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Glenda Mezarobba

Between Reparations, Half Truths and Impunity:
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By Borislav Petranov



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PRESENTATION



We are very pleased to present the 13th issue of *Sur Journal*, which addresses the subject of regional human rights protection mechanisms. The purpose of this issue is to examine the development of these regional systems, their drawbacks and potentials, and to discuss the possibility of cooperation and integration between them and the international human rights system. The journal's first article, titled **Urgent Measures in the Inter-American Human Rights System**, by Felipe González, reviews the treatment given urgent measures by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (precautionary measures, in the case of the Commission, and provisional measures, in the case of the Court).

Juan Carlos Gutiérrez and Silvano Cantú, in **The Restriction of Military Jurisdiction in International Human Rights Protection Systems**, examine cases from the Universal, Inter-American, African and European human rights protection systems in order to place the matter of military jurisdiction in a comparative perspective, particularly when this jurisdiction applies to civilians, whether they are passive or active subjects.

Addressing the African system specifically, Debra Long and Lukas Muntingh, in their article titled **The Special Rapporteur on Prisons and Conditions of**

Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia?, analyze the mandates of these two special mechanisms and consider the potential for conflict generated by two mandates being held by a single member.

This edition of the journal also contains an article by Lucyline Nkatha Murungi and Jacqui Gallinetti on the role of the courts of Africa's Regional Economic Communities regarding the protection of human rights on the continent, in **The Role of Sub-Regional Courts in the African Human Rights System**.

Magnus Killander, in **Interpreting Regional Human Rights Treaties**, illustrates how regional human rights courts have, for the purposes of interpreting international treaties on the subject, followed the rules established by the Vienna Convention on the Law of Treaties.

Antonio M. Cisneros de Alencar, in **Cooperation Between the Universal and Inter-American Human Rights Systems in the Framework of the Universal Periodic Review Mechanism**, makes the claim that despite new opportunities for cooperation between the global and regional human rights systems, a great deal more can still be done to make the Inter-American system benefit from the UN Human Rights Council's Universal Periodic Review Mechanism.

We hope that this issue of Sur Journal will draw the attention of human rights activists, civil society organizations and academics to the possibility of a greater cooperation and integration between the regional and the international human rights systems.

We have also included in this issue the article **Strong Link in the Chain**, by Borislav Petranov, a homage to Professor Kevin Boyle, an exceptional academic and human rights defender, and a tireless partner of Sur Journal and the other initiatives of Conectas Human Rights. His life will remain a major source of inspiration for us. This issue includes another two articles, both dealing with the topic of transitional justice in post-dictatorship Latin America. The article by Glenda Mezarobba, titled **Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil**, reconstructs and analyzes the process developed by the Brazilian State for making amends with victims of the dictatorship and with society. It also looks at what has already been done and what still needs to be done in terms of truth and justice and in relation to reforming the country's institutions.

The article by Gerardo Alberto Arce Arce, meanwhile, discusses the process of establishing a Truth and Reconciliation Commission in Peru, and the judicialization of the human rights violations that occurred dur-

ing the country's armed conflict in light of the relations between the Peruvian armed forces and the political and civil spheres of its society, in **Armed Forces, Truth Commission and Transitional Justice in Peru**.

This is the second issue released with the collaboration of the Carlos Chagas Foundation (FCC), which started supporting Sur Journal in 2010. We would like to thank the FCC once again for its support, which has guaranteed the continued production of the print version of this journal. Similarly, we are grateful to the MacArthur Foundation and to the East East: Partnership Beyond Borders Program (Open Society Foundations) for their support for this issue.

We would also like to thank the Centre for Human Rights, of the University of Pretoria (South Africa), and the Center for Legal and Social Studies (CELS, Argentina) for their involvement in the call for papers and the selection for this 13th issue.

Exceptionally, the present issue, dated December of 2010, was printed in the first semester of 2011.

Finally, we would like to remind everyone that the next issue of Sur Journal will address the UN Convention on the Rights of Persons with Disabilities and the importance of tackling this issue within the realm of human rights.

The editors.



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ABSTRACT

The development of sub-regional communities in Africa is not a new phenomenon, but the incorporation of human rights into their agenda is relatively new. In effect, REC courts have introduced a new layer of supra national protection of human rights in Africa. The development is welcomed because it is likely to advance the cause for the promotion and protection of human rights. However, considering that the primary focus of the RECs is economic development, their ability to effectively embrace the role of human rights protection is questionable. The development of this mandate for the sub-regional courts is necessitated by the emerging prominence of human rights in the business of RECs. But, its interpretation and implementation has extensive ramifications for the advancement of human rights in Africa; the harmonisation of human rights standard in the region and for the unity and effectiveness of the African human rights system.

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KEYWORDS

Regional integration – Regional economic communities – Human rights mandate – Sub-regional courts – African Human Rights System – Human rights jurisdiction



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THE ROLE OF SUB-REGIONAL COURTS IN THE AFRICAN HUMAN RIGHTS SYSTEM

Lucyline Nkatha Murungi and
Jacqui Gallinetti

1 Introduction

Regional integration in post-colonial Africa began in 1963, with the adoption of the Charter of the Organisation of African Unity (OAU). This regional initiative was followed by the formation of sub-regional economic communities, commonly referred to as Regional Economic Communities (RECs) such as the East Africa Community (1967), the Economic Community of West African States (1975) and the Southern Africa Development Coordinating Conference (SADCC, 1980). In general, the main objective of the co-operation was the pursuit of economic development of member states.¹ Save for a remote reference to the United Nations Declaration of Human Rights the purposes of the OAU did not include the promotion or protection of human rights. In addition, though the African Charter on Human and Peoples' Rights (African Charter) was adopted in 1981, promotion and protection of human rights only became an objective of the African Union (AU) in the year 2000 upon the adoption of the Constitutive Act of the African Union.²

Similarly, the founding documents of most RECs adopted before the African Charter, did not provide for protection or promotion of human rights whether as a goal or principle thereof. Currently however, promotion and protection of human rights and democracy is part of the fundamental principles or goals of most RECs. In effect, the RECs have introduced a new layer of supranational protection and promotion of human rights in Africa. Their courts now play an important role in the protection of human rights through the determination of human rights cases.

Whereas the entry of RECs as an avenue for protection of rights is generally favourably hailed (VILJOEN, 2007, p. 503), its novelty demands a consideration as

Notes to this text start on page 141.

to their appropriateness as fora for the protection of human rights. Particularly, there is need to establish the place of REC courts within the African human rights system (AHRS) and their relationship with the regional human rights institutions. There is also concern over their capacity to effectively exercise the new competence in light of the economic focus of their founding treaties. The potential impact of the proliferation of human rights courts on the unity of international human rights law in Africa and how best to deal with this reality is another outstanding issue for advocates for human rights in the region.

This article examines the significance of the role of the REC courts in the protection of human rights in Africa. In doing so some of the challenges facing their place in the African human rights system will be interrogated such as their suitability as *fora* to resolve human rights disputes and the implications of their integration into the larger regional framework.

2 Regional integration in Africa - historical background to the inclusion of a general human rights agenda

After the demise of colonial rule in Africa, mainly in the 1960s, the reality of the political and economic fragility of post-colonial African states became apparent. In response to this reality, African states were called upon to integrate politically and economically in order to achieve development and to undo the balkanization of Africa brought by colonialism (LOLETTE, 2005). This was to be done through the creation of larger markets and consolidation of the resources and potential of the poor economies (THOKO, 2004, p. 1). Though this agenda was not immediately achieved at the regional level, states began to come together in their respective sub-regions following a pattern of geographical proximity (ECONOMIC COMMISSION FOR AFRICA, 2006). Hence, most RECs are centred on geographical sub-regions (VILJOEN, 2007, p. 488). The 1996 OAU decision to divide Africa into 5 sub-regions along geographical lines seems to have endorsed this approach (AJULU, 2005, p. 19). In 1980 the OAU adopted the Lagos Plan of Action triggering a process that culminated in the adoption of the Treaty establishing the African Economic Community, commonly referred as the Abuja Treaty (KOUASSI, 2007; RUPPEL, 2009). While the Abuja process postdates the formation of some of the RECs, its influence on the place of human rights in their operations is evident from the framing of their documents which in some cases almost replicate its provisions (EAST AFRICAN COMMUNITY, 2007, art. 3(g), art. 6 (d)).

Pursuit of African economic integration through the African Economic Community (AEC) is a core project of the OAU/AU. Arguments that economic integration did not take centre stage in the transformation of the OAU into the AU (VILJOEN, 2007, p. 480) notwithstanding, the Constitutive Act of the AU recognises the need to coordinate and harmonize policies between the existing and future RECs for gradual attainment of the objectives of the Union (AFRICAN UNION, 2000, art. 3 (c, l)). This reaffirms the centrality of RECs to AU agenda and their role as economic building blocks within the AU. Alongside other factors (RUPPEL, 2009, p. 275),³ the

Abuja process can be regarded as the key driver behind both the formation of RECs across the continent,⁴ and the inclusion of human rights in the agenda of the RECs.

There are other reasons for the integration of human rights into the mandate of RECs. First, the adoption of the African Charter has made human rights a common feature in interstate relations on the continent (EBOBRAH, 2009a, p. 80). The obligations of states emanating from the Charter and other human rights treaties to which African states are party, oblige them to reflect human rights protection in subsequent commitments such as those arising from REC treaties (THOKO, 2004, p. 112).⁵ Second, human rights coupled with good governance create an appropriate investment climate that is critical to furthering economic development (RUPPEL, 2009, p. 279). The adoption of strong human rights values and institutions creates confidence for investors and trading partners and ensures effective participation of individuals.

Finally,

international human rights law emphasises the importance of human rights obligations in all areas of governance and development and requires governments and economic policy forums [such as RECs] to take into account human rights principles while formulating national, regional and international economic agendas.

(OLOKA-ONYANGO; UDAGAMA, 1999, para. 47).

3 Evolution of human rights into the mandate of REC courts⁶

It is evident that in the recent past human rights have become a fundamental component of the task of RECs in Africa. This development can be regarded as a response to the regional agenda as set out in the African Charter and the Abuja Treaty. The mandate of REC courts has also now been extended to cover human rights. However, the approaches adopted by RECs in this regard are dissimilar and uncoordinated. Hence concerns persist as to their suitability as forums for promotion and protection of human rights, the delimitation of such role so as to remain legitimate yet sufficiently utilitarian within the existing frameworks of RECs, and the implications of these new actors on the human rights discourse in the continent.

RECs tend to have an institutional structure that includes a court which is the judicial or principal legal organ of the community to deal with controversies relating to the interpretation or application of the REC's law (RUPPEL, 2009, p. 282). As the organs vested with such responsibility, they have, as a result of the incorporation of human rights into the agenda of RECs, been required to adjudicate over cases, to interpret provisions of their treaties or to advise their principals on questions with implications for human rights. The treaties of most RECs have therefore gradually moved towards according REC courts competence to hear human rights cases (EBOBRAH, 2009a, p. 80).

The evolution of protection of human rights as an agenda of RECs and as part of the jurisdiction of their courts is unique to each one of them, and the approaches adopted in this regard are also different. Thus to trace these developments, it is necessary to look at some of these RECs and their courts in turn.

3.1 *Economic Community of the West African States, (ECOWAS)*

ECOWAS is a fifteen member group of West African states formed in 1975 to promote economic integration of member states.⁷ This scope of co-operation expanded in tandem with the need to respond to issues in the member states which also created an entry point for human rights into the agenda of ECOWAS (EBOBRAH, 2008, p. 7). Its founding Treaty did not contain any references to human rights (EBOBRAH, 2008, p. 9). Gradually however, protocols adopted under the Treaty incorporated different rights in their scope, culminating in the 1991 ECOWAS Declaration of Political Principles which expressed, amongst others, a determination by member states to respect fundamental human rights as embodied in the African Charter.⁸ In 1993 the Treaty of ECOWAS was amended to recognise promotion and protection of human and peoples' rights in accordance with the African Charter as a fundamental principle of ECOWAS.⁹ The move towards rights consciousness was therefore a combination of necessity and changing international dynamics (NWOGU, 2007, p. 349).

The ECOWAS Community Court of Justice (ECOWAS Court) is the judicial arm (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1993, art. 6 (1)(e)) and the principal legal organ (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1991b) of ECOWAS. The Protocol to operationalize the ECOWAS Court was adopted in 1991 and amended in 2005 and 2006 respectively¹⁰ to give the ECOWAS Court competence to determine cases of violation of human rights occurring in any of the member states (EBOBRAH, 2009a, p. 86). The ECOWAS Court has since admitted and determined several cases on human rights¹¹ and is the only of the courts highlighted in this article that has an express mandate over questions of human rights.

3.2 *The Southern Africa Development Community, (SADC)*

SADC is the Southern Africa sub-regional equivalent of ECOWAS with a current membership of 15 states.¹² The SADC framework of co-operation is based on *inter alia* a guarantee of human rights (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2001, art. 5 (a)(b) (c)(i)(j)(k)) which is also one of the principles of SADC (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2001, art. 4 (c)). The political institution building envisaged by SADC is said to promote economic development into a community based on human rights, democracy and the rule of law (THOKO, 2004, p. 110). However, despite the human rights centred conception of development within the Treaty and the centrality of human rights in its objectives, it is argued that human rights protection under the SADC Treaty has a secondary, almost cursory status (THOKO, 2004, p. 110), and that the promotion and protection of human rights is not the top priority of SADC (RUPPEL, 2009, p. 291).

The SADC Tribunal was established as one of the institutions of SADC (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2001, art. 9 (1), (g)) with the duty to ensure adherence to and proper interpretation of the Treaty and its subsidiary instruments, and to adjudicate disputes referred to it (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2001, art. 16 (1)). The Tribunal has jurisdiction over the interpretation and application of the Treaty, protocols and

subsidiary instruments of SADC and on all matters arising from specific agreements between member states, whether within the community or amongst themselves (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2000, art. 14). However, the provision establishing its jurisdiction omits an express mention of jurisdiction over human rights and therefore it has been argued that the tribunal lacks a clear human rights mandate (EBOBRAH, 2009b, p. 20). Nevertheless, despite the arguments regarding the nature of its jurisdiction over human rights, the SADC Tribunal has thus far heard and determined matters relating to human rights.¹³

The tribunal has the potential to contribute significantly to a deeper harmonisation of law and jurisprudence and to better protection of human rights in SADC. This, however, depends on the commitment of member states and SADC institutions to the enforcement of the tribunal's judgments (RUPPEL, 2009, p. 301) and clarification of the court's jurisdiction over human rights.

3.3 The East Africa Community, (EAC)

Economic integration in post-colonial East Africa dates back to the East African Co-operation Treaty of 1967 concluded between Kenya, Uganda and Tanzania, which later collapsed (ADAR, 2008, p. 2; EAST AFRICAN COMMUNITY, 2007, para. 2 of the Preamble). The EAC was revived in 1999 through the signing of the Treaty Establishing the East Africa Community and its entry into force in 2000. The fundamental principles of the EAC include good governance which entails *amongst others the* recognition, protection and promotion of human and peoples' rights in accordance with the African Charter (EAST AFRICAN COMMUNITY, 2007, art. 6). This provision can be regarded as an entry point for human rights into the EAC. To the extent that the Treaty refers to respect for human rights as a component of good governance, makes reference to aspects of human rights, and even predicates the admission of new members of the community on their human rights record (EAST AFRICAN COMMUNITY, 2007, art. 3 (3)b) then it can be argued that it has incorporated human rights into the treaty (RUPPEL, 2009, p. 277).

The EAC Treaty establishes the East Africa Court of Justice (EACJ) as the judicial organ of the EAC (EAST AFRICAN COMMUNITY, 2007, art. 9) with the responsibility to ensure adherence to law in the interpretation, application of, and compliance with the Treaty (EAST AFRICAN COMMUNITY, 2007, art. 23). The EACJ is vested with an initial jurisdiction over the interpretation and application of the EAC Treaty (EAST AFRICAN COMMUNITY, 2007, art. 27 (1)) and other original, appellate, human rights or other jurisdiction at a subsequent date upon a determination by the Council of Ministers (EAST AFRICAN COMMUNITY, 2007, art. 27 (2)).

Article 27(2) of the EAC Treaty (EAST AFRICAN COMMUNITY, 2007) deals with the jurisdiction of the EACJ. In doing so, reference is made to both an initial as well as 'other jurisdiction as will be determined' by the Council. This indicates that the member states of the EAC intended to develop its jurisdiction in phases (OJIENDA, 2004, p. 95). As a result, the second set of areas of the EACJ's jurisdiction which fall to be determined at a future date (and which includes human rights) is beyond its current jurisdiction. Therefore, in the absence of the relevant determination and adoption

of the necessary protocol, it is said that the EACJ does not yet have jurisdiction over human rights (PETER, 2008, p. 210; OJIENDA, 2004, p. 98; EBOBRAH, 2009b, p. 315).¹⁴

However, the inference of lack of mandate is contested. While some commentators interpret it to mean that the jurisdiction is lacking (RUPPEL, 2009, p. 306),¹⁵ it is also argued that the provision is simply not clear (VILJOEN, 2007, p. 504). The latter view implies the existence of an implied mandate and is backed by several factors including extensive references to human rights under the EAC Treaty and the fact that the EACJ has thus far adjudicated over cases raising human rights questions.¹⁶ Further, exercise of the jurisdiction articles 27(1), 31 and 32 of the EAC Treaty is likely to touch on human rights questions. In these circumstances, the response of the EACJ to issues arising in such instances is of essence in determining whether indeed it has a human rights mandate at all.

Ultimately, the need for a clear provision on the law applicable by the EACJ or for a Protocol as required by article 27(2) is underscored (PETER, 2008, p. 213). This is in view of the fact that the EAC Treaty does not clearly outline the law applicable by the EACJ save for the references made to the principles of the African Charter in the objectives of the EAC (EAST AFRICAN COMMUNITY, 2007, art. 6, 7).

4 Specific issues relating to the human rights mandate of the REC Courts

As highlighted above, the role of RECs in the protection and promotion of human rights in Africa is relatively new. The contribution of REC courts to the protection of rights in Africa notwithstanding, there are concerns in relation to their suitability in this regard and how this impacts on the discourse on human rights in the continent. These concerns are discussed below.

4.1 Relationship of REC courts with the AHRS

A human rights system consists of a set of norms and institutions accepted by states as binding (FREEMAN, 2002, p. 53). Assessed against such a system, the efforts of RECs with respect to human rights fall short of constituting independent human rights systems. This is because despite making extensive references to human rights, they lack corresponding institutions established specifically to deal with human rights. This is the basis of the argument that there are no sub-regional human rights systems existing in Africa but that they are simply sub-regional intergovernmental groupings with human rights as a concern within their mandate (VILJOEN, 2007 p. 10). This may ultimately change if RECs commit to developing the existing initiatives into fully fledged systems. The African Commission on Human and Peoples' Rights (African Commission) at a 2006 brainstorming meeting acknowledged that human rights do not fall under its mandate to the exclusion of the other organs of the AU (AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, 2006, annex 2). This means that the other organs of the AU, including the AEC to which RECs attribute their role, are equally bound to integrate human rights into their mandates and function.

The assertions that the AHRS does not include the role of RECs must be understood to refer to the AHRS as established in the formal documents and institutions of the AU. However, it is submitted that in view of the depth of integration of human rights into the economic and other agenda of the AU, it is difficult to understand human rights in Africa without recognising the role of RECs. It is further arguable that despite the absence of an express linkage between RECs and the AHRS, it is undeniable that RECs sit in a relationship with the AU.

Strengthening the existing RECs and establishing new ones where none exist are the first steps on the road towards the agenda of African economic integration pursued by the AEC.¹⁷ Thus it is argued that RECs as part of the AEC have a duty to respect and promote human rights in their jurisdictions (RUPPEL, 2009, p. 281; AFRICAN UNION, 2000, art. 3 (c), (l)). By analogy, REC courts, to the extent that they preside over matters of human rights, can be deemed to be in an informal relationship with the African Court on Human and Peoples' Rights (African Court) and the African Commission.

A human rights system comprises of a set of norms and institutions accepted by states as binding (FREEMAN, 2002, p. 53). In the AHRS, these are contained in the African Charter and its protocols and the African Charter on the Rights and Welfare of the Child. These treaties establish the African Commission (ORGANISATION OF AFRICAN UNITY, 1986, art. 30), the African Court¹⁸ and the Committee of Experts on the Rights and Welfare of the Child (The Committee)¹⁹ respectively. These bodies promote and protect the rights established under the respective treaties.²⁰ There are, however, different opinions on the scope of the AHRS. Some scholars restrict it to the foregoing documents and institutions (BENEDEK, 2006, p. 46) while others extend it to include all documents adopted by the AU which relate to an element of human rights (HEYNS, 2004, p. 681).

In 2008, the AU adopted a protocol²¹ to establish an African Court of Justice and Human Rights (ACJHR). The statute of the ACJHR is, as at the time of this work, not yet in force pending deposit of the 15th instrument of ratification (AFRICAN UNION, 2008b, art. 60). Once it is in force, the role currently vesting in the African Court will be overtaken by the human rights wing of the ACJHR.²² Hence this article focuses on the African Court, as opposed to the ACJHR, as the only existing judicial enforcement mechanism of the AHRS.

Entry of RECs into the protection of human rights has led to a complex institutional framework in the region (CHIDI, 2003, p. 3). Creation of REC courts with a human rights competence means that the African Court no longer has a monopoly in the interpretation and enforcement of the African Charter. However, the African Charter does not contemplate the existence of other supra-national courts in Africa (such as REC courts) dealing with human rights. This is explained by the fact that the African Charter predates the entry of RECs in the field on human rights.

As discussed in section 2 above, RECs are the building blocks of the AEC that was established out of the Abuja process. As the AEC is a core project of the AU, a relationship can be said to exist between the AHRS and RECs as institutions established under the auspices of the AU. Hence it is arguably incorrect to treat the AEC and the RECs as distinct systems. It is therefore submitted that the literature

and documents of the AHRS have long been overtaken by practice. Nevertheless, this article proceeds on the basis of the formal parameters of the AHRS as described earlier in this section.

4.2 Jurisdictional relationship between REC courts, the African Court and the African Commission

In the absence of any jurisprudence, this relationship may be inferred from the weight that would be accorded to the decisions of REC courts by the African Court and the African Commission. The primary avenue to determine this relationship is to consider the criterion for admissibility of matters before the African Court and Commission as set out in article 56 of the African Charter (VILJOEN, 2008, p. 78). The article raises two issues that could be relevant to the relationship between RECs and the AHRS. These relate to the exhaustion of local remedies and the principle of *res judicata*.

4.2.1 Exhaustion of local remedies

In this regard it is argued that there is no obligation on victims to go to the REC court before submitting their matter to the African Court or the African Commission. The requirement of exhaustion of local remedies is relevant to the relationship between an international/regional court and a state. It is founded on the principle that the national authorities should have an opportunity to remedy the breach within their own jurisdiction (VILJOEN, 2007, p. 336). Local remedies refer to 'the ordinary remedies of common law existing in jurisdictions and normally accessible to persons seeking justice' (AFRICAN COMMISSION ON HUMAN RIGHTS, 2004) as opposed to a supra-national court such as an REC court. Therefore, it is doubtful that the African Commission or African Court could decline to admit a matter on the basis that it has not been heard by the relevant REC court or even that this question might arise at all.

4.2.2 Matters settled by another court or tribunal

Article 56(7) of the African Charter (ORGANISATION OF AFRICAN UNITY, 1986) provides that the African Commission may not admit for consideration cases which have been settled by the states involved in accordance with the principles of the United Nations, the Charter of the OAU or the African Charter. This provision embodies the principle of *res judicata* to the extent that it excludes a matter which has been 'settled by the states' involved (VILJOEN, 2007 p. 340). It however does not preclude the consideration of matters that are before another judicial or quasi-judicial forum, and hence leaves an opening for judicial forum shopping. In the absence of a prohibition of concurrent proceedings on the basis of the principle of *lis pendens* in the 'other forum', it is possible for a litigant to institute concurrent proceedings before a REC court and the African Commission or Court (VILJOEN, 2007, p. 340).

The concern that this raises is whether one whose cause has been heard and determined by a REC court can approach the African Commission or Court for redress in the same case. This depends on both the provisions of each REC regarding the finality of their decisions, and the approach of the African Court or Commission to such matters. However, it is submitted that to allow an unsuccessful litigant at the sub-regional level to pursue a remedy at the regional level would be tantamount to establishing the African Court as an appellate body, which it is not. Helfer makes a similar argument in respect of the European Court of Human Rights and the UN Human Rights Committee (HELPER, 1999, p. 285).²³

The approaches adopted by different RECs on the relationship of their courts with the African Court vary.²⁴ For instance, article 38 of the EAC Treaty provides that a dispute referred to the EACJ cannot be settled by any other method other than that established under the Treaty. This implies finality of the decisions of the EACJ. The Protocol of the SADC tribunal on the other hand is explicit that the decisions of the SADC Tribunal are final and binding (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2000, art. 24 (3)). Difficulty arises where there is no finality clause because in that case it has to be determined whether REC courts are forums for dispute settlement in terms of the principles of the UN Charter, the OAU or the African Charter (VILJOEN, 2007, p. 339).

The Charter of the OAU encourages peaceful settlement of disputes through non-judicial means (ORGANISATION OF AFRICAN UNITY, 1963, art. 7 (4))²⁵ but this does not proscribe judicial means. The provision is not specific to human rights cases, but the recurrent theme is peaceful settlement. To the extent that international judicial settlement is considered a means for the peaceful settlement of disputes (ALFORD, 2000, p. 160), coupled with the presence of finality clauses in the REC treaties, there is potential that the decisions of the REC tribunals could completely oust the jurisdiction of the African Commission and the Court by virtue of article 56(7) of the African Charter.

4.3 Regional and sub-regional human rights mechanisms – the merits and de-merits

Whether or not the proliferation of REC courts may be deemed a blessing or a liability depends partly on its relative advantage or disadvantage over the existing regional mechanisms. There is a general underlying assumption that REC tribunals are favourable forums and an illustration of state commitment to the cause of human rights. But certain issues hold sway on the practical benefit of one relative to the other. These include but are not limited to accessibility, enforcement, the quality of jurisprudence, responsiveness to the peculiar needs of a region, potential for better standards of rights and the capacity to complement existing mechanisms.

First, it is argued that RECs (as opposed to regional mechanisms) are better suited to address sub-region specific issues. The small number of states constituting RECs allows them to address the issues with particular detail to its peculiar circumstances. Also, the notoriety of certain issues in a sub-region necessitates the development of jurisprudence on them in a manner that may

not have been considered at the regional level. In addition, the judges of a REC court are likely to have a better appreciation of the issues affecting a sub-region than those at the broader regional level.

Second, in as far as enforcement is concerned, the African Court has the capacity to make binding decisions²⁶ but it has not really presided over any matter yet.²⁷ The African Commission on the other hand, despite regularly deciding on human rights complaints submitted to it, does not render binding decisions. In these circumstances, it could be argued that the binding decisions (EAST AFRICAN COMMUNITY 2007, art. 35) of REC courts are the best alternative for enforcement of rights. However, the difficulty of enforcing the decisions of international courts arising from the consensual nature of international law equally affects REC courts. As with international courts, REC courts lack institutions with power to compel states to comply with its orders (EBOBRAH, 2009a, p. 96). For instance the government of Zimbabwe expressed its intention not to comply with the judgment of the SADC tribunal in the *Campbell* case (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, 2007; RUPPEL, 2009, p. 300). The only point of recourse for the SADC Tribunal in such circumstance is to refer the finding of non-compliance to the Summit of Heads of States or Governments (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2000, art. 32 (5)). Interestingly, an attempt has been made in recent times to enforce a decision of the SADC Tribunal against Zimbabwe in the South African national courts.²⁸ This is a seemingly novel approach to judicial enforcement of supra-national decisions and the outcome of the case will be instructive regarding the prospects of success of such endeavours.

The third issue for discussion relates to the accessibility of courts. Accessibility may be classified in two categories: physical accessibility and capacity to bring a matter before the forum. With respect to the former, the geographical proximity of REC courts to the victims of rights violations in some cases makes it easier for the victims to approach the court. In this way, the REC courts are more responsive to the needs of the victims. In practical terms, it means less travel cost and ease of litigation especially with respect to witness appearances (NWOGU, 2007, p. 354). While it is recognised that the Interim Rules of Procedure of the African Commission allow it to sit in the state of origin of the claim (AFRICAN UNION, 2008a, art. 30), in the practice of the African Commission however, matters are heard during its sessions which mostly take place in Banjul, the Gambia (VILJOEN, 2007, p. 313). Besides, hosting the sessions has financial implications for the host state thus it is not an attractive option. On this basis, REC courts are a more accessible forum for a victim of rights violations.

Regarding the right to be heard, most REC courts allow individuals direct access (VILJOEN, 2007, p. 507). This contrasts access to the African Court which is subject to the consent of the state concerned, effected by declaration accepting the competence of the Court in terms of article 34(6) of the Protocol on the African Court (AFRICAN UNION, 2004, art. 5(3)). As of December 2010, only four states had tendered such a declaration²⁹ to allow individual communications. Also, some of the REC treaties admit cases without the need for exhaustion of local remedies³⁰ thereby making it easy for individuals to access the court.

Fourth, there is concern with respect to the capacity of the REC Courts to perform their protective functions regarding human rights effectively. RECs have demonstrated the intention to accord human rights a place in their agenda, but their capacity to achieve this goal is doubtful within the existing frameworks. Whereas there are extensive provisions on the duty of the REC member states to protect rights, it has been argued that there are no corresponding institutions to oversee the performance of these obligations or to drive the agenda of human rights in the REC (THOKO, 2004, p. 111).³¹ There is the potential for human rights to become secondary to the economic interests in the day to day business of the REC (LAMIN, 2008, p. 233). This could mean that the REC courts are more focused on the other functions of the REC at the expense of the development of human rights jurisprudence.

Most of the REC courts have a combined jurisdiction, doubling as courts of justice and of human rights (RUPPEL, 2009, p. 307). This vast responsibility and a corresponding small number of judges appointed to the various courts raise questions as to whether these courts are sufficiently equipped to competently discharge their dual responsibilities. A further concern relates to the human rights competence of the judges of REC courts to determine human rights matters. Whereas the appointment of judges at the regional level of the AHRS emphasises their competence in respect of human rights (AFRICAN UNION, 2004, art. 11 (1), 2008b, art. 4), there is no corresponding emphasis on a human rights competence for the appointment of judges to the REC courts (EAST AFRICAN COMMUNITY, 2007, art. 24 (1)).

Despite the foregoing concerns, through litigation before REC courts and the harmonisation of legislation in the member states, there is growing jurisprudence on human rights in the respective sub-regions. In addition, the deliberations emanating from these forums are essential in enriching the human rights discourse in the sub-regions and hence empowering the citizens. Furthermore, the judicial emphasis on respect for human rights emanating from REC treaty obligations serves to create pressure on the member states to adhere to higher standards of rights.

Finally, most RECs in Africa recognise the African Charter as the minimum standard on human rights for the region, hence any attempts at the protection of rights within the RECs would have to build upon those contained in the African Charter (VILJOEN, 2007, p. 500). However, in view of the fact that there is not yet a human rights catalogue in any of the RECs considered in this article, this inference can be deemed speculative. On the other hand the evolution of rights into the agenda of the RECs may reveal disparate approaches to the incorporation of human rights into the mandate of REC courts. These differences would possibly translate into varying degrees of protection in each of the sub-regions. This in turn exposes the entire region to disparate standards and makes it difficult to reach a common African human rights standard. This places in question the competence of the RECs as building blocks to an effective regional human rights mechanism.

The foregoing factors would persist even after the establishment of the ACJHR (NWOGU, 2007, p. 354) and therefore, there is a strong case for the continued development of a human rights competence for REC courts and tribunals.

4.4 *The proliferation of supranational human rights courts in Africa*

The dramatic increase in the number of international judicial bodies represents what is referred to as the proliferation of international courts and tribunals (SHANY, 2003, p. 5). This phenomenon is neither unique to Africa nor specific to REC courts. Rather, it is global, attributable to both the nature of international law and the recent development in the field of international law (OELLERS-FRAHM, 2001, p. 71).³² The ramifications of this phenomenon on the protection of human rights in Africa raise some issues for consideration.

Firstly, in the absence of properly coordinated judicial integration on the continent, it is argued that multiplicity of courts poses a threat to the unity of international human rights law in the region through the establishment of separate uncoordinated systems of international human rights standards and norms in different parts of Africa. This in turn creates the potential for varied interpretations of substantive and procedural human rights norms in the different sub-regions. Whereas it is highly probable that there will be disaggregated jurisprudence emerging from the different REC courts, it is submitted that the real problem is the lack of a systematically coordinated or defined relationship between the different REC courts rather than the issue of multiplicity of courts. Such structural organisation demands the existence of a normative or institutional hierarchy or system established under each relevant treaty.

As stipulated above, RECs do not form part of the AHRS *per se*, hence the threat of disintegration is very real. In addition, the varied approaches of REC courts towards the African Charter impacts on the unity of jurisprudence. For instance the use of the African Charter as a rights catalogue for a REC court as in the case of the ECOWAS Court coupled with a finality clause creates the possibility of variant interpretations of the same provision at regional and REC level. Currently only the EAC proposes a separate rights catalogue, and it may happen that the rights that will be contained therein may be similar in content to rights in the African Charter. Should this occur, there is the potential for the EACJ to decide a case on the same legal basis and reasoning as the African Court but derived from a different normative source and with no obligation to refer to either the African Commission or Court. Having said this, there is no guarantee that there would be a similar reasoning or outcome and likewise there is also a possibility that no conflict may arise.

Nevertheless, it is noted that it is difficult to point at an instance in practice where an REC court or the African Commission contradicted one another. On the contrary, REC courts have often referred to the jurisprudence of the African Commission with approval to aid their decisions.³³ This implies that there is an informal inter-fora respect and interaction. However, it would be important to have this relationship institutionalised to lessen the possibility of subjectivity.

Secondly the proliferation of courts could lead to the overlap of jurisdiction of various courts and the possibility of conflicting decisions on the same law. It is argued that the availability of several judicial forums that have concurrent jurisdiction creates an opportunity for human rights practitioners to pursue the

most favourable option or to institute several proceedings in the various forums. In the current context, it would entail a choice between one REC court over another or a REC court³⁴ and the African Court or Commission. This type of forum shopping is generally regarded in a negative light due to its potential to undermine the authority of the courts, generate conflicting decisions and create possibilities for endless litigation (HELPER, 1999, p. 286-287).³⁵

The concern regarding forum shopping can, in as far as human rights are concerned in Africa, be regarded as perceived rather than real. Certain other factors mitigate the potency of this threat such as the indigence of most victims of rights violations (HELPER, 1999, p. 287),³⁶ and geographical distance from the court. On the other hand, Helfer also argues that if well regulated, forum shopping can materially benefit international human rights law. For instance, forum shopping encourages jurists to dialogue on norms shared in the cross-cutting treaties thereby encouraging the development of jurisprudence. However, in view of the overlapping membership of African states in various RECs (RUPPEL, 2009, p. 283) and the possibility of conflicting decisions, it would be advisable to regulate the practice.³⁷

5 The implications of the human rights mandate of the REC courts

This article identifies three critical issues that arise from the human rights mandate of the REC courts: their jurisdictional competence; the normative framework in which they operate, and their location within the structural framework of the AHRS. Each of these is discussed in more detail below.

5.1 *Jurisdictional competence*

Jurisdiction is a legal term referring to either a power or competence to exercise authority over a legally defined relationship between the subjects (EVANS; CAPPS; KONSTADINIDIS, 2003, p. xix). It creates a capacity to generate legal norms and to alter the position of those subject to such norms (ALEXY, 2002 p. 132). It also refers to the power of a court to determine a case before it in terms of an instrument either creating it or defining the jurisdiction (CHENG, 2006, p. 259). The terms competence and jurisdiction are so deeply intertwined that they are often used interchangeably (KOROMA, 2003, p. 189). But subtle distinctions can be made between the two, such as that while jurisdiction relates to a court's capacity to decide a concrete case with final and binding force, competence regards the propriety of the exercise of such jurisdiction (ROSENNE, 1997, p. 536). A tribunal is generally incompetent to act beyond its jurisdiction (CHENG, 2006, p. 259).

Various approaches have been adopted in defining the jurisdiction of REC courts with respect to human rights. Mainly, such competence is either expressly established by treaty or the specific intention of the state parties to the treaty is not clearly set out. However, despite seemingly clear distinctions between the approaches, the existence of jurisdiction is a matter of interpretation in each case especially where it is not expressly stated.

5.1.1 Express versus implied mandates

Of the three REC courts referred to in this article, the ECOWAS Court is said to have an express human rights mandate (EBOBRAH, 2009a, p. 80). With respect to the EACJ and the SADC Tribunal, the answer is not so obvious though the general inclination is that they have an implied mandate (RUPPEL, 2009, p. 307). It is reported that inclusion of a specific human rights mandate for the SADC Tribunal was discussed and rejected, with a panel of experts mandated to draft a proposal for the tribunal preferring a general jurisdiction with respect to human rights (VILJOEN, 2007, p. 505). The absence of express provisions notwithstanding, both the EACJ and the SADC tribunal have decided cases that impact on human rights issues.³⁸

While the two tribunals are often collectively said to lack express jurisdiction over human rights (EBOBRAH, 2009a, p. 80), a subtle but critical distinction must be made between their provisions regarding human rights. The Protocol on SADC Tribunal is silent on the human rights mandate of the tribunal.³⁹ The EAC Treaty on the other hand expressly excludes such jurisdiction until the adoption of a Protocol to expand the jurisdiction of the EACJ to human rights (EAST AFRICAN COMMUNITY, 2007, art. 27 (2)). In effect, while the silence of the SADC Protocol can be interpreted as indifference on the subject, legitimacy of the exercise of a human rights jurisdiction by the EACJ is even more precarious.

The exercise or assertion of jurisdiction rests on a quest for legitimacy to be found in the expression of state consent (KOROMA, 2003, p. 198). Legitimacy of the court's actions is circumscribed by the bounds of its authority. It affects the response of the parties to the decision rendered; if such decision is deemed to exceed the power of the court, it is unlikely to be enforced effectively. Absence of an express jurisdiction leaves it upon the court and the parties to delimit the scope of the courts authority. This opens an opportunity for subjectivity and conservatism that could injure genuine pursuit of redress.

In *Katabazi and 21 others v Secretary General of the East African Community and another* (EAST AFRICAN COURT OF JUSTICE, 2007), the applicants were part of a group of 21 charged with treason and misprision of treason. The application claimed *inter alia* a breach of articles 6, 7(2) and 8 (1) (c) of the EAC treaty relative to the fundamental principles of the EAC, the operational principles thereof and the general undertaking of the states to implement the EAC Treaty. Counsel for the applicants requested the EACJ to regard the matter as an application for determination of whether the conduct of the state of Uganda was in breach of a fundamental principle of the EAC. Counsel for the respondent on the other hand argued that the claims of the applicants related to a question of human rights over which the EACJ did not have jurisdiction by virtue of article 27(2) of the EAC Treaty.

In response to the question of its jurisdiction, the EACJ stated as follows

Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No it does not have.....It is very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect.

Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights per se.

Yet it continued,

While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation.

(EAST AFRICAN COMMUNITY, 2007, art. 27 (1)).⁴⁰

On this basis, the EACJ found that the principle of the rule of law, a fundamental principle of the community, had been breached.

The decision of the court to deal with the matter in the face of an express exclusion of its jurisdiction over human rights is nothing short of extreme judicial activism, skewed towards a usurpation of legislative functions (EBOBRAH, 2009a, p. 82). Yet, if the court had determined otherwise, it would indeed have ‘abdicated itself’ from performing a duty with which it is vested in terms of the treaty; that to interpret a provision of the Treaty. Therein lies the dilemma of courts whose express mandate does not sufficiently cover the scope of its functions. The capacity of a court to address an issue is circumscribed by the scope of its mandate. Hence a clear articulation of the mandate of the EACJ is necessary to avoid this impasse.

During the hearing of the main application in the *Campbell* case⁴¹ the respondent contested the jurisdiction of the SADC Tribunal arguing that in the absence of a rights protocol, the tribunal had no jurisdiction over human rights. In response, the SADC Tribunal stated that stipulation of human rights, democracy and the rule of law as a principle of SADC sufficed to grant it jurisdiction over matters of human rights, democracy and rule of law. Though the mandate of SADC Tribunal is not expressly excluded as in the case of the EAC, it is clear that this omission gave an opportunity for contestation and is hence undesirable.

In *Olajide v Nigeria* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2004) the ECOWAS Court declined to adjudicate over questions of human rights arguing that its protocol did not confer such jurisdiction. The matter arose prior to the 2005 amendment of the Protocol relating to the ECOWAS Court which vested the court with jurisdiction over human rights and allowed individual access to the court. The decision was taken despite the existence of ‘sufficient human rights content in the constitutional and other legislative instruments of ECOWAS’ (EBOBRAH, 2008, p. 17). It was argued that where the meaning of the treaty was clear, the court would apply it as such (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2004, para. 53-54). The decision has been criticised as shying away from activism in that case since nothing in the Protocol prevented the admission of the matter (VILJOEN, 2007, p. 507). Thus, in light of this case, the benefit of an express mandate is clear.

The foregoing cases illustrate three main issues underlying the exercise of an implied jurisdiction. First, the exercise of such jurisdiction can be interpreted as exceeding the authority of the court and therefore compromise the legitimacy of the decision. It also makes the scope of the power of the court elusive. Secondly, it creates an opening for litigious contestation of the courts authority thereby lengthening the

process unnecessarily which is undesirable for human rights litigation. Lastly, it accords discretion to the judicial officers to determine the court's competence. This introduces subjectivity and in the face of a conservative bench, the likelihood that such matters may not be admitted. This is for instance clear when the decisions of the EAC and the ECOWAS Court in *Katabazi* (EAST AFRICAN COURT OF JUSTICE, 2007) and *Olajide* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2004) are contrasted.

In light of the foregoing factors, it can be concluded that an implied mandate for human rights, whilst not absolutely barring exercise of jurisdiction, does not achieve optimum protection for rights and is inconsistent with the commitment of RECs to protection of human rights evident in their founding documents.

5.2 Normative framework

This refers to the body of law applied by REC courts in dispensing their obligations under their respective treaties and which defines the values and goals pursued by the REC and the primary rules that impose duties on actors to perform or abstain from actions (DIEHL; KU; ZAMORA, 2003, p. 51). The normative sources applied by REC courts in exercise of the human rights mandate vary from one REC to the next. For instance, the literal reading of article 21 of the SADC Protocol on the Tribunal implies sufficiency to direct the tribunal on what law to apply. With respect to human rights, however, the answer is not as obvious. The SADC treaty establishes an obligation for states to abide by the principle of human rights, democracy and the rule of law. But the normative source of such standards is not specified.

Similarly, article 27(2) of the EAC Treaty can be interpreted to mean that the law to be applied by the EACJ with respect to human rights will be defined in the Protocol that will expand the court's jurisdiction. However, the EAC Treaty establishes 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter as a fundamental principle of the EAC (EAST AFRICAN COMMUNITY, 2007, art. 6 (d)). Hence, a determination of whether a state party is in breach of the treaty would inevitably entail a determination of whether or not the conduct is a breach of the African Charter. That demands an enquiry into the substantive content of the rights. Nevertheless, it is submitted that this does not suffice to establish the African Charter as a normative source or standard of rights in the EAC.

5.2.1 The African Charter as a rights catalogue for REC courts

It has been suggested that in view of the wide recognition of the African Charter as a standard for rights in the RECs, it can be employed as the normative source of rights for REC courts as all the AU members are party to the African Charter (VILJOEN, 2007, p. 500). It is further argued that the development of 'distinct sub-regional human rights standards, such as the SADC Charter of Fundamental Social Rights, is likely to accentuate differences, [thereby] undermining the movement towards African unity and legal integration' (VILJOEN, 2007, p. 501). These arguments are founded on an assumption that the RECs recognize the African Charter as a standard for rights. Notably however, the SADC Treaty does not make any reference to the African

Charter. But this does not mean that failure to refer to it implies discord with its provisions. Indeed, in the *Campbell* case, the SADC Tribunal referred to the African Charter extensively and even relied on the jurisprudence of the African Commission.

The interpretation and enforcement of the African Charter is a function of the African Commission and the African Court. The suggestion of its application by REC courts would create another forum for interpretation and enforcement. Recalling the absence of judicial hierarchy, the use of finality clauses with respect to the decisions of REC courts, the exclusion of REC courts from the formal structure of the AHRS and lack of judicial coordination in the region, the inevitable result of this suggestion is a replication of forums with a similar mandate and a real chance of conflicting decisions. It does not hold promise for addressing the threats to the unity of human rights law in the region.

The use of the African Charter as a rights catalogue blurs the normative hierarchy between the regional and sub-regional human rights instruments that underlies the intention of the eventual unification at the regional level. Such hierarchy is implicit in judicial order and is an invaluable asset for the AHRS. Thus the argument for the African Charter as a rights catalogue for the RECs is not as obviously advantageous as some authors contend.

In supporting his argument for the African Charter as a rights catalogue for RECs, Viljoen observes that separate cataloguing of human rights is likely to accentuate differences and undermine integration (VILJOEN, 2007, p. 500). However, it is submitted that the possibility of accentuating differences is adequately mitigated by the recognition of the African Charter and other international standards of human rights as a normative minimum. For instance the draft East African Bill of Rights (PETER, 2008, p. 336)⁴² has extensive provisions covering both the rights established under the African Charter and beyond. If adopted, it would present better protection than the African Charter. In the case of SADC, there are differences of opinion on whether the SADC Charter of Fundamental Social Rights can be deemed as a rights catalogue for the SADC Tribunal (VILJOEN, 2007, p. 500; RUPPEL, 2009, p. 295-296).

5.3 Structural framework

The structural framework refers to the institutional organisation of the AHRS. A system is a purposeful arrangement of interrelated elements or components which cannot be adequately described and understood in isolation from one another (SHANY, 2003, p. 78). It has been established in the preceding sections that REC courts are not formally recognised as part of the AHRS. A concern arises regarding the relationship between the REC courts and the institutions established at the regional level, and how the AHRS institutional framework can be modified (if at all) to accommodate the role of REC courts.

Generally RECs do not constitute independent human rights systems (VILJOEN, 2007, p. 10). They are created for the pursuit of economic integration and the promotion and protection of human rights is barely incidental to that main purpose. Furthermore, they do not have institutions specifically tailored towards the performance of human rights functions. If RECs indeed fall short of independent human rights systems in Africa, then, in order for them to achieve the optimum

protection of rights as envisaged in their respective documents they need either to fully develop their institutions to a fully fledged system or to align with a better co-ordinated and institutionally established system, namely the AHRS.

6 Conclusion

The significance of the role played by REC courts in the protection of human rights in the Africa today cannot be denied. It is a reflection of a renewed commitment by African states to the realisation of human rights in the region. It also points to the fact that the traditional human rights institutional framework in the region has long been overtaken by practice. The formal parameters of the AHRS do not adequately cater for the role of RECs in the field of human rights. This deprives the region of the benefits of the coordinated development of protective mechanisms that would create an optimum environment for the protection of rights. Though there are numerous problems associated with the emerging role of RECs in the protection of human rights, there is an equal wealth of benefits to be reaped from their work. The problems highlighted in this article render themselves to a solution through proper delimitation of the role of REC courts and restructuring of the system to take cognisance of the recent developments.

Whether or not the region stands to benefit from the role of these new players is almost entirely dependent on the willingness of states to revisit the AHRS and to align the operations of the RECs with the regional framework.

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LIST OF ABBREVIATIONS

African Charter:	African Charter on Human and Peoples' Rights
African Commission:	African Commission on Human and Peoples' Rights
African Court:	African Court on Human and Peoples' Rights
ACJHR:	African Court of Justice and Human Rights
AEC:	African Economic Community
AHRS:	African Human Rights System
AU:	African Union
EAC:	East Africa Community
EACJ:	East Africa Court of Justice
ECOWAS:	Economic Community of the West African States
ECOWAS Court:	ECOWAS Community Court of Justice
OAU:	Organisation of African Unity
REC:	Regional Economic Community
REC Courts:	Regional Economic Community Courts
SADC:	Southern African development Community
SADC Tribunal:	Southern African Development Community Tribunal

NOTES

1. See <http://www2.gtz.de/wbf/4tDx9kw63gma/RECs_Final_Report.pdf> or <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf> generally for an outline of the existing RECs in Africa and their corresponding memberships. Last accessed on: 6 Dec. 2010.
2. Articles 3(h) and 4(m) of the Constitutive Act of the AU (AFRICAN UNION, 2000) establish promotion, protection and respect of human rights as part of the objectives and principles of the AU. Nevertheless, it is noted that other documents adopted under the auspices of the OAU such as the Treaty Establishing the African Economic Community (1991) had already established human rights as a fundamental concern thereof. This suggests an incremental approach in the adoption of human rights as an agenda of the OAU. See chapter II article 3(g) and 5(1) of the AEC Treaty (AFRICAN ECONOMIC COMMUNITY, 1991).
3. Such as calls by the UN Economic Commission for Africa (UNECA) on African States to work towards a single economic union through the creational of sub-regional economies.
4. There are at least 14 RECs in Africa today, 8 of which are recognised by the African Union. See <www.africa-union.org> for a list of the recognised RECs.
5. Thoko argues that the obligations contained in the Universal Bill of Rights establish the civil, political, economic and social needs of people as rights which may not be curtailed in the pursuit of economic development. It is hence proposed that the Treaties of these RECs may not be interpreted in isolation of the other human rights obligations, but rather in a manner that furthers these objectives. This approach is derived and supported by the provisions of Article 31(3) (c) of the Vienna Convention on the Law of Treaties. In the context of RECs, one is bound to interpret their treaties in line with their obligations as obtaining under other human rights instruments.
6. The term 'courts' as used in this work refers to both courts and tribunals.
7. See generally <<http://www.comm.ecowas.int/sec/index.php?id=about-a&lang=en>>. See also paragraph 6 of the preamble to the 1975 ECOWAS Treaty (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1975).
8. See para. 5 of the preamble and paras. 4, 5 and 6 of the substantive part of the Declaration (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1991).
9. Article 4(g) of the 1993 Revised Treaty of ECOWAS (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 1993) which also refers to specific rights and obligations of member states as in article 56(2), 59 and 66(2) c.
10. By Supplementary Protocol A/SP.1/01/05 and A/SP.2/06/06.
11. These include *Ugokwe v Nigeria and Others* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2005b), *Kéïta and Another v Mali* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2007a), *Essein v The Republic of the Gambia* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2007b) AHRLR 131, *Manneh v The Gambia* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2008a) AHRLR 171, *Karou v Niger* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2008b) AHRLR 182, *Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Another* (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2009).
12. See <<http://www.sadc.int>> on the member states of SADC.
13. *Mike Campbell (PVT) Limited and Another v The Republic of Zimbabwe* SADC (T) 2/2007 and in *Luke Muntandu Tembani v The Republic of Zimbabwe*, case number SADC (T) 07/2008 (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, 2008). In the Campbell case, the SADC Tribunal considered whether compulsory acquisition of private land owned by the applicants through an amendment of the Respondent's constitution was a violation of human rights obligations under the SADC Treaty. In the Tembani case, the SADC Tribunal was required to determine whether a provision of the Respondent's law which ousted the jurisdiction of courts in respect of the foreclosure of property charged to loan was a violation of human rights.
14. In 2005, the secretariat of the EAC developed a draft protocol for the expansion of the EACJ's jurisdiction to *inter alia* human rights as required in article 27(2). The process of consultation on the draft was scheduled to be completed by August 2006, and to date has not been finalised. This delay in adoption of the Protocol is attributable to several factors including unrealistic time framing of the schedule for adoption, limited consultation with stakeholders, and susceptibility of the process to political manipulation.
15. He argues that though the Treaty provides for broad protection with regard to human rights, the EACJ has no jurisdiction over human rights issues.
16. *Katabazi and 21 others v Secretary General of the EAC and another* (EAST AFRICAN COURT OF JUSTICE, 2007) and *Nyong'o and 10 others v The Attorney General of Kenya and others* (EAST AFRICA COURT OF JUSTICE, 2006).
17. Article 4(2) of the Treaty Establishing the African Economic Community (AFRICAN ECONOMIC COMMUNITY, 1991). See also article 3(g) of the same Treaty.
18. Article 1 of the Protocol on African Court (AFRICAN UNION, 2004).

19. Chapter 2 of the African Charter on the Rights and Welfare of the Child (ORGANISATION OF AFRICAN UNITY, 1990).
20. See articles 30 of the African Charter (ORGANISATION OF AFRICAN UNITY, 1986), 2 of the Court Protocol (AFRICAN UNION, 2004) and 32 of the African Charter on the Rights and Welfare of the Child (ORGANISATION OF AFRICAN UNITY, 1990).
21. Protocol on the Statute of the African Court of Justice and Human Rights (Statute of the ACJHR) adopted by the eleventh ordinary session of the AU Assembly, held in Sharm el-Sheikh, Egypt, 1st July 2008 (AFRICAN UNION, 2008b).
22. In terms of Article 16 of the Statute of the African Court of Justice and Human Rights, the ACJHR is to have two sections; a general affairs section composed of 8 judges and a human rights section composed of 8 judges. The general affairs section is to be competent to hear all cases submitted under article 28 of the Statute save for those concerning human and/or peoples' rights. The human rights section is to be competent to hear all cases relating to human and or peoples' rights.
23. An analogy can be drawn from his argument to the present relationship between the African Charter and the RECs.
24. Article 38 of the EAC treaty provides that a dispute referred to the EACJ cannot be settled by any other method other than that established under the Treaty. This can be read as establishing the finality of the decisions of the EACJ.
25. Its successor the Constitutive Act of the AU has similar provisions but leaves the definition of peaceful means to the AU Assembly.
26. See articles 30 and 46(2) of the African Charter (ORGANISATION OF AFRICAN UNITY, 1986) and the Statute of the ACJHR (AFRICAN UNION, 2008b) respectively.
27. Only the case of *Michelot Yogombaye v The Republic of Senegal* (AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, 2008), has been brought before the Court so far. However, the African Court dismissed this matter on the basis that the Respondent state, Senegal, had not accepted the jurisdiction of the African Court in terms of article 34(6) of the 1998 Protocol to the African Charter on African Court (AFRICAN UNION, 2004).
28. In *Louis Karel Fick & Others versus Government of the Republic of Zimbabwe* (SOUTH AFRICA, 2009) the North Gauteng High Court, Pretoria upheld the application by successful litigants before the SADC Tribunal to attach the non-diplomatic property owned by the Government of Zimbabwe in South Africa. However, the Court failed to provide substantive reasons for its order, save for stating it relied on the papers before it. As a consequence, the Government of South Africa is appealing the decision. The appeal is yet to be determined as at the date of this article (SA TO CHALLENGE..., 2010).
29. These are Burkina Faso, Mali, Malawi and Tanzania.
30. Article 10(d) of Supplementary Protocol A/ SP.1/01/05 Amending Protocol A/P.1/7/91 on the Community Court of Justice (ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 2005a) on the requirements for admissibility of a matter before the ECOWAS Court.
31. Thoko argues in respect of SADC that the SADC Treaty does not create any institution with a specific mandate to deal with human rights despite having an unequivocal commitment to human rights.
32. He argues that international law is not a comprehensive body of laws consisting of a fixed body of rules applicable to all states with a central legislative organ. Rather, it is in permanent development with its actors and ambit of activity increasing considerably in the past few years.
33. In the *Campbell* case (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL, 2007) for instance, the SADC Tribunal relied on the decision of the African Commission in *Constitutional Rights Project and Others v Nigeria* (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 2000) AHRLR 227 and in *Zimbabwe Human Rights NGO Forum v Zimbabwe* (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 2006) AHRLR128.
34. Countries that are members or party to more than one sub-region have a choice of REC courts to approach (which is the majority of most African countries).
35. He identifies three types of forum shopping based on the nature of choice available to the potential litigant: choice of tribunal, simultaneous petitioning and successive petitioning.
36. He argues that successive litigation is not costless.
37. Article 56(7) of the African Charter (ORGANISATION OF AFRICAN UNITY, 1986) which is material in this regard only prohibits admission of successive claims. This is insufficient to deal with the possibility of forum shopping.
38. See notes 16 and 13 above respectively.
39. Article 15 which provides for the jurisdiction of the SADC Tribunal neither provides for competence over human rights questions nor excludes such jurisdiction.
40. Article 27(1) of the Treaty relates to the jurisdiction of the EACJ to interpret and apply the EAC Treaty.
41. See note 13 above
42. The Draft East African Bill of Rights (PETER, 2008, Annexure II) developed by the National Human Rights Institutions in the East African region under the auspices of Kituo Cha Katiba. The draft, though not formally adopted by the EAC is intended to be a human rights code to guide the human rights jurisprudence and operations of the EACJ.

RESUMO

O desenvolvimento de comunidades sub-regionais na África não é um fenômeno novo, mas a incorporação de direitos humanos em suas agendas é relativamente recente. Com efeito, as cortes das comunidades econômicas regionais introduziram uma nova dimensão de proteção supranacional dos direitos humanos na África. Esse desenvolvimento é bem-vindo, porque provavelmente fará progredir a promoção e a proteção dos direitos humanos. Entretanto, considerando que o foco principal dessas comunidades é o desenvolvimento econômico, sua capacidade de efetivamente compreender o papel da proteção dos direitos humanos é questionável. O desenvolvimento desse mandato para as cortes sub-regionais é necessário pela proeminência emergente dos direitos humanos nos negócios das comunidades econômicas regionais. Sua interpretação e implementação, contudo, tem amplas ramificações para a promoção dos direitos humanos na África, a harmonização dos padrões de direitos humanos na região e para a unidade e a efetividade do Sistema Africano de Direitos Humanos.

PALAVRAS-CHAVE

Integração regional – Comunidades econômicas regionais – Mandato para direitos humanos – Cortes sub-regionais – Sistema Africano de Direitos Humanos – Jurisdição relativa a direitos humanos

RESUMEN

El desarrollo de las comunidades subregionales en África no es un fenómeno nuevo, pero la incorporación de los derechos humanos a su agenda es relativamente reciente. En efecto, los tribunales REC han introducido un nuevo manto de protección supra-nacional a los derechos humanos en África. Este hecho es bienvenido porque puede producir un paso adelante en la promoción y protección de los derechos humanos. Sin embargo, considerando que el objetivo principal de las REC es el desarrollo económico, su capacidad para asumir eficazmente la función de protección de los derechos humanos es discutible. La creciente importancia de los derechos humanos en los asuntos de las REC necesita del desarrollo de este mandato para los tribunales subregionales. Pero la interpretación e implementación que ellos hagan tendrá amplias ramificaciones para el avance de los derechos humanos en África, para la armonización de los estándares de derechos humanos en la región y para la unidad y eficacia del sistema africano de derechos humanos.

PALABRAS CLAVE

Integración regional – Comunidades económicas regionales – Mandato de derechos humanos – Tribunales subregionales – Sistema Africano de Derechos Humanos – Jurisdicción de derechos humanos

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