently or potential expected to be part of the overall African system.

From a human rights perspective, the documents of ECOWAS are silent on how ECOWAS institutions are to relate with continental institutions involved in the field of human rights. There is also little, if any practice to guide an understanding of the relationship between the ECOWAS regime and continental human rights system. On the side of the continental system, there are provisions in certain documents which provisions touch on relations between the system and subregional mechanisms involved in the field of human rights. As previously observed,⁵⁴³ the PSC Protocol for example recognises regional security mechanisms like the mechanism established

⁵⁴⁰ Art 4 of the AEC/REC Protocol.

⁵⁴¹ Art 17 of the AEC/REC Protocol.

⁵⁴² I Brownlie *Principles of public international law* (2008) 621.

⁵⁴³ Chapter 2 of this work.

under the ECOWAS Conflict Management Protocol as part of the ‘overall security architecture of the Union’.⁵⁴⁴ What these provisions fail to do is to outline the nature of operational relation between the continental system and the subregional mechanisms. From the judicial and quasi-judicial perspective, the African Charter, the Protocol to the African on the African Court on Human and Peoples’ Rights and the African Children Charter all make general provisions for competence of continental human rights supervisory bodies to receive requests from ‘African Organisations’ for advisory or interpretative opinions on the applicable human rights instruments.⁵⁴⁵ Further, in its rules of procedure, the African Committee of Experts on the Rights and Welfare of the Child has elaborated on the provisions of article 42 of the African Children Charter to create a right to ‘invite RECs’ to submit reports to the Committee on the implementation of the African Children Charter and to ‘give expert advice in areas falling within their scope of activities’.⁵⁴⁶ All the provisions on ‘African organisations’ and ‘RECs’ naturally include ECOWAS and its institutions.

It would be observed that none of the provisions considered expresses any hierarchical relation between the continental system and subregional regimes like the ECOWAS regimes. There is also no clear delineation of areas of competence or indications of what mechanisms alleged victims should approach first. What is clear however, is that the provisions envisage subregional involvement in the human rights issue area, and the communal usage of relevant continental human rights instruments. Notwithstanding these observations, there are a few reasons to support a view that the continental mechanisms stand in some sort of ‘superior’ position vis-à-vis the subregional regimes like ECOWAS. First, from the general point of view of integration, the revised ECOWAS Treaty recognises that its integration should ‘constitute an essential component of the African continent’.⁵⁴⁷ By implication, the activities of ECOWAS, including in issue areas like human rights should defer to wider continental initiatives. Secondly, especially in the judicial and quasi-judicial sector, the issue-specific nature of the mandate of the continental human rights

⁵⁴⁴ Art 16 of the PSC Protocol. See also the provisions for parliamentary cooperation as well as the NEPAD provisions discussed previously.

⁵⁴⁵ See art 45(3) of the African Charter, art 4 of the Protocol on the African Court of Human and Peoples’ Rights and art 42(c) of the African Children Charter.

⁵⁴⁶ Rule 69 of the Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child.

⁵⁴⁷ Art 78 of the revised ECOWAS Treaty.

supervisory bodies makes those bodies better placed to exercise hegemony in the area of human rights.⁵⁴⁸ In this regard, even the language of the documents of the continental system, which empower continental bodies to receive requests for advisory opinions from bodies like ECOWAS seem to envisage that the greater competence for interpretation lies with the continental bodies. It has to be noted however, that the instruments do not confer exclusive jurisdiction on continental bodies and they do not specify an appellate relationship. Thirdly, the ECOWAS system is ‘closer’ to West Africa⁵⁴⁹ and it is likely to be accessed first.

The deductions that can be made from the previous paragraph are that the ECOWAS system does not state the nature of the relation between ECOWAS institutions involved in the field of human rights and the institutions of the continental human rights system. However, continental instruments ‘recognise’ subregional regimes like the ECOWAS regime and envisages a supporting role for such regimes. Thus, the ECOWAS regime stands in a complementary relation with the continental institutions in a non-hierarchical position in the space between the national plane and international (continental) mechanisms for human rights realisation. At this point, it is relevant to revisit the question whether the ECOWAS system is a part, or has any specific link with the African human rights system.

Until recently, legal scholarship on the African human rights system has been conclusive on the position that the system revolved around the African Charter, the African Commission on Human Rights and (at that time), the emerging African Court on Human and Peoples’ Rights.⁵⁵⁰ On the strength of such traditional scholarship, the emerging ECOWAS human rights regime is not a part of the African human rights system as it does not have a direct link with the African Charter. To determine whether the ECOWAS regime is a part of the African human rights system, it would

⁵⁴⁸ See eg E Aukot, ‘The future of regional courts in redressing human rights violations: Is the establishment of the African Court on Human and Peoples’ Rights a Plus?’ in Wachira (ed) (2007). Aukot argues that the African Human Rights Court, as a specialised continental court for human rights issues should enjoy ‘supremacy’ vis-à-vis subregional courts like the ECCJ.

⁵⁴⁹ Although, not in all cases as the Secretariat of the African Commission is hosted in Banjul, The Gambia.

⁵⁵⁰ Recent works which have tended to adopt a more holistic approach include Viljoen (2007) and J Akpohor and DS Zimble (eds) *Africa’s Human Rights Architecture* (2008). For a contrary view, see JD Boukongou, ‘The appeal of the African system for protecting human rights’ (2006) 6 *AHRLJ* 268, 269.

be necessary to further explore what the system is and how parts of the system can be identified. In this regard, a system has been defined as ‘a set of elements that are related and that, through this set of relationships, aims to accomplish goals’.⁵⁵¹ A system may also be seen as ‘a regularly interacting or interdependent groups of items forming a unified whole’.⁵⁵² LoPucki adds that ‘systems are composed of subsystems’.⁵⁵³ Working by these definitions, the African human rights would refer to all the norms, principles and institutions that interact for the purpose of promoting the realisation of the objectives human rights protection around the framework of the African Charter. For identification of parts of a system, LoPucki advises inquiry into relationships rather than on stated components.⁵⁵⁴ He advocates the use of an analysis tool that evaluates interaction and purpose in order to identify the existence of a system and its components.⁵⁵⁵

As noted already, current analysis of the African human rights system excludes the ECOWAS regime as part of the system. It is arguable that this conclusion is the result of overly focusing on the familiar ‘components’ of the system. This would mean that adopting a ‘systems analysis approach’ and expanding focus to relationships would present a different picture and allow for seemingly unrelated ‘components’ to be admitted as part of a more comprehensive system, even if only as a subsystem. Using LoPucki’s approach, there is some level of interaction of the ECOWAS system with other parts of the African human rights system. While this may not currently be very much in all areas, it is very strong with respect to the use of the African Charter as a common standard for human rights in West Africa.⁵⁵⁶ In terms of purpose, there is clear evidence that the ECOWAS regime also partly aims at ensuring realisation of the objectives of the African Charter.⁵⁵⁷ There is thus an indication of a common purpose of the ECOWAS regime and the continental system. From this perspective, the ECOWAS regime, while not being a central part of the system, operates as a

⁵⁵¹ P Licker, *Fundamentals of system analysis* (1987) cited by Shelton (1999) 352.

⁵⁵² LM LoPucki, ‘The systems approach to law’ (1996 -1997) 82 *Cornell Law Review* 482. LoPucki cites the Webster’s Ninth New Collegiate Dictionary.

⁵⁵³ LoPucki (1996 – 1997) 487.

⁵⁵⁴ As above.

⁵⁵⁵ LoPucki (1996 – 1997) 498.

⁵⁵⁶ It can be pointed out that law-making instruments of ECOWAS commonly refer to the African Charter. Judicial protection of rights under ECOWAS has also been largely based on the African Charter.

⁵⁵⁷ Art 56(2) of the revised ECOWAS Treaty is instructive in this regard.

somewhat independent, but connected part of the African human rights system. It can therefore be regarded as a subsystem of the African continental human rights system.

3.7.3 Relation with the global human rights system

In terms of human rights realisation, the ECOWAS regime does not also prescribe any formal institutional relation with the global (UN) human rights system. From the point of view of the global human rights structures, there is also no recognition of any relationship between subregional regimes like ECOWAS and the global system.⁵⁵⁸ This is no different from the relation between the global system and the three main subregional human rights systems. As Shelton notes, the regional systems draw ‘inspiration from the human rights provisions of the United Nations Charter and the Universal Declaration of Human Rights’.⁵⁵⁹ Yet, these regional systems are autonomous and independent of the global system. At best, some form of mutual respect exists between the global and regional human rights systems. The ECOWAS regime is yet to have any significant contact with global institutions for human rights realisation to assist analysis of the nature of the relation. However, as already demonstrated earlier in this chapter, the understanding of human rights under the ECOWAS regime makes ample references to the UDHR which stands as the central human rights standard of the global human rights system. Added to this, the human rights obligations in the UN Charter would also be relevant considerations to the extent that ECOWAS member states are all members of the UN.

Beyond the recognition accorded the UDHR in the documents of the ECOWAS regime,⁵⁶⁰ it can be argued that the ECOWAS regime operates at a level too remote to require formalisation of relations. However, from a judicial and quasi-judicial perspective, the provisions under the ECOWAS regime and in the various UN Treaties preventing dual submission of cases before international mechanisms for rights protection is evidence of some level of mutual respect. Nevertheless, it can be the principle of speciality of purpose operates in favour of the global mechanisms for human rights in the remote event of a conflict.

⁵⁵⁸ However, the Office of the UN High Commissioner for Human Rights states that it can partner with organisations for the protection of human rights. This, it is submitted is wide enough to accommodate formal relations with ECOWAS.

⁵⁵⁹ Shelton (1999) 353.

⁵⁶⁰ The UDHR has also been applied frequently in judicial protection of human rights under the ECOWAS system.

3.8 Interim conclusion

The purpose of this chapter was to investigate whether there is a legitimate subregional regime for human rights protection under the ECOWAS framework. After an evaluation of the integration history of the Community, analysis of the treaties and other sources of law as well as a brief consideration of institutional mandates, this chapter has shown that despite its origins as an initiative for subregional economic integration, ECOWAS has gradually developed a human rights regime. The boundaries of the regime are still unclear as the regime is still at its infancy. The discourse has also shown that the legal foundation for an ECOWAS human rights regime rests on a delicate yet evident constitutional basis as contained in provisions of the revised ECOWAS Treaty. Thus, there is a lawful human rights regime which falls within the purview of the Community's organisational objectives. The chapter has also demonstrated that human rights standard-setting under the ECOWAS framework depends largely on restatement or adaptation of obligations that member states had undertaken under other treaty arrangements and thus, does not create additional obligations or impact negatively on the relations between the Community and its member states.

It has also been shown that whereas the human rights aspects in the mandates of some ECOWAS institutions are express and obvious, in others, they are not so clear. The chapter has also demonstrated the unclear relation between the budding regime and other, far more established human rights systems. The point has also been made that lack of clarity of human rights mandate of ECOWAS institutions amplifies the risk of conflict between the Community's institutions and other players in the African human rights system. Notwithstanding the uncertainties, one can venture that the regime has come to stay. However, the survival of the system would depend largely on its ability to navigate through the haze of uncertainties. This can be simplified where ECOWAS institutions identify their roles in the new regime with a view to enhancing their performances. In this process of identification and clarification of roles, the ECOWAS institutions need to develop mechanisms to regulate intra- and inter-organisation relations with national and continental bodies that are involved in the field of human rights. This is especially since some of the treaties applied by the ECOWAS regime were adopted on the platform of the AU and in some cases have



their own treaty supervisory bodies. The next chapter of this work will therefore focus on the institutional responsibilities for human rights under the ECOWAS regime.



Chapter Four

Current ECOWAS human rights practice: the conundrum of efficacy and symmetry

- 4.1 Introduction
- 4.2 The Authority: beyond the conferences
 - 4.2.1 General policy directions
 - 4.2.2 Creation, modification and control of Community institutions
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 - 4.5.3 Hosting of special units and execution of community human rights projects
 - 4.5.4 Formulation and initiation of human rights policies
- 4.6 The Council of Ministers
- 4.7 Other institutions in the system
- 4.8 Interim conclusion

4.1 Introduction

In the course of its existence, ECOWAS has experienced a major shift in its approach to human rights as a Community. From a treaty regime that paid little or no conscious attention to human rights, the Community has moved to a regime that can lay claim to a delicate but apparent competence in human rights. Admittedly, this competence is buried in the Treaty, instruments and documents of the Community and gives rise to questions of propriety and legitimacy. However, the previous two chapters have attempted to show that the newly developed human rights regime of the Community is within the legal boundaries of the organisation. It has been demonstrated that human rights realisation is incidental to and necessary for the achievement of successful economic integration that adds value to the life of ECOWAS citizens. Thus, a human rights regime in the ECOWAS framework does not conflict with the objective of economic advancement and does not lead to abandonment of economic goals.

As the emerging ECOWAS human rights regime operates within the territories of member states and within the jurisdiction of the African human rights system, the need for symmetry with both national and continental human rights mechanisms cannot be overemphasised. Hence, while it seeks efficacy in order to be relevant, it is essential for the ECOWAS regime to ensure that it complements rather than disrupt the existing human rights architecture. To the extent that it relies on national and continental human rights norms, the duty to find symmetry rests with the ECOWAS regime. Thus, this chapter analyses the actual human rights practice of the ECOWAS Community and its institutions in order to evaluate if and how the regime balances efficacy with symmetry. While assessing the usefulness of ECOWAS interventions, the impact of such interventions on intra- and inter-organisational relations will be evaluated to bring out issues of jurisdictional conflicts, inconsistencies and duplication. The chapter will also seek to identify mechanisms in the regime that are applied to find organisational balance. Taking an institutional rather than a thematic approach, the human rights work of each primary and subsidiary institutions of ECOWAS is analysed along the lines set out above before a conclusion is drawn.

4.2 The Authority: beyond the conferences

Generally, international organisations function through the activities of their primary and subsidiary organs. The distinction between primary and subsidiary organs lies in the fact that whereas primary organs are created in the founding treaty of an organisation, subsidiary organs are often creations of a primary organ in exercise of powers granted in a treaty.⁵⁶¹ One of the most common treaty-created primary organs in international organisations is the plenary assembly. The plenary assembly of international organisations is very often the organ that consists of all member states, usually represented by Heads of State and Government.⁵⁶² Although the hierarchical status of plenary assemblies depends on the intention of the converging states as laid out in the founding treaty of an organisation, they usually play an important role in determining the direction of international institutions.

Within the ECOWAS framework, the Authority of Heads of State and Government (the Authority) is a primary organ and the plenary assembly of the Community. As already indicated, the Authority is the supreme organ or institution and the highest decision-making body of the ECOWAS. It is responsible for the overall control of the Community.⁵⁶³ Under the prevailing legal framework of ECOWAS, the Authority acts by Supplementary Acts which, depending on the subject matter, may be adopted by unanimity, consensus or two-third majority.⁵⁶⁴ The revised Treaty does not confer an express human rights mandate on the Authority but institutional responsibility for human rights is evident in the work of the Authority. Under the revised Treaty, the human rights work of the Authority can be found in the general policy directions of the Authority, in the responsibility to implement the decisions of the Community and in the Authority's control of Community institutions. Aspects of human rights can also be found in powers conferred under some of the protocols of the Community. In most cases, the Heads of State and Government are members of the corresponding organ in the AU. They also head the governments at the national level. Thus, greater

⁵⁶¹ Schermers & Blokker (2003) 153.

⁵⁶² Amerasinghe (2005) 131.

⁵⁶³ As stated in chapter three, see arts 6 and 7 of the revised ECOWAS Treaty.

⁵⁶⁴ By art 9 of the revised Treaty, the Authority was to act by decisions adopted by unanimity, consensus or two-third majority. Following the adoption of Supplementary Protocol A/SP.I/06/06 Amending the Revised Treaty, a new art 9 was introduced. The new art 9 replaces decisions with supplementary acts as tools of the Authority.

responsibility ought to lie with this body to ensure coordination and to avoid conflicting obligations, loyalties and jurisdiction of institutions.

4.2.1 General policy directions

The most significant human rights work of the Authority relates to its general policy direction giving function. In this context, the Authority determines the overall human rights course of ECOWAS within its treaty framework, the actual scope of the human rights content in the activities of the Community and the limits of the powers exercisable by Community institutions in this issue area. Acting upon powers granted under article 63 of the 1975 original ECOWAS Treaty, members of the Authority, in their capacity as member states of ECOWAS seized the opportunity of treaty revision to introduce the idea of ‘recognition, promotion and protection of human and peoples’ rights’ as a fundamental principle upon which they will act in pursuit of the objectives of the Community.⁵⁶⁵ This is arguably the clearest statement in the treaty of an intention to include or at least defer to human rights in the functioning of the Community.⁵⁶⁶ It may very well have provided treaty foundation for the inclusion of human rights considerations in other documents of ECOWAS. In its capacity as a Community institution rather than a collection of member states, the Authority has built on the provisions of article 4(g) of the revised Treaty by including robust aspects of human rights, democracy and humanitarian law in some protocols adopted in the epoch of the revised Treaty.⁵⁶⁷

In mainstreaming human rights within the treaty and the overall legal framework of the Community, member states of ECOWAS acting through the Authority arguably operate in accordance with the principle of cooperating to ensure respect human rights contained in the Charter of the UN.⁵⁶⁸ Consequently the Authority consciously or unconsciously brings the Community in compliance with the duty incumbent on UN

⁵⁶⁵ Art 4(g) of the revised Treaty.

⁵⁶⁶ Constant reference to art 4(g) of the revised Treaty by the ECCJ in its determination of human rights cases supports this position.

⁵⁶⁷ Notable in this category are the Conflict Prevention Protocol and the Democracy Protocol. It has to be borne in mind that under the initial legal framework of the revised Treaty, the line between member states in their character as independent member states strictly and as the Authority by way of a Community institution was very thin as the Authority acted in an intergovernmental fashion that required members of the Authority to revert to the character of heads of states and government for the purpose of making treaties. Thus, treaty making for example began as a function of the Authority but usually ended as an action of individual states.

⁵⁶⁸ Art 1(3) of the UN Charter.

member states under article 103 of the UN Charter to avoid the conclusion of other treaties that would negate obligations undertaken under the UN Charter.⁵⁶⁹ However, the Authority has obviously also expanded the powers and activities of the Community beyond the original conception of the founding fathers. The question that arises then is whether the Authority has acted lawfully in this regard. Clearly, states have a right in international law to enter into treaties of any kind on any matter that is not prohibited by international law. States are also at liberty to determine the means by which the objectives of an organisation they have formed should be realised. Thus, the inclusion of article 4(g) in the revised Treaty is within the legal rights of ECOWAS member states. A presumption can be made that in taking the decision to enact article 4(g) in the revised Treaty, ECOWAS Heads of State and Government were aware of the existing treaty obligations and other human rights obligations under the AU framework. They were arguably also aware of the potential consequence that an obligation under article 4(g) of the 1993 revised ECOWAS Treaty would have for the various national human rights regimes. However, this is at best a rebuttable presumption and leaves open the question whether Heads of State and Government averted their minds to these concerns and the consequent need to provide mechanisms to avoid jurisdictional conflicts and inconsistencies.

There is no theoretical or practical guide on the exact interpretation and consequence of provisions listed as ‘fundamental principles’ in integration treaties but they are apparently understood in the ECOWAS context to require that the Authority takes human rights concerns into account in the pursuit of Community objectives. Additionally, the revised Treaty appears to have given the Authority leverage to ‘take all measures to ensure ... progressive development and the realisation of ... objectives’ of the Community.⁵⁷⁰ The cumulative effect of articles 4(g) and 7(2) of the revised Treaty seemingly gives legality to the approach of the Authority. Some commentators concede that member states of an international organisation may validly consent to new powers on the basis of the concept of customary powers.⁵⁷¹ Perhaps, the spillover into the realm of politics and the consequent need for restriction of the exercise of public powers has prompted the present regime by which member

⁵⁶⁹ It has been argued that the formula in the UN Charter provision relates to all obligations that result from the Charter. See B Simma (ed) (1995) *The Charter of the United Nations: A Commentary* 1120.

⁵⁷⁰ See the second limb of art 7(2) of the revised Treaty.

⁵⁷¹ Schermers & Blokker (2003) 176.

states consent to the conferment on and exercise of human rights competence by ECOWAS as an organisation.

The inclusion of human rights within the legal framework of the ECOWAS Community may also be seen as a move by the Authority to adopt a human rights approach to integration and development in West Africa. If, as some have argued,⁵⁷² ECOWAS can be conceptualised as a mechanism for the realisation of the right to development, taking a human rights approach should set ‘the achievement of human rights as an objective of development’.⁵⁷³ One of the ways of doing this is by ‘taking human rights as a frame of reference’ through ‘reference to and starting from human rights treaties’.⁵⁷⁴ As the Community organ or institution with legislative powers, the Authority is best placed to put ECOWAS in this context. By creating new legislative instruments with ample reference to the promotion and protection of rights recognised in the African Charter, the Authority builds on article 4(g) of the revised ECOWAS Treaty and sets the Community on a course of taking a human rights approach to development. Further, it avoids the complications that would have arisen if institutions of the Community were to operate under a legislative framework bereft of human rights values. In such a situation, ECOWAS institutions may have either been in breach of the human rights obligations of ECOWAS member states undertaken under other treaties or they would have been forced to read in human rights value into their functions.

Pursuant to its function of providing general policy directions for the Community, in 2001, the Authority adopted a regional plan of action to address the scourge of trafficking in persons in West Africa.⁵⁷⁵ By focusing on establishing appropriate criminal justice responses to tackle the scourge while initiating protection and rehabilitation measures for victims of trafficking, the Authority has positioned the Community to address one possible consequence of the free movement aspect of

⁵⁷² See N Nwogu, ‘Regional Integration as an Instrument of Human Rights: Reconceptualising ECOWAS’ (2007) 6 *Journal of Human Rights* 345 for example.

⁵⁷³ The Overseas Development Institute, *What Can We Do with a Rights-Based Approach to Development?* 3 Briefing Paper 1, (1999) available at http://www.odi.org.uk/briefing/3_99.html states that ‘a human rights approach to development sets the achievement of human rights as an objective of development’.

⁵⁷⁴ BI Hamm, ‘A human rights approach to development’ (2001) 23 *Human Rights Quarterly* 1005, 1011.

⁵⁷⁵ 2004 Annual Report of the ECOWAS Executive Secretary, 70.

integration.⁵⁷⁶ The propriety of ECOWAS engagement in this area may be open to challenge as questions may be asked whether such activities fall within the treaty competence of the Community. But as Viljoen has noted, the cross-border nature of human trafficking justifies intervention by RECs.⁵⁷⁷ It would be noted that the approach in ECOWAS has been to adopt policy papers rather than a binding instrument that adds to the body of regulatory norms or that impose new obligations on member states. This approach has the potential to positively impact on implementation of existing norms and mechanisms by reinforcing and coordinating member states' efforts without upsetting the existing structure. Arguably, this is a complementary approach to human rights realisation since it focuses on non-judicial and non-hierarchical aspect of implementation while giving a supervisory role to the collective over individual state mechanisms. However, it would be observed that there is no effort to link the Plan of Action to existing continental structures and procedures.

4.2.2 Creation, modification and control of Community institutions

Connected to the function of providing general policy direction, the power of the Authority to create, modify and control or oversee ECOWAS Community institutions has implications for human rights and has been applied in that regard by the Authority. The power to control and oversee the functioning of Community institutions is granted to the Authority in article 7(3)(b) of the revised Treaty. The Treaty also empowers the Authority to determine or modify the powers and functions of certain Community institutions to the extent that it gives the Authority power to make protocols setting out the functions, powers and organisation of those institutions.⁵⁷⁸ No express power is granted to the Authority in the Treaty to create institutions. However, as previously indicated, under the law of international institutions generally, it is recognised that certain organs or institutions may create subsidiary institutions.⁵⁷⁹ In exercise of such customary powers, the Authority has established new and subsidiary institutions not contemplated in the Treaty. Some of

⁵⁷⁶ See the 2001 ECOWAS Plan of Action for the Fight Against Trafficking in Persons.

⁵⁷⁷ Viljoen (2007) 510.

⁵⁷⁸ Eg see art 13(2) of the revised Treaty on the Authority's power to adopt a protocol on the Community Parliament and art 15(2) on similar powers in relation to the ECCJ.

⁵⁷⁹ Schermers & Blokker (2003) 153.

these institutions have human rights related powers that further institutional link with human rights in the Community.

Acting on its powers to make protocols for the establishment of certain Community institutions, the Authority, in making the 1991 Protocol on the ECOWAS Community Parliament, listed human rights as one of the issues over which the Community Parliament may exercise limited legislative competence.⁵⁸⁰ The Authority has also used a protocol to include competence over human rights in the expanded mandate granted to the ECCJ.⁵⁸¹ In using its legislative competence to empower these institutions to act in the field of human rights, the Authority removes the potential of forcing these institutions to imply power to act in this area. As these institutions are some of the Community institutions with which ordinary people come in contact regularly, this approach is likely to enhance popular participation in an otherwise technical integration process.

However, in making protocols, the Authority in certain cases appear not to have sufficiently considered the need to delineate Community competence from national competence of member states on the one hand and the competence of other international organisations on the other hand. Added to the fact that the boundaries of the human rights mandate of Community institutions are sometimes not well defined, room is created for tension arising from over-involvement of ECOWAS in fields well outside of its specific objectives. As would be subsequently demonstrated, in some cases this could result in issues of overlapping and conflicting jurisdictions arising. Such situations are best addressed by the exercise of care in making protocols. In view of the fact that an ECOWAS human rights regime is not a free-standing one, but operates within national territories over which national and continental also claim (prior) competence, greater sensitivity would have been necessary to maintain symmetry. This is more so, as ECOWAS would eventually become part of the wider African system under the AU/AEC framework.

The transformation of the ECOWAS Executive Secretariat into a Commission is also an example of the Authority's involvement in the promotion and protection of human

⁵⁸⁰ Art 6 of Protocol A/P2/8/94 Relating to the ECOWAS Parliament.

⁵⁸¹ See arts 3 and 4 of Supplementary Protocol of the ECCJ.

rights.⁵⁸² In approving the transformation, the Authority permitted the establishment of departments within the ECOWAS Commission with functions within the field of human rights. The Authority has also created subsidiary institutions such as the West Africa Health Organisation, the Council of Elders under the Conflict Management Protocol and ad hoc offices of Special Representatives of ECOWAS in certain member states emerging from conflict.⁵⁸³ All of these subsidiary institutions have been endowed with some level of competence in the field of human rights. As the ECOWAS Treaty only allows Community institutions to perform functions and act within the limits of powers conferred the Treaty and protocols of the Community, the relevance of the Authority's grant of such powers in the field of human rights cannot be overemphasised. The functions performed by these subregional institutions are very often in very specific areas where national mechanisms are non-existent or ineffective. Usually, they are also areas where continental reach is relatively limited. Thus, these institutions cannot be seen as general human rights supervisory bodies with potential to compete with continental institutions for priority of jurisdiction.

4.2.3 Responsibility to implement and enforce Community obligations of member states

Another important aspect of the work of the Authority in the field of human rights relates to implementation and enforcement of member states obligations to the ECOWAS Community. In order to enhance effective integration, each ECOWAS member state, by ratifying the revised Treaty made an undertaking to honour its obligations to the Community and abide by the decisions and regulations of the Community.⁵⁸⁴ This undertaking is reinforced by Treaty power conferred on the Authority to impose sanctions on a member state that fails to fulfil its obligations to the Community.⁵⁸⁵ In exercising the power to impose sanction, the Authority may involve the ECCJ in the sense that it may refer a question to the Court to determine

⁵⁸² The 29th Ordinary Summit of the ECOWAS Authority which held on 12 January 2005 approved the transformation of the ECOWAS Secretariat into a Commission. <http://www/news.ecowas.int/presseshow.php?nb=13&lang=en&annee=2006> (accessed 24 August 2008).

⁵⁸³ The office of Special Representative operates basically as representative of the President of the ECOWAS Commission in member states where ECOWAS Peacekeeping operations are on-going.

⁵⁸⁴ Art 5(3) of the revised Treaty.

⁵⁸⁵ Art 77 of the revised Treaty grants the power to sanction and lays out possible sanctions that may be imposed by the Authority in the event of such a failure by a member state to fulfil Community obligation.

and confirm whether a member state has failed to fulfil or honour its Community obligation.⁵⁸⁶

Arguably, the obligations that a member state owes to ECOWAS includes a duty to adhere to the principle of ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’.⁵⁸⁷ Community obligation would also include a duty to comply with the decisions of institutions of the Community (including those of the ECCJ) relating to human rights. In this regard, the system potentially addresses the concern of absence of enforcement mechanisms that trails international human rights supervisory mechanisms. It would be noted that this implies that the Authority retains both legislative and executive powers in relation to the Community. However, this is not inconsistent with practice in international institutional law.⁵⁸⁸ In the context of ECOWAS, the Authority’s power of implementation has been relied upon to exert pressure on some member states in situations of humanitarian concern⁵⁸⁹ and in order to restore constitutional government in situations of unconstitutional overthrow of government.⁵⁹⁰ The ease with which West African Heads of State and Government are willing to intervene in favour of human rights on the platform of ECOWAS contrasts with the reluctance that is displayed when action is needed in the AU framework. Such interventions by ECOWAS Heads of State and Government gives the impression of a subtle recognition and acceptance of the right to protect at a regional level on the basis of considerations such as proximity and the risk of ripple-effect in the event of conflict or crises.

While the implementation powers of the Authority have been successfully applied in favour of human rights in the situations described above, there is still a lack of clarity with regards to how this function can be exercised to implement or enforce decisions

⁵⁸⁶ Art 7(g) of the revised Treaty.

⁵⁸⁷ See art 4(g) of the revised Treaty.

⁵⁸⁸ The AU adopts a similar approach. In organisations like the EU, legislative and executive powers are conferred on the Council of Ministers.

⁵⁸⁹ For instance, the Authority piled pressure on former President Charles Taylor during the Liberian conflict.

⁵⁹⁰ In Togo, the Authority successfully prevailed on the Togolese authorities to conduct democratic elections after the death of former President Gnassingbé Eyadéma in 2005. Similarly, Guinea’s membership of ECOWAS was suspended by the Authority in 2009 following a military coup in that country.

of the ECCJ especially in human rights cases. The implementation role of the Authority is not mentioned in any of the Protocols of the ECCJ. However, article 77 of the revised Treaty should apply to require the Authority to act in the event of a member state's failure to comply with a decision against it. The case of *Manneh v the Gambia*⁵⁹¹ has presented the best opportunity so far to allow for the exercise of the Authority's implementation and enforcement powers. Refusal of the Gambia to release Mr Manneh from custody as ordered by the ECCJ arguably amounts to a failure on the part of that state to comply with Community obligation arising from a decision of a Community institution. However, as at July 2009, the Authority had neither acted nor made any pronouncement on the issue of non-compliance by the Gambia.⁵⁹² Perhaps, the fact that there are no guidelines how individuals may kick-start the processes of the Authority has contributed to the difficulty experienced in this respect. If that is the case, it may be beneficial for the Authority to set out the procedure by which its power of implementation and enforcement may be invoked by ECOWAS citizens. A more important question is whether by refraining to act, the Authority is tacitly acknowledging the right of member states to opt out of the emerging ECOWAS regime on the grounds that integration was for economic rather than human rights purposes. While this may be a tempting possibility, the continued use of the system for human rights realisation defeats such a possibility.

4.2.4 Human rights responsibilities in Community Protocols

Apart from its Treaty related functions, the ECOWAS Authority also takes on certain other specific roles in relation to human rights. These other roles are located in some of the protocols adopted by the Community. The responsibilities under the protocols are essentially of an executive nature. For instance, under the Protocol on Free Movement, Right of Residence and Establishment, the Authority is empowered, through its Chairperson, to direct the ECOWAS Commission to dispatch a fact finding mission to investigate allegations of 'systematic or serious violations' of the provisions of the Protocol. This process which only becomes operational if member states are unable to reach amicable settlement of the dispute touches on the enjoyment

⁵⁹¹ *Manneh v the Gambia*, Unreported Suit No ECW/CCJ/APP/04/07, Judgment No: ECW/CCJ/JUD/03/08. In reaction to the *Manneh* case, the government of the Gambia has indicated an intention to prompt for a review of the requirements for individual access to the ECCJ, especially in relation to exhaustion of local remedies.

⁵⁹² The judgment of the ECCJ in the *Manneh* case was delivered in June 2008.

of economic freedoms by citizens.⁵⁹³ Intervention in this regard coincides with the authority of the African Commission, the AU Peace and Security Council (AUPSC) and by extension, the AU Assembly to intervene in situations of serious or massive violations of human rights.⁵⁹⁴

By article 6 of the Conflict Prevention Protocol, the ECOWAS Authority is the highest decision-making body of the mechanism established under that protocol. Thus, the power to take crucial decisions and to act on rights related matters such as conflict prevention, management and resolution, peacekeeping, humanitarian support and peace-building resides in the Authority. Although the Conflict Prevention Protocol allows the Authority to delegate these powers to a smaller unit of heads of state and government operating as the Mediation and Security Council,⁵⁹⁵ ultimate decision-making powers remain in the Authority. Consequently, the Authority is one of the institutions of the mechanism that has to determine whether violation of human rights and the rule of law in a member state is serious and massive enough to warrant application of the mechanism.⁵⁹⁶

In line with its powers under the Conflict Prevention Protocol, the Authority approved the inauguration of the Council of Elders as an organ of the mechanism in 2000.⁵⁹⁷ The Authority also approved the dispatch of a high-level ECOWAS mission to Guinea Bissau in May 2004 following a perceived threat of deterioration of the pre-election conflict in that country.⁵⁹⁸ In adopting these measures and executing its functions under these protocols, the Authority may be taking a much needed proactive

⁵⁹³ See Amended art 7 in Supplementary Protocol A/SP.1/6/89 Amending and Complementing the Provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment.

⁵⁹⁴ By art 4(h) of the AU Constitutive Act, the AU can intervene in AU member states pursuant to a decision of the Assembly in respect of grave circumstances such as war crimes, genocide, crimes against humanity and threat to legitimate order (added by the Protocol on Amendments to the Constitutive Act 2003). The AUPSC claims a similar right by virtue of art 6 of the Protocol on the Peace and Security Council (2002). The African Commission's competence derives from art 58 of the African Charter.

⁵⁹⁵ Art 7 of the Conflict Prevention Protocol.

⁵⁹⁶ See arts 25 and 26 of the Conflict Prevention Mechanism. By art 25, the mechanism can be applied in any circumstance actual or threat of aggression or conflict in any member state, conflict between member states, internal conflict that threatens humanitarian disaster or threat to subregional peace and security, serious and massive violation of human rights and the rule of law and overthrow or attempted overthrow of a democratically elected government.

⁵⁹⁷ See 'Council of Elders approved' available at <http://news.ecowas.int/presseshow.php?nb=13&lang=en&annee=2003> (accessed 27 November 2008).

⁵⁹⁸ ECOWAS Annual Report (2005) 90.

approach to human rights protection. Such proactive actions are clearly commendable options to human rights protection as they are more likely to benefit ordinary people who suffer the most violations in the occurrence of violence.⁵⁹⁹ Although corresponding mechanisms exist in the AU, proximity and the threat of ripple-effect weighs in favour of ECOWAS interventions. In this regard, interventions have been positive and effective. The level of coordination and cooperation before intervention is not clear even though the need for such coordination is recognised and required by applicable instruments.⁶⁰⁰

4.3 A mandate without a method? the Community Parliament

Similar to governmental configuration in municipal systems, most international organisations have some form of parliamentary organ that is supposed to represent popular involvement in the functioning of such organisations. However, while one of the justifications for the existence of national parliaments is that it is undesirable to allow policy-making organs to supervise themselves without input from those most affected by decisions taken by these organs, justification for international parliamentary organs is not obvious. In fact it was previously thought that parliamentary control of the business of international organisations was unnecessary as no immediate link was seen to exist between the functions of these organisations and the citizens of their member states.⁶⁰¹ Moreover national parliaments were able to act as a bulwark against direct impact on their citizens in the sense that national constitutions often required national parliamentary involvement for the ratification of international agreements to take effect.⁶⁰²

With increasing sophistication of the processes of international organisations and greater evolution towards supranationality that allows the policies and acts of these organisations to by-pass national parliaments yet have direct effect in the national

⁵⁹⁹ See H Thoolen, 'Early warning and prevention' in G Alfredsson, J Grimheden, BG Ramcharan & A de Zayas (eds) *International Human Rights Monitoring Mechanisms* (2001) 311 – 328. Thoolen argues that even though preventive measures are often focused on conflict resolution and mitigation, there is link to human rights since human rights violations arising from conflict provoke refugee outflows and similar human rights concerns. For him therefore, prevention is better than the present regimes of human rights that are designed for suppression and cure after violation.

⁶⁰⁰ See art 16 of the AU Protocol on the Peace and Security Council. Also see art 52 of the ECOWAS Conflict Prevention Protocol. This article also obligates ECOWAS to inform the UN of military interventions but contains no such obligation towards the AU.

⁶⁰¹ Schermers & Blokker (2003) 398.

⁶⁰² Schermers & Blokker (2003) 399.

systems, the need for popular involvement in the processes has become more evident. On the whole, this involvement still falls short of parliamentary functioning as it is known in national systems. Thus, international parliamentary organs are bodies with varying forms of parliamentary powers.

Established for the first time under the revised Treaty, the idea of an ECOWAS Parliament was conceived under a treaty regime that envisaged greater popular participation on the part of ECOWAS citizens in the integration process.⁶⁰³ In this regard, the Parliament is an expression of the democratic intentions of the Community.⁶⁰⁴ Its relevance from a human rights perspective however goes beyond mere democratic expression. As already demonstrated, article 4(g) of the revised Treaty also contemplates integration in an environment of recognition, promotion and protection of human rights. As a treaty institution created under this new treaty regime, the question of human rights is prominent in the mandate of the Parliament. The method by which this mandate is to be fulfilled is however, unclear from the documents of the Parliament. It would be noted for example, that the Parliament is a ‘forum for dialogue, consultation and consensus for representative’ and its powers are essentially of an advisory nature.⁶⁰⁵ In the course of its short existence, the Parliament has by its procedures, statements and actions indicated an intention not to be unduly restricted in the exercise of its treaty competence. While some of these procedures are merely proposed, some have been put into practice and together they form the actual and potential human rights methods the ECOWAS Parliament.

4.3.1 Recommendations and other advisory inputs to decision-making

By article 6(1) of Protocol A/P2/8/94 the ECOWAS Parliament is allowed to ‘consider any matter concerning the Community’ especially on issues relating to human rights and fundamental rights. On its own, article 6(1) is not very enlightening but the provision is best appreciated when it is read in context with article 6(2). Since article 6(2) of the Protocol enumerates matters on which the Parliament may be consulted for its opinion, it can be argued that the allowance to ‘consider any matter’

⁶⁰³ The principle of popular participation is set out in art 4(h) of the revised Treaty. The 1975 ECOWAS Treaty did not provide for any parliamentary organ. Arts 6 and 13 of the revised Treaty establish the Community Parliament but leaves out details for the Authority to flesh out in a protocol.

⁶⁰⁴ The ECOWAS Community views the inauguration of the parliament as the fulfillment of ‘one of the requirements of democracy’. See the Annual Report of the Executive Secretary (2006) ix.

⁶⁰⁵ Para 4 of the preamble to Protocol A/P2/8/94 Relating to the Community Parliament.

relates to matters over which the Parliament may initiate enquiry. As matters for which the Parliament may be consulted under article 6(2) also include ‘respect for human rights and fundamental freedom’⁶⁰⁶ the difference between matters that the Parliament may consider and those on which it may be consulted for its opinion is almost non-existent. An understanding that the requirement to consult Parliament is imposed on the institutions saddled with decision-making in the Community should support the argument that the allowance to ‘consider’ rests on parliamentary initiative.⁶⁰⁷ Under Protocol A/P2/8/94, notwithstanding whether human rights and related matters are considered by the Parliament on its initiative or are presented by reason of consultation by other institutions, competence is advisory and may only lead to a non-binding recommendation.⁶⁰⁸

Following a 2006 amendment of Protocol A/P2/8/94, it is now intended that the competence of the ECOWAS Parliament will progressively move from advisory through co-decision to lawmaking in areas to be defined by the Authority.⁶⁰⁹ This progression is dependent on the Community’s successful transition from appointment or selection of parliamentarians from national parliaments to election by direct universal suffrage.⁶¹⁰ Apart from these envisaged competences by progression, Supplementary Protocol A/SP.3/06/06 retains the advisory competences under the earlier Protocol. To facilitate its work, the ECOWAS Parliament operates through standing and ad hoc committees which are granted responsibilities for the different aspects of its mandates. Those relevant to human rights include: Health and Social Affairs Committee, Education, Training, Employment, Youth and Sports Committee, Women and Children’s rights Committee and the Committee on Laws, regulations, legal and judicial affairs, human rights and free movement of persons.⁶¹¹ The recommendations from ECOWAS Parliamentary Committees are generally advisory though expectation is that human rights should get more detailed attention at the level

⁶⁰⁶ See art 6(2)(m) of Protocol A/P2/8/94.

⁶⁰⁷ See also JU Hettmann and FK Mohammed, ‘Opportunities and Challenges of Parliamentary Oversight of the Security Sector in West Africa: The Regional Level’ (November 2005) Freidrich Ebert Stiftung 20

⁶⁰⁸ During the initial stage of the Parliament’s existence, very little was done by the Parliament.

⁶⁰⁹ Art 4(1) of Supplementary Protocol A/SP.3/06/06 Amending Protocol A/P.2/8/94 Relating to the Parliament (Supplementary Protocol A/SP.3/06/06).

⁶¹⁰ Art 4(1)(3) of Supplementary Protocol A/SP.3/06/06.

⁶¹¹ A complete list of standing committees of the ECOWAS Parliament is available on <http://news.ecowas.int/presseshow.php?nb=9&lang=en&annee=2001> (accessed 27 November 2008).

of the committees. Theoretically therefore, either as a result of Parliament's own initiative or where Parliament is consulted by the decision-making institutions, the ECOWAS Parliament should play an advisory role in the human rights agenda of the Community.

Law and practice of international organisations seems to tilt towards a regime of limited powers for parliamentary organs of international organisations. Thus, it has been noted that 'as a rule, international parliamentary organs do not play a decisive role in international organisations. They offer an opportunity for mutual consultation and cooperation...'⁶¹² Rather than actual decision-making or law making, 'parliamentary organs have important advisory functions. In performing these functions, they may exert some influence on the governmental organs'.⁶¹³ In essence, the recommendations and other advisory inputs of the ECOWAS Parliament, though not binding on the decision-making organs, should have a strong persuasive effect and be used to the advantage of ECOWAS citizens. The persuasive effect of the Parliament's advisory input should be relevant to influence ECOWAS institutions as much as it should influence national parliaments to put pressure on governments. This is a potentially useful tool for purposes of implementation of human rights decisions of Community institutions made against member states.

In practice, there is hardly any record of ECOWAS Parliamentary initiative towards considering any matter relating to human rights. A study initiated by the ECOWAS Commission in response to a Parliamentary Resolution requesting for greater involvement in the integration process concluded that 'the parliament has never addressed recommendations to the other ECOWAS institutions'.⁶¹⁴ Perhaps the closest to an initiative on the part of the ECOWAS Parliament is the 2002 resolution in which the Parliament sought expansion of its powers. The Parliament specifically requested for an increase in the degree of its involvement in the promotion of human rights, democracy, good governance and peace.⁶¹⁵ The parliament also sought

⁶¹² Schermers & Blokker (2003) 417.

⁶¹³ Schermers & Blokker (2003) 420.

⁶¹⁴ ECOWAS August 2004: Study on the Enhancement of the Powers of the Community Parliament, ECOWAS Secretariat cited by Hettmann and Mohammed (2005).

⁶¹⁵ See the Resolution Relating to Enhancement of the Powers of the Community Parliament, Sept 2002, the ECOWAS Parliament. As a follow up to the study by the ECOWAS Secretariat, the Parliament was restructured at the end of its first legislative year. Since the inauguration of the second

involvement in the mechanisms of the Conflict Prevention Protocol and in election monitoring and observer missions in the region.⁶¹⁶ In failing to initiate consideration of matters of human rights, the ECOWAS Parliament reduces its potentials for contributing to the protection of rights in the Community.

Up until sometime in 2008, the requirement that Parliament be consulted and its opinion sought on certain issues concerning the Community was largely ignored.⁶¹⁷ However, since 2008, supplementary acts of the Community made by the Authority usually include a paragraph stating that the ECOWAS Parliament has been consulted and its opinion taken into account.⁶¹⁸ While the impact of this process may not be much, it provides an opportunity for advocacy and lobbying of the Parliament by civil society in favour of human rights. Considering that the new legal regime of the Community allows supplementary acts of the Authority to apply directly in member states without the need for ratification, Parliament's effective use of its advisory competence represents a window for limited popular approval of the increasing protection of human rights within the framework of the Community. The fact that ECOWAS Parliamentarians are also national parliamentarians in their various states should allow for greater coordination between national human rights policies and legislations and Community human rights initiatives. Thus, the chances of transparency and democracy in the formulation of human rights policies are potentially stronger at this level than at the continental level.

4.3.2 Petitions to Parliament

Despite obstacles to the exercise of legislative powers comparative to the legislative powers of national parliaments, the ECOWAS Parliament has created avenue for engagement with citizens and residents of the ECOWAS Community through the process of petitions to the Parliament. By Rule 85 of the Rules of Procedure of the

legislature on 13 November 2006, the Parliament's role in the Community has been increased, leading to a requirement that its opinion be sought before Community legislation is passed. See the ECOWAS Annual Report (2007) 135.

⁶¹⁶ As above.

⁶¹⁷ This is in spite of the fact that art 13(2) in Supplementary Protocol A/SP.1/06/06 provides that the Community shall ensure the effective involvement of the Parliament in decision making.

⁶¹⁸ The Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS which in its art 21 requires ECOWAS member states to set minimum standards for environmental, labour and human rights protection in accordance with international treaties, was enacted after the Authority had 'considered the opinion of the ECOWAS Parliament'.

ECOWAS Parliament, natural and legal citizens and residents of the Community may bring a petition to the Parliament. Such petition has to deal with a matter within the fields of activity of the Community and should affect the applicant directly. Once such a petition is declared admissible, it may be dealt with by the relevant Parliamentary Committee and could lead to a resolution or an opinion ultimately forwarded to the ECOWAS Commission for action.⁶¹⁹

Although the procedure is potentially restrictive to the extent that it requires a petitioner to be directly affected by the subject-matter of the petition, increasing inclusion of human rights within the ECOWAS fields of activity may mean that human rights issues can be appropriately dealt with by this procedure without the necessity of an adjudicatory process. The link with the ECOWAS Commission could translate to the use of good offices in the resolution of matters of concern in the field of human rights within the region. It is important to note the limitation of petitions to the Community's field of activities as it narrows down the scope for conflict and inconsistency with mechanisms of the member state and the AU.

4.3.3 Fact-finding and other missions

In setting out the functions of the bureau of the Community Parliament, article 16B.1(b) of Supplementary Protocol A/SP.3/06/06 recognises that the Parliament may hold hearings, meetings and fact-finding missions outside of its headquarters. Although this was not originally included in Protocol A/P.2/8/94, the ECOWAS Parliament is recorded to have undertaken fact-finding missions to the Mano River Union as well as reconciliatory visits during the Liberian crisis.⁶²⁰ Such visits were either aimed at preventing conflicts or initiating moves for the resolution of conflicts that have negative impact on the human rights situation in the region.⁶²¹ Recently, members of the ECOWAS Parliament have also been included in ECOWAS observer missions for the purpose of monitoring or observing elections in ECOWAS member

⁶¹⁹ <http://www.parl.ecowas.int/english/petition.htm> (accessed 21 August 2008).

⁶²⁰ Hettmann and Mohammed (2005) 9.

⁶²¹ As above. The outcome of the visit to Liberia was reportedly transmitted to the Authority and became a useful tool for mediation in the Liberian conflict.

states.⁶²² This development may also be connected to the Parliamentary resolution requesting for enhanced powers in Community affairs.

Considering that ECOWAS does not currently have any institution totally dedicated to the promotion and protection of human rights, the missions undertaken by the ECOWAS Parliament come closest to the type of promotional visits undertaken by the African Commission within the context of the continental human rights system. While it may be argued that human rights is not the central objective of the ECOWAS Community and therefore there may be no need for promotional visit, the fact remains that the proactive effect of successful missions of the Parliament can be useful for human rights realisation. As Parliamentarians are currently selected from national parliaments, the chances of positive influence and the use of good offices should be very high under the Community platform. The ECOWAS Parliament may not have control over the decision-making organs of the Community. It may not yet have powers to scrutinise budgets or to make laws. However, the current procedures and practices of the ECOWAS Parliament are potentially viable tools for the promotion of human rights in the ECOWAS Community without undue confrontation with national systems. Since the methods of the Parliament are not adversarial, the goodwill of member states ought to be greater here. Moreover, Parliamentary actions have no potential of disrupting national or continental measures. Instead, the means applied by the Parliament could be instrumental in developing cooperation with national systems.

4.4 A licence to protect: the Community Court of Justice

Traditionally, international judicial and quasi-judicial dispute resolution mechanisms are established for the purpose of resolving disputes between states as subjects of international law. Such international dispute resolution mechanisms exist either as independent international organisations created by treaty or as organs of international organisations with no independent treaty existence.⁶²³ An international dispute resolution mechanism may also exist as an organ or institution of an international organisation yet be established by an independent treaty. Judicial organs of international organisations were commonly concerned with issues relating to how the

⁶²² <http://news.ecowas.int/presseshow.php?nb=13&lang=en&annee=2007> (accessed 27 November 2008).

⁶²³ P Sand (ed) (2001) *Bowett's law of international institution* (5th ed) 337

international organisation operated or with the conduct of states as members of such organisations.⁶²⁴ With the growing involvement of non-state actors in the field of international law and international relations, especially in the area of human rights, international dispute resolution mechanisms have also taken on new roles, entering into the sphere of disputes between states and non-state actors.⁶²⁵ In general, international mechanisms only exercise jurisdiction over disputes involving non-state actors where prior treaty provision grants competence in that regard.

The ECCJ is established by the revised ECOWAS Treaty as an institution of the Community but functions in line with powers and procedures set out in specific treaties.⁶²⁶ The ECCJ is composed of seven independent judges appointed by the Authority from nationals of ECOWAS member states on the recommendation of the Judicial Council of the Community.⁶²⁷ The qualification for appointment as a judge of the ECCJ is ‘high moral character and ... the qualification required in their respective countries for appointment to the highest judicial offices’ or being ‘jurisconsults of recognised competence in international law’ versed ‘particularly in areas of Community law or Regional Integration’.⁶²⁸ Judges are appointed for a non-renewable term of four years and serve full time during their tenure.⁶²⁹

Although it was originally established to exercise traditional competence as a dispute resolution mechanism to mediate between member states on issues relating to the functioning of the Community as well as the conduct of states in the integration process, the ECCJ has since received a licence to entertain human rights disputes involving non-state actors. As a judicial body, the ECCJ’s work is basically adjudicatory but in pursuit of its expanded mandate, the ECCJ has been one of the

⁶²⁴ Schermers & Blokker (2003) 427

⁶²⁵ Sand (2001) 338

⁶²⁶ Arts 6 and 15 of the revised Treaty establish the ECCJ while its composition, powers and procedures are generally provided for in Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005 and Supplementary Protocol A/SP.2/06/06 of 14 June 2006. Also see Regulation of 3 June 2002 and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

⁶²⁷ See art 3(1)(4) in Supplementary Protocol A/SP.2/06/06. The Judicial Council of the Community is made up of the Chief Justices of member states. Only Chief Judges of member states whose nationals are not eligible for a vacant position are involved in the interview of prospective judges of the ECCJ. The Judicial Council makes its recommendation to the Authority through the Council of Ministers.

⁶²⁸ Art 3 in Supplementary Protocol A/PS.2/06/06. It would be noticed that prospective judges are not required to be versed in human rights law.

⁶²⁹ Art 4 in Supplementary Protocol A/PS.2/06/06. Under Protocol A/P.1/7/91, judges were appointed for a term of

most active Community institutions in the area of human rights. With tangible and visible action in the human rights arena, the ECCJ provides sufficient material for evaluation of its processes. Consequently, analysis of the human rights work of the work will be done in greater detail.

4.4.1 From interpretation to protection: the human rights jurisdiction of the ECCJ

At inception, the ECCJ was conferred with a contentious jurisdiction as well as an advisory jurisdiction.⁶³⁰ In relation to its contentious jurisdiction, the ECCJ was empowered to ‘ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty’.⁶³¹ Consistent with its status as a traditional international tribunal, the ECCJ could only exercise competence in cases between member states of ECOWAS or between member states and institutions of the Community. Where the interest of nationals of member states were involved in relation to ‘the interpretation and application of the provisions of the Treaty’, a member state was authorised to bring an action on behalf of its national, after amicable settlement has been unsuccessful.⁶³² In summary, the ECCJ was designed for the purpose of resolving disputes between subjects of international law in the interpretation and application of treaty provisions relating to regional economic integration.

In the first few years of its existence the ECCJ remain dormant as no matter was filed before it.⁶³³ However, the very first case (*Afolabi Olajide v Federal Republic of Nigeria*)⁶³⁴ that came before the Court raised issues around the question of individual access to the Court. The question of individual access related to human rights and fundamental freedoms partly founded on the recognition accorded the African Charter in the 1993 revised Treaty.⁶³⁵ While the ECCJ declined jurisdiction in the *Olajide*

⁶³⁰ See arts 9 and 10 of Protocol A/P.1/7/91.

⁶³¹ Art 9 (1) of Protocol A/P.1/7/91.

⁶³² Art 9(2)(3) of Protocol A/P.1/7/91.

⁶³³ The first set of judges of the ECCJ was appointed in 2001 even though the Protocol establishing the Court was adopted in 1991. The Court was idle from 2001 till 2004 when the case of *Olajide v Federal Republic of Nigeria*, 2004/ECW/CCJ/04 was heard.

⁶³⁴ Unreported Suit no. 2004/ECW/CCJ/04.

⁶³⁵ The *Olajide* case alleged a violation of the right to free movement in art 3(iii) of the revised ECOWAS Treaty and the right to freedom of movement under the African Charter based on the

case, the fallout of the case, linked with the new visibility of human rights in the Community agenda prompted the amendment of the 1991 Protocol on the Community Court of Justice. At the time the *Olajide* case was heard by the ECCJ, there was sufficient human rights content in the treaty and legislative framework of ECOWAS to sustain the exercise of human rights competence by ECOWAS institutions. The case might have been an opportunity for the ECCJ to take a more dynamic role in providing judicial protection of human rights under ECOWAS Community framework.⁶³⁶ A liberal interpretation of the revised Treaty could have resulted in a finding on member states' obligation to recognise, promote and protect human rights. However, the ECCJ shied away from such judicial activism and opted to give room for legislative provision of judicial competence in the field of human rights. The approach adopted by the ECCJ can be justified as it complies with the principle of attributed powers.⁶³⁷ The restraint by the ECCJ has resulted in a clear and unambiguous empowerment of the Court by the lawmaking organ of the Community. Thus, the human rights mandate of the ECCJ is 'a legislature-driven' mandate in the sense that it is expressly conferred by the main decision-making organ of the Community.

The jurisdictional change introduced by the 2005 Supplementary Protocol of the ECOWAS Court is rather expansive because that it affects the material, personal, temporal and territorial aspects of the Court's jurisdiction with respect to human rights. In addition to conferring the ECCJ with jurisdiction over cases of 'violation of human rights that occur in any member state',⁶³⁸ the Supplementary Protocol grants access to the Court to individuals and corporations with respect to different cases of human rights violation.⁶³⁹ This new jurisdiction is added to the original jurisdiction of the ECCJ and does not replace the original jurisdiction. Consequently, ECCJ is

provisions of art 4(g) of the revised ECOWAS Treaty. Interestingly, reliance was placed on the Nigerian domesticated statute of the African Charter.

⁶³⁶ See Viljoen (2007) 507. Viljoen argues that a more activist court would have taken a different position.

⁶³⁷ Also see art 6(2) of the 1993 revised ECOWAS Treaty which requires ECOWAS institutions to act within the limits of the Treaty and the protocols.

⁶³⁸ New art 9 of the Protocol of the ECOWAS Court as introduced by art 3 of the 2005 Supplementary Protocol.

⁶³⁹ New art 10 of the Protocol of the ECOWAS Court as contained in art 4 of the 2005 Supplementary Protocol. Access is available to individuals and corporations for acts and inactions of Community officials which violate rights, and to individuals for violation of human rights (apparently) that occur in member states.

conferred with an increased jurisdiction that comprises competence to interpret and apply the ECOWAS Treaty from a regional integration perspective in disputes involving member states and Community institutions, determination of Community obligation of member states and competence in complaints of human rights violation involving member states, Community institutions, corporations and nationals of member states. The ECCJ, it can be argued, has moved from a strictly regular judicial organ for treaty interpretation to a hybrid court with partially specialised human rights competence. It has to be stressed that the express conferment of competence by the proper authority prevents the employment of judicial activism or general principles of law as a basis for finding human rights jurisdiction. That way, some of the threat of indeterminacy could be averted because, as the product of a considered decision of the Authority, legislative conferment provides opportunity to ensure proper definition of competence.

4.4.2 The ECCJ as a human rights court

Against the backdrop that a Community treaty has been used to confer competence over human rights on it, the ECCJ arguably qualifies as a *sui generis* human rights court. However, the relative vagueness of its human rights mandate coupled with the absence of an ECOWAS human rights catalogue over which the ECCJ can claim ‘ownership’ makes the exercise of the mandate a less than straightforward affair. An examination of the practice and jurisprudence of the Court will therefore be necessary to enhance understanding of the functioning of the ECCJ as a human rights court.

4.4.2.1 Material jurisdiction of the Court

Generally, both the 1991 Protocol and the 2005 Supplementary Protocol empower the ECOWAS Court to adjudicate on disputes relating to the interpretation and application of the Treaty of ECOWAS, the Protocols and Conventions and all other legal instruments of the Community.⁶⁴⁰ The amended article 9 goes further to give the Court jurisdiction on matters relating to the legality of regulations, directives, decisions and other subsidiary legal instruments of the Community,⁶⁴¹ the failure of

⁶⁴⁰ See art 9 of Protocol A/P.1/7/91. Also see the amended art 9(1) in art 3 of the 2005 Supplementary Protocol. The ECOWAS Court interprets art 89 of the revised Treaty to mean that Protocols made pursuant to the Treaty form an integral part of it. See para 21 of the Court’s judgment in *Ukor* case (n 399 above).

⁶⁴¹ Amended art 9(1)(c) of the Court Protocol.

member states to honour their obligations as contained in the Treaty, Protocols, Conventions and other legal instruments of ECOWAS⁶⁴² and on cases of human rights violations that occur in member states.⁶⁴³

Attention has to be paid to the Court's competence to hear cases relating to the 'failure of member states to honour obligations' under the Treaty, Protocols, Conventions and other legal instruments of ECOWAS. In view of the obligations member states take on under ECOWAS instruments, to guarantee human rights at the national level, a human rights adjudication competence may be found in this provision. However, the obstacle in its usage is that only other member states and (unless specifically excluded by a protocol) the Executive Secretary (now President of the ECOWAS Commission) have access to the Court in this regard.⁶⁴⁴ The provision is somewhat comparable to the inter-state communications provisions in the African Charter. It also creates a novel situation where the ECOWAS Commission acquires access to bring human rights case against a member state where the state fails to perform its human rights obligations under the ECOWAS legal regime. Unfortunately, to date, there has not been any attempt to use these possibilities.⁶⁴⁵

From the individual human rights complaints perspective, the jurisdiction of the ECOWAS Court extends without limitations, to all cases of human rights violations that occur in member states. Thus, there is some level of indeterminacy in the provision. As ECOWAS does not have any particular human rights instrument over which the ECCJ can claim exclusive competence, the Court's human rights jurisdiction is not tied to any specific instrument. Instead, reference to human rights promotion and protection under instruments of ECOWAS appears to link to the African Charter and (to a lesser extent) the Universal Declaration of Human Rights

⁶⁴² Amended art 9(1)(d) of the Protocol.

⁶⁴³ Amended art 9(4) of the Protocol. Other areas of competence of the Court include actions against the Community, Community institutions and officials of the Community and its institutions.

⁶⁴⁴ Revised art 10(a) in art 4 of the 2005 Supplementary Protocol is clear on this point.

⁶⁴⁵ In view of the very rare use of the equivalent inter-state communications mechanism under the African Charter, it is doubtful if this provision will be used to the advantage of human rights victims in West Africa. Under the 1991 Protocol, member states had a right to bring actions before the ECOWAS Court on behalf of their nationals, but this never happened. See the *Olajide case* (n 634 above) in this regard.

(UDHR).⁶⁴⁶ This therefore leaves open the question whether only exclusively ECOWAS instruments such as the ECOWAS Treaty, Conventions, Protocols and other subsidiary instruments of the ECOWAS Community are applicable or whether the ECCJ may rely on any other human rights instrument. Considering that there are a plethora of rights scattered across the revised Treaty, Conventions and Protocols of the Community, the rights contained in any of those instrument of ECOWAS could be the basis for an individual action for the violation of rights.⁶⁴⁷ According to the ECCJ,⁶⁴⁸

As regards material competence, the applicable texts are those produced by the Community for the needs of its functioning towards economic integration: the Revised Treaty, the Protocols, Conventions and subsidiary legal instruments adopted by the highest authorities of ECOWAS. It is therefore the non-observance of these texts which justifies the legal proceedings before the Court.

The dictum of the Court in the *Kéïta* case can be read in several ways. It can be read to mean that only those rights relevant for the movement towards economic integration can base complaints of human rights violation. The dicta can also be read to mean that insofar as a right or group of rights are present in any of these instruments adopted for the pursuit of economic integration, they form part of ECOWAS legislation and can be applied. The latter understanding is preferable as the former would be unduly restrictive. The case law of the Court up till now also seems to support the more liberal interpretation. However, since the *Olajide case*, provisions of the revised Treaty or any other legislative instrument of the ECOWAS Community do not seem to have been applied in human rights cases before the ECCJ. Interpretation of the ECOWAS treaty based on human rights would seem to be one of the most uncontroversial sources of rights that the Court can apply.

⁶⁴⁶ Para 4 of the Preamble to the revised Treaty links to the African Charter, as does art 4(g). The latter provision makes ‘recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’ a fundamental principle of ECOWAS. In art 2 of the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Peace and Security Protocol), one of the basic principles upon which ECOWAS places its Peace and Security Mechanism is a re-affirmation of the commitment of member states to the principles contained in the African Charter and the Universal Declaration Art 1(h) of the ECOWAS Democracy Protocol goes even further as it states that the guarantee by ECOWAS member states, of rights set out in the African Charter and other international instruments is one of the constitutional convergence principles upon which the Protocol is based.

⁶⁴⁷ Eg, arts 59 (right of entry, residence and establishment) and 66(c) (rights of journalists) in the revised Treaty. See also the various conventions and protocols of the Community. In some cases, provisions of certain instruments of the Community are couched as state duties rather than individual rights. Art 22 of the Democracy Protocol.

⁶⁴⁸ *Keita v Mali* (n 373 above).

With respect to human rights catalogues as sources of action before the ECCJ, reference has essentially been made to the African Charter and the UDHR. As the UDHR is not a legally binding instrument, despite the fact that some of its provisions are seen to have acquired the force of customary international law, it is arguable that it can only serve as an interpretative guide rather than the source of human rights demand before the Court.⁶⁴⁹ Nevertheless, the possibility of states legislating provisions of the UDHR into binding obligations cannot be ruled out even though the ECCJ has not suggested that this is the case in the ECOWAS legal framework. The African Charter, on the other hand, is a legally binding human rights instrument to which all member states of ECOWAS are parties.⁶⁵⁰ In addition to the fact that nearly all reference to human rights in the legal instruments of ECOWAS relate to the African Charter, it is the only human rights instrument specifically mentioned in the 1993 revised Treaty.⁶⁵¹

Further, a teleological approach would lead to an interpretation that the statement of agreement in the Treaty, to cooperate for the purpose of realising the objectives of the African Charter implies that human rights in that instrument form part of the human rights provisions of the Treaty.⁶⁵² Taken together, these facts suggest that the African Charter is the most comprehensive material source of rights before the ECCJ. This is made possible because the African Charter does not grant exclusive supervisory competence on any institution.⁶⁵³ In any event, the African Charter is gaining ground as ‘the basis of a common regional human rights standard’, so that most RECs in

⁶⁴⁹ See eg J Dugard *International law* (2005) 314 on this point.

⁶⁵⁰ The ratification status of the African Charter is reproduced in (2009) 9(1) *African Human Rights Law Journal* 364.

⁶⁵¹ By art 19 of the 1991 Protocol, the Court is required to examine dispute in accordance with the provisions of the Treaty and the Court’s Rules of Procedure. Where necessary, the Court may also apply international law as contained in art 38 of the Statute of the International Court of Justice.

⁶⁵² Art 56 of the 1993 revised ECOWAS Treaty.

⁶⁵³ Part II of the African Charter creates the African Commission and sets out its mandate, but does not confer exclusive competence of implementation on the Commission. Similarly, the African Court on Human and Peoples’ Rights does not have exclusive competence over the African Charter as the Protocol establishing the Court is also silent on this point. See F Ouguergouz *The African Charter on Human and Peoples’ Rights* (2003) 710. Ouguergouz notes that ‘there is nothing in the Protocol to limit the freedom of state parties in the choice of methods for monitoring implementation of the African Charter ... There is nothing to prevent them from submitting disputes of this sort to another African body ...’ In what appears to be a contrary opinion, GJ Naldi & K Magliveras ‘Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples’ Rights’ (1998) 16/4 *Netherlands Quarterly of Human Rights* 436 suggest that the African Court of Human and Peoples’ Rights ‘seems to be the only competent judicial authority’ for the interpretation of the African Charter. Seeing that they do not state the basis of this opinion, one can respectfully say that the better opinion may be that expressed by Ouguergouz.

Africa have made reference it as a fundamental principle in their constitutive instrument.⁶⁵⁴

More importantly, the jurisprudence of the ECCJ indicates that the Court itself recognises the African Charter as the material source for the exercise of its human rights competence.⁶⁵⁵ In the *Ugokwe* case, the ECCJ emphasised the relevance of the African Charter in its work when it said:

In articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provisions of article 4 paragraph (g) of the Treaty of the Community, the Member States of the Economic Community of West African States (ECOWAS) are enjoined to adhere to the principles including ‘the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter n Human and Peoples’ Rights’.

Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter.⁶⁵⁶

The Court has not been so expressive of the reasons for its use of the UDHR. Yet, the UDHR has appeared frequently in proceedings before the ECCJ, either in the pleadings of litigants or in the decisions of the Court itself. The ECCJ has placed unambiguous reliance on the UDHR in at least three of its decisions.⁶⁵⁷ What is clear however, is that both the African Charter and the UDHR appear in varying frequency in parts of ECOWAS legislative instruments and this strengthens the argument that article 9(4) of the Supplementary Protocol of the Court can be read to accommodate actions based on all such enumerated human rights instrument. This attitude to interpretation benefits litigants before the ECCJ. The application of the African Charter before the ECCJ sets up a situation of possible forum shopping as between national courts, the ECCJ, the African Commission and the African Human Rights

⁶⁵⁴ See Viljoen (2007) 26. Viljoen cites art 4(g) of the ECOWAS Treaty, art 6(d) of the 1999 East African Commission Treaty and art 6A of the IGAD Agreement. He points out that the African Charter is the only international human rights instrument ratified by nearly all African states. Morocco is the only African state that is neither a member of the AU nor a state party to the African Charter.

⁶⁵⁵ See para 29 of the judgment in the *Ugokwe* case (n 382 above). This is significant from the perspective of art 31(3)(b) of the Vienna Convention of the Law of Treaties, which gives subsequent practice a place in the interpretation of treaties. In the *Ugokwe* case, in addition to the Nigerian Constitution, the African Charter and the Universal Declaration formed the basis of the applicant’s case. The African Charter was also one of the bases for the complaint in the case of *Lijadu-Oyemade v Executive Secretary of ECOWAS* (n 423 above).

⁶⁵⁶ *Ugokwe* case (n 382 above) para 29.

⁶⁵⁷ *Keita* case (n 373 above); *Essien v The Gambia*, (n 457 above) and in *Koraou v Niger* (n 71 above).

Court (or its successor). As the same instrument is applicable over the same territorial space, litigants can bring cases before any of these fora. While this may be beneficial for fortifying human rights realisation in West Africa, it also calls for some regulatory mechanisms.

Apart from the African Charter and the UDHR, other human rights instruments upon which actions before the ECCJ have been founded, and which the Court has referred to in judgments include the International Covenant on Economic, Social and Cultural Rights (CESCR),⁶⁵⁸ the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)⁶⁵⁹ and the Slavery Conventions⁶⁶⁰. While CEDAW is mentioned in at least one ECOWAS legislative document,⁶⁶¹ the other two instruments are yet to be specifically mentioned or enumerated in ECOWAS documents. To a lesser extent, provisions of national constitutions of member states have also been relied on in actions before the ECCJ although it is not clear whether the Court sees national constitutions as part of its sources of law. The liberal interpretation that the ECCJ has given to articles 9 and 10 of the Supplementary Protocol of the Court encourages robust human rights litigation. However, it also puts the Court at risk of developing jurisprudence that has the potential of being in conflict with the jurisprudence of the supervisory bodies of these treaties just as much as it raises questions of forum-shopping. In some cases, where it feels a need to go outside specific instruments, the Court has had resort to ‘general principles of law’ as contained in art 38(1)(c) of the ICJ Statute.⁶⁶²

An important point to note about the material jurisdiction of the ECOWAS Court is that it appears to cover economic freedoms as well as rights that fall in the different generations of human rights. Under the revised ECOWAS Treaty, economic freedoms are entrenched as rights of ECOWAS citizens and they carry the weight of fundamental rights under the ECOWAS regime as they are contained in the constitutive document.⁶⁶³ Economic freedoms under ECOWAS Community law are further fleshed out in protocols adopted to promote their implementation and they are

⁶⁵⁸ *Essien* case (n 455 above).

⁶⁵⁹ *Koraou* case (n 71 above).

⁶⁶⁰ As above.

⁶⁶¹ See eg, the Supplementary Protocol on Democracy and Good Governance.

⁶⁶² Para 31 of the *Ugokwe* case (n 382 above).

⁶⁶³ Art 59 of the revised ECOWAS Treaty.

considerably expanded beyond the narrow statements contained in the original Treaty and in the revised Treaty. In fact the first case heard by the ECCJ centred around denial of the right to free movement of persons and goods based on Treaty and Protocol provisions.⁶⁶⁴ It is necessary to question whether the enjoyment of these freedoms is tied to active participation in economic activities within the framework of economic integration. This is especially as some of the rights are granted in connection to certain types of workers or to nationals ‘for the purpose of seeking and carrying out income earning employment’.⁶⁶⁵ The ECCJ is yet to get the opportunity to make this determination.

On the basis that the African Charter is the most applied human rights instrument before the ECCJ and the Charter makes no distinctions between different generations of rights, the Court has not found a reason to make such distinctions. Thus, from the perspective of civil and cultural rights, the ECCJ has received complaints touching on rights such as: fair hearing and political participation,⁶⁶⁶ personal liberty, life, dignity and fair hearing,⁶⁶⁷ the right to property,⁶⁶⁸ and freedom from slavery.⁶⁶⁹ Economic, social and cultural rights (ESCRs) which have been more problematic in terms of justiciability before domestic courts have not featured much before the ECCJ. However, in the *Essien case*, the Court was faced with issues around ESCRs. Considering the status of ESCRs in the legal systems of some member states and the question whether the judiciary (in this case, an international court) has the technical competence and legitimacy necessary to interfere with the allocation of resources by elected officials, the desirability of socio-economic rights litigation before the ECCJ is open to debate. In the *Essien case*, the ECCJ appears to have tilted more to a consideration of the right to satisfactory working conditions from the perspective of non-discrimination rather than an intention to redistribute wealth. Thus, the case represents a ‘safe’ approach to economic and social rights litigation that avoids grounds for interference with allocation of national resources. Solidarity rights have not featured before the ECCJ.

⁶⁶⁴ *Olajide case* (n 634 above).

⁶⁶⁵ See eg, art 2 of the 1986 Supplementary Protocol and art 1 of the 1990 Supplementary Protocol.

⁶⁶⁶ *Ugokwe case* (n 382 above).

⁶⁶⁷ *Manneh case* (n 591 above).

⁶⁶⁸ *Alice Chukwudolue and 7 Others v Senegal*, Unreported Suit No. ECW/CCJ/APP/07/07.

⁶⁶⁹ *Koraou case* (n 71 above).

Overall, the collective approach to protection of rights is significant to the extent that it provides the opportunity for direct application of the African Charter where domestic constitutional principles require domestication before the African Charter becomes applicable within the legal system of a state or where socio-economic rights are constitutionally non-justiceable in a state. While the opportunity is positive to the extent that there is the promise of a forum for human rights litigation across generational barriers, it raises challenges for intra-organisational relations. If matters that are excluded from the horizon of judicial scrutiny by national legal systems are admissible before the ECCJ, there is bound to be some jurisdictional tension and by extension consequences for implementation of the ECCJ's decisions. This is especially as membership of the organisation relates or ought to relate to limitation of sovereignty in specific fields. The wide material jurisdiction of the ECCJ, which is not limited by Community competence could be problematic in the future.

4.4.2.2 Temporal jurisdiction

Determination of the temporal jurisdiction of the ECOWAS Court is important from the procedural and substantive perspectives of both the Court's Protocols and the African Charter. While both the 1991 Protocol and the 2005 Supplementary Protocol contain provisions relating to their entry into force, they are both silent on the temporal competence of the Court.⁶⁷⁰ It is important to note that both Protocols entered into force provisionally as soon as the heads of state and government of member states signed them.⁶⁷¹ For present purposes, the relevant provision is article 11 of the Supplementary Protocol by which the Protocol provisionally came into force on 19 January 2005. In the absence of anything to the contrary, the Court can only entertain cases of violations that occur after that date. The ECCJ has taken this position as it declined jurisdiction on this ground in the *Ukor* case.⁶⁷²

With respect to the substantive temporal competence, where a claim is based on the African Charter, reference has to be made to the position under the African Charter. As noted elsewhere, 'the texts are silent' on the temporal jurisdiction of the African

⁶⁷⁰ See, generally, art 34 of Protocol A/P1/7/91 and art 11 of the 2005 Supplementary Protocol.

⁶⁷¹ As above.

⁶⁷² *Ukor* case (n 399 above). Upon the facts of that case, the Court emphasised that there was nothing in the Supplementary Protocol to suggest that the Protocol could be given a retrospective effect. In this regard, the Court relied copiously on the jurisprudence of the ICJ. See especially paras 13 to 20 of the Court's judgment.

Charter.⁶⁷³ However, it goes without saying that the Charter becomes applicable upon coming into force in respect of the state party concerned. For claims based on the rights contained in the revised ECOWAS Treaty or any of the Community's other instruments, it would appear that the date of entry into force (with respect to the particular state) of the given instrument should be the determining consideration. With regard to 'other international instruments' as contemplated in the ECOWAS Democracy Protocol, should the Court decide to apply them in exercise of its human rights competence, the question of ratification ought to be taken into consideration. The Court needs to first satisfy itself that the instrument in question has been ratified by the state and has come into effect in respect of the state concerned before it can apply the provisions of such a an instrument. Any other approach would result in imposing treaty obligations on a member state before such obligations were accepted by the state itself.

One last point to be noted is that under the ECOWAS system, there is a limitation clause that makes actions against Community institutions and any member of the Community statute barred after three years from the date the right arose.⁶⁷⁴ Applied to human rights, this position imports certainty that is lacking in the African Charter and in the practice of the African Commission.⁶⁷⁵

4.4.2.3 Territorial jurisdiction

The human rights jurisdiction of the ECCJ covers violations of human rights 'that occur in any member state' of the Community.⁶⁷⁶ The choice of 'member state' as against 'state party' suggests that the jurisdiction is not limited even if a member state of ECOWAS is not a party to the Court's Protocol.⁶⁷⁷ However, considering that all member states of ECOWAS are also parties to the Court, there is very little significance in the couching of this provision. Accordingly, the human rights complaints mechanism of the ECCJ is applicable in the territories of the 15 states that

⁶⁷³ See F Ouguerouz, *The African Charter on Human and Peoples' Rights* (2003) 555.

⁶⁷⁴ Art 9(3) in art 3 of the 2005 Supplementary Protocol.

⁶⁷⁵ See generally S Gumede, 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *AHRLJ* 118; ST Ebobrah, 'The admissibility of cases before the African Court on Human and Peoples' Rights: Who should do what?' (2009) 3 *Malawi Law Journal* 87, 97.

⁶⁷⁶ Amended art 9(4) as contained in art 3 of the 2005 Supplementary Protocol. See also para 28 of the Court's judgment in the *Ugokwe* case (n 380 above). The term territory may very well include embassy premises of member states.

⁶⁷⁷ Art 1 of Protocol A/P1/7/91 defines member state to mean a member of the ECOWAS.

are currently parties to the ECOWAS Treaty and the Court Protocol (as amended by the 2005 Supplementary Protocol).⁶⁷⁸ As the amended article 9(4) currently stands in the Supplementary Protocol, there is nothing to restrict the jurisdiction of the Court over a member state of ECOWAS for any rights violation that such a member state allegedly carries out against any community citizen in the territory of any other member state. As national courts (each in their states), the African Commission and the African Court on Human Rights (with respect to all the states) all have jurisdiction over human rights issues, the potential for forum shopping is high. Notwithstanding this, the only provisions available to regulate jurisdictional conflicts and inconsistencies are article 56(7) of the African Charter and article 10 (d)(II) of the 2005 Supplementary Protocol of the ECCJ, both of which apply to international fora but not to national courts. An additional complication is that the ECCJ does not consider itself as bound by the secondary rules in the African Charter and thus, would not apply the provisions of article 56(7) of the African Charter in cases before it.⁶⁷⁹

4.4.2.4 Personal jurisdiction

By virtue of the new article 10 in the Supplementary Protocol, access to the ECCJ is open to member states, the Executive Secretary, the President of the ECOWAS Commission since January 200, the Council of Ministers, individuals, corporate bodies and staff of any Community institution.⁶⁸⁰ In terms of access to bring cases of a human rights nature, on the basis of the earlier argument with respect to actions for failure to fulfil a Community obligation, it may appear that any member state or the President of the ECOWAS Commission is competent to bring a human rights case against a member state.⁶⁸¹ Since the obligation contained in the revised Treaty and the relevant protocols is to guarantee promotion and protection of rights set out in the African Charter in ECOWAS member states, there is nothing to suggest that the obligation is restricted to a guarantee of those rights to citizens of the state concerned. Accordingly, access to the Court against any member state under this provision need

⁶⁷⁸ See the amended art 9 in the Supplementary Protocol.

⁶⁷⁹ See the dictum of the ECCJ in the *Koraou* case (n 71 above) 43.

⁶⁸⁰ See art 4 of the 2005 Supplementary Protocol.

⁶⁸¹ See art 9(3) of Protocol A/P1/7/91 and the new art 10(a) in art 4 of the 2005 Supplementary Protocol. It is important to note that by art 10 of the Supplementary Protocol, only provisions of Protocol A/P1/7/91 that are inconsistent with the Supplementary Protocol are null and void to the extent of the inconsistency. However, art 9 of Protocol A/P1/7/91 is no longer useful as it has been expressly repealed by art 3 of the 2005 Supplementary Protocol.

not be only where the victim of the violation is a citizen of the offending state. Up till now, no action has come before the ECCJ under this heading.

With regard to access to applicants other than member states and the President of the ECOWAS Commission, access is available to individuals and corporate bodies.⁶⁸² By article 10(c), access is for ‘proceedings for the determination of an act or inaction of a Community official which violates the rights of the individual or corporate body’. This is a very limited access as it must only be against ECOWAS (as an institution) for the rights-violating act or inaction of a Community official. In addition, it must be by the individual or corporate body alleging that their right has been violated. Hence, any body, group or institution above can be a plaintiff (or applicant) before the Court so far as the act or omission allegedly violates their right. This is one area where no other court (national or international) can claim jurisdiction. Hence, it is a rare area in which the ECCJ can claim exclusive jurisdiction. Thus, this provision guarantees effective remedy in this area.

One conspicuous omission from the Supplementary Protocol of the Court relates to the competence of non-governmental organisations (NGOs) to bring actions before the Court. It could be argued that the term ‘corporate bodies’ as used in the inserted article 10 (as contained in article 4 of the 2005 Supplementary Protocol) is wide enough to accommodate actions by NGOs. However, the couching of the provision, to the extent that such actions should be in determination of acts or inactions of a Community official which ‘violates the rights of the individual or corporate bodies’, gives the impression that any action brought upon facts that do not allege a violation of the rights of the corporate body may fail.⁶⁸³

While both the 1991 Protocol and the 2005 Supplementary Protocol are silent on the point, it appears from a combined reading of the amended (and inserted) articles 9 and 10 of the Court Protocol that member states, the Community, Community institutions and Community officials can be defendants before the Court.⁶⁸⁴ The most obvious

⁶⁸² Art 10(c) and (d) of the 2005 Supplementary Protocol.

⁶⁸³ See the inserted art 10(c) in art 4 of the 2005 Supplementary Protocol. The Court has not been asked to make a decision on the competence of NGOs to access the Court.

⁶⁸⁴ See arts 3 and 4 of the 2005 Supplementary Protocol.

respondents however, are member states of ECOWAS in actions for failure to fulfil human rights obligations arising from the ECOWAS Treaty, Protocols, Conventions and other legal instruments. Further, as argued above, paragraph (c) in the amended article 10 relates to rights-violating acts or inactions of Community officials. In other words, either ECOWAS itself (as the Community) or an official of ECOWAS in his official capacity may be a respondent.⁶⁸⁵ In relation to paragraph (d), the protocol does not say against whom the individual right of access can be exercised. This leaves room for the exercise of discretion by the Court in its interpretation and application of the Supplementary Protocol. In practice, there is very little discretion as most of the cases already treated by the Court are against member states of ECOWAS.

A curious development in respect of the exercise of the ECCJ's human rights competence is the emergence of individuals as respondents. While the provisions relating to human rights as contained in the ECOWAS instruments point to a state duty, the imprecise couching of articles 9(4) and 10(d) of the 2005 Supplementary Protocol leaves the door open for situations where human rights action can be brought against non-state actors before the Court.⁶⁸⁶ In granting jurisdiction to the Court for the determination of cases of human rights violations that occur in member states and access to individuals for applications for relief for such violations, the Supplementary Protocol seems to have issued a 'blank cheque' for human rights realisation. In the *Ukor* case, all the parties were non-state actors, yet the Court went on to exercise jurisdiction over the matter.⁶⁸⁷ This practice holds a risk for the character of the ECCJ as an international court. There is also provision for intervention by parties who consider that their interest may be affected by proceedings going on before the Court.⁶⁸⁸ While the provision was originally aimed at states, since the Supplementary

⁶⁸⁵ In 2005, the action brought by a dismissed staff member of ECOWAS was against the Executive Secretary of ECOWAS in that capacity and two staff members of the Community in their personal names. Part of the action touched on a violation of the right of fair hearing.

⁶⁸⁶ See Amerasinghe (2005) for a discourse on interpretation of treaties.

⁶⁸⁷ The *Ukor* case (n 399 above) was declared 'inadmissible for lack of merit' on grounds that the Supplementary Protocol did not apply retrospectively.

⁶⁸⁸ Art 21 of the 1991 Protocol (renumbered art 22 by art 5 of the 2005 Supplementary Protocol). Art 89 of the Rules of Procedure deals with the procedure for intervention.

Protocol came into force, individuals have relied on it to apply to join proceedings as co-respondents with a state or an individual.⁶⁸⁹

It is evident from the discourse that the ECCJ has jurisdiction in relation to human rights over the territories, citizens and institutions of ECOWAS member states as much as it has over ECOWAS Community institutions. While this is important for judicial protection of human rights within the ECOWAS Community framework, it evokes concerns on the effectiveness and efficiency of the mandate vis-à-vis member states and their institutions on the one hand and other continental judicial mechanisms for the protection of rights in Africa. The ECOWAS Community may need to make conscious responses to these concerns in the near future. On the positive side, the fact that the African Commission lacks the power to make binding decisions increases the usefulness of the ECCJ as a forum for human rights litigation. This is especially as the African Human Rights Court, though inaugurated, had not received any cases as July 2009 (four years after its inauguration in 2006). Even if the African Human Rights Court begins to function fully, the restriction on individual and NGO access potentially reduces its usefulness. All of these facts favour the continued operation of the ECCJ as a forum for human rights litigation. In fact, the emergence of the ECCJ's human rights competence does not seem to have affected the submission of cases to the African Commission.⁶⁹⁰ However, the reality of the risk of conflicting jurisdiction and conflicting decisions requires some that there should be some form of cooperation and coordination with other fora that is currently lacking in the ECOWAS practice.

4.4.2.5 Procedure before the ECCJ

Procedure before the ECCJ in human rights cases is regulated by the protocols relating to the Court and the rules of procedure of the Court. The rules of procedure were adopted in August 2003 by the Court on the basis of authority granted in article 32 of Protocol A/P1/7/91. At the time the rules were adopted, the ECCJ did not have jurisdiction over human rights and the Court was not competent to receive cases from

⁶⁸⁹ Eg in the *Ugokwe* case (n 382 above), there were interveners who joined as co-respondents with Nigeria and in the *Ukor* case, there was an application to join as intervener which failed (*inter alia*) on grounds of non-observance of the time limit.

⁶⁹⁰ Interview with staff of the African Commission in July 2009 indicates that the Commission continues to receive communications from NGOs and individuals from and against West African States.

individuals. Supplementary Protocol A/SP.1/01/05 contains provisions that are contributory to the human rights procedure before the ECCJ. By its article 10(d), the two conditions to be fulfilled for cases to come before the Court are that the application should not be anonymous and should not have been instituted before another international court. All other admissibility requirements under the African Charter or any other international procedure do not apply in human rights cases before the Court.⁶⁹¹ Perhaps the omission that sticks out the most is the question of exhaustion of local remedies. In its jurisprudence, the ECCJ has consistently maintained that the requirement to exhaust local remedies does not apply to human rights cases brought under Supplementary Protocol A/SP.1/01/05.⁶⁹²

Notwithstanding the ease that such a regime holds for litigants, the absence of the requirement to exhaust local remedies clearly has consequences for the system. On the one hand, it creates difficulty in the relation between the ECCJ and the national courts of ECOWAS member states in relation to priority of jurisdiction. On the other hand, it has the potential of setting the Court on a collusion course with member states as it does not give member states the first opportunity to attempt to resolve cases at the national level before exposing them to international adjudication.⁶⁹³ It also has consequences for the application of *res judicata* as between national courts and the ECCJ.

The requirement that cases should not be brought if they have been instituted before another international jurisdiction is a codification of the principle of *lis pendens*. Considering the possible danger of conflict of jurisdiction between the ECCJ and other international mechanisms exercising competence in West Africa, this is an important provision. One uncertainty that exist however is whether quasi-judicial bodies such as the African Commission and the African Children's Committee fall within the category of international courts mentioned.

Apart from these specific concerns, the current rules of procedure are generally adequate even for the purpose of the human rights competence even though they do

⁶⁹¹ See the *Koraou* case (n 71 above) at para 45 where the ECCJ emphasised that it has no powers to create additional requirements.

⁶⁹² *Essien* case (n 457 above); *Koraou* case (n 71 above).

⁶⁹³ The reaction of the Gambia in the *Manneh* case (n 591 above) is illustrative of this point.

not specifically provide for that purpose. It would only be observed that there is no provision for legal assistance to indigent litigants. Considering that some of the people most commonly at the receiving end of human rights violations are those at the lower end of the economic spectrum, omitting to create room for legal assistance may easily result in disempowerment of people with genuine cases.

4.4.4.6 Human rights judgments of the ECCJ: can the protector protect?

Under article 15(4) of the revised Treaty, judgments of the ECCJ are binding on member states, Community institutions, individuals and corporate bodies. This is reinforced by article 19(2) of Protocol A/P1/7/91 which makes such judgments immediately binding. Article 24 in Supplementary Protocol A/SP.1/01/05 also makes judgments with financial implications binding.⁶⁹⁴ All of these, taken together with article 77 of the revised Treaty which empowers the Authority to sanction member states for failure to fulfil Community obligations, should give some degree of force to judgments of the ECCJ.

However, in practice, the challenges national and international courts face in relation to the enforcement of decisions against states that are unwilling to comply with such decisions also exist with the ECCJ. Despite the provisions of article 77 of the revised Treaty, there is no clear formulation of the procedure to activate the processes of the Authority for the enforcement of the human rights judgments of the Court. The difficulty encountered with enforcing the decision of the ECCJ against the Gambia in the *Manneh* case is an illustration of this difficulty. The willingness of some other states to comply with the Court's decision however demonstrates the strengths of the system and neutralises the frustration that may otherwise have emerged.⁶⁹⁵ There is insufficient data to base analysis of the factors that encouraged compliance by Nigeria and Niger in the cases involving them before the ECCJ. However, it can be ventured

⁶⁹⁴ Art 24 of Supplementary Protocol A/SP.1/01/05 also states that judgments of the ECCJ shall be executed according to the civil procedure rules of the affected member state after verification. In this context, member states are required to identify and notify the Court of the national authority that would be responsible for the implementation of judgments. As at March 2009, no member state had complied with this provision.

⁶⁹⁵ In the *Ugokwe* case (n 382 above), Nigeria had no difficulty complying with the interim order of the ECCJ directing that a national legislator should not be sworn in pending determination of the case filed before the ECCJ. In the *Koraou* case (n 71 above), Niger indicated that it was ready to comply with the judgment of the ECCJ and it went on to pay damages awarded by the ECCJ in favour of the plaintiff.

that it was more as a result of political will and willingness to support the system rather than a question of the existence of a better enforcement mechanism at that level. While proximity of states in the region and the potential for greater effectiveness of peer pressure may have contributed to compliance, it has to be noted that proximity has a negative side. Considering that the development of a regional culture of compliance depends to a large extent on the attitude of regional hegemons, consistent failure by regional hegemons to comply with decisions could lead to development a culture of non-compliance by other states in the region.

Within the context of the ECOWAS Community, the ECCJ certainly ranks as one of the most dynamic and relevant institutions from a human rights perspective. Apart from its activities as a court, the ECCJ has also recently been represented in Community Election Observer Missions.⁶⁹⁶ Nevertheless, it is in its capacity as the judicial arm of the Community that the Court's potential for human rights protection lies. It is also in that mandate the concerns, from an international human rights law perspective arise. The human rights mandate of the court is ambiguous to an extent. In granting competence over all cases of human rights, the member states appear to have granted authority over matters that are not expressly covered in the revised Treaty. The practice of the Court does not indicate any deference to a principle of subsidiarity vis-à-vis member states. Threats of fragmentation of African international human rights law as a result of competing jurisdiction have also begun to emerge. The greatest beneficiaries however, may well be the people of West Africa as the Court provides a functional alternative for human rights protection at a level beyond national borders.

4.5 The Commission: more than a secretariat

Over the years, administration of international organisations has moved from simple secretarial services rendered on ad hoc basis by personnel of host countries to full time secretariats with international staff as it was under the League of Nations and now to the more comprehensive administration carried out by full time and professionally staffed organs.⁶⁹⁷ Commonly known as secretariats, administrative

⁶⁹⁶ <http://news.ecowas.int/presseshow.php?nb=13&lang=en&annee=2007> (accessed 27 November 2008).

⁶⁹⁷ See generally Schermers & Blokker (2003) 314.

organs have become increasingly important to the functioning of international organisations that they have been compared to national ministries in terms of administrative relevance.⁶⁹⁸ Although administrative organs play different roles in different international organisations, some of their main functions include administrative and clerical functions, budget preparation, collection of reports and information, presenting their organisations in legal proceedings and rendering technical assistance to member states.⁶⁹⁹ Administrative organs in some organisations have also engaged in election observation, carrying out executive functions and exercised a right to initiate policies.⁷⁰⁰ Hence, the functions and activities as well as the nomenclature of administrative organs defer from organisation to organisation.

The administrative organ of ECOWAS came into existence as the Executive Secretariat with essentially secretarial functions under the 1979 original Treaty of the Community.⁷⁰¹ Citing a need to enable its administrative organ to adapt to the international environment and to enhance its contribution to the integration process, the Community adopted a protocol to transform the organ from an executive secretariat to the 'Commission of the Economic Community of West African States' (ECOWAS Commission).⁷⁰² The new article 17 of the revised Treaty established the ECOWAS Commission and created the offices of a President, a Vice President and seven Commissioners.⁷⁰³ Supplementary Protocol A/SP.1/06/06 also increased the powers of the ECOWAS Commission, significantly transforming the Commission's role from a strictly secretarial body to an organ with some policy-making competence.⁷⁰⁴ Even the transformation did not confer a human rights mandate on the Commission. However, in compliance with instructions from the policy-making organs and some of its own initiatives, the Commission has become deeply involved in activities for the promotion and protection of human rights. While some of these

⁶⁹⁸ A Loveday, *Reflections on International Administration* (1956) 23 - 30 cited by Schermers & Blokker (2003) 314.

⁶⁹⁹ See Schermers & Blokker (2003) 318 - 324.

⁷⁰⁰ Schermers & Blokker (2003) 325 - 328.

⁷⁰¹ See arts 4(1)(c) and 8 of the 1979 ECOWAS Treaty. Even as a secretariat, the Commission performed functions that went beyond administrative and clerical duties.

⁷⁰² See generally the preamble and art 1 of Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty.

⁷⁰³ The seven Commissioners are responsible for the departments of the ECOWAS Commission which include:

⁷⁰⁴ Art 19 in Supplementary Protocol A/SP.1/06/06 gives the ECOWAS Commission competence to formulate proposals and make recommendations to the main policy-making organs of the Community.

activities are directed at rights protection, others are incidental but still relevant for the protection of rights in the Community framework.

4.5.1 Facilitator of human rights meetings and conferences

Connected to its role as the main provider of secretarial services yet exceeding the usual merely clerical duties of a secretariat, the ECOWAS Commission has convened, hosted or facilitated meetings and conferences that have shaped the human rights course of the Community and the West African region. In some cases, the Commission has performed this role in compliance with provisions of Community treaties and other documents. In other cases, the Commission has acted in accordance with directives from the Authority or the Council of Ministers. In yet other cases, the action of the Commission has been wholly the result of its own initiative or in collaboration with other actors in the field of human rights. In all situations however, the actions of the Commission has either led, or has the potential to lead to advancement of human rights at the Community level or at the national level of member states.

In article 35(2) of the Protocol on Democracy, ECOWAS member states laid the ground for the ECOWAS Commission (then Executive Secretariat) to provide a framework for independent human rights institutions in the West African region to be organised into a regional network in order to enhance their capacities to protect human rights. Consequently, from 2007, the ECOWAS Commission has begun to facilitate regional meetings of national human rights institutions on a five-year plan. According to the Commission's documents, the aim of the project is to enable the national human rights institutions to 'exchange experiences and best practices, identify deficiencies in capacities and contribute to building the capacities of national human rights institutions in West Africa'.⁷⁰⁵ In relation to democracy and governance, the Commission has also facilitated a meeting of national Electoral Commissions that resulted in the setting up of an ECOWAS Network of Electoral Commissions. The Commission provides coordination services to the network.⁷⁰⁶ It is not clear exactly what role the ECOWAS Commission can play in building the capacity of these

⁷⁰⁵ ECOWAS Annual Report 2007, 86.

⁷⁰⁶ See <http://news.ecowas.int/presseshow.php?nb=008&lang=en&annee=2008> (accessed 19 November 2008).

institutions since human rights and elections are not core objectives of the Community and therefore expertise in the areas may not be much. It is also not clear what the extent of concrete benefits from the Commission's involvement in these areas will be. However, the Commission's approach has been to work with NGOs and donor organisations in the field of human rights to provide a forum for the institutions to compare experiences. In that context, the Commission's role is more of a facilitator than a resource base.

The ECOWAS Commission has also been active in the area of gender and human rights. In 2006, while still the Executive Secretariat, it organised a regional workshop aimed at developing a regional framework to combat violence against women in the region. At this workshop, a framework on the Strategic Plan of Action on Gender-based Violence in the ECOWAS region was concluded.⁷⁰⁷ In the same gender context, the Secretariat hosted a regional workshop on Gender and HIV and AIDS⁷⁰⁸ and subsequently, as the Commission, hosted a meeting of experts on HIV and AIDS preventive education.⁷⁰⁹

Against the backdrop of the infamous conflicts that the West Africa region has become associated with, the ECOWAS Commission has also been involved in hosting or facilitating meetings relating to humanitarian law. In April 2006, a regional meeting on a draft code of conduct for Armed Forces of ECOWAS member states was hosted by the ECOWAS Executive Secretariat.⁷¹⁰ Considering that armed forces of ECOWAS member states are the forces that the Community uses in its peacekeeping and peace enforcing missions, the human rights consciousness of these forces potentially impacts on the protection of rights during these missions. Further, the Secretariat collaborated with the International Committee of the Red Cross to organise a meeting on the implementation of the treaties of International Humanitarian Law. The meeting was apparently aimed at enhancing member states' compliance with treaties in the area of humanitarian law and building Community capacity to meet humanitarian challenges in the region.⁷¹¹ Within the context of

⁷⁰⁷ ECOWAS Annual Report 2006, 96.

⁷⁰⁸ As above.

⁷⁰⁹ ECOWAS Annual Report 2007, 94.

⁷¹⁰ ECOWAS Annual Report 2006, 103.

⁷¹¹ As above.

conflicts and the consequences of conflicts in the region, the Secretariat, working with the United Nations High Commission for Refugees (UNHCR) had earlier organised a meeting of experts to address the needs of internally displaced persons and refugees in the region. One outcome of the meeting was the endorsement of an endorsed an interventionist strategy for achieving a lasting solution to the situation of refugees in West Africa.⁷¹²

The ECOWAS Commission in its previous status as Executive Secretariat has also been involved in hosting expert meetings on trafficking in persons within the West Africa region. These meetings which were originally directed by ECOWAS ministers resulted in the adoption of a regional plan of action on trafficking in persons. They also became platforms for appealing to member states of ECOWAS to ratify and implement relevant treaties at the national levels.⁷¹³ Evidently, these meetings and workshops hosted by the Commission (or Secretariat) may have contributed to improving the level of human rights protection in the region. However, the constitutionality of this function from a treaty perspective cannot be wished away. The link between these activities and the main organisational objective may also not be so evident. Notwithstanding these concerns, hosting human rights related meetings remains a major part of the ECOWAS Commission's human rights work.

Considering that the meetings hosted by the ECOWAS Commission are for the benefit of the member states or member state institutions involved in human rights work, the question of upsetting intra-organisational relations should not arise here. In fact, ECOWAS provides a platform for collective negotiation for donor support in specific areas of human rights. The meetings also provide a forum for member states to jointly address issues that affect all or more than one member state. To that extent, the ECOWAS Commission's action is a positive complement to the national initiatives. However, there is the question whether the work of the ECOWAS Commission in this area unnecessarily duplicates or undermines the work of continental human rights institutions like the African Commission. In view of the many challenges facing the African Commission such as shortage of financial and human resources, complementary work on the part of the ECOWAS Commission

⁷¹² ECOWAS Annual Report 2005, 94.

⁷¹³ 2004 Annual Report of the Executive Secretary, 76.

should not be problematic as it would be assisting the work of the African Commission. From the perspective of efficient use of resources, duplication ought to be avoided. In order to avoid duplication, there may be need for exchange of information between regional and continental institutions working in the same area. This does not currently happen even though ECOWAS cooperates with the AU in other regards.

4.5.2 Human Rights training programmes

Despite the fact that it is not a human rights organisation in the strict sense of the word, the ECOWAS Commission contributes to human rights education through different forms of training programmes. These programmes are either undertaken in collaboration with specialised human rights bodies or by the Commission on its own, with or without external support. The stated aim is often to build capacity of national institutions of member states or to enhance and improve Community intervention in the given area.

Given the importance of a stable political environment for effective integration, the Commission has built on the outcome of expert meetings to organise training for security forces of member states. In this regard, an information manual on human rights for security forces in the region was developed and put to use in the training of security forces.⁷¹⁴ Still on conflict issues and humanitarian law, the ECOWAS Secretariat collaborated with the International Committee of the Red Cross in July 2005, to organise a seminar on the implementation of international humanitarian law treaties by ECOWAS member states.⁷¹⁵ The relevance of such human rights training for security forces cannot be overemphasised especially with the Community's involvement in peacekeeping in member states. However, it is noted with concern that the work of the ECOWAS Commission shows more collaboration with human rights institutions outside the African Continent. While on its own, this should not be a problem, the risk that non-coordination of activities brings forces attention to it.

In relation to children specifically and trafficking of persons in general, the ECOWAS Commission organised a training workshop on the rights and protection of children

⁷¹⁴ This training was carried out in collaboration with the Office of the High Commissioner for Human Rights and the Commonwealth Secretariat. See ECOWAS Annual Report 2007, 79.

⁷¹⁵ ECOWAS Annual Report 2005, 90.

for four of the Franco-phone members of the Community. Pursuant to this, the Executive Secretariat reportedly developed a training manual on child rights and children protection services, on the basis of which the Community has claimed credit for the member states' ratification of treaties on trafficking.⁷¹⁶ The Secretariat further arranged a sensitisation programme to train ECOWAS member states on their reporting duties. The ECOWAS Commission has also arranged a media workshop on trafficking along with an experts meeting on sexual harassment in education institutions.⁷¹⁷ These training programmes arguably enhance the capacity of member states to protect human rights at the national level. Hence, there is little or no risk of upsetting intra-organisational relations. While there is a case to be made on the possibility of duplication with African Commission duties, these actions can be regarded as collective action by ECOWAS member states. Seen from this perspective, it would amount to a fulfilment by these states of their obligations under the African Charter. Alternatively, these actions can be accommodated as part of the role of the AEC building blocks. In any of these senses, there should be no resistance to the continued engagement of the ECOWAS Commission in human rights training.

4.5.3 Hosting of special units and execution of community human rights projects

Although ECOWAS does not have a single unified secretariat to service all its organs and institutions, the Commission (even from its days as the Community Executive Secretariat) serve as the coordinating office for the Community.⁷¹⁸ In that context, the Commission is responsible for the execution of some aspects of the Community's human rights work and hosts certain specialised units that carry out important human rights work within the Community framework. While the link between poverty and human rights may not be direct and obvious, it can not also be denied. Accordingly, it is now common to find governments and other stakeholders applying poverty reduction strategy papers (PRSPs) as a right-based approach to address poverty. In order to achieve the object of improving the standards of living of its citizens, ECOWAS has also developed a regional PRSP. It is within the Executive Secretariat

⁷¹⁶ ECOWAS Annual Report 2005, 95.

⁷¹⁷ ECOWAS Annual Report 2005, 90.

⁷¹⁸ For instance, under the ECOWAS regime, the ECCJ is served by the Registry of the Court and the Parliament is served by its own secretariat.

that a ‘multi-disciplinary technical team’ was formed to manage the implementation of the project.⁷¹⁹

Human rights protection work in the ECOWAS Commission has also included action in the areas of human trafficking and child protection. With respect to human trafficking, the ECOWAS Commission hosts the Community’s Trafficking in Persons Coordinating Unit which is responsible for facilitating the establishment of national task forces on trafficking, sensitisation and training of members of national task forces.⁷²⁰ Through the work of this Unit, the Commission ensures that issues around human trafficking remain paramount in the agenda of member states. The abolition of visas within the region and the consequent removal of obstacles to free movement is arguably a factor that can facilitate human trafficking. Thus, Community interest in addressing the scourge cannot be faulted. As regarding the protection of the right of children, a Child Protection Unit exists at the Commission and was formally incorporated into the organogramme of the then Executive Secretariat in 2005. The functions of the unit include strengthening ties with agencies that work in the field of child protection and evaluation of national programmes for the protection of children, especially children affected by armed conflict.⁷²¹ The Community has also established an Electoral Assistance Unit within the Commission to facilitate the implementation of the Protocol on Democracy.⁷²²

Either by its regular departments or using the special units established for those purposes, the Commission takes responsibility for the implementation of most of the Community’s human rights policies and legislations. Implementation by the Commission usually takes different forms such as participation in meetings with partner bodies, compilation of reports and undertaking monitoring, observation or fact-finding missions. With the development of an ECOWAS Gender Programme, the Commission’s implementation strategies have included participation in meetings such as the United Nations Commission on the Status of Women held in New York in 2006

⁷¹⁹ The regional PRSP was adopted by the ECOWAS Authority in Dec 2006. See the ECOWAS Annual Report 2006, 118.

⁷²⁰ ECOWAS Annual Report 2006, 98.

⁷²¹ ECOWAS Annual Report 2005, 94-95.

⁷²² ECOWAS Annual Report 2006, 104

and the AU Labour and Social Affairs Meeting in Cairo 2006.⁷²³ While participation in meetings with these agencies allows for effective coordination, the risk of duplication arises where agencies of member states also participate in these meetings in the corporate capacity of their various states.

In the area of monitoring and observation, the Commission has been most active in election monitoring and observation in the region. In pursuit of powers granted under the Democracy Protocol, the Commission has sent missions to member states involved in all kinds of elections. The fact that states crave the approval of such missions to validate their democratic projects demonstrates the significance of the process.⁷²⁴ These missions also enable the Commission to feel the pulse of member states and engage proactively to nip budding conflicts. The Commission also uses fact-finding missions and consultants to monitor and coordinate member states policies and actions to implement Community policies such as the Plan of Action on Trafficking in Persons.⁷²⁵ In some cases, the Commission also takes responsibility for collecting and evaluating reports from agencies of member states implementing human rights policies of the Community.⁷²⁶ These activities of the Commission are significant for at least two clear reasons. First, the difficulty of implementation that has been the hallmark of human rights supervision in Africa seems to have been effectively suppressed in the work of the Commission. State resistance to external intervention appears to be lower and this holds positive promise for human rights protection in the region. Second, by involving the Commission in the heart of the Community's human rights work, ECOWAS appears to have avoided the challenges that arise when human rights is relegated to an institution that is detached from the central administration of an international organisation. Notwithstanding these positive aspects, issues of duplication of functions vis-à-vis continental mechanisms and excessive spill-over from the main objectives of integration cannot also be ignored.

⁷²³ ECOWAS Annual Report 2006, 95.

⁷²⁴ In 2004, the Executive Secretariat sent a fact finding mission prior to elections in Guinea Bissau and in 2005, the a team of 162 observers was sent to monitor elections in Togo.

⁷²⁵ 2004 Annual Report of the ECOWAS Executive Secretary 76.

⁷²⁶ ECOWAS Annual Report 2006 77.

4.5.4 Formulation and initiation of human rights policies

Over and above its executive functions, the ECOWAS Commission also contributes to the formulation of human rights policies in the Community. While this may not be a generic function of secretariats of international organisations, it is not an extreme function as policies initiated or formulated by the Commission should generally be proposals subject to approval by the relevant decision-making institutions of the Community. In practice such proposals are adopted with little or no amendments. As some of the proposals emerge from experiences gathered in the course of field work, they are very relevant for the furtherance of the human rights direction of the Community. In 2006, the ECOWAS Executive Secretariat was responsible for the formulation of a Community policy on disaster mitigation and management. In doing this, the Secretariat reportedly consulted with relevant agencies in order to take the special needs of children into account.⁷²⁷ This form of consultation before formulation of policies is an important balancing mechanism that is neglected in the ECOWAS human rights framework.

With increased military action on the auspices of the Community and growing complaints regarding human rights violations by ECOMOG soldiers, the need for mainstreaming human rights in the training of peacekeepers became urgent in the work of the Community. In this context, the Secretariat undertook the task of collaborating with a specialist external body for the formulation of a code of conduct to guide armed forces.⁷²⁸ It would also be observed that the formulation of a regional child right policy for the Community was prioritised by the ECOWAS Commission in its 2007 work plan.⁷²⁹ Apart from such elaborate policy formulation, the Commission also initiate human rights policies for the Community in its implementation of ECOWAS legislations.

While the ECOWAS Commission does not have any specific treaty mandate for the protection of human rights, it is clear that a major part of the promotion and protection of human rights within the ECOWAS framework has been undertaken by this

⁷²⁷ ECOWAS Annual Report 2006, 102.

⁷²⁸ ECOWAS collaborated with the Geneva Armed Forces Democracy Control in this regard. ECOWAS Annual Report 2005, 93.

⁷²⁹ See the ECOWAS Commission Work Plan 2007 available at www.ecowas.int. (accessed 5 July 2009).

institution. Perhaps questions may arise from this reality. Is the Commission and indeed, the Community acting legally in continuing to involve the Commission in all of these activities? What concrete impact has been made by the Commission in the fields of human rights that it has been regularly engaged with? One may also ask whether the main contribution that the Commission should make to realisation of the main objectives of the Community suffer neglect as a result of the dispersal of energy and resources by the Commission. Some of these questions may involve further research. The conclusion that may be drawn here is that the work of the Commission impacts greatly on human rights within the region.

4.6 The Council of Ministers

The Council of Ministers is one of the main decision-making organs of the ECOWAS Community. The Council is a plenary assembly as all member states are represented by two national ministers. Unlike some other international organisations, the ECOWAS Council of Ministers is not the highest organ of the Community.⁷³⁰ As indicated in the previous chapter, the ECOWAS Council of Ministers acted essentially in a supportive role to the Authority. Consequently the human rights responsibilities of the Council of Ministers are basically reflective of the work of the Authority. The most important of these functions include the approval of budgets of all Community institutions, including those particularly engaged in the field of human rights. The Council also reviews and approves draft policies and regulations relating to human rights before they are sent to the Authority. On the rare occasion, the Council of Ministers makes statement on the human rights situation of West African people.⁷³¹ Hence the Council is not directly very active in the human rights work of the Community.

4.7 Other institutions in the system

Promotion and protection of human rights within the ECOWAS Community framework is not exclusive to primary organs or institutions created by the revised Treaty. Certain subsidiary institutions created by the Authority function wholly or partly in the issue area of human rights. While the law of international institutions

⁷³⁰ In the EU before the establishment of the European Council, the Council of Ministers was the plenary decision making organ.

⁷³¹ June 2006 on treatment of immigrant

recognises the right of primary organs in international organisations to create subsidiary organs or institutions, the powers delegated to such subsidiary organs ought not to exceed the powers possessed by the primary organs themselves. Primary organs may not also transfer their responsibilities to such subsidiary organs. Ultimately, creation and delegation of powers to subsidiary organs and institutions should be within the limits set by the prevailing treaty.⁷³² In the context of ECOWAS, subsidiary organs and institutions have been individuals and bodies either created independently or within the framework of certain protocols.

Under the Conflict Prevention Protocol, two main subsidiary organs and two ‘junior’ subsidiary organs having functions that impact on human rights have been created. The Mediation and Security Council (MSC) of the Community is a non-plenary decision making body created as an institution of the conflict prevention mechanism.⁷³³ Its main functions relate to the peace, security and humanitarian law aspect of the ECOWAS human rights project. Under article 26 of the Conflict Prevention Protocol, the MSC is one of the bodies authorised to initiate the mechanism. This makes it relevant for preventive and reactionary purposes where there are threats of humanitarian disasters, threat to peace and security or there is a case of serious and massive violations of human rights and the rule of law.⁷³⁴ The willingness and ability of the MSC to react appropriately in cases of emerging conflict and in situations of massive and serious human rights violations is vital to the prevention of further violation of rights of vulnerable groups such as women and children, refugees and IDPs. The MSC mirrors the AUPSC and should cooperate and coordinate its activities with the continental body.

The Council of the Wise which was originally established as the Council of Elders under the Conflict Prevention Mechanism is also important from a human rights perspective.⁷³⁵ The relevance of the Council of Wise for human rights within the

⁷³² Schermers & Blokker (2003) 168.

⁷³³ See arts 4 and 8 of the Conflict Prevention Protocol. The Mediation and Security Council comprises of nine member states, seven members elected by the Authority and two being the current and immediate past chairpersons of the Community. The Mediation and Security Council operates at the levels of heads of state and government, ministers and at ambassadorial level.

⁷³⁴ By art 26, the other bodies empowered to initiate the mechanism include the Authority, a member state, the President of the ECOWAS Commission or a request by the AU or UN.

⁷³⁵ The Council of Elders is established as an organ of the mechanism by art 17 of the Conflict Prevention Protocol. It comprises of eminent political, traditional, religious and women leaders with

Community is that it is applied as good offices, and its members intervene in conflict situations as mediators, conciliators and facilitators of peace. The Council of Wise also play an important role in the ECOWAS democracy and good governance project as members of observation teams to elections and fact-finding missions.⁷³⁶ The Observation and Monitoring Centre of ECOWAS (OMC), established by article 23 of the Conflict Prevention Protocol also plays a vital part in the peace, security and humanitarian law aspect of the Community's human rights programme. As the agency responsible for early warning in the system, the OMC allows the Community to adopt a proactive approach to human rights protection in the region. The OMC is one of the 'junior' subsidiary institutions in the mechanism. The other 'junior' subsidiary institution is the Special Representative of the President of the ECOWAS Commission. Established by article 32 of the Conflict Prevention Protocol, the main role of the Special Representative also relates to peace, security and humanitarian law. The Special Representative is the coordinator of humanitarian relief and peace-building activities during conflict situations. Being on the ground in conflict situations, the human rights orientation of such an office reflects on the conduct of armed forces and officials of the Community's intervention efforts.⁷³⁷

At least two other subsidiary institutions, existing independently within the Community framework are also relevant for implementation of the human rights agenda of ECOWAS. The West African Health Organisation (WAHO) is a specialised ECOWAS institution created to ensure a regional approach to the major health challenges of West African countries.⁷³⁸ The work of WAHO is important for the implementation of the right to health within the Community framework. WAHO's mandate revolves around developing regional health policies to address matters of concern to the entire Community. In this context, as at December 2005, WAHO had developed a regional programme on the prevention, treatment and care of people living with HIV and AIDS. It also developed a sectoral 3-year plan on HIV and AIDS

respect within the member states. The Council of Elders was approved by the Authority in 2000 and first inaugurated in July 2001.

⁷³⁶ For instance in 2006, members of the Council of Elders have led ECOWAS observation teams in elections in Togo, Liberia, Burkina Faso, Benin and the Gambia. In addition, two members of the Council also went on a fact-finding mission to Guinea and the Gambia. See the ECOWAS Annual Report 2006, 100.

⁷³⁷ ECOWAS Annual Report 2007, 84.

⁷³⁸ ECOWAS Annual Report 2005, 133.

control among the Armed Forces of ECOWAS member states and formulated a regional strategy for the reduction of material and pre-natal mortality.⁷³⁹ These programmes may very well not have been developed as part of a conscious project to implement the right to health at a Community level, yet they are vital for the realisation of the right in the region. This is obviously within the Community objective of ‘raising the standard of living’ of ECOWAS citizens without necessarily interfering with the sovereignty of member states. Fundamentally, as no similar continental agency exists, the threats of duplication are lower in these areas.

The ECOWAS Gender Development Centre (EGDC) based in Dakar, Senegal also exists as an independent subsidiary institution of the Community. The EGDC is the arrow-head for implementation of the Community’s gender development policy and gender management system. With a mandate to promote gender equality in West Africa, the EGDC’s main work has been in the areas of capacity building through training, advocacy and policy development.⁷⁴⁰ In pursuit of this mandate, the EGDC has had to do advocacy among parliamentarians in the region and fact-finding missions to rural areas.⁷⁴¹ The EGDC has also endeavoured to focus on promoting gender equality and equity in the region, advocacy for the involvement of women in key sectors of national economies in the region and developing regional policies on gender and HIV and AIDS.⁷⁴² As with the WAHO, the chances of conflict with regional and national institutions within these areas are very slim, if they exist at all.

4.8 Interim conclusion

The essence of this chapter was to evaluate how the ECOWAS human rights regime functions in practice. This evaluation was for the purposes of determining whether the regime is a valuable addition to the African human rights architecture and whether in its functioning, the regime works towards achieving symmetry with other parts of the architecture. The intention was to identify and highlight issues of jurisdictional conflicts and consistencies as well as situations of duplication of functions between ECOWAS institutions and national and continental human rights institutions. Notwithstanding the supposedly peripheral nature of human rights in the

⁷³⁹ ECOWAS Annual Report 2005, 81.

⁷⁴⁰ ECOWAS Annual Report 2005, 161 -162.

⁷⁴¹ As above.

⁷⁴² ECOWAS Annual Report 2007, 156 – 159.

organisational objectives of ECOWAS, this chapter has demonstrated that human rights features in some form or another in the functioning of most of the Community's institutions. Hence, treaty institutions and subsidiary institutions of the Community have been shown to have human rights or rights-related duties in their work.

This chapter has produced evidence that the human rights work of different ECOWAS institutions covers areas that are traditionally within the jurisdiction of ECOWAS member states and continental human rights institutions. Thus, the ECOWAS human rights regime strengthens national promotion and protection of human rights by assisting national institutions to address individual and common human rights challenges. In this regard, while there is a likelihood of tension between national courts and the ECCJ in relation to judicial protection of human rights, the risk of tension between the national systems and the ECOWAS regime has appeared to be significantly lower in the non-judicial sector. As the reach of the ECOWAS regime extends to areas that continental institutions are yet to cover, the usefulness of the regime cannot be denied. In judicial and non-judicial aspects of human rights realisation, the contributions and potential contributions of the ECOWAS human rights regime have been shown to add value to the African human rights system. However, there has also been evidence that the emerging ECOWAS regime has more potential to result in jurisdictional conflicts and inconsistencies with the continental components of the African human rights system.

The analysis has also shown that no conscious efforts have been made to ensure symmetry between the ECOWAS regime and the continental human rights system. While the approach of utilising the African Charter as the central human rights catalogue of the ECOWAS regime has prevented the creation of competing and conflicting norms, this has also led to some duplication of the functions of continental bodies. The discourse favours the position that in some situations, there is need and justification for the continued involvement of ECOWAS institutions in human rights work that ought to be carried out by national and continental institutions. The relative ease with which ECOWAS institutions address human rights challenges in the region has indicated that subregional intervention is desirable where individual state action would be insufficient and continental effort would be lost in the face of the magnitude

of the challenges. Hence, the need may just be for the development of mechanisms to promote symmetry between the various actors in the African human rights arena.

As the ECOWAS regime does not have any institution dedicated primarily to the promotion and protection of human rights, no direct institutional competition exists. However, it would be seen from the analysis in this chapter that there is some need to find inter- and intra-organisational balance in some aspects of the work of the ECOWAS Commission and the ECCJ. It was further shown that the biggest risk of jurisdictional conflict and inconsistency lies in the work of the ECCJ. Although, the responsibility for providing mechanisms to promote institutional balance and symmetry lies with the Authority as the main driver of integration in ECOWAS, it can be deduced from the discourse that ECOWAS institutions can contribute to balance and symmetry in their practices and procedures.

The overall conclusion from this chapter therefore is that the ECOWAS human rights regime is relevant and adds value to the African human rights system. However, support for the continued use of the regime would depend on the fact that the regime develops mechanisms to enable it complement rather than disrupt the national and continental components of the existing human rights architecture. As currently operational, the regime lacks those balancing mechanisms and faces a risk of resistance from other actors in the field. Thus, while the ECOWAS human rights regime is a model that can be recommended for other subregions in Africa, its export value depends on some modification that provides the balancing mechanisms that are presently lacking.



Chapter Five

Insights from beyond the continent: human rights in the European Union

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5.1 Introduction

In the preceding chapters, this study has shown that there is a budding human rights regime within the existing treaty framework of ECOWAS. Although it has been argued that the regime finds legitimacy in a contextualised interpretation of the ECOWAS Treaty, the point has also been made that human rights realisation within the framework of economic integration needs to develop mechanisms to enhance complementary co-existence with traditional human rights structures in Africa. In other words, the ECOWAS human rights regime is peculiar in the African human rights architecture. The peculiarity of human rights realisation in the ECOWAS framework possibly arises because of the common understanding that the organisation was founded to pursue the improvement of living standards through economic integration. Accordingly, some would contend that human rights realisation constitutes a peripheral if not unnecessary part of the agenda of an organisation like ECOWAS. Naturally, the novelty of REC involvement in the field of human rights contributes to amplifying the concerns that emerge. Considering that ECOWAS arguably has the most advanced practice within Africa in the field of human rights, its practice, processes and procedures stand as a model for other RECs in the continent. However, as the ECOWAS practice is also relatively new, the model that it presents is still in a formative stage and still grapples with some challenges.

While the ECOWAS model appears to be the most advanced in Africa, it is certainly not the only model that exists. The European Union (EU), which is a much older economic integration initiative, has in the course of its history also found itself drawn into the field of human rights. Thus, it would be expected that some of the concerns and challenges linked with the ECOWAS practice may have arisen or still exist in relation to the EU practice. Should this be a correct assumption, it might be beneficial to investigate the processes and mechanisms developed by the EU to tackle those challenges. Further, as previously noted, the wealth of experience, the rich jurisprudence and the scope of scholarly attention that has been given to the EU and its human rights practice make the EU an attractive comparator for emerging systems. Thus, this chapter seeks to examine the EU practice in the field of human rights. The aim of the chapter is to find out if there is an EU model in this field to serve as comparator by which the ECOWAS model can be measured for best practices and shortcomings. The chapter does not pretend to be a comprehensive study of the EU

human rights practice and will be restricted to the aspects that are relevant for the purposes identified.

In order to achieve its objective, this chapter is divided into five broad sections. The present section is followed by a brief history of the EU that contextualises the discourse. In the third section, the evolution of human rights in the constitutional framework of the EU is discussed by looking at the judicial origins and the subsequent treaty foundations for human rights in the EU. The legal consequences of these origins are also considered in this section. The current human rights practice of the EU is considered next, with a focus on the issues of overlap and jurisdictional conflict that emerge from the EU's intra-organisational relationship with its member states and its inter-organisational relationship with the Council of Europe.⁷⁴³ The human rights practice of the EU is considered under three broad sub-headings: human rights standard-setting, judicial protection and non-judicial protection of rights. Relationship-regulating mechanisms identified in the human rights practice of the EU are extracted and discussed separately in the section preceding the conclusion of this chapter. Although, the differences between the EU and ECOWAS human rights practices are pointed out in the entire chapter as they emerge, the section preceding the interim conclusion reiterates the main differences between the two models. The chapter concludes that certain mechanisms applied by the EU human rights regime would be useful for shaping the complementary value of the ECOWAS human rights regime if adapted for application in that regime.

5.2 The European Union in context

Following the destruction caused by the World Wars and in view of the role played by European states in those wars, at the end of the Second World War, Europe found a

⁷⁴³ The Council of Europe was the platform upon which the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950. It is thus regarded as the main framework for human rights protection in Europe. In that regard, it compares to the (O) AU and the African Charter in Africa. While the Organisation for Security and Cooperation in Europe (OSCE) is another international organisation operating in Europe that is involved in the field of human rights, the OSCE will not be included in the discussion in this chapter. Although as HJ Steiner, P Alston and R Goodman (2007) *International human rights in context* (3rd ed) 926 note, the OSCE has transformed from an 'East-West debating forum ... into an organisation designed to promote respect for a broadly defined range of human rights', there are three reasons for excluding it in this discourse. First, there is no equivalent institution in Africa vis-à-vis ECOWAS. Secondly, the OSCE does not have a binding human rights instrument and therefore does not pose the kind of threat to the EU that the structures of the Council of Europe would pose. Thirdly, the focus of the OSCE is apparently more in Eastern Europe than in Western Europe.

need to congregate to chart a course for its future. A common conclusion that came out of the different meetings of European leaders of the time was that progress in Europe lay in forging unification by some means or a ‘plurality of complementary ways’ aimed at a reconfiguration of its nation-states ‘to avoid internal repression and external aggression’.⁷⁴⁴ Considering that the needs to rebuild economies and to engage the root causes of repression and aggression were dissimilar to some extent, the choice was to undertake a ‘plurality of complementary ways’ for the purpose of rebuilding Europe. Against this background the Council of Europe (CoE) and the framework for the EU as it is known today were two in a host of organisations that were founded in Europe in the early 20th century. Thus, it is posited by some role-players that the CoE and the EU ‘were products of the same idea, the same spirit and the same ambition’.⁷⁴⁵ With the CoE focusing largely on the protection of human rights and the original organisations that formed the EU concentrating on aspects of economic integration, ‘parallel regimes’ on the basis of the two organisations were created in Europe.⁷⁴⁶

The pursuit of European economic integration began with the adoption in 1952 of the Treaty of Paris for the establishment of the European Coal and Steel Community (ECSC).⁷⁴⁷ Conceived originally to encourage unification of the coal and steel industries of participating countries and to create a common market for coal and steel, the ECSC was scheduled to operate till July 2002.⁷⁴⁸ Through the common market, the ECSC was expected to ‘contribute ... to economic expansion, growth of employment and a rising standard of living in the member states’.⁷⁴⁹ Around 1956, negotiations were concluded for the adoption of two new treaties in Europe for the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). In 1957, the Treaties of the EEC and Euratom

⁷⁴⁴ G Quinn, ‘The European Union and the Council of Europe on the issue of human rights: Twins separated at birth?’ (2001) 46 *McGill Law Journal* 849, 858

⁷⁴⁵ J Juncker ‘European Union: A sole ambition for the European continent’ Report presented to the attention of the heads of state and government of the member states of the Council of Europe on 11 April 2006, 2. Juncker presented this report in his capacity as Prime Minister of Luxembourg.

⁷⁴⁶ M Brosig, ‘Human rights in Europe: An Introduction’ in M Brosig (ed.) (2006) 18.

⁷⁴⁷ Steiner *et al* (2007) 1014. The founding members of the ECSC were Belgium, Germany, France, Italy, Luxembourg and the Netherlands. The Treaty of the ECSC was concluded on 18 April in Paris, France and entered into force on 23 July 1952.

⁷⁴⁸ AM Arnall, AA Dashwood, MG Ross & DA Wyatt, (2000) *European Union* (4th ed) 3-4.

⁷⁴⁹ Art 2 of the ECSC Treaty. See also K Lenarts & P Van Nuffel, R Bray (ed) (2005) *Constitutional Law of the EU* 80.

were signed in Rome, Italy.⁷⁵⁰ One similarity in the agenda of the ECSC on the one hand and the EEC and Euratom on the other hand was the objective of contributing to raising the standard of living in the member states of these organisations through engaging in economic integration and the promotion of different forms of economic activities.⁷⁵¹ Although the objective of integrating to raise standard of living may be seen as tilting towards some form of social-economic rights, political union and protection of human rights were expressly excluded from these founding treaties.⁷⁵²

Over a series of amendments to the treaties, expansion of activities carried out under the platform of the European organisations and decline of independent activities under Euratom, the EEC and Euratom merged to become the European Community (EC).⁷⁵³ It was on the framework of the ECSC and the EC that the EU was created in 1992 with the adoption of the Treaty of the EU (TEU) in Maastricht, The Netherlands.⁷⁵⁴ Although the TEU modified the original treaties, these treaties remained intact as the EC Treaty. Thus, the TEU is built on three so-called ‘pillars’: the EC, which is the first pillar, the Common Foreign and Security Policy (CFSP), the second pillar and the Police and Judicial Cooperation in Criminal Matters (PJCC), which is the third pillar.⁷⁵⁵ Under this arrangement, the EC or first pillar ‘embodies the Community jurisdiction in its most developed form’ as it represents the supranational aspect of the EU.⁷⁵⁶ With respect to the second and third pillars, supranationality does not apply as member states of the EU retained sovereign powers over the matters under these pillars, opting for intergovernmental cooperation in these areas.⁷⁵⁷

Although the TEU retains the Treaty of the EC and by extension, the economic objectives of the EC, the EU has additional objectives that go beyond those contained

⁷⁵⁰ The two treaties came into force on 1 January 1958. Arnall *et al* (2000) 7.

⁷⁵¹ See art 1 of the Euratom Treaty. Also see Lenarts & Van Nuffel (2005) 80.

⁷⁵² PP Craig & G de Búrca (2003) *EU Law, text, cases and materials* 380 -381.

⁷⁵³ KD Borchardt, (1999) *The ABC of Community law* European Documentation, European Communities, 18 holds the view that changing from the EEC to the EC is a reflection of transformation from a strictly economic community to a political integration scheme.

⁷⁵⁴ The TEU entered into force on 1 November 1993.

⁷⁵⁵ See Mathijsen (2004) 3. Also see A Rosas ‘The EU and International Human Rights Instruments’ in Kronenberger V (ed) (2001)*The European Union and the international legal order: discord or harmony* 60.

⁷⁵⁶ Borchardt (1999) 20. In this supranational character, the EC is the platform for exercising the limited sovereign powers transferred by member states to the organisation. Currently labeled ‘Community law’, the institutions of the organisation creates law that directly applies in member states and takes precedence over national law.

⁷⁵⁷ Mathijsen (2004) 5.

in the EC Treaty. These objectives include promoting economic and social progress, which is balanced and sustainable, asserting identity on the international scene through implementation of the CFSP, strengthening protection of the rights and interests of citizens of the Union, maintaining freedom, security and justice in the Union and maintaining the *acquis communautaire*.⁷⁵⁸ Despite the added objectives, the EC remains distinct from the other two pillars and its main objective remains economic. To achieve this objective, the EC Treaty envisages the employment of instruments such as the creation of a common market and the establishment of a monetary union.⁷⁵⁹ The task of actualising the project of the EC resides in the Community and its institutions as distinct from the member states. Notwithstanding that the institutions of the EC are also the institutions of the EU, the institutions continue to play a supranational role under the EC Treaty. In that regard, the EC exercises competence in a ‘functionality limited’ manner in relation to objectives of the EC.⁷⁶⁰ Considering that there is no plan to merge the EU or its activities with the CoE or any other European international organisation, some dissimilarity exists as between the EU and African RECs like ECOWAS that are recognised as building blocks for the AEC. Notwithstanding this difference, the questions of intra- and inter-organisational relationship in the EU and in ECOWAS are fairly similar and thus justify this inquiry. The EU will be used in this study to represent the EC in relation to the strict processes and procedures of economic integration and the study will not deal with the second and third pillars of the EU. However, where appropriate, the term ‘EC’ would also be employed.

5.3 The evolution of human rights in the EU Constitutional framework: activism or illegality?

Notwithstanding the suggestion that European unification was partly necessitated by the need to put an end to armed conflicts related to abuse of power in the countries of Europe, the promotion and protection of human rights within the framework of the EU did not originate from a preconceived and well thought-out process. Some commentators are in agreement that human rights realisation had no place in the

⁷⁵⁸ See art B in the TEU.

⁷⁵⁹ Lenarts & Van Nuffel (2005) 82.

⁷⁶⁰ Art 5 of the EC Treaty. See also Lenarts and Van Nuffel (2005) 80.

original founding treaties of the EU.⁷⁶¹ Just as no provision was made for human rights in the Treaty frameworks of the original communities, so was no ‘mechanism of system ... defined’ for that purpose.⁷⁶² Some have suggested that the failure to include human rights in the founding treaties can be explained by the fact that ‘at the time of their adoption, the economic integration undertaken by the six founding members of the Communities appeared a matter completely unrelated to that of fundamental rights’.⁷⁶³ Others contend that non-inclusion was understandable since the EC was formed strictly to enable member states to achieve economic integration.⁷⁶⁴ Others argue that non-inclusion was predicated on a conscious decision to avoid the fields of politics.⁷⁶⁵ However it is explained, the unshakable point is that human rights was not included in the founding treaties and the EU was set up for the specific purpose of economic integration. Thus, human rights in the original treaty framework of the EU was not significantly different from the ECOWAS 1975 Treaty regime.

While the views already considered seem to be based on the understanding that human rights realisation was excluded from the founding treaties mainly because it was not thought to be relevant for the pursuit of economic integration, there are other views that tow a slightly different line. Betten and Grief for example seem, to be of the view that exclusion of human rights in the founding treaties can be explained on the basis of the need to separate the focus of the different international organisations that were established in Europe.⁷⁶⁶ Based on the fact that the idea was considered and rejected, they contend that the decision to exclude human rights was not an oversight but the conscious choice of the drafters of the founding treaties.⁷⁶⁷ For them, two main reasons account for the absence of human rights in the original EC treaties. The one reason is the belief that economic integration had no potential to affect the enjoyment

⁷⁶¹ JM Perez de Nanclares ‘The protection of human rights in the European Union’ in Isa GF & de Feyter K (eds) (2009) *International Human Rights Law in a Global Context* 778; A Tizzano ‘The Role of the ECJ in the Protection of Fundamental Rights’ in Arnulf A, Eeckhout P & Tridimas T (eds.) (2008) *Continuity and Change in EU Law* 126.

⁷⁶² Perez de Nanclares (2009) 780.

⁷⁶³ Tizzano (2008) 126.

⁷⁶⁴ R Nuyens ‘The Benefit of the EU Fundamental Rights within Europe’s Human Rights Regime: Are the EU and the Council of Europe clashing on their human rights protection structures?’ (2007) unpublished long essay (available at http://essay.utwente.nl/702/i/scriptie_Nuijens.pdf) 32.

⁷⁶⁵ Quinn (2001) 858.

⁷⁶⁶ L Betten & N Grief (1998) *EU law and human rights* 53.

⁷⁶⁷ As above.

of human rights and the other is that the processes of the CoE could adequately cover the need for international protection of human rights in Europe.⁷⁶⁸ Consequently, the question arises whether there is need for a new human rights regime in the face of a prior, dedicated regional human rights regime. This again, is not different from the complications previously linked to the budding ECOWAS human rights regime. Alston lends indirect support to this view as he holds the opinion that confidence in the sufficiency of human rights protection under the ECHR and the UDHR 'enabled the work of building a European community to proceed without a separate human rights foundation'.⁷⁶⁹

The salient points in the two schools of explanations for the exclusion of human rights from the original treaty documents are fundamental for analysing the subsequent evolution of a human rights regime in the EU framework. First, if it is accepted that irrelevance of human rights realisation in the context of economic integration justified a deliberate decision to exclude human rights, it may be necessary to interrogate the justification and the legality of any subsequent addition of such a regime in the EU framework. Secondly, in the face of the almost overwhelming success of the ECHR human rights protection regime and the laudable developments in the UN human rights regime, confidence in their sufficiency ought to have increased in the latter years of the EC/EU. It therefore leaves open the question as to the need for a regime in the EU framework and whether there are potentials for conflict between the existing regimes and the subsequent EU human rights regime.

In what appears to be a reaction to the perception that economic integration as envisaged under the EU would not have the potential to impact on the rights of citizens of the member states, Perez de Nanclares has argued that there is now some reasons to warrant entry into the field of human rights. He explains that the growth of Community law under the EU and increasing powers exercised by the EU and its institutions resulted in direct impact of EU laws and mechanisms on citizens thereby outlining the risk of rights violation by the EU.⁷⁷⁰ This explanation adds to Alston's earlier argument that 'single market, a single currency and the imminent prospect of a

⁷⁶⁸ As above.

⁷⁶⁹ P Alston (ed) (1999) *The EU and human rights* 3.

⁷⁷⁰ Perez de Nanclares (2009) 781.

greatly enlarged Union, all have major human rights implications'.⁷⁷¹ Perhaps a more detailed explanation is that given by Brosig who identifies at least four reasons to justify the need for an elaborate EU involvement in the field of human rights. For Brosig, the fear that the transfer of governmental powers to the EU institutions by member states and its potential to impact negatively on domestic protection of human rights in the member states provides the first justification for a EU human rights regime.⁷⁷² A second justification relates to the fact that in the third pillar, intergovernmental cooperation on issues of justice and home affairs allows EU laws to affect aspects of human rights.⁷⁷³ Thirdly, Brosig contends that the EU has become an international actor in the mould of a nation-state and therefore requires a human rights protection system within its constitutional order.⁷⁷⁴ Finally, with specific reference to an EU catalogue of rights, Brosig's claim is that such a catalogue becomes a tool for integrating states upon common European values of rights protection.⁷⁷⁵

The first of Brosig's justifications does not differ significantly from the explanations proffered by Perez de Nanclares and Alston respectively. It centres on the need to control the exercise of governmental powers transferred to an international organisation that has the potential to directly affect relations within the domestic sphere. It is therefore a justification that the ECOWAS system can relate to, especially since after the declaration of intent and the execution of expanded supranational competence in favour of ECOWAS. However, it needs to be borne in mind that the justifications for ECOWAS involvement in the field of human rights goes beyond the need to control the exercise of governmental powers and touches on the need to provide a conducive, stable and secure environment for integration.

Against the background of these justifications for the introduction of human rights in the EU framework, it is almost generally acknowledged that a need exists for human rights monitoring in the context of European economic integration. However, the nature of its evolution and its practice have laid the ground for evaluating the legality

⁷⁷¹ See Alston's views as previously cited above, Alston (1999) 4.

⁷⁷² Brosig (2006) 22.

⁷⁷³ As above.

⁷⁷⁴ As above.

⁷⁷⁵ As above

of the process and the constitutional and treaty implications that arose in the face of the principles of limited competence and conferred powers. The evolution of the EU's human rights regime can be split into two important phases with different treaty implications. In relation to the first part, the question arises whether the evolution of human rights in the EU was the result of activism or illegality on the part of the judicial organ of the EU. Each of these phases is relevant for evaluating the legal implications of the emerging subregional human rights regimes in Africa. The next section of the study will set out and analyse these phases.

5.3.1 Judicial origins for Community human rights competence

An outstanding feature of the EU human rights regime is that protection of human rights under the Community framework was not first introduced by member states or the political institutions of the EU but by the slow and tedious work of the European Court of Justice (ECJ). The ECJ's acceptance of the need to protect rights, albeit, strictly in the character of fundamental rights could well be referred to as the first phase of the evolution of an EU regime for human rights protection. In this regard, it is acknowledged that the ECJ 'has shown leadership in the area of protecting human rights',⁷⁷⁶ and thus, 'has done most to create a system for the protection of fundamental rights within the EU'.⁷⁷⁷ Essentially, therefore, 'the whole foundations [of the protection of fundamental rights at the EU level] were the work of the Court'.⁷⁷⁸ Bearing in mind that this was carried out without constitutive treaty or other legislative foundation, the EU human rights regime is practically a judicially- driven regime.

In the early years of the original communities, tension between the domestic legal orders of the member states and the then recently emerging supranational order prompted the ECJ to assert what has become known as the principles of direct effect and primacy of Community law. In the 1963 case of *Van Gend & Loos*,⁷⁷⁹ the ECJ introduced the idea that member states had limited their sovereignty in favour of the

⁷⁷⁶ EF Defies 'Human Rights and the European Union: Who decides? Possible conflicts between the European Court of Justice and the European Court of Human Rights' (2000 – 2001) 19 *Dick International Law Journal* 301, 331.

⁷⁷⁷ Perez de Nanclares (2009) 782.

⁷⁷⁸ Tizzano (2008) 125 citing F Jacobs, 'Human rights in the European Union: the role of the Court of Justice' (2001) 26 *European Law Review* 337.

⁷⁷⁹ Case 26/62 *van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) ECR 1.

organisation in the specific fields covered by Community law. The decision in *Van Gend & Loos* was closely followed by the decision in *Costa v ENEL*,⁷⁸⁰ where the ECJ emphasised that the EEC Treaty had created a new legal order which was an integral part of the domestic legal systems and enjoyed primacy over national laws. The entry of fundamental rights protection into the discourse of Community law was apparently necessitated by the need to protect the efficacy of the principles of direct effect and primacy of Community law as instruments for effective economic integration.⁷⁸¹ This explanation may be relevant in analysing whether there was justification for the ECJ's engagement in a field that had been deliberately excluded from the original treaties and by extension, the agenda of the EU.

The principles of direct effect and primacy of Community law were naturally translated to mean that Community law was supreme within its sphere. To the extent that national laws that guarantee human rights were subordinate to Community law, yet Community law did not provide any guarantees for the protection of rights, an impression existed that the citizens of member states were left vulnerable. This applied essentially with regard to EC legislations and the acts of Community institutions. The resistance of national courts to the usurpation of rights protection guaranteed by national (constitutional) law threatened the supremacy of Community law and constituted the 'initial trigger' for the ECJ's acceptance of a duty to protect fundamental rights.⁷⁸² To fill the void created by the absence of constituent treaty foundation for human rights and preserve the supremacy of Community law, the ECJ had to declare that respect for fundamental rights was an important aspect of the general principles of Community law that was incumbent on the Court to apply.⁷⁸³ Thus, it would be noticed that whereas a rationale for judicial protection of human rights by the ECCJ in the ECOWAS model is the perceived inadequacy of national judicial protection, the ECJ involvement in human rights protection was necessitated by the desire on the part of national courts, especially the German courts, to ensure that the level of protection is not lowered by the integration process.

⁷⁸⁰ Case 6/64 *Costa/ENEL* (1964) ECR 1251.

⁷⁸¹ Tizzano (2008) 126.

⁷⁸² Craig & de Búrca (2007) 381; de Búrca 'Fundamental human rights and the reach of EC Law', (1993) 13 *Oxford Journal of Legal Studies* 283, 306.

⁷⁸³ D Shelton 'The boundaries of human rights jurisdiction in Europe' (2003) 13 *Duke Journal of Comparative and International Law*, 111; L Scheeck 'The Relationship between the European Courts and Integration through Human Rights' (2005) *ZaöRV* 837, 838

It might be necessary to note that the ECJ has not always been eager to ‘read in’ the duty to protect human rights or even fundamental rights as part of its competence. Tizzano for example records that the ECJ previously resisted the view that fundamental rights protection was relevant for applying the original treaties.⁷⁸⁴ Thus, in *Geitling v High Authority*⁷⁸⁵ the ECJ refused to accept arguments hinged on the protection of the right to property under German law on the grounds that its duty was to promote Community law which did not contain such guarantees of rights. Tizzano interprets this decision to represent a perception on the part of the ECJ that it ‘lacked competence to enforce fundamental rights recognised in national systems’.⁷⁸⁶ The ECJ’s line of reasoning is arguably justified from a positivist law point of view and is similar to the approach subsequently adopted by the ECCJ in deciding the *Olajide* case.⁷⁸⁷ However, it raised a gap in the structure of judicial protection for human rights that Europe had erected because in the event that Community law or its application resulted in the violation of rights, individuals lacked avenues for judicial vindication.⁷⁸⁸ It was in *Erich Stauder v City of Ulm Sozialamt (Stauder)*⁷⁸⁹ that the ECJ finally forced a right protection agenda on the EU when it concluded that fundamental rights formed part of the Community law that the Court was bound to apply.

Following the *Stauder* decision, national courts of EU member states apparently relaxed in their threat to challenge the supremacy of Community law. The German Constitutional Court, which was at the forefront of some of the challenges to the supremacy of Community, decided in 1986 that the protection of rights guaranteed by the ECJ’s jurisprudence and practice was equivalent to the protection available under German constitutional law and therefore sufficient to allow the German Court drop its role as guardian of the rights of German citizens against intrusion from Community law.⁷⁹⁰ It can be argued that the response of the German national court is an indication that the ECJ’s intervention was fruitful. It should be emphasised that up till this point,

⁷⁸⁴ Tizzano (2008) 126.

⁷⁸⁵ Joined cases 36-38/59 and 40/59 [1960] ECR 857,889.

⁷⁸⁶ Tizzano (2008) 126.

⁷⁸⁷ (n 634 above) (as discussed in chap 4 of this study).

⁷⁸⁸ Betten and Grief (1998) 55.

⁷⁸⁹ Case 29/69 *Erich Stauder v City of Ulm Sozialamt* [1969] ECR 419.

⁷⁹⁰ Scheeck (2005) 850.

protection of rights was on the basis that rights were part of the general principles of Community law, upon inspiration drawn from ‘constitutional traditions common to member states’ and international instruments on which member states have collaborated as signatories. The concept of rights as applied by the Court was of ‘fundamental rights’ rather than ‘human rights’,⁷⁹¹ and its application was for the purpose of scrutinising Community law and its implementation.⁷⁹² A persuasive conclusion is that although the introduction of the concept of fundamental rights as general principles of Community law provided a bulwark against potential violation arising from Community law, ‘the Court of Justice did not codify human rights as legal rules that formed an inherent part of the Community legal system’.⁷⁹³ Thus, technically, the ECJ did not legislate for the EC but exercised innovation and creativity within its allowable jurisdiction.

At least two sets of issues are discernable from the judicial origins of the human rights in the EU. The first relates to the implications of the evolution for effective and convenient realisation of rights. The second and more fundamental issue touches on the legality of the process of human rights in the EU. With respect to the effectiveness of a judicially-driven human rights regime in the EU, the ECJ practice of applying rights from a variety of sources in the absence of an EU catalogue of rights created a degree of uncertainty as to the exact rights that could be covered under the EU regime.⁷⁹⁴ The ‘judge-made human rights’ regime and its non-formulation of ‘a comprehensive set of rights’, it is argued, resulted in the reduction of transparency in the system and consequently created difficulties for the enjoyment of rights.⁷⁹⁵ These views are based on the fact that, in introducing the concept of ‘fundamental rights as an integral part of Community law’, the ECJ in the *Stauder* case did not indicate the scope of rights that could be protected by Community law. Related to this concern is the question of ascertaining the standard by which rights protection can or should have been pursued under the concept of fundamental law as part of Community law.⁷⁹⁶ A significant difference between this judicial origin of the EU human rights

⁷⁹¹ Rosas (2001) 55.

⁷⁹² Tizzano (2008) 127.

⁷⁹³ Perez de Nnlaclares (2009) 784.

⁷⁹⁴ As above.

⁷⁹⁵ J Kingston (2003) Human Rights and the European Union – An evolving system’ in MC Lucey and C Keville (eds.) *Irish Perspectives on EC Law* 277.

⁷⁹⁶ Perez de Nnlaclares (2009) 784.

protection regime and the ECOWAS model can thus be found in the fact that human rights was introduced into ECOWAS integration discourse by the treaty-making process of ECOWAS member states. The human rights regime in ECOWAS is therefore legislatively-driven. The exercise of human rights mandate by the ECCJ is also the result of legislative or treaty-making processes.

It would appear that some of the concerns raised were addressed to some extent by the ECJ itself through the development of its fundamental rights jurisprudence. In its decision in *Nold v Commission of the European Communities*,⁷⁹⁷ the Court built upon the concept of Community based fundamental rights by adding that relevant international treaties on human rights were as much a source of inspiration for its practice as were the common constitutional traditions of the member states. While this formulation increased the pool of human rights source base from which the ECJ could draw inspiration, it would not have done much for legal certainty in determining what rights are covered by Community law. In a subsequent decision in *Rutili v Minister for the Interior*,⁷⁹⁸ the ECJ clarified that the ECHR specifically formed a source of inspiration for its application of rights. The specific mention of the ECHR improves legal certainty, yet it reinforces the question of centrality of human rights source documents as between the EU internally developed sources and the ECHR. It is also suggested that a further ‘legal-technical’ problem of delimiting the confines of protection is evident from the nature of the regime.⁷⁹⁹

In sum, despite the benefits that come with the pioneering efforts of the ECJ in erecting a human rights regime upon the EU Community framework, the challenges of legal uncertainty and the consequent arbitrariness that surrounds protection of human rights could not be wished away. Some commentators capture it aptly by stating that ‘no matter how carefully it may be attuned to the need to ensure full respect of fundamental rights within the Community legal order, [the ECJ] cannot make up for the absence of the necessary legal and policy commitments on the part of other institutions’.⁸⁰⁰ However, it is this work of the ECJ that laid the foundation for

⁷⁹⁷ Case 4/73 *Nold v Commission of the European Communities* [1974] ECR 491.

⁷⁹⁸ Case 36/75 *Rutili v Minister for the Interior* (1975) ECR 1219.

⁷⁹⁹ Perez de Nanclares (2009) 787.

⁸⁰⁰ Alston and Weiler ‘An “ever closer union” in need of a human rights policy: The European Union and human rights’ in Alston (ed) (1999) 12.

subsequent EU engagement in the field of human right. As the discourse in chapter four of this study has shown, lack of certainty in relation to human rights source document can also be raised in the ECOWAS legislatively-driven rights regime. However, there is no question that the ECOWAS regime should not suffer a challenge of legality. Against the fact of ECJ foundation for the EU human rights regime, it needs to be determined whether such a level of judicial activism is justifiable at international law.

5.3.1.1 Legal consequences of ECJ action in the field of human rights

From the perspective of the law of international institutions, the question is whether there was legality in the ECJ's judicial introduction of rights protection into the EU framework at a time when treaty foundation in that regard was completely non-existent. There appears to be some view that even though the duty assumed unilaterally by the ECJ did not appear to be predicated upon any clear objective in the treaties, that line of action was 'necessary to enable the Community to carry out its functions'.⁸⁰¹ Hence, 'respect for and protection of human rights were ... conceived as an integral, inherent transverse principle forming part of all objectives, functions and powers of the Community'.⁸⁰² Put differently, where the protection of human rights is a vital condition for building an environment upon which economic integration can be pursued, institutions of the relevant organisation may engage in those activities even in the absence of treaty foundation. Such a view fits with some of the justification for ECOWAS involvement in the field of human rights. Bearing in mind that such a position, on face value, contradicts the principles of attributed competence and conferred powers, it needs to be interrogated whether theory and practice in the field of the law of international institutions supports this position.

An important manifestation of the concept of sovereignty in relation to international organisation is that drafters of constitutive documents of international organisations generally refrain from granting wide powers to organs and institutions of these organisations to expand objectives of the organisation. Thus, the power to expand objectives of organisations remains with the authorities of the converging states to

⁸⁰¹ JHH Weiler & SC Fries 'A human rights policy for the European Community and Union: The question of competences' in Alston (ed) (1999)156 – 157.

⁸⁰² As above.

exercise through the process of treaty amendment. Similarly, the functions, competences and instruments to be employed for the purpose of achieving organisational objectives are often laid out in the constitutive documents. However, in certain cases, constitutive documents permit institutions and organs of international organisations to employ ‘*all* reasonably available means’ towards achieving the objectives agreed upon. In the absence of such *omnibus* provisions, it is contended, ‘it is presumed according to traditional conceptions that they must restrict themselves to the use of those operative mechanisms specified in the instrument even though other and more effective mechanisms become available after the organisation’s establishment’.⁸⁰³

Where the means authorised for the realisation of organisational objectives are restrictively set out or there is very little room for manoeuvre on the basis of an omnibus provision, the option left for the expansion of functions, competence and powers should be by way of treaty amendment at the discretion of the member states of the organisation. Short of treaty amendment, the other seemingly accepted means of adapting an international organisation is by liberal interpretation of the constitutive documents of the organisation. In this regard, the Vienna Convention on the Law of Treaties (VCLT) provides statutory basis for contextual interpretation of treaties.⁸⁰⁴ Admittedly, this gives room for the organs saddled with the responsibility of interpretation to exercise wide discretion in attempt to adapt an organisation to current realities. Normally, the task of interpretation is borne by the judicial or quasi-judicial organs engaging in judicial interpretation. Judicial interpretation, it is argued, can take either of two forms. In the one sense, interpretation is done in the context of locating the meaning of a text ‘so that interpretative statements can be true or false depending on whether or not they reflect that meaning’. In the other sense, interpretation is stretched to the extent of creating an otherwise absent meaning in the text.⁸⁰⁵ Thus, as Hexner had noted, ‘any normative text is ...open to more than one interpretation. It

⁸⁰³ EP Hexner ‘Teleological interpretation of basic instruments of public international organizations’ in Engel S (ed), (1964) *Law, state and international legal order* 122.

⁸⁰⁴ Art 31 of the VCLT.

⁸⁰⁵ IL Vidal ‘Interpretation and judicial discretion’ in Beltran JF & MN Mora (eds) (2006) *Law, politics and morality: European perspectives II* 90.

belongs, however, to the essence of a normative text that its interpretative radius, the range of the possible meanings attributable to it, be limited'.⁸⁰⁶

The sense that emerges from the views on judicial interpretation appears to be that while it is conceded that interpreting organs do have some discretion, such discretion needs to be cautiously exercised. Yet Hexner acknowledges that there may be a need to expand 'the interpretative range of a provision ... in the process of time in conformity with changing circumstances'.⁸⁰⁷ He finds support in Kelsen who stressed 'that the law is open to more than one interpretation is certainly detrimental to legal security; but it has the advantage of making the law adaptable to changing circumstances, without the requirement of formal alteration'.⁸⁰⁸ For Hexner, such an extension of meaning outside of the 'interpretative range ... (of) an instrument involves a *modification* of the instrument in contrast to its interpretation'.⁸⁰⁹ Accordingly, it has to be accepted, albeit cautiously, that it is not unusual for interpretation of constitutive documents of international organisations to be stretched to the boundaries of modification of such documents. The question that is thrown up at this point is whether such practices are lawful.

Available opinion appears to be that expansive interpretation of constitutive documents tilting towards treaty modification is not totally unlawful under certain circumstances. Kelsen's position in this regard is to deny overwhelming constitutionality while acknowledging that treaty amendment need not always be done in strict compliance with pre-determined procedures laid out in the treaties. Basing his analysis on the Charter of the United Nations, Kelsen concludes that treaty modification may occur through interpretative application, which though not completely inconsistent with the law, tends to exceed the 'ascertainable intention' of treaty authors. By this means law can be dynamic in the face of difficulty or impossibility of treaty amendment.⁸¹⁰ In these cases, the operational position which may be loosely called a 'new law' comes into being riding on the back of violation of the 'old law' or legal position.

⁸⁰⁶ Hexner (1964) 123.

⁸⁰⁷ As above.

⁸⁰⁸ H Kelsen, (1950) *The Law of the United Nations* London, xiv - xv (as cited by Hexner (1964) 124.

⁸⁰⁹ Hexner (1964) 124.

⁸¹⁰ Kelsen (1950) xv.

Clearly, interpretative actions that ‘violate’ old laws ignite the principle of ‘*ex injuria jus non oritur* – law cannot originate in an illegal act’ but are accepted as an exception by which ‘a new law originates in the violation of old law’.⁸¹¹ Hexner contends that this is ‘an evolutionary method ... that is now in the process of being accepted by the community of nations as a subsidiary source of international law’.⁸¹² The justification seems to be that treaties sometimes need to be interpreted on a teleological basis to conform to what Sir Gerald Fitzmaurice terms ‘the theory of emergent purpose’.⁸¹³ A final word on this point would be to reiterate Hexner’s argument that a distinction has to be drawn between ‘(authorised) interpretative actions of an organ and its (unauthorised) modifying actions ... even in case the (unauthorised) modifying action is being “legitimised” by an approving attitude of the member states’.⁸¹⁴ This is because the ‘effect of a modification even if informally consented to by an “appropriate number” of member states cannot be regarded as equivalent to that of a formal amendment’ as such modification ‘will have to be regarded as temporary’.⁸¹⁵

It can be deduced from the views expressed above that subsequent ‘ratifying action’ by member states of an international organisation may legitimise modifying interpretation by a judicial arm. In this regard, subsequent action by the political institutions of the EU and acquiescence by member states may have served to legitimise the actions of the ECJ. A 1977 joint declaration by the political institutions of the EU suffices as ratifying action on the introduction of ‘fundamental rights as part of Community law’.⁸¹⁶ This has also been supported by further political declarations some of which were made by member states.⁸¹⁷ However, as already canvassed, such judicial modification has to be temporary. Hence, the first phase of the EU human rights protection project which was judicially driven developed in an uncoordinated manner and was saddled with uncertainties around its legality, scope and future. However, although it is the product of judicial activism, there is some grounds to argue that such activism was not unlawful and may be contemplated by international law. While it may have succeeded in the context of Europe, its

⁸¹¹ Kelsen (1950) 911 - 912.

⁸¹² Hexner (1964) 129.

⁸¹³ Hexner (1964) 129 -130.

⁸¹⁴ Hexner (1964) 124.

⁸¹⁵ Hexner (1964) 131.

⁸¹⁶ Nuyens (2007) 34; Alston and Weiler (1999)10.

⁸¹⁷ Perez de Nanclares (2007) 788.

qualification as an inspirational model in the African context is not so certain since there is a stronger likelihood of resistance to international judicial encroachment on state sovereignty by African states. Thus, its suitability as a model for African RECs would require further interrogation.

5.3.2 Treaty foundations for Community human rights competence

Despite the advancement in rights protection that was prompted by the ECJ's pioneering work in the EU legal framework, it was almost inevitable that the human rights regime had to find space within the EU constitutional framework in order to enhance legal certainty and transparency. While there did not appear to be any resistance from member states to the ECJ engineered human rights regime of the EU, several years of 'reading in' human rights set the stage for treaty amendments that finally put human rights protection within the EU treaty framework.

As already demonstrated, the original treaties of the EU did not mainstream human rights in the organisation's agenda. However, the treaties were not completely bereft of rights-related provisions. Although they were not couched as human rights provisions per se and were not used as such, certain articles in these early treaties contained provisions that had clear links to human rights protection.⁸¹⁸ As these isolated human rights-related provisions were not sufficient to base any viable human rights regime, especially in the face of the work of the ECJ, other EU institutions themselves found a need to call for some form of action to properly position human rights in the agenda of the organisation.⁸¹⁹ However, it was not until the 1980s that the first clear Treaty recognition for human rights appeared in the preamble to the Single European Act (SEA).⁸²⁰ In the preamble to the SEA, EU member states merely recorded their determination to 'work to promote democracy on the basis of the fundamental rights recognised in the ECHR', yet this was widely regarded as the starting point for grounding the EU's human rights regime on treaty foundation.⁸²¹

⁸¹⁸ See eg the old art 119 in the 1957 Treaty of the EEC. The rights mainly provided guarantee against discrimination. See also Quinn (2001) 860; R Rack and S Lausegger 'The Role of the European Parliament: Past and Future' in Alston (ed) (1999) 802.

⁸¹⁹ As Alston & Weiler (1999) 4 note, the EU Parliament and the EU Commission were involved in this regard.

⁸²⁰ See the preamble to the Single European Act [1986] OJ L 169/1. See Rack & Lausegger (1999) 802.

⁸²¹ Betten & Grief (1998) 62; Alston & Weiler (1999) 10.

The prominence given to such preambular provisions in the literature can perhaps be seen as an indication of the peripheral place that human rights had in the EU treaty framework.

Following the adoption of the Treaty of the European Union (TEU) at Maastricht in 1992, the EU began the process of actual consolidation of the work of the ECJ by giving clearer treaty foundation for human rights protection.⁸²² In the TEU, human rights were included in main body of a Community Treaty for the first time.⁸²³ In its article F(2) (renumbered article 6(2) in latter treaties), the TEU proclaimed that the EU shall respect fundamental rights as guaranteed by the ECHR and ‘as they result from the constitutional traditions common to the member states, as general principles of Community law’. Clearly, this was a codification of the position already popularised by the ECJ yet it was heralded as being ‘not only of great symbolic significance, but also clearly imposed a legal obligation upon the EU institutions’.⁸²⁴ It would be noted that article F(2) TEU is not included as an objective of the EU. Thus, the understanding that its inclusion translated into a legal obligation on the EU institutions could possibly be justified on the grounds that protecting rights was a necessary condition for the realisation of the objectives of the EU.

The progression of human rights within the EU treaty framework continued in a positive direction in the treaties of Amsterdam and Nice both of which amended the TEU to some extent.⁸²⁵ The Treaty of Amsterdam amended article F of the TEU by first replacing sub-article 1 which related to respect of national identities of member states with governments based on democratic principles. In the new provision which was renumbered article 6(1), EU member states affirmed that their Union ‘is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’. It would be observed that in this provision, the EU moved from the concept of ‘fundamental rights’ as was consistently used by the ECJ to recognition of human rights as it is more commonly used. Further, the provision

⁸²² The Treaty of the European Union [1992] OJ C191/1 was signed on 7 February 1992 and entered into force on 1 November 1993.

⁸²³ Rack & Lausegger (1999) 803.

⁸²⁴ Tazzano (2008) 131. See also Shelton (2003) 113; Perez de Nanclares (2009) 789.

⁸²⁵ The Treaty of Amsterdam [1997] OJ C 340/1 was signed on 2 October 1997 and entered into force on 1 May 1999. The Treaty of Nice which was signed on 26 February 2001 and dealt essentially with institutional reforms only entered into force on 1 February 2003.

states in unequivocal terms that these are principles upon which the EU project is founded rather than objectives of the Union. Perhaps it is significant that at this point in its history, the EU has moved from a purely and strictly economic integration initiative to involve some form of political integration. The Treaty of Amsterdam retained article F(2) TEU as article 6(2) but made it justiciable by extending the jurisdiction of the ECJ to apply to that provision with regard to actions of the EU institutions.⁸²⁶ If the provisions are justiciable, it cannot be easily denied that the EU attaches legal weight to them even though they are not stated objectives of the Union. To the extent of providing for human rights protection as a principle for integration rather than an objective, the EU regime is no different from the ECOWAS regime. Arguably therefore, there is consistency in giving some legal status to statements of principles in treaties of international organisations.

The Treaty of Amsterdam takes the EU course of human rights further with the addition of a new article 7 which allows the EU to guarantee certain rights attached to EU membership in the event of a finding that ‘serious and persistent’ breaches of human rights occur in a member state. Whereas the protection of rights under the ECJ engineered regime was restricted to a negative protection of rights as against EU institutions and Community law, the new article 7 TEU arguably extends the horizon for human rights in the EU. As one commentator notes, the jurisdiction conferred on the Union by article 7 TEU is potentially expansive ‘as it could cover human rights violations ... committed by member states even in fields normally regarded as coming within their exclusive jurisdiction’.⁸²⁷ A significant aspect of article 7 TEU, as Rosas correctly points out, is that the standard by which potential violation is to be measured under the provision is article 6(1) which codifies respect for ‘human rights’ rather than the arguably narrower concept of ‘fundamental rights as general principles of community law’.⁸²⁸ This approach suggests an intention to take human rights protection beyond the narrow conceptualisation promoted by the ECJ both in terms of definition of the human rights as to be understood in the context of the EU and in terms of the coverage that is possible within the EU framework. In essence, it creates a regime that is comparable to the CoE and national regimes and that is not confined

⁸²⁶ Art K 7(7), Treaty of Amsterdam. See also Tizzano (2008) 131; Besson (2006) 344.

⁸²⁷ Kingston (2003) 280.

⁸²⁸ Rosas (2001) 60.

to rights necessarily protected only by economic concerns. The Treaty of Nice does not add much to the regime introduced by the Treaty of Amsterdam beyond amending the procedures for making the determination required in article 7 TEU.

In the Treaty of Lisbon, which aims at making the EU more democratic, human rights mainstreaming in EU constitutive documents went even further.⁸²⁹ The Treaty of Lisbon inserts a new preambular paragraph which refers to the EU drawing inspiration from concepts which have developed from ‘universal values of the inviolable and inalienable rights of the human person’. It then goes on to insert a new article 1a that affirms that the ‘Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. However, in article 2 which follows and lays out the objectives of the Union, the only mention of human rights relates to a declaration to combat social exclusion and discrimination, promote social justice and protection, gender equality and protection of the rights of the child. The conclusion that can be drawn is that in as much as human rights protection has climbed in the treaty framework of the EU, it falls short of being a clear objective of the Union. However, all of these provisions cannot mean nothing and in this regard, the contention that legal obligations to protect rights arise from these treaty provisions cannot be ignored.

Apart from the apparently highly influential general provisions that have been used to demonstrate an obvious regime change in the field of human rights, some of these treaties contain other human rights-related provisions with actual and potential implication for human rights in the EU. Some of these include article 13 of the Consolidated Treaty establishing the European Community⁸³⁰ and article 181a of the Treaty of Nice. However, despite these general and specific provisions, some analysts seem to be in agreement that human rights remains outside the list of objectives of the EU and no general human rights competence can be found in the mandate of the EU and its institutions.⁸³¹ In fact, while some translate these treaty developments to mean encouragement for the ECJ to slightly extend its fundamental rights protection

⁸²⁹ The Treaty of Lisbon was signed on 13 December 2007 and had not entered into force as at June 2009.

⁸³⁰ [2002] OJ C 325/33.

⁸³¹ Brosig (2006) 19; Alston & Weiler (1999) 22.

jurisdiction,⁸³² others contend that the reference to fundamental rights in article 6(2) TEU does not provide European citizens with any practical right to invoke the provisions against states and provides no penalties for default.⁸³³ Others are convinced that the treaty developments notwithstanding, the fact that human rights protection did not make its way into the objectives enumerated in the treaties should mean that ‘national laws as they affect human rights remain outside Community reach so long as they do not impact Community laws or policies’.⁸³⁴ Considering the similarity between the EU Treaty regime in the field of human rights and the corresponding ECOWAS regime, these arguments can also be made against the ECOWAS regime. It has to be noted however, that these analysis were based on the treaties up to the Treaty of Nice.

Probably in response to critics who had argued that human rights protection under the EU could be greatly improved if the EU as an organisation acceded to the ECHR, calls for EU accession to the ECHR began to emerge within the EU institutions themselves.⁸³⁵ Prompted by these calls, the European Council referred the question of accession to the ECJ for its judicial opinion. In its opinion, the ECJ declared that such an accession would be of ‘constitutional significance’ and no existing provisions in the then EU Treaties could be provide sufficient legal basis for accession.⁸³⁶ The ECJ specifically considered article 308 TEC which is the Treaty’s ‘necessary and proper’ clause⁸³⁷ and concluded that it did not confer any general powers on institutions of the Community to enact rules or enter into treaty agreements in the field of human rights.⁸³⁸ Thus, it indicated that treaty amendment was required for such a far-reaching project. Debates have raged over the actual implication of this decision with the prevailing view being that the decision did not prohibit EU action in the area of human rights.⁸³⁹

⁸³² As above.

⁸³³ TC Stever ‘Protecting human rights in the European Union: An argument for treaty reform’ (1996 - 1997) 20 *Fordham International Law Journal* 919.

⁸³⁴ See eg Shelton (2003) 113.

⁸³⁵ The European Commission and the European Council were active in this regard.

⁸³⁶ See generally, Opinion 2/94 of March 1996.

⁸³⁷ Shelton (2003) 115.

⁸³⁸ As above.

⁸³⁹ See eg Rosas (2001) 64; Alston and Weiler (1999) 24.

In the face of the ECJ Opinion and the debate it sparked, article 6 of the Treaty of Lisbon is a clear statement by EU member states that human rights counts in the Union. In article 6, EU member states gave treaty status to the EU's Charter of Fundamental Rights,⁸⁴⁰ then went on to state that the 'Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. This effectively removes any outstanding legal obstacles to EU adoption of the ECHR as a standard for human rights in the Union but does so setting out the condition that accession would not affect EU competences as already agreed upon. Clearly, human rights protection has travelled far in the EU and the improved developments in successive treaties are indications that member states of the EU have made a conscious transition from treaty regimes with no place for rights to a highly compliant regime. In such a legal environment there would be little room for second guessing the intentions of the EU member states in the field of rights protection. While the judicial origin of human rights in the EU sets it apart from the ECOWAS experience, the treaty bases for human rights in both models have been largely similar. The advancement made in the Treaty of Lisbon which is expected to enter into force sooner than later, takes the EU model farther than what obtains in the ECOWAS regime. However, the overall position would be that in so far as the realisation of human rights is recognised by member states of both organisations as principles that guide the integration process, such statement of principles carry some legal value and is sufficient for mainstreaming human rights in their activities.

5.4 Current human rights practice: addressing issues of overlap and organisational conflicts

Despite the debate on whether human rights protection in the EU falls short of being recognised as an objective of the Union and whether the EU lacks general competence to enact primary rules in the field of human rights, the EU has had a fairly long history in the field. In fact, it is not unusual to find allusions to a 'Community human rights system' in relation to EU human rights practice.⁸⁴¹ Isolated treaty provisions touching on aspects of human rights have been identified as 'basis for protection of

⁸⁴⁰ The EU Charter of Fundamental Rights is a non-binding instrument adopted in 2000.

⁸⁴¹ Eg Shelton (2003) 115.

certain rights'.⁸⁴² There is also belief that EU legislation in certain areas 'coincide with ... classic fundamental right' and such provisions should be applicable in favour of rights protection.⁸⁴³ All of these added to the progressive increment of general treaty provisions that mainstream human rights in the EU framework reinforce the assertion that there is a robust human rights practice in the EU. As such, some are not even convinced that the ECJ suggested at any point in its Opinion that human rights protection contradicted the objectives of the EU or that the Community lacked competence to legislate in the area of human rights.⁸⁴⁴ Perhaps the challenge that emerges then is to determine the scope and boundaries of the EU human rights practice vis-à-vis the member states and the CoE.⁸⁴⁵ Although it is possible to separate discussion on EU human rights practice vis-à-vis its member states from its practice in relation to the CoE, the EU itself does not appear to consciously make this distinction. Further, there is not enough separate inter- and intra-organisation human rights practice to warrant such an approach. Thus, just as the ECOWAS practice was considered as a single practice, the EU practice would be considered together.

An important aspect of the EU human rights regime is that the duty to protect rights is not confined to any single institution or body.⁸⁴⁶ Recognising that rights protection need not be confined to the judicial sphere even at the international level,⁸⁴⁷ the EU's practice in this field seems to spread across the work of its main institutions. In terms of policy monitoring, a duty to ensure compliance with human rights obligations has been attributed to the EU Parliament.⁸⁴⁸ Developments in the treaties have also been interpreted to mean an expansion of the ECJ's adjudicatory role in the field of human rights.⁸⁴⁹ In addition to these and the work of the other EU institutions, a Fundamental Rights Agency was established in 2007 to perform certain roles in the protection of rights in the EU.

⁸⁴² Nuyens (2007) 39 identifies arts 12 and 13 of the EC Treaty as grounds for the EU to address issues of discrimination.

⁸⁴³ Weiler & Fries (1999) 168.

⁸⁴⁴ Alston & Weiler (1999) 24.

⁸⁴⁵ See Brosig (2006) 23.

⁸⁴⁶ Alston & Weiler (1999) 11 – 12.

⁸⁴⁷ Besson (2006) 356.

⁸⁴⁸ KSTC Bradley 'Reflections on the human rights role of the European Parliament' in Alston (ed) (1999) 840.

⁸⁴⁹ de Búrca (1993) 306.

With all of these developments, issues of overlap and conflicts of mandate in the field of rights protection are bound to emerge. Some argue that ‘the demarcation between the Community and the member states has not always been respected in practice’ hence ‘institutions are frequently accused of usurping the powers of the member states ... without regard to the rights and interests of which the member states are still the ultimate defenders’.⁸⁵⁰ These concerns also exist in relation to other international organisations. As Besson notes, ‘the EU’s intervention in the human rights field might threaten the work of other human rights organisations like the UN or the Council of Europe’.⁸⁵¹ These are some of the concerns that have been identified in relation to the ECOWAS human rights practice. The approach to addressing these concerns may very well not be the same in both organisations. It is therefore relevant to examine the actual human rights practice of the EU in standard setting, adjudication and non-judicial monitoring of rights in order to enhance an understanding of how it relates to member states and other international institutions.

5.4.1 Community standard-setting in the field of human rights

Since the various generations of EU treaties did not confer the task of setting human rights standard within the Union on any particular institution or organ, virtually all the main organs of the EU have been involved in setting standards in one form or another within the field of human rights. Consequently, the body of norms that can be loosely termed the EU human rights law can be found in different forms with varying legal status.⁸⁵² In terms of setting the overall policy direction of the Union, the European Council clearly plays a vital role.⁸⁵³ Some of the more conspicuous human rights policies set by the European Council are in the area of anti-discrimination in furtherance of article 13 of the EC Treaty.⁸⁵⁴

While the European Council plays the major role in the policy direction of the Union, there are some who argue that the European Parliament has contributed in no small

⁸⁵⁰ Bradley (1999) 841.

⁸⁵¹ Besson (2006) 358.

⁸⁵² P Filipek ‘Protection of human rights in the EU – Meeting the standards of a European human rights system?’ in Adam Bodnar, Michal Kowalski, Karen Raible & Frank Schorkopf (eds) (2003), *The emerging constitutional law of the European Union; German and Polish Perspectives* 58.

⁸⁵³ The European Council comprises of the heads of state and government of the member states.

⁸⁵⁴ Craig & de Búrca (2007) 379.

measure to shaping the human rights policies of the Union.⁸⁵⁵ In this context, the EU adopts policies that coincide with the mainstream views in the field of human rights. For instance, the EU is presented as an adherent of the principle of the indivisibility of human rights to the extent that it recognises rights in all the so-called three generations of human rights.⁸⁵⁶ However, in terms of concrete norm creation, the EU has three major documents that will be focused upon in this study.

5.4.1.1 The ECHR

The ECHR is not an instrument adopted under the platform of the EU and should ordinarily not come under a discussion of human rights instruments of the Union. However, the history of the EU human rights protection regime is replete with indications of intent in the EU to ‘own’ or at least ‘co-own’ the ECHR as a source of rights within the framework of the Union. As already shown, this has led to the preparation of the ground for accession of the EU to the ECHR by way of treaty amendment. Thus, there is a possibility to claim some justification for considering the ECHR as a document setting human rights standards in the EU. The use of the African Charter in the ECOWAS regime is almost a mirror of this EU practice.

As with the entire human rights project of the EU, the ECJ can claim a pioneering role in steering the Union towards adoption of the ECHR as a source of rights within the framework of the Union.⁸⁵⁷ Early in its human rights jurisprudence, the ECJ opted to give the ECHR ‘a special and central role as a source for identifying fundamental rights’ and thus ‘came to de facto integrate the Convention ... in the Community legal order through its general principles’.⁸⁵⁸ As a tool in the hands of the ECJ, the ECHR fell short of being incorporated either in whole or in part as a part of Community law since its use was restricted to application as an interpretative aid.⁸⁵⁹ In this character, the ECHR was used merely to flesh out the ‘general principles of Community law’ and was not binding on the Union or its institutions per say. The ECJ’s approach to the use of the ECHR also meant that there was some level of uncertainty in relation to identification of what rights in the ECHR could be claimed before the Court under

⁸⁵⁵ Rack & Lausegger (1999) 804 .

⁸⁵⁶ Alston & Weiler (1999) 31.

⁸⁵⁷ The process leading to the ECJ’s adoption of the ECHR will be discussed and analysed in the next section.

⁸⁵⁸ Tizzano (2008) 128.

⁸⁵⁹ Betten & Grief (1998) 62.

Community law. However it set the stage for subsequent agitations for formal adoption of the ECHR as part of Community law.

Between 1979 and 1982, the European Commission and the European Parliament had severally called for the EC to formally adopt the ECHR by way of accession.⁸⁶⁰ Critics argue that apart from its symbolic value, accession to the ECHR by the EU would do much to ensure accountability of the EU institutions in their work.⁸⁶¹ Accession was bound to enhance legal certainty in the human rights practice of the Union as well. The pressure piled by the European Commission and the European Parliament in the 1990s resulted in the European Council requesting for the ECJ's opinion on the legal issues that arise in relation to accession. In Opinion 2/94, the ECJ was unequivocal in its finding that accession to the ECHR by the EU raised constitutional issues as it would alter the structure of the Union to the extent that it subjected it to another international organisation. Thus, the ECJ concluded that for such accession to occur, there would be need to amend the Treaty of the Union.⁸⁶² Despite initial resistance from certain quarters, EU member states have effected the required amendment in the Treaty of Lisbon.⁸⁶³ Hence, as soon as that Treaty comes into force the EU would be ready to accede to the ECHR. In the meantime, the ECHR remains 'a point of reference' for the ECJ and the other institutions of the Union in the definition of fundamental rights even though it does not enjoy exclusivity in that regard.⁸⁶⁴

While accession would address some of the concerns raised in relation to the fragmented and haphazard use of the ECHR in the EU framework as is presently the case, accession is not without its own challenges. For one, the nature of the relation between the ECJ and the ECtHR which is the treaty supervisory organ of the ECHR has to be ironed out.⁸⁶⁵ It may also raise the question whether accession to the ECHR precludes the adoption of other human rights norms by the EU or whether any

⁸⁶⁰ Nuyens (2007) 39.

⁸⁶¹ Alston & Weiler (1999) 11.

⁸⁶² There were other obstacles to accession, one of the most of which was that the CoE had to also undertake an amendment that would allow an international organisation become a party to the ECHR which contemplates only states parties.

⁸⁶³ See art 6(2) of the Treaty of Lisbon.

⁸⁶⁴ Rosas (2001) 54.

⁸⁶⁵ There are those who hold the view that no hierarchical relation need exist between the two judicial bodies. See Scheeck (2005) 854.

existing or potential instruments adopted by the EU would be subordinate to the ECHR within the structure of the Union. There also might be need to explain the relation of the ECHR to Treaty provisions in the event of accession.

Whatever the answers to these concerns may be, there is informed opinion that it is not unusual for an organisation to adopt normative standards of another organisation and thereby give it legal force within the adopting organisation. Hence John Finnis states:⁸⁶⁶

... it is characteristic of legal systems that ... they ... purport to adopt rules and normative arrangements ... from other associations within and without the complete community, thereby 'giving them legal force' for that community; they thus maintain the notion of completeness and supremacy without pretending to be either the only association to which their members may reasonable belong or the only complete community with whom their members may have dealings, and without striving to foresee and provide substantially for every activity and arrangement in which their members may wish to engage.

Considering how the ECHR has been used in the EU organisational framework and the chance that the Union might become a party to the ECHR, this instrument constitutes an important standard-setting document in the stables of the Union. The use of the African Charter by the ECCJ in the ECOWAS regime is slightly different in the sense that the primary rules of the African Charter are appropriated in whole even though the ECCJ does not see itself bound to apply the secondary rules in the Charter.⁸⁶⁷ However, the two models are similar in their adoption of the central human rights instruments in their respective regions.

5.4.1.2 The Workers' Charter

One of the lesser known human rights instruments of the EU is the Community Charter of Fundamental Social Rights for Workers (1989 Charter).⁸⁶⁸ Said to be the initiative of the European Parliament, the 1989 Charter did not receive complete and enthusiastic support from all member states.⁸⁶⁹ The 1989 Charter seemingly provides for a procedure by which the EU Commission was empowered to publish annual

⁸⁶⁶ J Finnis (1980) *Natural law and natural rights* 148.

⁸⁶⁷ See the *Koraou* case (n 71 above) as discussed in chapter 4 of this study.

⁸⁶⁸ This instrument was adopted in 1989. Some writers refer to it as the Community Charter on Fundamental Rights and Freedoms. See Nuyens (2007) 37. But see Betten & Grief (1998) 70 and J Kingston (2003)282.

⁸⁶⁹ Nuyens (2007) notes that at least one member state failed to sign the 1989 Charter.

reports on its implementation. For some, the effectiveness of the 1989 Charter was curtailed by certain principles upon which the Charter was hinged. These were respect for the principle of subsidiarity, respect for the diversity of national systems and preservation of business competitiveness.⁸⁷⁰ To the extent that provisions in this Charter were enacted into the more popular EU Charter of Fundamental Rights, the 1989 Charter was not completely irrelevant.⁸⁷¹ However, this Charter was not very widely known and it is doubtful if the people it was meant to benefit were familiar with the rights contained in it. Apart from the fact that the 1989 Charter failed to receive total support from member states, the risk of creating confusion and conflicting standards vis-à-vis global instruments, the ECHR and the bills of rights of member states cannot be ignored.

5.4.1.3 The EU Charter of Fundamental Rights

Although treaty intervention reinforcing the practice of the ECJ had strengthened the protection of human rights within the EU to appreciable levels, the lack of a generally accepted Union-specific rights catalogue remained a sore point in the EU's human rights regime for a long time. Critics contended that the absence of a catalogue resulted in undesirable legal uncertainty.⁸⁷² In response, institutions like the European Parliament reiterated the need for the adoption of a catalogue specific to the Union.⁸⁷³ While it was thought that accession to the ECHR could rectify the deficit, the ECJ's Opinion 2/94 apparently fast-tracked the movement towards adoption of comprehensive rights catalogue. Consequently, at the initiative of the European Council of Cologne in 1999, representatives of different stakeholders took part in the drafting of the EU Charter of Fundamental Rights (CFR) leading to its adoption in 2000.⁸⁷⁴ At adoption, the CFR was neither made as a binding treaty nor was it not attached to the EU treaty framework. It was classified as a solemn proclamation by the European Council, the European Commission and the European Parliament.⁸⁷⁵

⁸⁷⁰ Betten & Grief (1998) 71.

⁸⁷¹ Kingston (2003) 282.

⁸⁷² Perez de Nanclares (2009) 784.

⁸⁷³ Rack & Lausegger (1999) 806.

⁸⁷⁴ See Nuyens (2007); J Polakiewicz 'The relationship between the ECHR and the EU Charter of Fundamental Rights' in Kronenberger (ed) (2001) 70.

⁸⁷⁵ Perez de Nanclares (2009) 791.

Being an ‘inter-institutional declaration’, the legal value of the CFR at its adopted was not very high.⁸⁷⁶

Despite being a new catalogue of rights, it appears that care was taken to ensure that the CFR was not used to create new rights or new categories of rights. As such the CFR was not a platform for the invention of new rights but a means to codify ‘a set of core values which all EU countries have approved’ previously in the ECHR albeit in a slightly different form.⁸⁷⁷ Hence, the CFR was conceived as ‘an instrument of consolidation’ that ‘brings together in one single coherent text rights already guaranteed in the Community legal order’.⁸⁷⁸ While the CFR is claimed to be merely a codification of ECHR based rights in slightly different wording, its scope is recognised to be wider than previous instruments to which the EU member states are party.⁸⁷⁹ Thus, the CFR combines rights present in diverse instruments and spreads across the so-called three generations of rights.⁸⁸⁰

Considering that the CFR is currently not a binding instrument and lacks the legal force of a treaty, the EU institutions have found innovative ways of putting it to use. Based on internal communication of the EU Commission, legislative and regulatory acts in the Union which impact on rights covered by the CFR are required to be subjected to compatibility with the instrument.⁸⁸¹ Accordingly, institutions such as the EU Commission and the European Parliament are known to have developed a practice of referring to the CFR in recitals to Community legislative documents while the ECJ employs the CFR as interpretative aid similar to the ECHR.⁸⁸² The CFR has also been the main instrument applied by the EU Network of Independent Experts and the newly created EU Fundamental Rights Agency. Clearly, even though it has not yet acquired a binding legal status, the influence of the CFR in the human rights work of the EU and its institutions is considerable.

⁸⁷⁶ Perez de Nanclares (2009) 792. This is bound to change when the Treaty of Lisbon enters into force.

⁸⁷⁷ Brosig (2006) 20.

⁸⁷⁸ Tizzano (2008) 132.

⁸⁷⁹ RCA White (2008) 147.

⁸⁸⁰ Kingston (2003) 282.

⁸⁸¹ Tizzano (2008) 133.

⁸⁸² Perez de Nanclares (2009) 793.

Perhaps the adoption of the CFR may have reduced the challenge of legal uncertainty that has trailed the human rights regime of the EU. However, there are evidently other issues that arise in relation to the CFR. From the perspective of legitimacy, the argument has been made that ‘norm-setting in the human rights area should be the result of societal choices at the end of a democratic, participatory and deliberative process’.⁸⁸³ It is argued further that the EU cannot claim as much legitimacy in this regard as national systems would claim, thereby calling into question its credentials as a forum for the development of such norms.⁸⁸⁴ Persuasive as this line of argument may be, it fails to account for the legitimacy of other international platforms upon which existing international human rights standard-setting instruments have been adopted. It is also important to note that the process leading to the adoption of the CFR was said to have included representatives of national governments, national parliaments, EU institutions and other stakeholders.⁸⁸⁵ Consequently, the strength of the legitimacy challenge would greatly be watered down.

Fear that the adoption of the CFR could lead to conflict between different norm regimes constitutes another challenge that surrounds the instrument. Some hold the view that instead of initiating another catalogue of rights, efforts should have been concentrated on improving coherence and raising awareness on existing instruments and procedures.⁸⁸⁶ The concern is that the establishment of ‘a second autonomous human rights regime outside the Council of Europe system would start a competition between the ECJ and the Human Rights Court’.⁸⁸⁷ This potential for conflict is believed to exist because the CFR is aimed at EU institutions as well as member states in their implementation of EU law.⁸⁸⁸ While such concerns are not unfounded, there is belief that as the ECHR merely sets minimum standards, the risk of conflict is reduced because the CFR is wider in scope and would hardly fall below the minimum standards set by the ECHR.⁸⁸⁹ This view finds support in the argument that ‘the mere

⁸⁸³ Brosig (2006) 23.

⁸⁸⁴ As above.

⁸⁸⁵ Polakiewicz (2001) 73.

⁸⁸⁶ Polakiewicz (2001) 91.

⁸⁸⁷ Brosig (2006) 20.

⁸⁸⁸ Polakiewicz (2001) 74.

⁸⁸⁹ Nuyens (2007) 43.

fact that the EU Charter is broader in scope than any one of existing human rights treaties takes it beyond the approach of duplicating the ... human rights treaties'.⁸⁹⁰

Assuming that the argument of lesser risk of duplication and conflict on the basis of a wider scope is correct, the wider scope of the CFR is readily accepted.⁸⁹¹ However, some of those who suggest the possibility of a reduction of the risk still admit that there is a chance of ambiguity in the interpretation of human rights in Europe on the basis that the CFR and the ECHR are different instruments applicable within the same territorial space.⁸⁹² It is further contended that the expanding influence of the EU and its laws is likely to create difficulty in finding a dividing line in terms of *ratione materiae* as between the CFR and national constitutions on the one hand and between the CFR and the ECHR on the other hand.⁸⁹³

Notwithstanding the concerns that have emerged, the adoption of the CFR has some support. There is at least some argument that the lack of a catalogue of rights in the EU prompted the direct application of the ECHR in EU member states that have elected not to incorporate that instrument into their national laws.⁸⁹⁴ Thus, the adoption of the CFR and its use in place of the ECHR would prevent the mandatory and indirect incorporation that the application of the ECHR is thought to result in. The various concerns raised in relation to the adoption of the CFR have demonstrated that the mere adoption of a Union-specific catalogue of rights has not resulted in the anticipated legal certainty in the EU's human rights regime. Instead, it sparks further challenges of conflicting standards, conflicting interpretations and general confusion. However, it has to be admitted that most of these concerns have remained more apparent than real. What is evident however is that the EU has come a long way in setting standards for the protection of human rights within its organisational framework. Yet, as Craig and Búrca have noted, these developments have not extinguished the debates around the human rights regime of the EU.⁸⁹⁵ In terms of

⁸⁹⁰ M Scheinin 'The Relationship between the Agency and the Network of Independent Experts' in Alston P & de Schutter O (eds) (2005) *Monitoring fundamental rights in the EU: The contribution of the Fundamental Rights Agency* 81.

⁸⁹¹ Besson (2006) 347.

⁸⁹² Nuyens (2007) 42.

⁸⁹³ Polakiewicz (2001) 74.

⁸⁹⁴ Stever (1996-1997) 958.

⁸⁹⁵ Craig & de Búrca (2007) 380.

own norm creation, the EU stands out as only mostly consequential norm creation in the field of human rights can be found in the ECOWAS practice. In other words, even though some of its Protocols have human rights implication, ECOWAS is yet to engage in full scale standard-setting beyond the formulation of policy documents.

5.4.2 Judicial protection of rights

As the judicial organ of the EU, the main responsibility of the ECJ is to ensure that the law is observed in the interpretation and application of the law.⁸⁹⁶ In execution of this function, the ECJ has had to interpret the treaties in a manner that has had far reaching consequences. Hence, the very important doctrines of direct effect and supremacy of the Community law were introduced through the decisions of the ECJ.⁸⁹⁷ As already shown, in reaction to the threat of resistance to the principle of supremacy of the Community posed by some national courts of EU member states, the ECJ embarked on an ‘an exercise of bold judicial activism’,⁸⁹⁸ and introduced the concept of fundamental rights as part of the general principles of Community law that it was obliged to enforce. Since then, the ECJ has continued to play a major role in the protection of rights within the EU with little distinction between the original concept of fundamental rights and the concept of human rights. As it is the avenue by which claims of rights violation are judicially vindicated,⁸⁹⁹ the practice and procedures of the ECJ is one of the most visible aspects of the EU human rights system. It therefore carries some of the bigger risks of conflict with institutions of member states and other international organisations. This practice is the focus in this part of the study.

5.4.2.1 Individual access to the ECJ

Generally, human rights litigation occurs in two main forms: inter-state cases in which only state parties take part and the individual complaints where individuals

⁸⁹⁶ Art 220 of the Consolidated Treaty establishing the European Communities. Although by art 220, the ECJ is made up of the Court of Justice and the Court of First Instance, the term ECJ is used here to represent both courts.

⁸⁹⁷ EF Defeis, ‘Human rights and the European Court of Justice: An appraisal’ (2007- 2008) 31 *Fordham International Law Journal* 1104, 1108.

⁸⁹⁸ JHH Weiler, ‘Eurocracy and distrust: Some questions concerning the role of the European Court of Justice in the protection of fundamental rights within the legal order of the European Communities’ (1986) 61 *Washington Law Review* 1103, 1105.

⁸⁹⁹ This assertion is being made with caution in view of the opinion held by some writers that judicial authority in the EU is divided between the community courts and the courts of member states. See eg P Craig, ‘The jurisdiction of the Community Courts reconsidered’ (2001) *Texas International Law Journal* 555, 556.

bring actions against member states of an organisation or state parties to a treaty alleging violation of rights. While the relevance of inter-state cases cannot be ignored, practice indicates that human rights litigation occurs more in the realm of individual complaints systems. Thus, it is in that area that the challenges around human rights protection mechanisms are more prominent. The position is not different in the EU human rights system and this justifies an examination of the nature of individual access to the ECJ in cases claiming the violation of rights.

Direct individual access to the ECJ is basically provided for in articles 230, 232, and 288 of the Consolidated Treaty of the European Community (CT). Article 230 CT grants access to individuals and legal persons seeking a review of the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, acts and decisions of the Commission on the condition that the decision is ‘addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former’. In article 232, access is granted to individuals and legal persons alleging a failure on the part of Community institutions to act in breach of the Treaty. Article 288 on the other hand relates to claims around the contractual obligations of the Community. In essence, direct individual access to the ECJ on claims for violation of human rights is almost non-existent.

While direct access is restricted, article 234 CT empowers the ECJ to give preliminary rulings concerning the interpretation of the treaties and other community legislation. Requests for preliminary rulings generally come to the ECJ through national courts before which questions on EU law and treaty interpretation may have arisen. The decision to request preliminary rulings is optional for national courts although the highest national courts are under obligation to request such preliminary rulings in cases that come before them.⁹⁰⁰ In this context, some commentators have contended that since the discretion to request for a preliminary ruling resides in the national courts, individuals have no impact on that decision and therefore cannot compel a national court to make the request.⁹⁰¹ This would mean that except a national court before which an individual brings a claim seeking to enforce rights under Union law

⁹⁰⁰ Art 234 CT.

⁹⁰¹ Filipek (2003) 61.

makes the decision, there is no chance of such a matter coming before the ECJ. However the article 234 procedure has been the avenue by which the ECJ has had opportunity to advance the human rights content of the Union. Thus, the ECJ's jurisdiction under article 234 CT has been described as the 'jewel in the crown of the existing regime'.⁹⁰² Although the observation was made in the wider context of the ECJ's jurisdiction, it applies aptly to the human rights practice of the Court. Hence, it has been noted that the preliminary rulings procedure is the most widely used procedure for bringing human rights claims against Community acts.⁹⁰³ This procedure, it is argued, enhances coherence in the interpretation and application of EU law while at the same time providing 'shelter to national courts' in political sensitive cases.⁹⁰⁴ While the preliminary ruling option exists under the ECOWAS regime, it has never been put into use. From a human rights perspective, it is doubtful whether the preliminary ruling option in the ECCJ's 2005 Supplementary Protocol would be relevant, given that cases commonly relate to allegations of violations far removed from the strict confines of Community treaty interpretation.

In the face of such limited individual access before the ECJ, the point has been made that no effective system of remedies exists in favour of natural and legal persons in the field of EU Law.⁹⁰⁵ This is especially so since only certain categories of statutes can be the subject of review by direct application before the ECJ.⁹⁰⁶ While conceding that the existing system does not grant broad access for individual claims, Shelton has argued that the doctrines of direct effect and state liability as developed by the ECJ creates avenues for individuals 'to rely on sufficiently precise Community legislation in national courts notwithstanding non-incorporation or implementation of the Community law'.⁹⁰⁷ Thus the individual may not be completely deprived of remedies. However, the point has to be made that this practice reduces the risk of jurisdictional conflicts between national courts and the ECJ as much as it prevents the possibility of forum shopping between the two levels of adjudication. Further, the procedure of optional request for preliminary ruling encourages a coordinated rather than a

⁹⁰² Craig (2001) 559.

⁹⁰³ Stever (1996 -1997) 962.

⁹⁰⁴ Scheeck (2005) 845.

⁹⁰⁵ Filipek (2003) 59.

⁹⁰⁶ As above.

⁹⁰⁷ Shelton (2003)124.

hierarchical relation between the ECJ and the national courts since the national courts are involved in direct application of EU law in their own right.⁹⁰⁸

5.4.2.2 Applicable sources of human rights standards

As already noted, despite the inclusion of human rights within the treaty framework of the EU, the Union has failed to adopt a binding catalogue of rights to be applied in its human rights system. Consequently, the ECJ has had to apply different human rights instruments in the course of protecting rights within the EU. In this regard, the ECHR has apparently enjoyed a pride of place as a treaty of choice in the jurisprudence of the ECJ. As the early fundamental rights jurisprudence of the ECJ indicates, when it recognised a need to search far for standards to flesh out its claim to a fundamental rights competence, the original approach of the ECJ was to refer to ‘international treaties for the protection of human rights on which the Member states have collaborated or of which they are signatories’ to find guidelines.⁹⁰⁹ Subsequently, after the ratification of the ECHR by all the then member states of the Community, the ECJ mentioned the ECHR in the *Rutili* case as a source of inspiration for its fundamental rights practice.⁹¹⁰ By the late 1980s, specifically in the *Hoechst* case, the ECJ decided that the ECHR has a ‘particular significance’ in its fundamental rights system.⁹¹¹

Having established a strong jurisprudence in which the ECHR is held out as a significant source of inspiration for the EU’s human rights agenda and prompting treaty recognition of this fact, the ECJ has been consistent in its use of the provisions of the ECHR without necessarily suggesting that the instrument is part of Union law. In its use of the ECHR, the ECJ has from time to time triggered a fear of conflicting interpretation to the extent that it exercises autonomy in interpreting the instrument. Thus, it has been observed that the ECJ has occasionally used the ECHR ‘in a manner which is more expansive than the Convention’s ‘mother’ institutions in Strasbourg’.⁹¹² While this development is seen as sign of ‘a growing confidence of the

⁹⁰⁸ Scheeck (2005) 844 – 845.

⁹⁰⁹ See the *Nold* judgment. Also see Tizzano (2008)128; Shelton (2003) 112.

⁹¹⁰ See *Rutili v Minister for the Interior* (1975) ECR 1219. See Scheeck (2005) 850.

⁹¹¹ See Cases 46/87 and 227/88, *Hoechst A.G. v Commission*, [1989] E.C.R. 2859.

⁹¹² See C Lyons ‘Human rights case law of the European Court of Justice, January 2003 to October 2003’ (2003)3(2) *Human Rights Law Review* 323, 330 commenting on Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich*, Judgment of the ECJ, 23 September 2003.

EU judiciary to formulate their own fundamental rights principles which pay heed to the ECHR but are not bound by their Strasbourg colleagues'⁹¹³ others find 'the potential ... of conflicting rulings becomes increasingly apparent'.⁹¹⁴ In contrast, the use of the African Charter by the ECCJ has been in a form that suggests that the African Charter is claimed as part of the body of ECOWAS Community law without a corresponding obligation to be bound by the secondary rules for applying the African Charter. Hence, the risk of conflicting interpretations becomes even bigger.

The analysis demonstrates that the ECJ's unilateral adoption of the ECHR without agreements to guide its usage raises questions around fragmentation of human rights law in Europe. However, it has been emphasised that the use of instruments like the ECHR is only for guidance purposes and is thus a positive rather than a negative step.⁹¹⁵ It is also argued that the approach of the ECJ respects the position of the ECHR in the constitutional orders of EU member states and therefore, is a positive development.⁹¹⁶ Evidently, there are compelling arguments on either side of the divide on the desirability of the use of the ECHR by the ECJ in its case law. However, the ECHR remains a vital instrument in the hands of the ECJ.

As the ECHR is merely employed as an interpretative aid rather than an exclusive or exhaustive catalogue of rights under the EU, the ECJ refers to other instruments in its protection of human rights.⁹¹⁷ Thus, the ECJ makes some reference to other CoE and UN human rights instruments some of which may not necessarily have been ratified by all member states of the Union.⁹¹⁸ Similarly, the Advocates General in the framework of the ECJ (though not the Court itself) have also referred to the EU's own CFR even though this instrument is a non-binding political declaration of the Union's institutions.⁹¹⁹ In the maze of instruments and documents applied by the ECJ, the

⁹¹³ Lyons (2003) 338.

⁹¹⁴ de Búrca (1993)306.

⁹¹⁵ T Ahmed & I de Jesus Burtler 'The European Union and Human Rights: An international perspective' (2006) 4 *European Journal of International Law* 771, 773 -774.

⁹¹⁶ White (2008) 150.

⁹¹⁷ Rosas (2001) 60.

⁹¹⁸ Rosas (2001) 57.

⁹¹⁹ See for instance Advocate General FG Jacobs, Opinion of 14 June 2001, (Case C-377/98) *Netherlands v European Parliament and Council* where arts 3(2) of the CFR was cited; Advocate General Stix-Hackl, Opinion of 32 May 2001(Case C-49/00) *Commission v Italy* where art 31(1)of the CFR was cited. Both of these cases are cited by Scheeck (2005). See generally Perez de Nanclares (2009) 793.

challenge of legal certainty cannot be ignored. The risk of conflicting interpretations vis-à-vis treaty supervisory bodies established under these ‘borrowed’ instruments cannot also be ignored. There is also the further question whether by its later practice, the ECJ does not indirectly impose international treaties upon EU member states that are not parties to such treaties under the guise of common constitutional traditions. Thus, it is left to debate whether adoption of a binding EU specific rights catalogue is the better option.

5.4.2.3 Use of ECtHR Case law

Considering that the ECJ’s use of the ECHR has been the subject of much debate tilting towards the claim, amongst others, that such usage had the potential to result increasingly in situations of conflicting interpretations, it is important that the Court refers to the case law of the ECtHR as this limits the potential for conflicting interpretation. The use of ECtHR case law is a relative recent practice as reference was first made in the 1990s in the *P v S and Cornwall County Council* case.⁹²⁰ Prior to this period, as shown by the *Hoechst* decision,⁹²¹ the ECJ was not unwilling to go contrary to the decisions of the ECtHR even though it is claimed that this is never done deliberately.⁹²² However, in its decision in the *Roquette Freres* case, the ECJ made a turn-about and stated categorically that in deciding cases in which provisions of the ECHR came into question, the Court would have regard to existing case law of the ECtHR.⁹²³

The danger averted by the ECJ’s decision to refer to the case law of the ECtHR can be illustrated by at least two examples. In the *Hoechst* case, the ECJ interpreted article 8 of the ECHR relating to the right to privacy as excluding protection for business activities and premises whereas the ECtHR subsequently held in *Niemietz v Germany*⁹²⁴ that search of business premises without a warrant constitutes a violation

⁹²⁰ CC Case C-13/94 [1996] ECR I-2143. In this case, the ECJ referred to the ECtHR case of *Rees v United Kingdom*, (2/1985/88/135), Series A, No.106 ECHR. Also see the *Baustahlgewebe GmbH* case (17.12.1998) where the ECJ also referred to the ECtHR’s case law on the right to fair trial enshrined in article 6 of the ECHR –LS 851.

⁹²¹ *Hoechst* (1989).

⁹²² *Kingston* (2003) 285.

⁹²³ See Case 138/79 SA *Roquette Freres v Council of the European Communities* [1980] ECR 3333. Also see *Tizzano* (2008) 129.

⁹²⁴ *Niemietz v Germany*, 16 Eur. H.R. Rep. 97 (1993).

of article 8. In relation to article 6 of the ECHR, there have also been conflicting decisions from the ECJ and the supervisory organs of the ECHR. While the ECJ came to a conclusion in *Orkem v Commission*⁹²⁵ that the guarantee against self-incrimination in article 6 did not extend to administrative investigations, the ECHR monitoring institutions held differently. Firstly, the defunct European Commission of Human Rights decided in *Saunders v United Kingdom*⁹²⁶ and then the ECtHR in *Funke v France*⁹²⁷ as well as in *Murray v United Kingdom*,⁹²⁸ took opposing views by holding that the guarantee against self incrimination in article 6 applied to all situations where the threat of sanctions exist.⁹²⁹

As it appears that the conflicting decisions of the ECJ usually came before the ECtHR developed jurisprudence on the issues in question, it might be accepted that the ECJ does not deliberately seek to make conflicting findings. However, Scheeck argues that ‘whereas the ECJ now *de facto* applies ECHR case law, it has not specified whether this is a binding endeavour’.⁹³⁰ What is obvious is that conflicts are unlikely to erroneously occur for as long as the ECJ refers to the case law of the ECtHR in the development of its own jurisprudence in cases involving application of the ECHR. In the ECOWAS regime, the ECCJ has not yet referred to the jurisprudence of the African Commission and this leaves room for conflicting interpretation of the African Charter. However, the African Commission is a quasi-judicial body and it remains to be seen whether the same attitude would be adopted towards the decisions of the African Human Rights Court.

5.4.2.4 Nature of human rights protection before the ECJ

Traditionally, the idea that human rights originated as a tool to check excessive and abusive exercise of governmental powers results in the characterisation of the duty to protect rights as a negative duty. In this sense, the duty to protect rights is understood to mean refraining from violating the rights of people. However, it is now commonly accepted that the idea of human rights envisages a set of duties to respect, protect and

⁹²⁵ Case 375/87 *Orkem v Commission* (1989) ECR 3343.

⁹²⁶ (1996) (1997) 23 EHRR 313.

⁹²⁷ *Funke v France*, 256-A Eur. Ct. H.R. (Ser A) (1993).

⁹²⁸ (1996) 22 EHRR 29.

⁹²⁹ See generally Shelton (2003) 144; Scheeck (2005) 854.

⁹³⁰ Scheeck (2005) 856.

fulfil rights.⁹³¹ Perhaps as a result of the fact that the EU is not primarily a human rights organisation, it is believed that the entry of human rights in the agenda of the Union is basically to bond the institutions and restrain national actors involved in implementation of Union laws.⁹³² Thus, some commentators are convinced that ‘the nature of human rights protection within the EU is essentially “negative”’.⁹³³ Consequently, as the arrow-head of the evolution of the EU’s human rights system, ‘the ECJ’s emphasis on human rights was implemented through ‘negative integration’ in which Community institutions were prohibited from acting in any way that could lead to a violation of the fundamental principles of human rights’.⁹³⁴ In adopting a negative approach, the ECJ would probably not be demanding an imposition of positive human rights obligations. This may appear more acceptable than the adoption of a positive approach to rights realisation which would require the ECJ to specify a duty to act rather than a duty to refrain from acting.

While the negative approach to human rights protection might have been a ‘safer’ terrain for the ECJ in the era of strict judicial origins for the Union’s human rights system, such an approach may not be justifiable in the face of generous treaty provisions supporting Union action in the field of human rights. In this regard, some commentators have argued that a critical constitutional principle the ECJ has articulated in its rights jurisprudence is affirmation of a positive duty on EU institutions to ‘ensure the observance of fundamental rights’. This is interpreted to mean that EU institutions are not merely under an obligation to refrain from rights violation but are required to ensure that rights are ‘observed within the respective constitutional role played by each institution’.⁹³⁵ This formulation may not be too different from the negative approach yet it goes further than that approach. It is still early to identify how the ECCJ would go in its protection of rights. However, as the case law of the ECCJ shows, that Court has no difficulty in ensuring negative protection of rights. Challenges to relations with national legal systems in general and national courts in particular, could probably arise if the ECCJ undertakes positive protection of rights.

⁹³¹ See eg, the African Commission’s decision in *SERAC v Nigeria* (2001) *AHRLR* 60 (ACHRP 2001).

⁹³² Besson (2006) 344 holds one such view.

⁹³³ Ahmed & de Jesus Burtler (2006) 794.

⁹³⁴ Defeis (2000 – 2001) 313.

⁹³⁵ Alston & Weiler (1999) 25.

5.4.2.5 The scope of the ECJ human rights protection

A fundamental feature of international courts and judicial organs of international organisations is that, unlike some national courts, these international institutions cannot generally claim inherent jurisdiction as their competence is usually clearly defined and often links to the overall competence of the parent organisation. Despite its activism in relation to fundamental rights protection, the ECJ appears to have been somewhat cautious in the scope of protection that it provides in the area of fundamental rights. Thus, it has been contended that another ‘critical constitutional principle’ that informs the ECJ’s practice is the limitation of its ‘human rights jurisdiction’ to the ‘field of Community law’.⁹³⁶ The term ‘Community law’ in this respect may be understood to apply to the personal, material and the territorial jurisdiction of the Court in the area of human rights.

Naturally, the ECJ’s exercise of judicial authority would be in relation to treaty interpretation from the perspective of determining whether treaty provisions impose obligations to protect human rights. It has to be noted that this aspect of the Court’s mandate does not involve assessment of the validity of treaty provisions since the ECJ does not have a competence to review primary law of the EU. Since primary law would be viewed strictly as the product of the law-making powers of member state in their capacity as sovereign states rather than as products of the law-making functions of Union institutions, primary law cannot be reviewed by the ECJ for conformity with human rights standards.⁹³⁷ However, in addition to determining whether primary law raises duties to protect rights, the ECJ’s competence to give preliminary rulings extends to interpretation of the secondary laws of the EU to determine the existence of duties to protect rights and assessment of such laws for compliance with human rights standards.⁹³⁸ Thus, acts of the EU institutions are examinable by the ECJ with the aim of annulment in the event of a failure to respect human rights standards.⁹³⁹ While this examination was originally applied in the economic field where the exclusive competence of the Community lay, it has now been expanded to the terrain of all

⁹³⁶ As above.

⁹³⁷ See Filipek (2003) 59. Primary law of the EU includes the treaties and all protocols annexed to the treaties.

⁹³⁸ Stever (1996 – 1997) 941.

⁹³⁹ de Búrca (1993) 296.

other genre of rights.⁹⁴⁰ The practice of subjecting secondary Community laws and acts of the institutions to scrutiny is particularly important as these are not subject to assessment either before national courts of member states or any other international treaty body with jurisdiction over the EU member states. The jurisdiction of the ECJ has not developed well enough to sustain analysis of this point.

Following the introduction of the doctrine of direct effect and implementation of EU laws and measures by institutions and governmental departments of member states, the ECJ was faced with the challenge of determining whether and to what extent the implementing acts of member states could be scrutinised by Union human rights standards.⁹⁴¹ In the *Booker* case, it was submitted that member states should be bound by the fundamental rights standards of the EU in situations where they implement measures on behalf of the Union.⁹⁴² It is now fairly well settled that both Community institutions and member states, when acting on behalf of the EU, are bound to ensure protection of rights. Thus, although in the *Cinétheque* case,⁹⁴³ the ECJ was reported to have stated that it lacked jurisdiction to assess national laws which were not within the of Community law for conformity with the ECHR, in the *Wachauf* case,⁹⁴⁴ the Court was emphatic that member states acts implementing Community law were subject to such assessment.⁹⁴⁵

In view of the direction the ECJ has taken in its fundamental rights jurisprudence, the overwhelming opinion amongst commentators is that national laws falling outside the scope of Community law is not subject to ECJ scrutiny for conformity with rights standards. However, national measures and acts of member states adopted for the implementation of Community law are open to ECJ scrutiny as much as the acts of EU institutions are.⁹⁴⁶ In these situations, the member states fall within the judicial net of the ECJ in the states' capacity as agents of the EU. The further question that arose was whether the ECJ could assess 'national laws which restrict ... Community's aims

⁹⁴⁰ Shelton (2003) 112.

⁹⁴¹ See Joined Cases C-20/00 and C-64/00, *Booker Aquaculture and Hydro Seafood v The Scottish Ministers*, Opinion of the AG, 20 September 2001 and Judgment of the ECJ, 10 July 2003[2003] ECR I-7411 cited by Lyons (2003) 333

⁹⁴² Advocate General Mischo in the *Booker* case as cited by Lyons above.

⁹⁴³ *Cinétheque SA and Others v Fédération Nationale des Cinémas Français* [1986] 1 CMLR 365.

⁹⁴⁴ Case 5/88, *Wachauf v Germany* [1989] ECR 2609

⁹⁴⁵ See de Búrca (1998) 297; Kingston (2003) 275.

⁹⁴⁶ Betten & Grief (1998) 77.

and ... freedoms guaranteed under its law, when those national laws are enacted primarily to further national non-economic goals of a specific social, cultural or moral nature'.⁹⁴⁷ The answer does not appear clear cut but the view seems to be that even outside of the agency situations, acts of member states are examinable for rights compliance insofar as member states apply exceptions allowed by Community law.⁹⁴⁸ It is therefore the Court's position that 'that national measures either implementing Community acts or derogating from the Treaty's provisions must also comply with Community standards of fundamental rights protection'.⁹⁴⁹

It should be added further that there is a sense that the ECJ requires a link with some EU related activity for it to exercise jurisdiction in a case brought before it. Thus, in one case, the failure to find a commercial link between students distributing information leaflets on abortion and the service providers proved fatal for the claim of violation of rights before the ECJ.⁹⁵⁰ In fact, in the *Kremzow* case,⁹⁵¹ the ECJ declined to give preliminary ruling of an interpretative nature on the grounds that the issues and legislation in question had no link with Community law or activity.⁹⁵² Notwithstanding this line of cases, Lyons analyses subsequent cases and comes to a conclusion that the ECJ's definition of economic actors as potential beneficiaries of its rights regime to 'embrace those often outside the scope of Community law'.⁹⁵³

A conclusion that can be drawn from the analysis of the scope of the ECJ's human rights work is that the Court has endeavoured to restrict its exercise of jurisdiction to the territory of the EU and member states, issues related to the laws, measures and implementing acts of the EU and its member states and to persons acting in relation to EU law or benefiting from EU law. In this context, the ECJ does not appear to delve into matters that are not contemplated by the EU treaties. However, in at least two fairly recent cases, the ECJ is known to have ventured into previously unknown terrain by subjecting UN Security Council resolutions to human rights scrutiny, albeit scrutiny for conformity with customary international law based rights rather than EU

⁹⁴⁷ de Búrca (1993)289.

⁹⁴⁸ Kingston (2003) 275.

⁹⁴⁹ Tizzano (2008) 129.

⁹⁵⁰ *SPUC v Grogan* (1991) 3 *CMLR* 849 cited by Búrca (1998) 289.

⁹⁵¹ Case C-299/95 *Kremzow v Austria* (29 May 1997).

⁹⁵² See Betten & Grief (1998) 76.

⁹⁵³ Lyons (2003) 336 – 337.

fundamental rights standards.⁹⁵⁴ For its part, the case-law of the ECCJ indicates that although it limits its jurisdiction to the territories of ECOWAS member states, the ECCJ has been less conservative in the scope of matters over which it exercises its competence. This is due to the vagueness of the enabling provision in the 2005 Supplementary Protocol on the Court. The ECCJ is thus more likely to fall into competition with national and continental judicial and quasi-judicial fora with jurisdiction over human rights.

5.4.3 Non-judicial protection: observation and monitoring

It is incontestable that judicial and quasi-judicial protection of human rights have contributed in no small measure to the advancement of the human rights cause all over the world. This is especially so in the EU framework considering the very important role that the ECJ has played in the formation of an EU human rights system. However, as some commentators have noted, judicial protection of human rights is necessary but not sufficient or exhaustive for meeting the growing challenges of protecting rights.⁹⁵⁵ Negative intervening forces such as ‘ignorance, lack of resources, ineffective representation, inadequate legal standing and deficient remedies all have the capacity to render judicially enforceable rights illusory’.⁹⁵⁶ This would mean that total reliance on judicial protection to the exclusion of other options for the protection of rights pose the risk of shutting out some of the most vulnerable from the safety net of rights protecting mechanisms.

While the argument has been put forward that the EU’s human rights policy appears faulty to the extent that it places too much emphasis on ‘equipping individuals to pursue existing Community legal remedies’⁹⁵⁷ the ECJ’s jurisprudence has been interpreted to suggest that the duty to protect rights within the Union’s framework rests on all EU institutions.⁹⁵⁸ Although the ECJ actually dominated the EU’s human rights landscape in its formative years, this has changed considerably since then. In addition to greater involvement of EU institutions in the protection of rights, new

⁹⁵⁴ See *Kadi v Council and Commission* (2005) E.C.R. II-3649 and *Yusuf and Al Barakaat International Foundation v Council and Commission* (2005) E.C.R. II-3533. Also see Besson (2006) 347.

⁹⁵⁵ Alston & Weiler (1999) 13.

⁹⁵⁶ As above.

⁹⁵⁷ Alston & Weiler (1999) 12.

⁹⁵⁸ Weiler & Fries (1999) 157.

bodies have also been created to push the Union's rights rhetoric. All of these institutions and their work form the non-judicial aspect of human rights protection in the EU. The non-judicial aspects of the EU extend very much into the Union's foreign policy thrusts. However, the study will focus on the internal aspect of the work.

5.4.3.1 The human rights work of the European Parliament

As is the case with all other institutions of the EU, the European Parliament has never had and still does not have any actual competence or mandate in the field of human rights. Yet, its involvement in human rights issues dates back to the early days of the EC. It is suggested that the European Parliament took advantage of the dearth of human rights in the Communities' agenda to expand its own then limited sphere of influence. By acknowledging the relevance of rights to the work of the Communities and incorporating human rights rhetoric into its own activities, the European Parliament engaged in human rights work.⁹⁵⁹ With the incremental inclusion of human rights in the treaty framework of the EU and the expanded scope of the Parliament's influence, it is now contended that article 6 of the CT imposes an obligation on the European Parliament to factor human rights into all aspects of its competence and functions in the EU.⁹⁶⁰ Thus, from the early days of its existence, the European Parliament is acknowledged to have been involved in the promotion of rights through diverse means such as production of annual reports, making resolutions and a host of other activities.⁹⁶¹

When the European Parliament introduced its human rights report series in 1983, the reports were aimed at monitoring global human rights issues rather than the human rights situation within the EU or its member states. However since the late 1980s, in response to opinion that global human rights scrutiny could only be justified if the Parliament could first monitor the human rights situation within the EU, the European Parliament introduced the 'Human Rights in the European Union' reports with focus on the situation of human rights in EU member states.⁹⁶² While monitoring and reporting in this context was aimed at providing the Parliament with reliable

⁹⁵⁹ Rack & Lausegger (1999) 801.

⁹⁶⁰ Bradley (1999) 845.

⁹⁶¹ Alston & Weiler (1999) 42.

⁹⁶² Rack & Lausegger (1999) 807 – 808.

information upon which to take policy decisions, it apparently occurred without a clear legal basis and probably encroached on areas that fall outside of EU law.

Another means by which the European Parliament got involved with human rights work was through the adoption of ad hoc resolutions on issues including human rights concerns. Between 1973 and 1988, the number of resolutions adopted by Parliament rose significantly but these resolutions were essentially aimed at human rights situations in third countries. Hence out of 117 resolutions passed by the European Parliament in 1988, only one was targeted at internal EU issues.⁹⁶³ Not too different from the practice of issuing resolutions, the Parliament is known to also employ its parliamentary question procedures to raise fundamental issues concerning human rights. However, most of the questions raised are also aimed at human rights issues in countries other than the EU member states. While the approach of the European Parliament ensures that it avoids challenges to the legality of its actions from within the EU and its member states, the focus on external countries may have contributed to the difficulty of measuring the impact of its work which has been described as extensive in volume yet difficult to evaluate.⁹⁶⁴

Certain other procedures of the European Parliament actually or potentially create room for the Parliament to focus its attention on human rights issues within the EU and its member states. For instance, it is emphasised that all standing committees in the Parliament deal with some form of human rights issues even though only two appear to have clear mandates in the field.⁹⁶⁵ Even more obviously directed at internal human rights issues is the petitions procedure of Parliament which grants a right of access to EU citizens and residents to bring petitions before the European Parliament. Between 1987 when a Committee on Petitions was established and 1998, over 10,000 petitions were submitted to the Parliament. Some of these petitions involved human rights issues relating to minority rights, prisoners rights and allegations of discrimination.⁹⁶⁶ The Parliamentary procedure that allows Parliamentary Committees to hold public hearings has also been used to focus on human rights issues. In some of these hearings, the European Parliament or members of Parliament have expressed

⁹⁶³ Rack & Lausegger (1999) 810. Effort made to get more recent statistics was unsuccessful.

⁹⁶⁴ See Bradley (1999) 839.

⁹⁶⁵ Rack & Lausegger (1999) 812.

⁹⁶⁶ Rack & Lausegger (1999) 813.

strong views on human rights issues in EU member states.⁹⁶⁷ It can be seen that these procedures of the European Parliament deals with human rights issues that should be the concern of member states rather than a concern of the EU.

Under the more recent treaty instruments of the EU, the European Parliament has been given bigger roles in the human rights work of the EU. Hence it has been noted that even though no particular treaty provision empowers the Parliament to investigate human rights issues or adopt resolutions in this area, the Parliament can find legal backing in different articles in the treaties.⁹⁶⁸ The role given to the Parliament in the determination whether there has been serious and persistent breach of rights under article 6(1) TEU should stand out as one such provision. However, there is nothing to show that the Parliament placed reliance in these provisions to embark on its various activities in the field of human rights. A conclusion that can be drawn is that the European Parliament has also exercised some form of legislative activism in positioning itself as a role player in the EU's human rights system. But it has done so with caution and has so far successfully avoided any complaint of acting *ultra vires* its treaty mandate. Even though it has a clear human rights mandate, the ECOWAS Parliament has not been very enthusiastic in applying that mandate. There is therefore very little comparative material from the ECOWAS Parliament.

5.4.3.2 The human rights work of the European Commission

Although the European Commission performs functions that are more executive than administrative in nature, its involvement in the field of human rights is more in relation to the foreign policy engagements of the EU than in the internal human rights system. The rare occasions that could possibly be the Commission's unambiguous involvement in internal human rights issues within the EU would be the Commission's call for the EC to accede to the ECHR and the declarations jointly made with other institutions affirming the ECJ's fundamental rights jurisprudence.⁹⁶⁹ With the entry into force of the Treaty of Amsterdam, the European Commission has been empowered to initiate the process for determining whether there has been serious and persistent breach of the principles of liberty, democracy, respect for human rights

⁹⁶⁷ Rack & Lausegger (1999) 815.

⁹⁶⁸ Bradley (1999) 845.

⁹⁶⁹ See Nuyens (2007) 39; Betten & Grief (1998) 69.

and fundamental freedoms and the rule of law as contained in articles 6(1) and 7 of the Treaty. Although this provision has not yet been put into practice, the Commission's action would necessarily be predicated on reliable information on the human rights situation in an affected member state. In this regard, the Commission would either monitor the internal human rights situation in member states or rely on monitoring done by another body. In effect, the Treaty of Amsterdam creates room for the European Commission to take more than a passing interest in human rights within member states. The European Commission has also introduced a process of Impact Assessment by which human rights commitments are incorporated into EU policies and activities.⁹⁷⁰ For this purpose, the Commission uses provisions in the CFR and to some extent, the ECHR to mainstream human rights.⁹⁷¹ The Impact Assessment process relates to Union policies, legislations and activities and therefore does not affect relations with member states. Thus, it would be seen that the European Commission plays a marginal role in the internal workings of human rights in the EU. As the main executive organ of ECOWAS, the ECOWAS Commission is more involved in executing the non-judicial aspect of human rights protection in the ECOWAS framework. Arguably, the realities and needs of ECOWAS member states and their citizens are different from the human rights needs of European citizens. Thus, the challenge of duplication of efforts is almost non-existent in the EU model.

5.4.3.3 The Fundamental Rights Agency

Much of the criticism on the human rights system of the EU was focused on the lack of a concrete human rights policy, the uncertainty created by the lack of a Union specific rights catalogue and the absence of a dedicated EU institution with primary responsibility for pushing the Union's human rights agenda. Hence, it was argued that gaps and lacunae that existed in the EU human rights system could be traced to the fact that there was no Union agency to coordinate information relating to human rights in a systematic and comprehensive manner.⁹⁷² These observations were made at a time there were at least two bodies involved some form of human rights work within the Union.⁹⁷³ It was probably in response to the observations of such critics and the

⁹⁷⁰ Nuyens (2007) 44.

⁹⁷¹ As above.

⁹⁷² Alston & Weiler (1999) 13.

⁹⁷³ The one body was the Network of Independent Experts established by the European Commission in 2002 pursuant to a recommendation by the European Parliament in 2000. The other was the European

report of a Comité de Sages that the EU Fundamental Rights Agency (FRA) was conceived. At least one commentator has interpreted the idea to create the FRA as an indication of a more internal human rights focus.⁹⁷⁴

Following the conclusion by representatives of EU member states, at the Brussels European Council in 2003, that there was a need for human rights data collection and analysis aimed at defining policies in that area, the EU set the processes in motion for the establishment of the FRA.⁹⁷⁵ As part of the process, the European Commission carried out impact assessment, issued a public consultation paper and convened a public hearing on the establishment of the Agency. At the end of these activities, the formal process for the establishment of the FRA began in June 2005 with the issuance by the European Commission of a regulation for that purpose.⁹⁷⁶ The FRA was finally established in February 2007 and inaugurated on 1 March 2007.⁹⁷⁷ According to the memorandum for the establishment of the FRA, the mandate of the Agency would be to ‘collect and access data on the practical impact of Union measures on fundamental rights and on good practices in respecting and promoting such rights’.⁹⁷⁸ The mandate of the FRA is linked strongly to the CFR so that the mandate of collecting and analysing data on human rights is done with reference to rights contained in the CFR. The FRA carries out its responsibilities with a thematic focus on areas within the scope of the EU.⁹⁷⁹

From inception, following the model of national human rights agencies of EU member states, the FRA was not conferred with complaint resolution powers. Thus, the mandate of the FRA does not include the monitoring of human rights compliance by the member states.⁹⁸⁰ Consequently, the FRA operates as a body to advise policy making institutions of the EU and member states, upon request by these states, on the best approaches to guarantee human rights protection. Hence the tools employed by

Monitoring Centre on Racism and Xenophobia. Both institutions are not discussed in this study since they are both defunct.

⁹⁷⁴ Scheinin (2005) 82.

⁹⁷⁵ E Howard ‘The EU Agency for Fundamental Rights’ (2006) 4 *European HR Law Review*, 445 - 446.

⁹⁷⁶ As above.

⁹⁷⁷ The FRA is established by Council Regulation (EC) No 168/2007 of 15 February 2007.

⁹⁷⁸ Howard (2006) 447.

⁹⁷⁹ ‘European Fundamental Rights Agency’ available at http://en.wikipedia.org/wiki/European_Fundamental_Rights_Agency (accessed 1 January 2009).

⁹⁸⁰ Howard (2006) 446.

the FRA include the preparation of annual and periodic reports on human rights along thematic lines rather than on territorial or country basis. The FRA is supposed to be ‘a centre of expertise on fundamental rights issues at the EU level’ and its establishment is expected to enhance the EU human rights system.⁹⁸¹ Some hold the view that the FRA would be a useful mechanism for identifying possible breaches of article 6(1) TEU and thereby prepare the grounds for triggering of the article 7 TEU procedure.⁹⁸² The fact that the FRA’s mandate takes a thematic rather than a territorial focus may create difficulty for the Agency’s effectiveness in furthering the article 7 TEU procedure. However, the nature of the mandate would allow the FRA to function without the tension that accompanies human rights supervision by international bodies. No dedicated human rights monitoring agency exists in the ECOWAS framework.

5.5 Mechanisms for maintaining intra- and inter-organisational balance in human rights practice

The discourse on the practice and processes of the EU’s human right’s system has shown that actual tension or potential for tension and even rivalry exists between the EU and the CoE system that is now recognised as the main framework for human rights protection in Europe. Arguably, there is also some evidence of tension as between the Union and member states with regard to the expanding scope of the EU human rights protection regime. Such tension and rivalry may well have been anticipated as Winston Churchill is quoted to have insisted, in the formative years of post World War Europe that no room exists for rivalry between the EU and the CoE.⁹⁸³ The potential for rivalry might have been avoided had the two European organisation stuck to their main areas of operation. Yet, if there were any plans to maintain such functional delineation in order to avoid duplication of functions and hence rivalry, such plans did not succeed.⁹⁸⁴ The EU human rights regime has therefore previously manifested the threats and risks of inter- and intra-organisational conflicts as associated in this study with the ECOWAS human rights regime.

⁹⁸¹ As above.

⁹⁸² Nuyens (2007).

⁹⁸³ Quoted by Juncker (2006) 3.

⁹⁸⁴ Scheeck (2005) 844.

In the face of failure to restrict the EU to the originally narrow idea of providing a platform for economic integration, and as a result of the entry of the EU into the terrain of human rights protection, the ground was laid for intra- and inter-organisational tension. Hence, it has been observed that introducing human rights into the agenda of the Union puts the system in a state of constant tension between the ECJ and the national courts of member states on the one hand and as between the EU and the CoE on the other hand.⁹⁸⁵ Some commentators even attribute resistance to expansion of the EU's human rights policies and activities from stakeholders to a fear that such an exercise would distort the division of competence and allow the EU encroach on areas reserved for member states.⁹⁸⁶ This fear has played itself out already in different forms, including in member states' dissatisfaction with the practice of the European Parliament in the field of human rights.⁹⁸⁷ Thus, even though there have been expectations that borrowing from each other would allow for complementary relation of a permanent kind between the EU and the CoE, this has not happened.⁹⁸⁸

Tension and the potential for rivalry apparently exist in nearly all aspects of the EU's relatively limited human rights system. In terms of the ECJ and its involvement in judicial protection of human rights, the use of the ECHR raises issues in relation to member states and the CoE mechanisms. The first of these relates to concerns about conflicting decisions, the resulting fragmentation of the system and the confusion that it sets in the member states.⁹⁸⁹ This is exacerbated by the fact that national courts, lawyers and litigants are faced with the possibility of divergent standards from the ECJ and the ECtHR, both of which are of equal standing in international law and binding on the national systems.⁹⁹⁰ Then there is the fear that the ECJ threatens the continued primacy of the ECtHR.⁹⁹¹ Concerning the EU's adoption of the CFR, there is also concern that ambiguity would arise in standard setting resulting in duplication and legal uncertainty that could lead to a weakening of the existing regime.⁹⁹² The

⁹⁸⁵ Perez de Nanclares (2009) 779.

⁹⁸⁶ Alston & Weiler (1999) 22.

⁹⁸⁷ Bradley (1999) 840.

⁹⁸⁸ Juncker (2006) 3.

⁹⁸⁹ Scheek (2005) 854.

⁹⁹⁰ Scheek (2005) 854; White (2008) 150.

⁹⁹¹ Scheek (2005) 848.

⁹⁹² Polakiewicz (2001) 74 quoting the President of the ECtHR; Defeis (2000 -2001) 330; Nuyens (2007) 42.

creation of the FRA also raised concerns in some member states as it did in the CoE. While the Dutch Senate viewed it as a waste of public resources, the CoE was more worried about rivalry with its own mechanisms, creation of double standards leading to forum shopping and general confusion amongst citizens of Europe.⁹⁹³

In the context of the concerns, there is some element of disagreement as to what organisation should ordinarily prime in the field of human rights. While one commentator argues that human rights is not an exclusive concern of any of the European organisations,⁹⁹⁴ others take the view that human rights, especially its monitoring, is a 'classical task of the Council of Europe and the OSCE but not of the EU'.⁹⁹⁵ However, the CoE appears to fancy itself as the traditional protector of human rights in Europe.⁹⁹⁶ With regards to member states, it seems it is generally accepted that the primary duty of protection of rights resides in the domestic systems and the EU can only complement the national mechanisms.⁹⁹⁷ Hence, the fear that EU involvement 'would be an invitation to a wholesale destruction of the jurisdictional boundaries between the Community and its member states'.⁹⁹⁸ Notwithstanding these contentions, the argument has been put forward that existing regional and global mechanisms need not be seen as sufficient for rights protection.⁹⁹⁹ Specific to the CoE mechanisms, it is acknowledged that the existing 'monitoring machinery cannot answer every question',¹⁰⁰⁰ so that matters that fall out of the CoE safety net could still be addressed by the EU system.¹⁰⁰¹ Thus, rather than expend energies on maintaining strict demarcation of functions, it might have become more beneficial for Europe to develop mechanisms to achieve some form of balance in the field of rights protection.

There are least three identifiable mechanisms by which tension and rivalry arising from the EU involvement in human rights protection are addressed. They are the principle of limited competence and the principle of subsidiarity (both treaty-based principles) and the practice of coordination and cooperation between the EU and the

⁹⁹³ Nuyens (2007) 64.

⁹⁹⁴ Shelton (2003) 96.

⁹⁹⁵ Brosig (2006) 16.

⁹⁹⁶ Nuyens (2007) 62 records that the Summit of the CoE held in 2005 decided that the protection of human rights and the promotion of democracy and the rule of law were its core tasks and it should therefore continue to focus on those.

⁹⁹⁷ Besson (2006) 346.

⁹⁹⁸ Alston and Weiler (1999) 23.

⁹⁹⁹ Besson (2006) 358.

¹⁰⁰⁰ Juncker (2006) 5.

¹⁰⁰¹ Shelton (2003) 95.

CoE. These mechanisms arguably explain the survival of the EU system in the midst of the various concerns discussed in this work. As already seen, no clear mechanisms exist under the ECOWAS framework to address the risks associated with the involvement of its organs and institutions in human rights protection. Thus, a proper understanding of the EU mechanisms would enhance the possibility of developing ECOWAS mechanisms to address similar concerns.

5.5.1 The principle of limited competence

Hinged on the doctrine of attributed competences,¹⁰⁰² the principle of limited competence operates to the effect that the EU and its institutions only have powers in those areas that are connected with the objectives that member states agreed to pursue jointly. In the framework of the EU, the principle of limited competence is a constitutional principle and is contained in article 5 of the CT which provides that:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The effect of the principle is that internal and international action of the EU needs to have a treaty foundation. Article 5 CT therefore presupposes that the Union has clear competences vis-à-vis member states and matters not listed fall to the residue of the states.¹⁰⁰³ Union competence, it is contended, is not enumerated on the basis of subject matter but in terms of functional correlation to the organisational objectives.¹⁰⁰⁴ The summation therefore is that even though EU law is held to supersede national law, this is only in the context of the limited competence.¹⁰⁰⁵ Consequently, the EU human rights regime has to comply with the constitutional limits associated with the treaty competences of the Union.¹⁰⁰⁶

¹⁰⁰² See Schermers & Blokker (2003) 155 -157. These authors explain that the by this doctrine, international organisations are only competent to act in accordance with powers granted by member states. Hence, international organisations are precluded from generating their own powers and they may not exercise unlimited power that is not necessary for the objectives set out in the founding instrument.

¹⁰⁰³ Lenarts & Van Nuffel (2005) 86 -87.

¹⁰⁰⁴ Lenarts & Van Nuffel (2005) 80.

¹⁰⁰⁵ Stever (1996 -1997) 943 - 944.

¹⁰⁰⁶ Alston & Weiler (1999) 22.

Based on the principle of limited competence, it has been argued that EU influence on the human rights situation in member states does not extend to areas that fall outside the Union's competence.¹⁰⁰⁷ Probably linked to the operation of this principle, initial member states support or acquiescence in relation to the ECJ's introduction of human rights into the EU is explained to have resulted from the perception that it would act as a limitation on the institutions of the Union rather than a restraint on the states themselves.¹⁰⁰⁸ The simplicity of the doctrine as deductible from the practice of the ECJ is in the fact that Union institutions are only required to refrain from acting once it is established that a given field of activity is not within the competence of the Union and is not likely to affect the realisation of the goals of the Union.

Deference to the principle of limited competence on the part of the ECJ can be found in the scholarly analyses of the work of the Court. The overwhelming conclusion in the literature is that the ECJ does not scrutinise domestic laws, policies and practices for conformity with human rights standards where such domestic laws and practices do not fall within the scope of Union law.¹⁰⁰⁹ The initial practice of the ECJ was to focus its rights scrutiny on the secondary legislations and the acts of the Union's institutions.¹⁰¹⁰ The focus on secondary rather than primary legislation is explained by the fact that primary legislation of the EU proceeds from the exercise of sovereignty by member states. Following the expansion of the scope of Union law and the increased involvement of member states in the implementation process, stretching the ECJ's scrutiny to cover member states became inevitable. However, such scrutiny on the part of the ECJ has remained restricted to the so-called agency situations where a member state implements Union legislation or policy on behalf of the Union or where a state relies on EU permitted derogations.¹⁰¹¹ It would be noticed that in abiding by the principle of limited competence, the ECJ stands very little chance of having its jurisdiction in relation to rights scrutiny challenged by EU member states. It would therefore avoid tension in that regard with ease. In the same vein, there is reduced

¹⁰⁰⁷ Besson (2006) 344; Bradley (1999) 844.

¹⁰⁰⁸ Craig & de Búrca (2007) 381.

¹⁰⁰⁹ Shelton (2003) 113; Stever (1996-1997) 964; Quinn (2001) 863; Betten & Grief (1998) 75.

¹⁰¹⁰ Tizzano (2008) 129.

¹⁰¹¹ Weiler & Fries (1999) 161; de Búrca (1993) 297; Kingston (2003) 276. The *Cinéthèque v Fédération Nationale des Cinémas Français* case, (Cases 60 and 61/84 [1985] ECR 2605) provides excellent example of the ECJ's position in this regard. In that case, the Court emphasised that it had no powers to assess the compatibility with the ECHR of national legislation falling 'within the jurisdiction of the national legislator'.

possibility of the ECJ's jurisdiction conflicting with the jurisdiction of the ECtHR even though this is not completely ruled out as the cases have shown.¹⁰¹²

The principle of limited competence is not restricted to judicial practice and thus, impacts on the legislative powers of the Union. The ECJ's position in its Opinion 2/94 demonstrates the point that the Union lacks unlimited legislative powers and it can only legislate on the basis of powers expressly or implied granted by the treaties. Consequently, Besson for example, argues that if the CFR operates to impose a positive duty on Union institutions to promote rights that would amount to extending the legislative powers of the Union.¹⁰¹³ In recognition of its limits, the Union denies that the CFR, even in the light of its annexation to the treaty, is intended to create new competences for the Union in the field of human rights.¹⁰¹⁴ As such, article 51(2) of the CFR emphasises that 'this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. The idea being that the CFR is merely a codification of rights previously guaranteed by EU member states in different forms.¹⁰¹⁵ While there are some who doubt the claim of the CFR in this regard,¹⁰¹⁶ there is a sense that the Union makes a deliberate effort to keep within its treaty competences in line with the principle of limited competence. Successfully doing so potentially prevents hoisting extra obligations on member states, avoids conflict with the constitutional bills of rights of the states and ultimately remains within the standards of the ECHR.

Another area where the principle of limited competence is evident is in the establishment of the FRA. As previously noted, the Explanatory Memorandum on the Agency states that the essence of the FRA is to 'establish a centre of expertise on fundamental rights issues at the EU level'.¹⁰¹⁷ This can be interpreted to mean that the focus should be on issues at the EU level. But more significant is the decision not to confer monitoring duties in the form of a complaint resolution mechanism and to grant a thematic rather than a territorial mandate. Arguably, these approaches allow for focus on those themes that fall within the Union's competence and reduce the

¹⁰¹² See eg the *Hoechst* case.

¹⁰¹³ Besson (2006) 347.

¹⁰¹⁴ Besson (2006) 346.

¹⁰¹⁵ Perez de Naclares (2009) 975; Besson (2006) 347.

¹⁰¹⁶ See eg Besson (2007) 346 -347.

¹⁰¹⁷ Howard (2006) 446.

temptation to cover every conceivable human rights issue that emerges from a member state.

As a mechanism for limiting conflict in the field of human rights protection, the principle of limited competence is definitely not a fool proof process. In fact there is record of continued belief among scholars that the EU has not succeeded in preventing itself from usurping the competences of other actors. However, it remains an instrument that is viable if properly applied. It would be recalled that the ECOWAS treaty does not contain a general statement of the principle of limited competence. However, some statement of the principle can be found in article 5(2) of the 1993 revised ECOWAS Treaty, relating to the powers of the ECOWAS organs. The limitation of powers in the ECOWAS Treaty is such that, while it acts as a restraint on ECOWAS Community organs, it has little effect on the organisation as an entity. The overall effect is that the ECOWAS authority, acting on behalf of the organisation as whole, can expand organisational powers and functions with little or no restriction. This arguably creates a bigger room for inter- and intra-organisational conflicts.

5.5.2 The principle of subsidiarity

Another general constitutional principle of the EU that operates within the Union's human rights system to regulate its relation with member states and their human rights systems is the principle of subsidiarity.¹⁰¹⁸ It is contended that the principle of subsidiarity is a model of cooperative sovereignty that applies to exercise of EU competence.¹⁰¹⁹ The principle is codified in article 5(2) CT and fleshed out in a protocol.¹⁰²⁰ By a commonsense understanding, subsidiarity under the EU requires that Union institutions should only exercise powers where the objective aimed at cannot be adequately realised if action is taken at the national level.¹⁰²¹ Thus, the essence of subsidiarity is avoidance of 'hierarchical governance' and restraint in the

¹⁰¹⁸ The principle is commonly associated with the principle of proportionality in the EU treaty framework. However, the principle of proportionality is not very relevant for the present purposes and will not be considered.

¹⁰¹⁹ Besson (2006) 357.

¹⁰²⁰ See Craig & de Búrca (2007) 155 who state that the current guidelines on the operation of the principle of subsidiarity were originally developed in 1992 at the European Council at Edinburgh before being adopted as primary law by way annexation to the Amsterdam Treaty.

¹⁰²¹ Shelton (2003) 135.

exercise of organisational powers in areas where the Union does not have exclusive competence.¹⁰²² Applied to the EU human rights system, it would be expected that action for the protection of rights should be attempted at national levels where such layers of protection exist. Thus, it has been noted that some stakeholders in the EU perceive that an application of subsidiarity demands that member states retain the task of protecting human rights.¹⁰²³ This is believed to be an erroneous understanding as it is contended that the principle also applies in favour of action by the Union where the given circumstances favour a more communal action.¹⁰²⁴

Although it has been explained in a simplified manner and linked with aspects of the EU's human rights work, subsidiarity does not lend itself to quick and easy appreciation. Thus, writers have described it as 'cloudy and ambiguous'¹⁰²⁵ and 'characterised by internal tensions and inherent paradoxes'.¹⁰²⁶ In relation to its application in the EU, ambiguity and uncertainty is exacerbated by the fact that it is possible to extract different interpretations to the provisions that set it out in the treaties.¹⁰²⁷ In the one interpretation, there is a broad political determination concerning the appropriate level of decision making. In the other interpretation which is narrower, a more legalistic determination of 'comparative efficiency' is proclaimed to apply.¹⁰²⁸ The cumulative interpretation resulting would then require an EU institution to make a determination of comparative efficiency in order to decide whether the action to be taken should occur at the Union level.¹⁰²⁹

Adopting a doctrinal rather than a technical approach to analysing subsidiarity in the EU, Carozza submits that as a general principle of the EU constitutional system, it 'functions as a conceptual and rhetorical mediator between supranational harmonisation and unity, on the one hand and local pluralism and difference, on the other hand'.¹⁰³⁰ Thus, subsidiarity becomes a tool for maintaining balance between the EU system and the legal systems of the member states by nipping unnecessary

¹⁰²² Craig & de Búrca (2007) 156.

¹⁰²³ Alston & Weiler (1999) 27.

¹⁰²⁴ As above.

¹⁰²⁵ de Búrca (1998) 218.

¹⁰²⁶ PG Carozza (2003) 39.

¹⁰²⁷ de Búrca (1998) 219.

¹⁰²⁸ As above.

¹⁰²⁹ As above.

¹⁰³⁰ Carozza (2003) 39-40.

jurisdictional conflict. In this context, Carozza pictures subsidiarity as an alternative to a rigid and overbearing application of sovereignty.¹⁰³¹ In the field of human rights protection in the EU, subsidiarity as a mechanism for maintaining balance seeks a middle course between preserving the sovereign rights of the member states to determine the scope of human rights protection that each state can offer and ensuring a uniform level of protection under the framework of the Union.¹⁰³²

Carozza's analysis develops out of the prior presentation of subsidiarity by John Finnis. For Finnis, the principle of subsidiarity is applicable to all forms of human community and should be understood as not signifying 'secondariness' or 'insubordination'. Instead of seeing subsidiarity as meaning a hierarchical relation between systems in which the subordinate system acts as a rule, Finnis paints a picture of support which he hinges on 'assistance' since the root of the subsidiarity is the Latin word '*subsidium*' which he translates as help or assistance.¹⁰³³ Using the imagery of associations, Finnis insists that the principle of subsidiarity requires support and assistance from a larger and more efficient level of an organisation to enable a smaller level to achieve desired goals. Thus, he concludes that a proper application of subsidiarity entails 'that larger associations should not assume functions which can be performed efficiently by smaller associations'.¹⁰³⁴ Carozza reads this to mean that 'there is an emphasis on leaving room for 'lower' levels of governing to have as much scope for action as possible'.¹⁰³⁵ However, he also identifies what he terms 'positive subsidiarity' that allows for intervention by 'higher' levels in situations where the 'lower' level is unable to meet the desired goals. Carozza asserts 'an inherent right' of intervention which he sees as the *subsidium* that Finnis talked about. Thus, the *subsidium* in the principle of subsidiary is not to destroy but to complement a lower level of operation in order to enhance functioning and 'contribute to the common good of all'.¹⁰³⁶

Within the EU human rights system, the impact of the principle of subsidiarity can be noticed in various aspects and tasks performed by the different institutions. In the

¹⁰³¹ Carozza (2003) 52.

¹⁰³² Carozza (2003) 52 -53.

¹⁰³³ J Finnis (1980) 146.

¹⁰³⁴ Finnis (1980) 146 -147.

¹⁰³⁵ Carozza (2003) 56. At p 44, Carozza describes this as 'negative subsidiarity'.

¹⁰³⁶ Carozza (2003) 44.

debate concerning the accession of the EU to the ECHR, Stever records that subsidiarity was one of the legal bases upon which certain member states mounted opposition.¹⁰³⁷ While the adoption of the Treaty of Lisbon has rendered this issue mute, it might be possible to explain this position on the grounds that member states being parties to the ECHR instead of the EU and thereby remaining the fora for rights protection complies with the principle of subsidiarity. In other words, the argument would be that adopting the ECHR as a standard for protection of rights within the EU framework is better achieved at the national level and should therefore exclude action at the EU level. The creation of the FRA may also have taken cognisance of the principle of subsidiarity. Alston and de Schutter have argued that the role assigned to the FRA is compatible with the principle as the Agency can only deal with issues that are best achieved by collective action.¹⁰³⁸ Initial resistance to the adoption of a binding rights catalogue can also be explained in terms of the principle of subsidiarity. But it is the adoption of the CFR that is held out as the first formal application of the principle to the EU human rights work.¹⁰³⁹ However, subsidiarity is not so obvious in the rights jurisprudence of the ECJ.

As the principle of subsidiarity impacts on the exercise of power rather than the existence of power at the level of the EU, some commentators doubt whether the principle actually applies or should apply in the ECJ's human rights practice.¹⁰⁴⁰ Equating the ECJ's interpretative functions as a form of law making, de Búrca questions how the principle would apply to the Court but observes that at least in relation to review of the acts of other institutions, the ECJ in applying the principle should require qualitative and quantitative indicators to justify action at the Union level.¹⁰⁴¹ Using this standard, de Búrca concludes that the ECJ applies the principle of subsidiarity as 'an instrument of low intervention and minimal scrutiny' in its review of legislative action by the EU.¹⁰⁴² However, Carozza finds at least two situations of

¹⁰³⁷ Stever (1996 - 1997) 989. According to de Búrca (1998) 225 the Finnish government's submission before the ECJ in the Opinion 2/94 proceedings contained the argument that the introduction of the principle of subsidiarity restricts the scope of the omnibus provisions in art 235 EC (now art 308 CT).

¹⁰³⁸ Alston and de Schutter (2005) 37 - 38. The views were projective as the FRA only came into being after the text by these authors had been published.

¹⁰³⁹ Carozza (2003) 39.

¹⁰⁴⁰ de Búrca (1998) 219; Carozza (2003) 39.

¹⁰⁴¹ de Búrca (1998) 222.

¹⁰⁴² de Búrca (1998) 225.

tacit application of subsidiarity in the fundamental rights case law of the ECJ while acknowledging that the ECJ has never applied the principle expressly.¹⁰⁴³

Firstly, Carozza argues that by basing its source of fundamental rights on the constitutional traditions of member states, the ECJ could be said to be deferring to the principle of subsidiarity. This process, it is argued further encourages judicial dialogue between the ECJ and the highest courts of the member states.¹⁰⁴⁴ The second evidence of the application of the principle that Carozza finds is in relation to the Court's review of acts of member states against fundamental rights standards. Carozza contends that the principle is tacitly applied when the ECJ defers to national courts where the action under review is not of Union institutions but of member states in any of the agency situations, often leading to the ECJ 'presenting its own role merely as one of providing information and criteria needed for the national court alone to decide on the application of Community fundamental rights law to the act at issue'.¹⁰⁴⁵ To Carozza's observations may be added the ECJ's approach to the award of remedies upon a finding of violation of Union law. In *Brasserie de Pecheur v Germany*,¹⁰⁴⁶ the ECJ emphasised that as Community law had no provisions on reparations, upon a finding of violation, it was up to the domestic legal systems of the member states to set out criteria for reparation of a victim on the condition that the criteria should be comparable to similar claims in the given legal system. Such an approach allows the ECJ to defer to the expertise and institutional legitimacy of national courts while creating and enhancing coordination. By contrast, the ECCJ finds violations and makes orders on compensation without reference to the national courts of member states.

It would appear then that the procedure of preliminary ruling itself is a variation of the application of the principle of subsidiarity as it allows action to commence at the national level rather than at the Union level. Thus, in the context of judicial and non-judicial interventions in the field of human rights, the principle of subsidiarity can be applied as a negative restraint as much as it can apply as a positive duty to act. In its negative character, the principle of subsidiarity enables the EU institutions to avoid

¹⁰⁴³ Carozza (2003) 39.

¹⁰⁴⁴ Carozza (2003) 54.

¹⁰⁴⁵ Carozza (2003) 55.

¹⁰⁴⁶ Joined cases C-46/93 and C-48/93 [1996] ECR I-1029. See also Besson (2006) 141.

unnecessary conflicts with national systems of member states. As a positive duty, the principle allows Union intervention in situations where national action would be insufficient. It has to be noted that the relative strong culture of rights protection in the constitutional frameworks of EU member states would generally favour a negative application of subsidiarity while it does not exclude occasional interventions. Perhaps, the most obvious evidence of the need for subsidiarity in the ECOWAS human rights regime is in the area of judicial protection. As already established, the current practice of the ECCJ does not even require exhaustion of local remedies, which is the most common expressions of subsidiarity. The ECOWAS Commission's involvement in human rights also demonstrates very little deference to the principle of subsidiarity. All of these contribute to making the risk of jurisdictional tension and conflict appear bigger in the ECOWAS context.

5.5.3 Cooperation and coordination

While the constitutional principles of limited competence and subsidiarity developed to regulate the relation between the EU and its member states also impact on the EU's relation with other international human rights systems, especially the CoE system, it is by cooperation and coordination that the Union is best able to maintain equilibrium in this area. Unlike the two other principles already considered, cooperation, which includes dialogue, and coordination are not constitutional principles of the EU but they remain important in the work of the EU institutions. The need for cooperation and coordination is more evident in relation to the CoE mechanisms as a result of the fact that all the member states of the EU are also members of the CoE and are bound by the CoE's mechanisms. Moreover, although the EU considers other international human rights instruments in its human rights work, it is the ECHR that the ECJ has adopted as a significant source of rights through a process that 'has evolved ...from a situation of borrowing to appropriation'.¹⁰⁴⁷

By pioneering the adoption of the ECHR as a central feature of its rights jurisprudence and prompting treaty recognition of this position, the ECJ is said to have 'helped considerably in putting an end to the debate on the clash between the "Europe of human rights" and the "Europe of trade", yet it also evoked worries of

¹⁰⁴⁷ Besson (2003) 358; Scheeck (2005) 853.

fragmentation and conflict.¹⁰⁴⁸ The situation is further complicated by the fact that the EU treaties fail to provide directions to regulate the relation between the Union's institutions, particularly the ECJ, and the mechanisms of the CoE.¹⁰⁴⁹ In the face of the very persuasive contentions that the CoE is the prime protector of human rights in Europe,¹⁰⁵⁰ cooperation and coordination had to be developed as innovative means to address the expectations of doom.

Cooperation and coordination between the institutions of the EU and the CoE in the field of human rights take different forms. Although it is generally admitted that the ECJ and the ECtHR are distinct international courts operating in different organisational settings and employing different methods in pursuit of fairly distinct goals, both courts have managed to engage in some form of judicial dialogue that allows the one to make reference to the jurisprudence of the other in cases with related issues.¹⁰⁵¹ It has to be noted however that the relationship between the ECJ and the ECtHR developed over time. As Kingston notes, originally, there was simply 'comity' between the courts such that the ECJ strove to ensure that its protection did not fall below ECHR standards while the ECtHR refrained from interfering with the ECJ's practice.¹⁰⁵² Gradually, the inter-court relation developed to a level of mutual respect.¹⁰⁵³ At the level of mutual respect, each court began to seek guidance from the jurisprudence of the other in a manner that did not amount to binding precedence but demonstrated deference.¹⁰⁵⁴ Apart from 'cross-referencing' case law, judges of both courts also hold informal yet regular consultative meetings.¹⁰⁵⁵ Thus, in addition to judicial dialogue through cross-referencing, there is the practice of 'judicial diplomacy' in the relation between the courts. Consequently, the relation between

¹⁰⁴⁸ Scheeck (2005)848, 853.

¹⁰⁴⁹ Defeis (2000 – 2001) 329.

¹⁰⁵⁰ See eg Juncker (2006) 5.

¹⁰⁵¹ Scheeck (2005) 843; White (2008) 155.

¹⁰⁵² Kingston (2003) 284.

¹⁰⁵³ Lyons (2003) 343.

¹⁰⁵⁴ Defeis (2000 – 2001) 331; Tizzano (2008) 128; White (2008) 154. As already canvassed, the ECJ's use of ECtHR case law became formalised in the *Roquette Freres* case [1980] ECR 3333. While the use of ECJ rights case law by the ECtHR is not very common, in *Bosphorus Hava Yollari Turizm Ve Ticaret Sirketi v Ireland* App No 45036/98 (2006) 42 EHRR, the ECtHR acknowledged that the EU system for the protection of rights is equivalent to the regime under the ECHR. In the 1999 case of *Pellegrin v France* (1996) 22 EHRR 123 the ECtHR resorted to the case law of the ECJ. Similarly, in *Goodwin v United Kingdom* (1996) 22 EHRR 123 the ECtHR is on record to have relied on ECJ case law (*P v S and Cornwall County Council*) to strengthen its decision on the matter before it.

¹⁰⁵⁵ Scheeck (2005) 873.

these courts has been described as ‘fruitful’.¹⁰⁵⁶ While it may not completely extinguish all threats of conflicting jurisprudence, these forms of cooperation have significantly improved the rapport between the two regimes. In relation to the ECCJ, there are traces judicial diplomacy targeted at the African Human Rights Court since judges of both courts have held joint meetings at least once.¹⁰⁵⁷ However, judicial dialogue between the ECCJ and the African Human Rights Court can only take place when the latter court begins to operate fully. The prevailing area of concern is therefore, the relationship between the ECCJ and the African Commission, which Commission has been largely ignored by the ECCJ even though it is a treaty supervisory body of the African Charter and has developed an expansive body of jurisprudence on the contents of the African Charter.

Cooperation and coordination also occur effectively in relation to standard-setting in the field of human rights. As is the case with judicial cooperation, there is evidence of involvement of both organisations in the efforts undertaken in this area. In the first place, a ‘well established practice’ is that ‘the CoE involves the EU whenever new conventions are being prepared’.¹⁰⁵⁸ In the arguments made in favour of EU accession to the ECHR, it is expected that this practice will be formalised as the EU would have a legal right to be represented in the formulation of standard-setting instruments. From the perspective of the EU, the process of drafting the CFR demonstrates how cooperation and coordination comes into play. The involvement of representatives of governments of member states, national parliaments and observers from the CoE ensured that resistance to the CFR was greatly reduced. Hence it is on record that the adoption of the CFR was ‘welcomed’ by the CoE.¹⁰⁵⁹

The opportunity provided for other stakeholders to participate in the development of the CFR enabled the ECtHR and the Committee of Ministers of the CoE to express their concerns with the emerging charter. Consequently, provisions were made in the CFR to address such concerns and ensure consistency between the systems.¹⁰⁶⁰ Thus, while article 52 of the CFR provides that rights in the CFR that correspond to ECHR

¹⁰⁵⁶ Juncker (2006) 6.

¹⁰⁵⁷ As evidenced by the 2006 meeting mentioned in chapter 4 of this study.

¹⁰⁵⁸ Juncker (2006) 7.

¹⁰⁵⁹ Polakiewicz (2001) 70 -73.

¹⁰⁶⁰ Polakiewicz (2001) 74 -75.

rights should be interpreted in accordance with the ECHR, article 53 insists that the CFR would not be interpreted in a manner that conflicts with existing standard-setting instruments such as national constitutions and international human rights treaties including the ECHR.¹⁰⁶¹ These provisions are consistent with the provisions of article 307 CT which preserve the status of earlier treaties that EU member states are party to. By linking the treaty provision and the practices of cooperation and coordination, the EU reduces the risk of conflicting standard-setting to a minimum.

Coordination is also noticeable in the creation of the FRA by the EU. In view of the prevailing perception of the CoE as the main institution for rights protection in Europe, the creation of the CFR was a ‘sensitive issue’ in the relations between the two organisations.¹⁰⁶² Thus, prior to taking the decision to establish the FRA, the European Commission launched public consultation to enable stakeholders express views on the development.¹⁰⁶³ As was the case with the process towards adoption of the CFR, this consultation process allowed the mechanisms of the CoE to present their concerns on the FRA. It also increased the legitimacy of the Agency as member states and their citizens could ‘own’ it. Very importantly, the process resulted in the decision to formalise initiatives to avoid conflict by the adoption of a Memorandum of Understanding (MoU) between the EU and the CoE in relation to the functioning of the FRA.¹⁰⁶⁴ Preparatory to the adoption of the MoU, the Committee of Ministers of the CoE (Committee) were also able to formulate and document the CoE’s expectations on the work of the FRA.

Pursuant to the various initiatives, the Committee produced a document expressing the worries that creation of the FRA had potential implications for the overall system of rights protection under the CoE. Thus, the Committee suggested the inclusion of certain obligations in the regulation establishing the Agency. These include an obligation to take the activities and findings of CoE mechanisms into account in the Agency’s work, coordinating activities with the CoE mechanisms and concluding a

¹⁰⁶¹ On this point generally, see Polakiewicz (2001) 75.

¹⁰⁶² Juncker (2006) 6.

¹⁰⁶³ Nuyens (2007) 67.

¹⁰⁶⁴ Nuyens (2007) 63.

bilateral cooperation agreement.¹⁰⁶⁵ Most of these conditions were also included in the MoU adopted by the EU and the CoE to regulate the work of the FRA. Thus, the MoU requires that regular contacts be established at appropriate levels between the FRA and the CoE. It also obligates the FRA to exchange information and data with the CoE mechanisms, subject to the rules of confidentiality. Other points agreed upon include the FRA's duty to take account of the judgments and decisions of the ECtHR and findings of other CoE monitoring bodies. The FRA is also expected to reconcile on-going and prospective activities with the CoE bodies.¹⁰⁶⁶

Thus, overall effect of coordination and cooperation between the EU and the CoE in the process leading to the establishment has guaranteed the continued functioning of the CoE as the primary source and interpreter of human rights standards in Europe while enabling the EU, through the FRA, to contribute to the protection of right.¹⁰⁶⁷ Although the provisions of article 307 CT contributes in some way to the coordination efforts of the EU, it is arguably the institutions themselves that have perfected the practice of cooperating and coordinating with the CoE. In essence, this approach puts the EU and its human rights work in a complementary rather than a confrontational role vis-à-vis the CoE and its mechanisms. Such a value adding role fortifies the protection of rights in Europe and avoids the conflict that would have resulted otherwise.

5.6 Similarities, dissimilarities and insights

As previously noted in this study, in their explanation of the concept of spillover, economic theorists posit that spillover can be motivated by reward generalisation, frustration or imitation.¹⁰⁶⁸ The development of a human rights regime under the ECOWAS framework cannot be attributed to a generalisation of reward because economic integration as pursued by the organisation has not been totally successful. Thus, spillover to an issue-area such as human rights realisation can best be explained as a consequence of frustration or imitation. It is from the perspective of spillover as a

¹⁰⁶⁵ European Council of Ministers' Document (EC Ministers Document) CM/AS (2007) Rec1744 final of 19 January 2007.

¹⁰⁶⁶ Co-operation between the Council of Europe and the Agency for Fundamental Rights of the European Union: Agreement between the CoE and the EU (1029 Meeting, 11 June 2008) available at <https://wcd.coe.int> (accessed 13 June 2009).

¹⁰⁶⁷ See the Chairperson of the EU Council as quoted by the EC Ministers Document.

¹⁰⁶⁸ See chapter 2 of this study.

result of imitation that the EU human rights regime is significant in a study of the ECOWAS regime. There are two possible angles to link the EU human rights regime to a study on the ECOWAS regime. On the one hand, it has to be considered whether there is sufficient similarity between the two regimes to justify a claim that the EU regime influenced the development of the ECOWAS human rights regime. Such a link is important for the purpose of demonstrating that state practice exists in the field of international organisations to justify the emergence of a human rights regime within the framework of an economic integration scheme. This would have by extension, partially contributed to addressing the question whether hoisting a human rights regime on an economic integration platform necessarily conflicts with the main objectives of an international organisation. On the other hand, proceeding on the basis that the ECOWAS regime emerged as an imitation of the EU regime, the comparison has provided a basis for determining whether imitation occurred in a manner that adapts or adopts the best practices such as creation of relevant mechanisms to create organisational balance.

The bases for integration in both the EU and ECOWAS were essentially economic and in both systems, no effort was made to include specific human rights objectives in the founding treaties. In spite of initial decisions (advertently or inadvertently) to exclude human rights from their integration agenda, both organisations incrementally developed human rights regimes, notwithstanding the fact that within their respective territorial spheres, relatively successful regional human rights systems are fully operational. In view of the experiences of both organisations (as representative of state practice) and available limited jurisprudence, it can cautiously be asserted that, on the basis that addressing human rights concerns creates a suitable environment for economic integration, international organisations established for economic integration can legitimately enter into the field of human rights without necessarily conflicting with their main founding objectives. The similarity in the practices of the EU and of ECOWAS is that in both organisations, there has been a demonstrated need for veering into the field of human rights. In the case of the EU, the need was to satisfy the demand by national courts, especially the German Constitutional Court, to guarantee at the collective level of integration, human rights protection equivalent to that which existed at the national level. In ECOWAS, the need for including human rights in the agenda has generally been to ensure the creation of a suitable and stable

environment for integration by providing alternative platform for promoting and protecting human rights in the face of limited protection at the national level.

Despite the differences in justification, there are grounds to argue that successful economic integration in each case depended or depends on the ability of the system to meet the human rights challenges that emerged. To the extent that spilling over to the field of human rights facilitates integration, the human rights regimes that have evolved can find legitimacy in the respective omnibus provisions in the founding treaties of these organisations. While there is commonality of legitimacy, the expression of source and the actual practices of the two regimes differ and to some extent, reflect the nature of the justification for adding human rights to organisational agenda. By resorting to general principles of law as a window to introduce human rights that was excluded from the original treaty framework, the ECJ dug into human rights as values that were common to member states of the EC. In other words, values present at the national level were transported to the collective, regional level and survived with the tacit support of member states and their institutions (especially the courts). Although there was basis to challenge the legality of judicial introduction of human rights in the absence of a treaty basis, subsequent acts of member states arguably provided complete legitimacy for the process. However, even such subsequent legitimating acts needed to be translated into the treaty framework. By expressing human rights as principle for integration and using that as a legal foundation for expansive human rights work, the EU set precedent for other organisations. In the expression of respect for human rights as a condition for accession to the EU Treaty, the drafters of successive EU treaties reflect the intention of the EU member states to ensure that the conditions prevailing at the national level, which has been extended to the level of integration are not diluted by admitting states with a lower level of respect for human rights.

While the evolution of human rights in the ECOWAS system was also the result of a gradual process, it was not prompted by the ECCJ. In view of the fact that it resulted from a conscious treaty amendment process, the ECOWAS human rights regime had no need to draw inspiration from general principles. In any event, the human rights culture at the national level of the ECOWAS member state may not have been sufficient to sustain a claim to respect for human rights as a general principle.

However, the idea of respect of human rights as a general principle of international law rather than a regional concept could very well have founded such a regime. Notwithstanding this, the statement of fundamental principles contained in the ECOWAS Treaty is akin to the corresponding statement in the EU treaties and should therefore enjoy a similar legal quality sufficient to sustain a human rights regime. However, in the absence of a human rights culture as strong as that identified in the EU, the focus of ECOWAS is justifiably to encourage the growth of such a culture rather than to maintain an existing value system. Consequently, whereas the EU regime favours a negative application of subsidiarity in the sense of deferring to national protection of rights, the ECOWAS approach has to be targeted at a positive application that allows for active regional involvement in human rights protection vis-à-vis member states.

A further consequence of the different approaches is that the risk of jurisdictional tension and conflict with national and specialised regional human rights system is greater in the ECOWAS regime than it is in the EU order. Despite that fact, the EU regime appears to have more mechanisms aimed at regulating organisational conflicts. Obviously, there is a significant difference in the fact that unlike the relation between ECOWAS and the AU/AEC, the EU is not envisaged to converge in the CoE or any other international organisation. This should have enhanced the development of better mechanisms in the ECOWAS regime to regulate intra- and inter-organisational relations. Yet, the workings of the EU human rights regime allows for better regulation. In spite of a lower level of active involvement in the field of human rights, the EU regime's respect for the principle of limited competence ensures that the organisation does not encroach on the competences of member states. The regime also successfully employs the principle of subsidiarity in a negative sense in judicial and non-judicial protection of rights so that regional intervention is only triggered in the failure of national mechanisms and therefore complements the national mechanisms. Although the justification for its involvement in the field apparently warrants a deeper involvement, it also should require that the ECOWAS regime employs both positive and negative approaches to the application of subsidiarity. The practice of cooperation and coordination that occurs in the EU regime vis-à-vis the CoE and other international bodies is another important aspect that is lacking in the ECOWAS regime. The uncertainty surrounding the ultimate relation between the AU/AEC and

ECOWAS makes it even more imperative for the ECOWAS regime to shape and grow mechanisms similar to those present in the EU regime.

5.7 Interim conclusion

The evolution of human rights in the framework of the EU can hardly be described as the product of a well thought-out and predetermined process. As the discourse in this chapter has shown, the chequered history of the system ensured that it was almost impossible to discard a challenge to the legality of the ECJ's introduction of rights protection through the process of treaty interpretation and application. However, it has also been shown that the doctrine of functional interpretation of treaties provides some room for interpretation that tilts towards treaty modification. Moreover, such treaty modifying interpretations could be given legitimacy by ratifying actions of member states of an international organisation. The chapter has also shown that the approach adopted by member states of the EU to mainstream human rights protection in the treaty framework of the Union was to include rights protection as a principle of integration rather than as an objective of the Union. However, inclusion as a principle of integration is still interpreted as imposing legal obligations that do not conflict with the central objectives. While the current approach may not have extinguished all forms of doubt as to the competence of the EU and its institutions to be involved in the protection of rights, it has certainly improved the standing in that regard and has enhanced legal certainty in this area.¹⁰⁶⁹ To this extent, the EU regime is similar to the ECOWAS human rights regime.

It has also been demonstrated in this chapter that the involvement of the EU and its institutions in the field of human rights has sparked off tension and the possibility of conflicts with the legal systems of member states, on the one hand, and other international human rights protection systems, particularly the CoE, on the other. In order to address these tensions and conflicts, the EU human rights regime has had to resort to the constitutional principles of limited competence and subsidiarity as well as cooperation and coordination. It is by resorting to these mechanisms that the EU human rights regime has succeeded in holding out itself as a complement to both national systems and other international systems. The presence of these mechanisms

¹⁰⁶⁹ See de Búrca (1993) 304; Besson (2006) 346.

is the factor that distinguishes the EU system from the ECOWAS regime for human rights protection. The treaty regime of the EU together with the mechanisms for maintaining intra and inter-organisational balance constitute the alternate model to the ECOWAS model for rights protection in an economic integration scheme. It has to be conceded that the EU has gone beyond exclusive economic integration. It cannot also be denied that the motivations for the spillover to rights protection in both models are different just as the degree of domestic rights protection that exists is unequal. Perhaps these are the factors that make a wholesale adoption of the EU model undesirable but there are definitely lessons that can be borrowed and adapted to improve the model of protection that ECOWAS presents. However, this chapter has demonstrated that it is possible to undertake human rights protection on the platform of economic integration without upsetting relations with member states and other international organisations with prior competence in the field.

Chapter Six

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

- 6.1 Introduction
- 6.2 Human rights in the East Africa Community
 - 6.2.1 The East African Community
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- 6.4 Towards non-disruptive subregional systems
- 6.5 Interim conclusion

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 necessarily 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.

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