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JUDICIAL ENFORCEMENT OF HUMAN RIGHTS THROUGH REGIONAL ECONOMIC COMMUNITIES: A COMPARATIVE ANALYSIS WITH THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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Declaration

ESMAEL ALI, hereby declare that this dissertation is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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Acronyms

ACHPR	African Charter on Human and Peoples' Rights
AEC	African Economic Community
AfCHPR	African Court on Human and Peoples' Rights
AMU	Arab Maghreb Union
APRM	African Peer Review Mechanism
AU	African Union
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEN-SAD	Community of Sahel-Saharan States
CERD	Convention on the Elimination of All Forms of Racial Discrimination
COMESA	Common Market for Eastern and Southern Africa
CRC	Convention on the Rights of Child
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGAD	Inter-Governmental Authority for Drought and Development
NEPAD	New Partnership for Africa's Development
NGOs	Non-governmental Organizations
NHRCs	National Human Rights Commissioners
OAS	Organization of American States
OAU	Organization of African Unity
PTA	Preferential Trade Agreement for Eastern and Southern Africa
RECs	Regional Economic Communities
SACU	Southern African Customs Union
SADC	Southern African Development Community
UDHR	Universal Declaration of Human rights
UN	United Nations
UNECA	United Nations Economic Commission for Africa
WWII	Second World War

Table of Contents

Declaration -----	ii
Acknowledgements -----	iii
Acronyms -----	iv
Abstract-----	ix

CHAPTER ONE

1. Introduction -----	1
1.1 Background -----	1
1.2. Objective of the Study -----	6
1.2.1. General Objectives of the Study -----	6
1.2.2. Specific Objectives of the Study -----	6
1.3. Statement of the Problem-----	7
1.4. Research Questions -----	9
1.5. Methodology of the Research -----	10
1.6. Scope of the Study -----	10
1.7. Significance of the Study -----	11
1.8. Limitations of the Study -----	11

CHAPTER TWO

ECONOMIC INTEGRATION AND THE DEVELOPMENT OF HUMAN RIGHTS IN AFRICA

2.1. Introduction -----	13
2.2. Continental Integration in Africa -----	14
2.3. Regional Economic Integration in Africa -----	16
2.4. African Economic Community (AEC) -----	18
2.5. African Union-AU and the African Economic Community-AEC -----	20
2.6. Continental Integration and the Development of Human rights -----	22

2.7 RECs and Human Rights	25
2.8 AEC and Human Rights.	26
2.9 Challenges of the Integration Process	28

CHAPTER THREE

HUMAN RIGHTS PROTECTION WITH IN REGIONAL COMMUNITIES AND THE AFRICAN HUMAN RIGHTS SYSTEM

3.1. Introduction	31
3.2. African Human Rights System.	32
3.2.1. The African Commission on Human and Peoples' Rights	35
3.2.2. The African Court on Human and Peoples' Rights.	38
3.2.3. The African Committee of Experts on the Rights and Welfare of the Child.....	40
3.2.4. Evaluating the African Human Rights System	41
3.3. Normative Frameworks and Protection of Human Rights under the RECs.....	42
3.3.1 The Arab Maghreb Union-AMU	42
3.3.1.1 Protection of Human Rights with in AMU	43
3.3.2. The Community of Sahel – Saharan States (CEN-SAD)	44
3.3.2.1 Human Rights Protection With in CEN- SAD	44
3.3.3. The Common Market for Eastern and Southern Africa (COMESA)	44
3.3.3.1 Human Rights Protection with in COMESA	45
3.3.3.2. Judicial Enforcement of Human Rights with in COMESA.....	46
3.3.4. The East African Community (EAC)	47
3.3.4.1. Human Rights Protection with in EAC	48
3.3.4.2 Judicial Enforcement of Human Rights with in EAC	52
3.3.5. The Economic Community of Central African States (ECCAS)	54
3.3.5.1 Human Rights Protection with in ECCAS	54
3.3.6. Intergovernmental Authority on Development –IGAD	55
3.3.6.1 Protection of Human Rights with in IGAD	56

3.3.7. The Southern African Development Community SADC	57
3.3.7.1 Human Rights Protection With in SADC	57
3.3.7.2 Judicial Enforcement of Human Rights with in SADC	61
3.3.8. The Economic Community of West African States ECOWAS	63
3.3.8.1. Protection of Human Rights with in ECOWAS	64
3.3.8.2. Judicial Enforcement of Human Rights with in ECOWAS	66

CHAPTER FOUR

JUDICIAL ENFORCEMENT OF HUMAN RIGHTS IN THE ECOWAS AND SADC COMMUNITIES: A COMPARATIVE ANALYSIS IN LIGHT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

4.1 Introduction	68
4.2 Responsibility to Implement and Enforce Human Rights in Africa	69
4.3 Judicial Protection of Human Rights	72
4.4 The Human Rights Jurisdiction	72
4.4.1. The Human Rights Jurisdiction of the Court of the ECOWAS.....	72
A. Personal Jurisdiction	73
B. Subject Matter Jurisdiction	74
C. Procedure before the Court	78
4.4.2 The Human Rights of Jurisdiction of SADC Tribunal	79
A. Personal Jurisdiction	79
B. Subject Matter Jurisdiction of the Tribunal	81
C. Procedure before the Tribunal	82
4.4.3. The Jurisdiction of the African Court of Human Rights	83
A. Personal Jurisdiction	83
B. Subject Matter Jurisdiction	85
C. The Procedure before the Court	86
4.5 Advisory Jurisdiction	87

4.6. Judgments of the Courts	88
4.7. Enforcement of Judgments	98
4.8. Amicable Settlement	101
4.9 Relation between the Regional Courts and the African Court of Human Rights ---	102
4.10 Evaluating the Roles of Regional courts in the Realization of Human Rights ----	103
4.11. Challenges Facing Regional Courts in the Human Rights Protection-----	106

CHAPTER FIVE

CONCLUSION and RECOMMENDATIONS

5.1. Conclusion	112
5.2. Recommendations	114

Bibliography

Abstract

Regional Economic Communities are much involved in the protection of human rights to change the human rights system of those states having poor human rights record and to facilitate the trade relations among the member states and the integration as well. The treaties of many of the RECs made reference to the African Charter on Human and Peoples' Rights as a common standard to achieve higher normative standard throughout the regions. Furthermore, some RECs involve in the enforcement of human rights for violations under the African Charter on Human and Peoples' Rights and other Conventions that a state concerned is party in addition to the communities' treaties, conventions and protocols.

This thesis examines the enforcement of human rights through the judicial organs of the RECs; particularly the ECOWAS Community Court of Justice, and the Tribunal of SADC in comparison with the African Court on Human and Peoples' Rights.

Key words: Human Rights, RECs, African Court on Human and Peoples' Rights, and Judicial Enforcement.

CHAPTER ONE

Introduction

1.1. Background

The protection and promotion of human rights has been incorporated in different international, continental and national legal and policy instruments. In 1981, the OAU Assembly of Heads of State and Government adopted the African Charter on Human and Peoples' Rights (here after, the Banjul Charter) in Nairobi, Kenya. The Banjul Charter entered in to force in 1986. The Charter is the heart of the African human rights protection system. It comprehensively includes all generations of rights in one document. For the promotion and protection of human rights in member states to the Banjul Charter, the African Commission on Human and Peoples' Rights (the Commission) has been given the mandate. The Commission entertains communications both inter-state and individual complaints, in addition to reviewing state reports though the decision of the Commission are not binding.

To complement the protective mandate of the Commission, the system adopted a protocol. In 1998, the OAU, predecessor of the AU, adopted the Protocol to the Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights¹ (AfCHPR). Since 2004, after the fifteenth ratification was deposited, the Court has been operational. The Court has jurisdiction over all cases and disputes submitted to it regarding the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol to the Charter on the Establishment of the African Court on Human and Peoples' Rights, and any other relevant human rights instrument ratified by States that are party to a case. However, the individual complaints mechanism is not directly available to individual victims unless the state concerned declares the competence of the court as per Article 34(6) of the Protocol.

¹ Protocol to the Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on June 9, 1998 and entered in to force in 2004

In July 2006, the Assembly decided that the African Court on Human and Peoples' Rights should be merged with the Court of Justice of the African Union in to the African Court of Justice and Human Rights.² This Court will be the supreme judicial organ of AU. The African Human and Peoples' Rights Court is currently the operational Court, but working on the understanding that, once the Protocol on the Statute of the African Court of Justice and Human Rights enters into force, the merged Court will commence full operations.

At the continental level, the African Human Rights System has protocols³, charters⁴, conventions⁵ and declarations⁶ that enhance the promotion and protection of human and peoples' rights on the continent.

Besides the continental human rights system, the Regional Economic Communities (RECs) include human rights provisions in their treaties, declarations, and protocols.⁷ The birth of RECs in Africa can be traced back to the 1960s when the United Nations Economic Commission for Africa (UNECA) encouraged African states to incorporate single economies in to regional systems with the ultimate goal of creating a single economic union on the continent. In order to realize this aim, the continent has taken several steps towards enhancing the process of economic and political integration on the continent. Different African leaders initiate the decisions and declarations that enhanced the integration processes. Among the decisions and declarations, the crucial

² The Protocol on the Statute of the African Court of Justice and Human Rights was adopted by the Assembly in Sharm El-Sheikh, Egypt, on 1 July 2008, but (as of July 2010) which had not yet entered in to force.

³ Such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, and entered into force Nov. 25, 2005.

⁴ Such as the African Charter on the Rights and Welfare of the Child, 1990 and *entered into force* Nov. 29, 1999.

⁵ Such as the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, *entered into force* June 20, 1974.

⁶ Such as [the "Khartoum Declaration on Africa's Refugee Crisis"](#), September (1990).

⁷ The SADC Treaty of 1992 in its preamble, under Articles 4(c) and 5 provide that member states of the community are obliged to act in accordance with the principles of human rights, democracy and rule of law and call the people of the region to involve in the process of development and integration particularly through guaranteeing democratic rights and observing human rights. In the same way the treaties of other RECs, such as the Treaties of ECOWAS (1993) and EAC (1999) state that member states shall promote and encourage the full enjoyment by the all peoples of their fundamental human rights, especially their political, economic, social and cultural rights; (see the Revised Treaty of ECOWAS, the preamble, Articles 2, 3, and 4; and the 1999 Treaty of EAC under Articles 5(3) and 6(d).

one was the Abuja Treaty⁸ of 1991, which resulted in the establishment of the African Economic Community (AEC), which entered into force in 1994. The stated goals of the organization include the creation of free trade areas, customs unions, a single market, a central bank, and a common currency and thus establishing an economic and monetary union.

Before the adoption of the Treaty establishing the AEC, there were Regional Economic Communities since African countries face many social, developmental, economic, trade, education, health, diplomatic, defense, security and political challenges. These RECs are established to create free trade area, to achieve collective self-sufficiency for their member states by means of economic and monetary union. Though there are many RECs operating within AU Member States, in line with a decision of the Assembly of Heads of State and Government, there are only eight (8) RECs recognized by the AU. The AEC has used these recognized RECs as a basis for the integration of the African economy. The integration of the Regional Economic Communities is the building blocks of the political and economic integration of the continent. The steps of each and every integration process in one way or another have impact on human rights of the peoples of the communities. At the beginning, human rights were not the focus of attention of these RECs due to the novelty of human rights and the principle of state-sovereignty. However, with the revision of the existing treaties, the revival of the defunct RECs or the establishment of new RECs, RECs have become more involved in the realization of human rights on the continent. Human rights are and should be a part of the integration process. Abuse or denial of human rights of the communities, undoubtedly, greatly impacts negatively on the integration process. However, in the 1990s, the treaties of RECs have been revised⁹, and/or restructured¹⁰ and come up with human rights provisions.

⁸ Treaty establishing the African Economic Community, adopted in 1991, Abuja, Nigeria and entered in to force in 1994

⁹ See the Revised Treaty of ECOWAS, 1993

¹⁰ Preferential Trade Area for Eastern and Southern Africa (PTA) was changed in to Common Market for Eastern and Southern Africa in 1993; the Treaty Establishing the Common Market for Eastern and Southern Africa, COMESA, was signed on 5th November 1993 in Kampala, Uganda and was ratified a year later in Lilongwe, Malawi on 8th December 1994.

Among the main institutions (departments) of the Regional Economic Communities, one is the Courts (Tribunals) of justice. The Courts (Tribunals) are restricted to adjudicate cases in their jurisdiction. The problem here is that some courts have a clear mandate to adjudicate on human rights issues raised by the communities; where as some courts have been denied such power; and some other courts exercise the power of adjudicating on matters of human rights through interpreting their mandate widely. Here, the protection and enforcement of human rights varies according to time, place, culture, and social development of a given community. This results in a multiplicity of interpretation and application of human rights instruments on the continent, which is another obstacle to the integration process.

Although there is recognition of the idea of an African Human Rights System, there is a proliferation of institutions, instruments, and mechanisms in the communities for the realization of human rights, which calls for consolidation and co-ordination among themselves. The involvement of RECs in the promotion, protection and enforcement of human rights complicates the existing practice of the African Human Rights System. This is due to the fact that judicial bodies of RECs interpret the African Charter; have mandates that overlap with those of the African Court and Commission; and there is no clear institutional co-ordination between the regional courts and the continental judicial and quasi-judicial bodies. Many of the recognized RECs involve in the human rights law-making at the regional level. The law-making organs of the RECs adopt several binding human rights norms applicable in their respective regions over which they exercise jurisdiction.

Many African leaders had a dream of creating a united Africa in political as well as in economic aspects. Due to the failure of creating one united Africa, RECs have been emerged in different regions of the continent; and being membership to RECs has been considered as being a sign of being a good African and a means of obtaining external assistance. Due to such and other factors, many African states are members to various Regional Economic Communities. Membership to more than one of those RECS has

serious and long-term implications for the countries involved. Membership to more than one RECs means that the country has to participate in several economic communities and to provide personnel and backup facilities. Since human and natural resources are scarce, this would be a real burden for the Country. The country needs experts to staff these communities and complicate procedures are necessary to co-ordinate policies of the country in the different organizations. Despite multiple costs for membership contributions, the country is required to apply different external tariffs in respect of each member country. The issue of overlapping membership is not only regarded as a hurdle for the integration of the continent but also for the protection and promotion of human rights due to the existence of concurrent jurisdiction of different judicial organs on a single situation. Moreover, due to the differences in legal, social, political and administrative systems, there is a great probability of these different judicial bodies to interpret one normative source differently.¹¹ Hence, in the absence of co-ordination among the organs of RECs and between those and the African human rights system, there will be a possibility of jurisdictional rivalry and conflict on specific cases. This and other background situations lead me to study on human rights enforcement by the African Court of Human and Peoples' Rights and the Courts (Tribunal) of the RECs, particularly, the Court of Justice of ECOWAS and the Tribunal of SADC, in a comparative perspective.

1.2. Objective of the Study

The objective of this study is to find out the problems and challenges of the legal, structural and institutional framework that contributes to the respect, promotion and protection of human rights through Africa's RECs in general. In particular, this study engages in a comparative perspective the function of the Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC) as against the African Court on Human and Peoples' Rights. When trying to do so, the researcher considers the following General and Specific objectives.

¹¹ F. Viljoen, *international Human Rights Law in Africa*, Oxford University Press, 2007, at 502

1.2.1. General Objectives of the Study

The general objectives of the study are to investigate the legal, structural and institutional frameworks that enhance the enforceability of human rights through the court of justice of ECOWAS and the Tribunal of SADC comparing with the legal and institutional mechanism of the African Court on Human and Peoples' Rights ('AfCHPR'). The study also investigates the relative advantages and shortcomings and/or challenges of the existing human rights regimes of both the AfCHPR and the judicial bodies of RECs with a view to improve the judicial enforcement of human rights in the continent and to propose best practices to those judicial organs. Particular attention has been given to the roles of the courts of the two communities (the court of ECOWAS and the Tribunal of SADC) that they effectively contribute in the protection of human rights of the communities.

1.2.2. Specific Objectives of the Study

Specifically the study attempts to;

- ✓ Identify the different rules of RECs that enhance the promotion and protection of human rights in their respective regions
- ✓ Assess the nature and quality of regional human rights protection of the recognized RECs vis-à-vis the continental human rights system
- ✓ Assess the challenges and criticisms of the two communities' judicial bodies and the AfCHPR in the enforcement of human rights in their respective region and the continent, and

1.3. Statement of the Problem

In Africa there are around 14 RECs with two or more in each region¹². At the 7th ordinary session of the AU's Assembly of Heads of State and Government in Banjul, the Gambia, in July 2006, the AU officially recognized eight RECs. These RECs are mainly established to foster the economic integration of the regions. Among the considerations that motivated them to do so was the determination to strengthen their economic, social, cultural, technological and other ties for their fast, balanced and sustainable development. The responsibility for upholding human rights and fundamental freedoms rests primarily on the individual states. The international community particularly the UN at the global level and the AU at the regional level will be responsible and thus devise different mechanisms of promotion and protection of human rights in case a state fails to respect the rights of its citizens in its territory.

Hence, generally the problems in the protection of human rights may be highlighted as follows:

In Africa, the responsibility of protecting and promoting human rights vests on the established organs that operates under the African Human Rights System. These are the Commission and the Court. These bodies are exclusively established under the African Charter on Human and Peoples' Rights (ACHPR) and the Protocol to the ACHPR for the establishment of an AfCHPR for the purpose of promoting and protecting human rights in the region. However, decisions of the Commission do not have binding effect. To solve this problem, the African Court on Human and Peoples' Rights has been established and becomes operational though it has limited accessibility to individual victims.

The Courts and Tribunal of RECs are established to settle disputes that arise in the economic transactions of the communities on the basis of their treaties, protocols and declarations that have been adopted by the communities. However some RECs such as the Economic Community for Western African States (ECOWAS) give adjudicatory power on human rights issues to their Court of Justice. The Tribunal of SADC decides on human rights cases widely interpreting its mandate set out in the founding

¹² Id, at 488

instruments and the objectives of the Community. The study hence considers the normative basis of the Tribunal in comparison with the ECOWAS Court of Justice.

Moreover, RECs are involved in the law-making process on human rights issues over which their judicial bodies exercise jurisdiction, besides the laws and rules adopted at the continental level. This makes the protection and promotion of human rights at the continental level so complicated. In such cases, the co-ordination and consolidation of the protection and promotion of human rights comes in to picture. In addition since many African countries are members of more than two RECs, it creates jurisdictional rivalry and conflicts among the judicial organs of the RECs and between these bodies and the AfCHPR. More over, due to the differences in legal and political systems, different interpretations of one normative source will occur.

In the process of integration, human rights will not evade from the impact of the integration process. Respecting and promoting human rights at the national and regional level enhances the economic and political integration of the region and the continent as a whole. In the African Human Rights System, the decision of the Commission lack binding effect and though the Court is functional, the individual complaints mechanism is not directly accessible to all victims unless they come from states that have made the declaration under article 34(6). Hence, in such cases using the Courts of RECs may be appropriate for individuals. However, the decisions of the courts may be in a manner that compromises their aim. This means that the Courts may interpret norms of international human rights differently so as to meet the economic objectives of the respective communities.

RECs set the African Charter as a minimum standard to be achieved by member states. Besides this fact, the proliferation of regional judicial organs may result divergent interpretations on a single normative basis. Political and economic integration can not easily be achieved in the absence of uniform human rights protection and interpretation. In general, disregarding the promotion and protection of human rights of a community is not legally and morally acceptable. It retards the development of human resources, lowers the level of productivity and economic growth of the society and creates social

and economic inequalities among the community (ies). Hence, to ensure and accelerate the integration process of the regions and the continent, and to the effective protection and enforcement of human rights at the continental level, it is found necessary to make research and give recommendations on the abovementioned statements of problems.

1.4. Research Questions

The study tries to focus on and find out the following questions and give recommendations through analyzing the legal, institutional and structural frameworks of the communities on the one hand, and the AfCHPR on the other hand.

- What are the advantages of judicial bodies of ECOWAS and SADC in the promotion and protection of human rights compared with the AfCHPR?
- Is the enforcement of human rights through the judicial bodies of RECs complementary to the works of the AfCHPR?

1.5. Methodology of the Research

In this research, qualitative legal research methods have been used to study the protection of human rights through RECs. The study adopts a comparative approach towards the protection of human rights. Combining descriptive, prescriptive and comparative analytical approaches, this research endeavors to find out the effectiveness of RECs, in particular ECOWAS and SADC, in the protection of human rights in Africa in comparison with the AfCHPR, without compromising their original stated objectives.

Different literatures written on RECs and Human Rights have been used to conduct the research. Legislations, conventions, declarations, books, journals, policies, plans of actions, strategies, unpublished materials such as reports, archives, judgments, and other materials released by different organs were consulted. Also, electronic and print media were used to get the relevant information about the subject matter under discussion.

1.6. Scope of the Study

The researcher tries to see the human rights protection system of all types of RECs in Africa that are recognized by AU. The scope of the study covers the issues related with the protection and enforcement of human rights through the RECs.

Although the definition of the term “RECs” covers many institutions found even in other continents, the researcher focused on ECOWAS and SADC in their judicial enforcement and protection of human rights in a comparative perspective with the protection mechanism of African Court on Human and Peoples’ Rights. The research also included the experiences of some other Africa’s recognized RECs, which have better protection, and enforcement mechanisms of human rights that help the AfCHPR, ECOWAS and SADC for future betterment of protection of human rights of their respective communities.

1.7. Significance of the Study

The research is considered to have its own significance. Among others:

- to find the possible ways of protection and enforcement mechanisms of human rights through RECs and the African Human Rights institutions;
- it is hoped to contribute as a material for further study in the area of RECs and human rights in Africa, in general and protection of human rights through the Courts and Tribunals of RECs in particular;
- to initiate people to make study on the area of RECs and their roles in the promotion, protection and enforcement of human rights;
- intended to show the legal differences and gaps of the RECs, particularly ECOWAS and SADC communities, and the AfCHPR; and
- to suggest or recommend the possible solutions that the judicial bodies of RECs should follow to enhance their protection and enforcement of human rights in the continent in line with the AfCHPR

1.8. Limitations of the Study

The researcher of this thesis expects to be faced with a number of limitations and challenges. Although every research has its own limitations, it is hardly to state the entire list of elements, which have been faced with as limitations of this research.

Material Challenges: although it is essential to get different sources that serve as secondary qualitative or quantitative data, the Faculty Library does not have enough reading materials, and Internet service that are conducive and easily accessible to the researcher. The Law Library does not have reserved place and proper access to websites.

Financial Challenge: Shortage of financial provision to cover the existing cost of inflation was another problem.

Technical Challenge: because of the financial shortage and the uneasily accessibility of the judicial bodies of RECs as well as the AfCHPR, the researcher was forced to depend on secondary sources.

Access to important primary documents of the RECs is thus, the major challenge that contributes for the limitations of the study. Though efforts to collect primary documents were made, to some extent, reliance is placed on secondary materials available at the websites of the institutions. There is also difficulty in gaining access to up to date materials and cases since the websites are not updated regularly. Reliance is also placed on scholarly materials written on the RECs. These and other issues are mentioned as limitations.

CHAPTER TWO

ECONOMIC INTEGRATION AND THE DEVELOPMENT OF HUMAN RIGHTS IN AFRICA

2.1. Introduction

The need for unity, cooperation and integration is not a matter of choice but a necessity where developmental challenges such as poverty, ignorance, pervasive conflicts, natural disasters and a wide range of the diverse socio-economic and political problems have dominated. Due to the growth of the global economy which created the ruthless competitive world of globalization, the need for integration and cooperation becomes ever more important for African states to cope with the challenges of development and to advance the economic, political and social interests of the peoples of the continent.

Concerning the benefits of integration, Olesegun Obasanjo stated that:

*'Regional economic cooperation and integration has remained a central pillar of Africa's development strategy; and it has been seen as an essential instrument for faster collective growth and prosperity for the countries and peoples of this continent. It is our hope and indeed our shared aspiration to create a larger economic entity and market place that would facilitate viable production capacities in industry and agriculture through a collective exploitation of our enormous human and natural resources.'*¹³

The main purpose of this study is to provide a short description of the process of economic cooperation and integration in Africa under the auspices of supranational institutions and the emergence of provisions on human rights for the promotion and protection of human rights. Thus, this chapter will focus on the continental and regional

¹³ See former President Olusegun Obasanjo's keynote address at the National Seminar on African Union, organized by the Ministry of Cooperation and Integration in Africa held at Abuja, Nigeria, 14-15 May 2004; in D. Olubomehin and D. Kawonishe, 'The AU and the Challenges of Regional Integration in Africa'. Prepared for presentation at the Annual Conference of the African Studies Association of Australia and the Pacific, 26-28 November 2004, University of Western Australia, at 5

economic integration processes; the role of African Union (AU) in the continental integration process and the evolution of human rights in the economic integration process. The challenges facing the continental integration process and the possible solutions will be the conclusion of this chapter.

2.2. Continental Integration in Africa

The idea of a unified Africa has been developed with the pan-African congresses. The creation of African continental integration in terms of political economy was the dream of young intellectual elites who were the leaders of pan-African movement during the colonization era. Pan-African movement was taken as a guiding ideology up on which the battle for decolonization was fought with vigor, strength and determination.¹⁴ It was in the fifth pan-African congress that declared the 'freedom and independence of African states' and struggle to it to be 'free from all foreign imperialist control whether political or economic'.¹⁵ This incident can be considered as claiming their right to self-determination. The struggle includes the political and economic cooperation that led to the political unity of Africa. After the pan-African meeting held in Cairo, Egypt in 1963, and the OAU was born, as result of this meeting, in Addis Ababa at the first summit of Heads of State and Government. The question of economic cooperation and integration was one of the principal concerns of the African leaders as the basis for economic and political transformation.¹⁶ However, these efforts have been culminated with the establishment of OAU.

The Charter of OAU stated that 'all African states should unite so that the welfare and well being of their peoples can be assured'¹⁷. Moreover, the organization shall have to coordinate and intensify their cooperation and efforts to achieve a better life for the

¹⁴ L. Olu-Adeyemi and B. Ayodele, 'The Challenges of Regional Integration for Development in Africa: Problems and prospects', J.Soc.Sci., 15(3) 213-218 (2007), at 213

¹⁵ K. Nkrumah, "Revolutionary Path", London, Panaf Books, 1973, at 43

¹⁶ Olubomehin and Kawonishe, 2004,(above note 13), at 4

¹⁷ Preamble of the Charter of OAU,

peoples of Africa.¹⁸ The Charter had imposed obligation on states parties to coordinate and harmonize their general policies especially in the economic cooperation.¹⁹

Over the years, regional economic institutions have been established with the failure of the OAU to establish a single economic community. However, the organization adopted the Abuja Treaty-the Treaty establishing the African Economic Community (AEC) in 1991, in Abuja, Nigeria. The Treaty entered in to force in 1994, with the AEC forming an integral part of the OAU. While the OAU was a political body, the AEC was set up to pursue the economic integration of the continent. The Abuja Treaty seeks to Create AEC through six stages using the regional economic communities as functional building blocks of continental integration.

The OAU failed to successfully integrate African economy; solve conflicts within and among African states; bring development and improve the standard of living of the peoples of Africa.²⁰ Thus, it needed to be restructured in a way that would make it relevant to the challenges of globalized and unipolar world.²¹ Hence, the AU, which was adopted in Lome, Togo, changed the OAU, and the Assembly of the AU held its inaugural meeting in Durban, South Africa, in July 2002.²² The AU is established to accelerate the process of implementing the Treaty establishing the AEC and the political and socio-economic integration of the continent.

2.3. Regional Economic Integration in Africa

Regional integration means combining the economic, political, and social aspects of some part of a continent. Economic integration, according to John Rourke, means '*such a close degree of economic intertwining that by formal agreement, the countries*

¹⁸ Article 2(1)(b) of the Charter of OAU,

¹⁹ Article 2(2)(b) of the OAU Charter

²⁰ Olubomehin and Kawonishe, (2004), (above Note 13), at 1. Though the OAU failed to integrate the African economy, it has achieved in decolonization and collapsing the Apartheid in South Africa.

²¹ *ibid*

²² The constitutive Act of AU was adopted on 11 July 200 and entered in to force on 26 May 2001.

involved begin to surrender some degree of sovereignty and act as an economic unit.²³

In other words, regional economic integration has been defined as a

'process in which participating countries inexorably seek economies of scale, increased commercial activities and uninhibited factor mobility, via institutional integration and policy integration both of which refer to the growth of collective decision making under the auspices of supranational institution and the sharing of responsibility for policies'.²⁴

Economic integration differs from economic cooperation. The former involves deeper integration such as the unification of monetary, fiscal, social policies among member states under the supervision of supranational organ; where as the latter is a *'process whereby sovereign states cooperate with one another bilaterally or multilaterally through international governmental organizations or processes such as meetings'*.²⁵ Economic cooperation, according to van Niekerk, is the 'weakest and issue-focused arrangement', where as economic integration 'implies a higher degree of lock in and loss of sovereignty'.²⁶

Regional economic integration in Africa, motivated by the political vision of pan-Africanism and (to some extent) OAU, has been taken concrete steps in establishing institutions in all sub- regions.²⁷ As a result, the East African Community (EAC), Inter-Governmental Authority for Drought and Development IGADD (in 1996 changed in to Inter-Governmental Authority on Development-IGAD), Preferential Trade Agreement for Eastern and Southern Africa (PTA), (in 1993 changed in to Common Market for Eastern and Southern Africa-COMESA), the Economic Community of West African States-ECOWAS, Customs Union of West African states, West African Monetary Union, Economic and Customs Union of Central Africa, Economic Community for Central

²³ J. Rourke, 'International Politics and the World Stage'. Brown& Benchmark Publishers, (1995), 569

²⁴ A. Babarinde, 'Analyzing the Proposed African Economic Community: Lessons from the Experience of the European Union', prepared for the third ECSA_world conference on the EU in a changing World, Brussels, Belgium, 19-20 September 1996.

²⁵ J. Rourke, (1995), (above note 23), 569

²⁶ LK Van Niekerk, 'Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience" (2003),

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²⁷ *ibid*

African States-ECCAS, SADCC (in 1992 changed to Southern African Development Community), and Southern African Customs Union (SACU) have been established. These regional groupings have been unsuccessful in realizing the economic integration of the respective communities and the continent due to political and socio-economic reasons, such as lack of political will, low share in intra-regional trade, foreign debt, uneven distribution of trade benefits and so forth.

The adoption of the Treaty establishing the AEC, however, has shown significant remarkable changes in the regional economic institutions. The existing institutions have revised their treaties and restructured their institutions; defunct economic communities have been revived and new regional economic communities have been established. Among the RECs found in Africa, the AU's Assembly has recognized eight of them in 2006. These are the Arab Maghreb Union-AMU, The Community of Sahel-Saharan States-CEN-SAD, The Common Market for Eastern and Southern African States-COMESA, The East African Community-EAC, The Economic Community of Central African States-ECCAS, The Economic Community of West African States-ECOWAS, The Intergovernmental Authority on Development-IGAD and The Southern African Development Community-SADC. These recognized RECs are used as building blocks of the AEC. There are agreements between the AEC and some of those recognized RECs to develop and accelerate the continental economic integration in Africa. The AEC is thus intended to consolidate continental integration initiatives within the RECs.

2.4. African Economic Community (AEC)

Many African leaders perceive economic integration as promising vehicle for achieving and enhancing socio-economic development in their respective countries. This can come about through the creation of strong economic community.²⁸ The movement of Pan-Africanism tried to lead all of African states towards a united goal of prosperity, democracy and security. However, the movement culminated with the establishment of the OAU in 1963. However since the 1963, there was no concrete step that tried to

²⁸ M. Ndulo, 'African Economic Community and the Promotion of Intra-African Trade, (1992), 2

create a single, unified continental economic community in Africa. However, efforts have been made by the OAU to increase trade or other interactions among African countries. Notable among these efforts are the adoption of the Lagos Plan of Action and the Final Act of Lagos, which incorporates programmes and strategies for the promotion of economic and social development and the integration of African economies in order to increase self-sufficiency and favor the endogenous and self-sustained development of the continent.²⁹

It was with the signing of the Treaty of Abuja³⁰ that created the AEC, the Common Market of Africa that the foundations of a future economically integrated and united Africa can be seen. The Treaty envisages the creation of an African Economic Community over a period of thirty-four years using six defined stages of evolution.³¹ It also stipulates that African states must endeavor to strengthen the RECs in particular by coordinating, harmonizing and progressively integrating their activities in order to realize the establishment of AEC.³²

Among the six stages, the first three stages are to be processed by the recognized RECs. The first stage that was to be completed in 1999 was about the creation of RECs. As a result, the defunct EAC had been revived and thus completed the stage. The second stage, which was to be completed in 2007, focuses on stabilization of tariffs and other non-tariff barriers; and strengthening of intra-REC integration and inter-REC coordination and harmonization. As one of the steps towards the creation of the African common market, this stage is devoted to rationalize and strengthen the economic integration issues of recognized RECs, on the one hand, and coordinate and harmonize their activities with reviewed and shorter time frame to be agreed up on, on the other hand. The second report of the AU Commission on the status of integration in Africa shows that with the exception of IGAD and AMU, the rest of RECs have completed this

²⁹ Olubomehin and Kawonishe, (2004), (above note 13) , 4

³⁰ As of 04 February 2010, except Eritrea, the rest of 52 African States signed the Treaty; and 49 states ratified it with the exception of Djibouti, Madagascar and Somalia.

³¹ RF. Oppong, *'The AU, AEC and Africa's RECs: Untangling a Complex Web'*, (2010), 93

³² The objectives of AEC are set out under article 4 of the Abuja Treaty

stage.³³ In other words, tariff and non-tariff barriers have been eliminated in RECs, except in the IGAD and AMU. The establishment of a free-trade area and customs union in each regional economic community is the third stage that will be completed in 2017.

The last three stages are continental processes that lead to the establishment of AEC, which the RECs have not yet reached. Coordination and harmonization of tariff systems among the RECs with a view of establishing a free trade area culminating in continent-wide customs union; establishment of continent-wide African common market and common policies; and establishment of continent wide economic and monetary union which is the establishment of African Central Bank, African Monetary Fund, an African Investment Bank, African single currency and electing members of the pan-African parliament are the fourth, fifth and sixth stages. Thus, going through all the stages of integration, the activities and programmes of RECs will merge and the AEC will be created and becomes fully functional.³⁴

2.5. African Union-(AU) and the African Economic Community-(AEC).

African Union and African Economic Community are two distinct organs established with the purposes of political unification and economic integration of the continent respectively. Though political unification and economic integration are two distinct ideas, they are convoluted in Africa.³⁵ Oppong correctly observed that this convolution of *'political unification and economic integration has led to an inappropriate structuring and fusion of institutions which ultimately ill-serve the objectives of economic integration'*.³⁶

³³ Report on the second Strategic Plan of the AU Commission (2009). The report did not cover the AMU.

³⁴ The organs of the AEC are listed under article 7 of the Abuja Treaty

³⁵ Oppong (2010), (above note 31), 98

³⁶ *ibid*

The Abuja Treaty stipulated that the 'community shall form an integral part of the OAU', predecessor of AU,³⁷ and declares that the 'Treaty and protocols adopted under it shall form an integral part of the OAU Charter'.³⁸ This means that the institutions of the OAU/AU are co-opted to perform the functions of the AEC, whether the institutions are suited for the needs of economic integration.³⁹ Professor Asante opined that the organs of OAU are ill-equipped to meet the challenges of integration and affects the loss of identity of the AEC.⁴⁰ In his view, the AEC surely requires distinct and separate institutional arrangements.⁴¹ The African Court of Justice and Human Rights may be the best example to show the problem of convolution of institutional roles.

The Court of Justice is one of the organs of AEC with the jurisdiction of interpretation and application of the AEC Treaty.⁴² The Court is not yet established. Moreover it will never be operational with the adoption of the African Court of Justice and Human Rights.⁴³ The African Court of Justice and Human Rights will now perform the functions of the African Economic Community Court of Justice.

The problem related with the African Court of Justice and Human Rights in the economic integration is that though the subject matter of the court is wide, its personal jurisdiction is very restrictive even when compare with the personal jurisdiction of RECs. The Court has the jurisdiction to interpret and apply the Treaty establishing the AEC and any laws adopted by the AEC.⁴⁴ However, the personal jurisdiction of the court on economic issues is limited to the states that are parties to the Protocol establishing the court, the Assembly, the Parliament and other organs of AU, authorized by the Assembly and a staff member of the AU.⁴⁵ As the Court of AU, it may not be problematic to political issues but it is for economic matters. The Court has no

³⁷ Article 98(1) of the Abuja Treaty

³⁸ Article 99 of the Abuja Treaty

³⁹ Oppong (2010), (above note 31), 98

⁴⁰ SKB Asante, 'Towards an AEC' in SKB Asante (ed.) 'towards an AEC, African Institute of South Africa, (2001), 8-9

⁴¹ Id, 16

⁴² Article 18 of the AEC treaty

⁴³ See protocol on the Statute of the African Court of Justice and Human Rights, 2008. It is not yet in force.

⁴⁴ Article 28 of the protocol on the Statute of the African Court of Justice and Human Rights

⁴⁵ ibid

jurisdiction to hear cases involving states that are not parties to the protocol even though they may be parties to the AEC Treaty. This will be a challenge for uniform application and enforcement of the community law and is difficult to have a stable and effective economic community where community law is not uniformly applicable with in and enforceable against member states.⁴⁶

Moreover, Individuals who have played significant roles in the ECOWAS, SADC, COMESA and EAC will not have chances to participate in the judicial processes of the community. Thus, it restricts the number of potential disputes that may be brought to the Court and, thus, put the effectiveness of the economic integration of the continent under question. Oppong firmly argue that the absence of individual standing on economic issues before the Court is inconsistent with the position of other African RECs.⁴⁷ Hence, revisions of the Protocol on the Statute of the African Court of Justice and Human Rights concerning the *locus standi* for individuals on economic issues are recommendable.

2.6. Continental Integration and the Development of Human Rights

The establishment of the OAU was with the main purposes of political integration having a restrictive competence. Among the main purposes, eradication of colonialism and apartheid were some of them that the organization had succeeded. One of the guiding principles of the organization was the respectation of the newly acquired sovereignty of African states, which in turn taken by African leaders to act with in their territories as they pleased. Thus, many African leaders had oppressed their peoples with impunity.⁴⁸ The organization as well as other African leaders watched helplessly as violations of various forms occurred in many countries guided by the principle of non-interference in the internal affairs of states and respect for domestic sovereignty.⁴⁹

⁴⁶ Oppong (2010), (above note 31) 100

⁴⁷ Id, 102

⁴⁸ The oppressive regimes of Idi Amin's Uganda, Bokasa's Central African Republic, and Nguema's Equatorial Guinea were, some of them, viewed internationally as paradigmatic of African leadership.

⁴⁹ T. Murthi, 'The African Union', (2005), 26

As some scholars have argued, human rights and practices have some sort of symbiotic relationship which enables citizens to participate in and influence governmental decision-making.⁵⁰ Therefore, respect for human rights is seen as important for political stability and democratic governance. Internal peace and stability is the vital tool for integration. However, lack of respect for human rights, which is the main cause of internal conflict in Africa, is internal challenge to governmental legitimacy and the potential of conflict with neighboring states that do not provide the right environment for integration.⁵¹

In the OAU Charter, there were some references to human rights. The preamble of the OAU Charter declared that 'non- interference is the inalienable right of the peoples of Africa' and to achieve their legitimate aspirations, respecting the principles of equality, justice, freedom, and dignity are essential objectives. Moreover, the Charter of the UN and the UDHR have been given due regard to promote international cooperation and provide solid foundation for peaceful and positive cooperation among states.⁵² However, that reference could be described as merely a record of adherence to the principles of the UN Charter and the UDHR, and an indication of the OAU's compatibility to the spirit of the UN rather than actual commitment to undertake binding obligations of human rights.⁵³ Hence, the OAU did not show the type of commitment in the area of human rights as it did in the areas of decolonization and apartheid.⁵⁴ Though the OAU showed some commitment in the protection of human rights in its preamble, the structure of the organization restricted it with an attendant impotency of action.⁵⁵ No organ of OAU was dedicated to the protection of human rights.

⁵⁰ J. Takougang, *'The Future of Human Rights In Sub-Saharan Africa'*, in J. Mbaku (ed.), 'Preparing Africa for the 21st century', (2002), 79

⁵¹ *ibid*

⁵² See the seventh paragraph of the preamble and article 2(1)(e) of the OAU charter

⁵³ G. Naldi, 'The OAU: An Analysis of its role', (1989), 6

⁵⁴ Z. Cervenka, 'The Unfinished Quest for Unity: Africa and the OAU', (1977), 8

⁵⁵ SC. Saxena, *'The AU: Africa's Giant Step Towards Continental Unity'*, in J. Mbaku and SC. Saxena (eds.), "Africa: The Crossroads", (2004), 180

By the end of 1969, the OAU took its first step towards the protection of human rights with the adoption of a Convention to regulate refugee issues in the continent.⁵⁶ This shows that until the 1970's, realization of human rights in Africa was almost an after thought in continental integration process. The evolution of the African human rights system can be traced back to the 1961 Lagos Conference on the 'Rule of Law', which was organized by the International Commission of Jurists that represents the first firm calls on African Heads of State and Government to give serious thoughts to the adoption of a regional human rights instrument in Africa.⁵⁷ This was followed by the 1967 statement and resolution 24 (xxiv) issued by the UN Commission on Human Rights and in 1972 calling for the establishment of continent specific institutions for the protection of human rights in Africa.⁵⁸ In June 1981, the OAU Assembly of Heads of State and Government adopted the African Charter on Human and Peoples Rights. The adoption of the Charter clearly demonstrates a major shift of the OAU policy and principles in the realization of human rights in the continent. Because, for an institution established on the basis of the principle of non-interference in the domestic affairs of states, the adoption of the Charter is manifestation of the willingness of states to give up to a body created in the exercise of sovereign will. In fact, the Charter created the African Commission on Human and Peoples' Rights as the main supervisory body of the African Charter.

Under the auspices of the OAU/AU, other human rights instruments that deal with specific aspects of human rights in Africa have been adopted. The African Charter on the Rights and Welfare of Child, the Protocol on the Rights of Women in Africa and the African Youth Charter are some of the instruments that develop the African human rights system. Moreover, to complement the protective mandate of the African Commission, the OAU Assembly of Heads of State and Government adopted the Protocol on the Establishment of an African Court on Human and Peoples' Rights in June 1998, in Burkina Faso.

⁵⁶ Naldi, 1989,(above note 53), 108

⁵⁷ Id, at 180

⁵⁸ ibid

To accelerate the integration process and to amend the mandate on the protection of human rights, the OAU was transformed into the AU. It was viewed as a 'visionary step towards greater integration, good governance and the rule of law' in African countries.⁵⁹ The Constitutive Act of the AU included references to human rights. One of the objectives of the AU, outlined in its Constitutive Act is the '*promotion and protection of human rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments*'.⁶⁰ Moreover, the principle for continental integration is also expanded with the collective right of AU to intervene in a member state in respect of grave circumstances that violated aspects of human rights.⁶¹ The guiding principles of AU underscore the importance of human rights, specifically respect for human rights, democratic principles, the rule of law and good governance. Ensuring the promotion and protection of human rights are regarded as the integral part of the mandates of the main organs of AU. A human rights mandate may be inferred from the objectives, powers and functions of the Peace and Security Council, ECOSOC, the Pan-African Parliament and the African Union Commission.⁶²

2.7. Regional Economic Communities and Human Rights

As it was at the continental level, the realization of human rights was initially not the focus of RECs since they were primarily established for economic purposes. Many members of RECs were those African leaders who continuously violated human rights domestically with impunity without interference at the regional or continental level. Lack of respect for human rights that is potential for political instability hampered both the integration process and economic growth and development.⁶³ A peaceful environment, which recognizes and promotes human rights, is regarded as a fundamental prerequisite for economic development and integration. Thus, unlike the original constitutive instruments of the various RECs, recognition and respect for human rights

⁵⁹ Murithi, 2005, (above note 49), 34

⁶⁰ Article 3(h) of the Constitutive Act of AU

⁶¹ Article 4(h) of the Constitutive Act of AU

⁶² See Article 2(5) of the Statute of ECOSOC of AU (2004), Article 3 of Protocol Establishing the Pan-African Parliament, and Article 3(f) of the Protocol Establishing the Peace and Security Council

⁶³ Takougang, 2002, (above note 50), 181-82

appears to be institutional principles in the revised constitutive treaties of many of the RECs.⁶⁴ Most of the instruments establishing the various RECs adopted after the African Chapter on Human and Peoples' Rights, explicitly refer to the promotion of human rights under the African Charter either as an objective or as a fundamental principle of the economic groupings.⁶⁵

Another reason is that states have acceded or ratified specific human rights treaties, conventions, or declarations at the global / continental level in committing themselves to respect, promote and protect human rights.⁶⁶ These obligations of commitments, then, are also needed to be reflected in the constitutive instruments of RECs. The development of human rights in the RECs may be due to the change in the political climate of some regions, pressure from civil society organizations, from the integrating states and calls for reform from donor countries and organizations to expand original objectives.

The adoption of the Abuja Treaty, Come up with the use of RECs as pillars for continental economic integration. Thus the link created by the RECs, AU and AEC needed to align the principles of the RECs with the policy and principles of the AU and AEC. Thus, some of the RECs have revised their constitutive treaties, re-established and re-structured their institutions and consequently included the principles of recognition and protection of human rights in their treaties.

RECs are not only incorporated norms of human rights in to their constitutive instruments, but also translated human rights principles and ideals into practice. This can be realized by either judicial or extra judicial (administrative) means both resulting in the promotion and enforcement of human rights.⁶⁷ Therefore, RECs incorporated human rights in to their constitutive instrument, using their various institutions, respect,

⁶⁴ See article 4(9) of the Revised ECOWAS Treaty, 1993; article 6(A) of the IGAD Agreement: and article 4(c) of the SADC Treaty, 1992

⁶⁵ S. Musungu, '*Economic Integration and Human Rights In Africa: A comment on Conceptual linkages*', 3 AHRLJ, 2003, 88-96, 92

⁶⁶ OC. Ruppel, '*RECs and Human Rights in East and Southern Africa*', AHRLJ, (2009), 275-316, 275

⁶⁷ id, 281

promote and enforce human rights that are laid down in their legal instruments, in the African Charter or in other various instruments.

2.8. African Economic Community and Human Rights.

The Abuja Treaty is the establishing instrument of the AEC. The Treaty designed the RECs as the pillars up on which the unified continental economic community becomes true. Thus, the co-ordination, harmonization and gradual integration of the activities of RECs, on the basis of the proposed stages within the time limit, is expected for economic integration at the continental level. As the building blocks for effective establishment of AEC, the activities of RECs on human rights may have impact on the future community. RECs incorporate the norms of human rights instruments in their constitutive instruments; draft economic policies guided by human rights principles; and oblige member states and institutional organs to act in accordance with the specific principles of human rights; respect for human rights and review human rights related issues at the regional community judicial institutions. Thus, the involvement of RECs in the realization of human rights may have a positive impact on the activities of the AEC.

The Abuja Treaty affirms and declares the adherence of the parties to recognize, promote and protect human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights as a principle of the Community.⁶⁸ Article 3 provides that the contracting parties

'in pursuit of the objectives stated in article 4 of this treaty (AEC Treaty) solemnly affirm and declare their adherence to the following principles...

'(g) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.'

In the body of the Treaty itself one of the objectives of AEC is to

'promote cooperation in all fields of human endeavor in order to raise the standard of living of African peoples and maintain and enhance economic

⁶⁸ Article 3(9) of the Abuja Treaty

stability, foster close and peaceful relations among member states and contribute to the progress, development and the economic integration of the continent’.

The close reading of this article implies that the drafters of the Treaty took cognizance of the right to development provided under article 22(2) of the African Charter and as such imposed duty on member states to promote the coordination and harmonization of the integration activities of RECs to which they belong. With respect to human rights protection, a number of other provisions in the Treaty are worth highlighting. The member states undertake to abolish national restrictions on the free movement of peoples, goods, services and capital and the right to residence and establishment,⁶⁹ protect the environment,⁷⁰ provide basic education,⁷¹ health⁷² and ensure the rights of women.⁷³

However, though the Treaty incorporates norms of human rights, the Court of Justice will not entertain issues on human rights since the functions of the Court of the Community is devoted to the African Court of Justice and Human Rights. Therefore, the African Court of Justice and Human Rights will be able to hear violations of human rights when it comes in to operation.

2.9. Challenges of the Integration Process

Efforts of political unity and economic integration have been started with the initiatives of Pan-African movement. These gave impetus for the creation of the OAU in 1963 and many other economic institutions in different regions. However, even today all these endeavors do not result political unification or economic integration of the continent. Recent efforts reveal that there are positive forces, which will lead to the socio-

⁶⁹ Article 43 of the Abuja Treaty

⁷⁰ Article 58 of the Abuja Treaty

⁷¹ Article 68 of the Abuja Treaty

⁷² Article 73 of the Abuja Treaty

⁷³ Article 75 of the Abuja Treaty

economic integration, greater unity and solidarity between African countries. As the successor of OAU, the AU is structured with vastly expanded mandate enabling it to create unity and solidarity among African nations and promote political stability, peace, development and human rights. The New Partnership for Africa's Development (NEPAD) and African Peer Review Mechanism (APRM) are also designed to accelerate the continental and regional economic integration. The signing and ratification of the Treaty establishing the AEC is also a necessary step to create economically integrated Africa. However, there are also major challenges and obstacles to the process of economic integration that should be addressed.

To start with, lack of political commitment to have agreed policies and plans, the non-observance of commitments undertaken with in the respective agreements and to incorporate the regional and continental agreed policies and plans in the national policies are the major challenges in the political environment. Ndolu stipulates that

'there is a lack of political will in the member countries that is necessary to see integration succeed, expressed in the chronic, non-observance of commitments undertaken with in the respective agreements and in the insufficient use of the instruments set up by these agreements'.⁷⁴

The existence of political instability in Africa is against the efforts to integrate African economy. Another major challenge to the integration process is inadequate infrastructures, especially in the transportation and telecommunications among African countries. The low level of inter-regional and intra-regional trade in Africa is the other challenge. Overlapping membership, the unequal distribution of trade benefits between member countries are another challenges of the integration process.

Having identified the challenges and obstacles to the economic integration, the following possible solutions are recommended. African countries shall focus on the establishment of a strong political foundation. Strong political commitment will be a strong base to make every effort such as to have common standing on the trade liberalization;

⁷⁴ M. Ndulo, 1992, ,(above note 28), 9

harmonization of monetary policies; incorporation of regional and continental agreed policies and plans into domestic policies and plans; and the observance of the agreed policies and plans. Explaining the reasons for integration to the peoples and participate them should be accorded special roles in African integration. This will promote the private sector investment at the national, regional and continental level. Investment on physical hindrances to trade, such as roads, railways, power line, air services and telecommunications, is necessary. Besides, RECs must work hand-in-hand. For instance, COMESA, EAC and SADC decided to start working together towards a merger in to a single REC with the objective of fast tracking the attainment of the AEC.⁷⁵ The last but not the least solution is that, since trade benefits unavoidably are unequally distributed between countries, there must be well designed, satisfactory and adequately funded compensatory mechanism for countries with vulnerable economies. These and other possible solutions, if applied properly, will solve the problems faced by the integration process.

⁷⁵ COMESA-EAC-SADC, Final Communiqué of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government, held in Kampala, Uganda, (2008): Towards a single Market-Deepening COMEAS-EAC-SADC Integration; available at <http://about.comesa.int/attachments/078-Final-Communique-Kampla-22-10-08.pdf> last accessed on 20 July 2010

CHAPTER THREE

HUMAN RIGHTS PROTECTION WITH IN REGIONAL ECONOMIC COMMUNITIES AND THE AFRICAN HUMAN RIGHTS SYSTEM

3.1. Introduction

The constitutions of almost all African countries have recognized and guaranteed the promotion, protection and enforcement of human rights.⁷⁶ Not only normative rules have been incorporated, but also institutional mechanisms for the protection and enforcement of human rights have been established. However, in Africa, large-scale breaches of human rights have repeatedly committed. The domestic human rights protection systems are not working properly in such countries. It should be emphasized that the domestic level of protection should be the strongest of all levels of protection. However, if the domestic legal system of a particular country does not protect the human rights of every one within its jurisdiction, there will be a need for higher level of protection.

In Africa, at the continental level, normative and institutional frameworks for human rights protection and enforcement have been established. The African human rights system has developed various human rights norms and jurisprudence. The main legal instrument of the African human rights system is the African Charter on Human and Peoples' Rights (The African Charter) which together with other human rights instruments make up the normative framework of the system. Besides for the effective implementation of these instruments, different organs have been established. The African Commission on Human and Peoples' Rights (The African Commission) is one of the important organs for the effective implementation of human rights in Africa. To complement the protective mandate of the Commission, the African Court on Human and Peoples' Rights (The African Court or the African Court of Human Rights) is established. Therefore, it remains to be seen to what extent these organs promote,

⁷⁶ See generally, C. Heyns (ed), Human Rights in Africa, Kluwer Law Int'l, (1999)

protect and enforce human and peoples' rights in Africa. This chapter focuses on the protection and enforcement of human rights within the African human rights regime.

RECs in Africa are established mainly for the purpose of economic cooperation and integration. However, many of the treaties establishing these institutions make references to human rights. These treaties also establish the recognition and protection of fundamental human rights and freedoms as a main principle of their systems. Thus, this chapter also tries to review and analyze the normative framework of the recognized RECs for the promotion and protection of human rights as well as on the applicability of human rights normative rules through their judicial bodies.

3.2. African Human Rights System.

Africa is one of the regions in the world by and large establish its own supra-national human rights system. The legal foundation for continental human rights system is the

'adoption of a general human rights treaty which recognizes a wide range of human rights and the establishment of monitoring or enforcement mechanism (body or bodies) to determine whether violations have occurred and supervise the applicability of treaty in domestic spheres of states parties'.⁷⁷

These bodies are the human rights commissions and human rights courts.

In Europe, under the auspices of the Council of Europe, the first continental human rights system has been established, short after the end of the Second World War (WWII). The Treaty establishing the system is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and its subsequent protocols.⁷⁸ The system had a dualistic enforcement mechanism: the European

⁷⁷ C Heyns, and F. Viljoen, "Current Developments: An Overview of International Human Rights Protection in Africa", 15 SFJHR, (1999). At 421

⁷⁸ The convention entered in to force on 3 September 1953. The European Social Charter adopted in 1961 and entered in to force on 26 February 1965, which recognizes Economic, Social and Cultural rights, where as the Convention and its subsequent protocols exclusively recognizes civil and political rights.

Commission of Human Rights and the European Court of Human Rights. However, the adoption of Protocol 11 in 1998 brought a new system of enforcement mechanism. The system uses only the European Court of Human Rights comprising the mandates of both the Commission and the Court. Supervising the compliance of decisions of the court by the states which have been found in violations of the European Convention and subsequent agreements is in the hands of the Committee of Ministers which is composed of foreign affairs of members of the Council of Europe.⁷⁹

Like wise, the Inter- American Human Rights System is established with the adoption of the American Convention on Human Rights of 1969⁸⁰ and the American Declaration on the Rights and Duties of Man of 1948. Under the auspices of the Organization of American States (OAS), the system recognized and adopted two-tier enforcement mechanisms: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Although there is no specific mechanism to supervise the compliance of decisions of the Commission and the Court by the states, which have been found to be in violations of the American Convention, the General Assembly of the OAS has a general mandate in this regard.⁸¹

The system in the Africa is based on the African Charter on Human and Peoples' Rights of 1981.⁸² Under the auspices of the OAU, the African Charter recognizes all the traditional three generations of human rights-civil and political rights, economic, social and cultural rights as well as solidarity or group rights. However, the Charter does not encompass all the rights provided in the 1966 UN Covenants such as the right to privacy,⁸³ the right to form trade unions,⁸⁴ the right to free, fair and periodic elections,⁸⁵ freedom from forced labor⁸⁶ and rights related to housing and social security.⁸⁷ The

⁷⁹ Article 46(2) of the European Convention of Human Rights

⁸⁰ The Convention entered in to force on 18 July 1978

⁸¹ Article 65 of the American Convention on Human Rights

⁸² The Charter entered in force in 1986

⁸³ See article 17 of the Covenant on Civil and Political Rights of 1966

⁸⁴ Article 8 of the Covenant on Economic, Social and Cultural Rights of 1966

⁸⁵ Article 25 of the Covenant on Civil and Political Rights of 1966

⁸⁶ Id article 8(2) and (3)

⁸⁷ Article 11 of the Covenant on Economic, Social and Cultural Rights of 1966

Charter also makes reference to individual and state duties. The unique features of the Charter are the recognition of the indivisibility and interdependence of all generations of rights;⁸⁸ the recognition of individual duties;⁸⁹ inclusion of peoples' rights;⁹⁰ and the use of claw-back clauses⁹¹ as opposed to the traditional derogation clauses. Derogation clauses set out the extent and conditions under which a right may be limited or restricted; whereas claw-back clauses subject a right to state discretion using phrases such as "with in the law"; 'in accordance with the law'; and 'provided one abides by the law'.⁹² There are also other human rights instruments that are playing a role in realizing human rights in Africa. Some of them are the OAU Convention Governing the Specific Aspects of Refugee problems in Africa;⁹³ the African Charter on the Rights and Welfare of the child;⁹⁴ and Protocol on the Rights of Women in Africa.⁹⁵

Enforcement of the Charter primarily rests with the African Commission on Human and Peoples' Rights. The mandates of the Commission are promotion and protection of human rights and interpret the provisions of the Charter.⁹⁶ The adoption of the Protocol on the Establishment of the African Court on Human and Peoples' Rights complements the protective mandate of the Commission. The judgment of the Court is binding on the parties, final and not subject to appeal. Supervision of compliance with the decisions of the Court by states that are found in violations of the Charter and other subsequent agreements is exercised by the Executive Council on behalf of the Assembly of AU.⁹⁷

Four year after the adoption of a resolution to merge the African Court on Human and Peoples' Rights and the African Court of Justice in July 2004, the Assembly of Heads of

⁸⁸ The 7th paragraph of the preamble of the African Charter stated that states parties to the Charter convinced that civil and political rights can not be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

⁸⁹ See articles 27-29 of the African charter

⁹⁰ Id, articles 19-24

⁹¹ Id, articles 9,10,12,13 and 14

⁹² SF Musungu, 2003, (above note 65), at 91

⁹³ Adopted on 19 September 1969 and entered into force on 20 June 1974

⁹⁴ Adopted on 11 July 1990 and entered in to force on 29 November 1999

⁹⁵ Adopted on 11 July 2003 and entered in to force on 25 November 2005

⁹⁶ Article 45 of the African Charter

⁹⁷ See article 29(2) of the Protocol of the African Court on Human and Peoples' Rights

State and Government adopted the Protocol on the Statute of the African Court of Justice and Human Rights at the summit of AU held in Sharm EL-sheikh, Egypt, in July 2008.⁹⁸ This means that both the African Court of Justice and the African Court on Human and Peoples' Rights merge and create a single court- the African Court of Justice and Human Rights.⁹⁹ Thus, with the entry in to force of the Protocol on the Statute of the African Court of Justice and Human Rights, the continent will have a single court mandated with various jurisdictions such as disputes concerning political, economic and human rights matters. Therefore, any case that is under the jurisdiction of this Court will be brought to the African Court of Justice and Human Rights.

3.2.1. The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (the African Commission or the Commission) was established by the Banjul Charter and come in to existence in 1987. The Commission consists of 11 members serving in their personal capacity and each of them elected for a six-year renewable period.¹⁰⁰ The members of the Commission are elected by secret ballot by the Assembly of OAU/AU, nominated by the states parties to the Banjul Charter.¹⁰¹ The Commission has two regular sessions per year, each lasting for about two weeks and when necessary may meet for extraordinary sessions. Before extended to 15 days, the period of each regular meeting was 10 days.¹⁰²

The primary functions of the Commission are to promote human and peoples' rights; ensure its protection and interpret the provisions of the Banjul charter. In terms of promotion, the Commission may collect documents; under take studies and research; organize seminars, symposia and conferences; disseminate information; encourage national and local institutions working on human and peoples rights; formulate and laid

⁹⁸ As of 06 August 2010, the protocol is signed by 22 African countries and ratified by Burkina Faso, Libya, and Mali.

⁹⁹ Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights of 2008

¹⁰⁰ Articles 31 and 36 of the African Charter

¹⁰¹ Id article 33

¹⁰² See Rules 2 and 3 of the Rules of Procedure of the African Commission (1995)

down rules and principles; make recommendations to governments and cooperate with other African and international human rights institutions.¹⁰³

Protection entails reception of communications of alleged human rights violations by states parties. The communications may be lodged by other states parties,¹⁰⁴ or by individual and /or NGOs.¹⁰⁵ Following consideration of the complaints, the Commission is required to report to the states concerned and to the Assembly of Heads of State and Government about the facts and its findings.¹⁰⁶ The Commission has received not more than 400 communications in its history; many of which are inadmissibility decisions due to lack of exhaustion of local remedies and complaints against non-state parties or institutions.¹⁰⁷ Exhaustion of local remedies is a prerequisite to the Commissions' declaring any case admissible for consideration on the merits and is the single most common reason that communications are declared inadmissible.¹⁰⁸ Decisions of the Commission from time to time show a steady improvement in the overall level of quality and detail of submissions and jurisprudence. Recent decisions of the Commission contain extensive references to the jurisprudence of the international judicial and quasi-judicial bodies and to international soft laws including resolutions and declarations of the Commission and other institutions.¹⁰⁹

The Commission is also empowered to interpret all the provisions of the Banjul Charter whenever requested by the 'states party to the Charter, an institution of the OAU/AU or an African organization recognized by the OAU/AU'.¹¹⁰ In interpreting the Charter, the Commission shall take in to consideration of various African instruments on human and peoples' rights, the charters of UN, OAU (the Constitutive Act of AU), the UDHR and other human rights instruments adopted by the UN and by African countries.¹¹¹

¹⁰³ See article 45 of the African Charter

¹⁰⁴ Id, articles 47-53

¹⁰⁵ Id, articles 55-58

¹⁰⁶ Id article 52

¹⁰⁷ The decisions of the Commission are available on <http://www.achpr.org/english/-info/list-Decision-Communications.html>

¹⁰⁸ See Articles 56(5) of the African Charter

¹⁰⁹ See Generally, 'Decisions of the African Commission on Human and Peoples' Rights on Communications 2002-2007', Institute for Human Rights and Development in Africa, Banjul, the Gambia, April 2008

¹¹⁰ See article 45(3) of the African Charter

¹¹¹ See Article 60 and 61 of the African Charter

Furthermore, the Commission exercises its mandate in the form of receiving and considering state reports and after reviewing the reports, it forwards concluding observations to the respective states. The status on submission of state reports to the African Commission clearly indicates that almost all states parties to the Banjul Charter do not comply with the duty to submit reports on the measures taken with in the states parties. As of May 2010, 13 states parties do not even submit the initial report to the African Commission; 17 states parties only submit reports once; 15 states parties submit reports twice combining the periodic reports with other overdue reports and 7 states parties submit reports to the Commission 3 times. Only Rwanda submits reports to the Commission four times,¹¹² combining over due reports with periodic reports.¹¹³

When there is a series of serious or massive violations of human and peoples' rights, the Commission is empowered to resort to any appropriate method of investigation.¹¹⁴ For the exercise of its functions, the Commission is empowered to establish committees, working groups and sub-commissions of experts.¹¹⁵ Pursuant to these powers, the Commission, establishing different committees and working groups, conducted certain investigations on thematic issues such as the situations of refugees' returnees and displaced persons'; undertake on site investigations in particular countries;¹¹⁶ and also appointed Special Rapporteurs on extra-judicial, summary or arbitrary executions on prisons and conditions of detentions in Africa;¹¹⁷ press freedom and the Right to information; human rights defenses in Africa; and on the rights of women in Africa.¹¹⁸

¹¹² Rwanda ratified the Banjul Charter on 15 July 1983. It submits the first report in August 1990, the second report in March 2000, the third report in June 2004 and the fourth one in June 2007.

¹¹³ See The Status on Submission of State Reports to the African Commission, available on <http://www.achpr.org/english/-info/statereport-considered-en.html>, last accessed on 27 June 2010

¹¹⁴ See Articles 46 and 58 of the African Charter

¹¹⁵ See Rules 28(1) and 29(1) of the Rules of Procedure of the Commission

¹¹⁶ The Commission sent Fact-finding Missions to the Republic of Sudan (Region of Darfur), from 8th -18th July 2004 and to the Republic of Zimbabwe from 24th -28th June 2002.

¹¹⁷ The Special Rapporteur on Prison and Detention in Africa has been sent to Cameroon from 2nd -15th September 2002, Ethiopia from 19th -29th March 2004 and to the Republic of South Africa from 14th -30th June 2004

¹¹⁸ The Special Rapporteur on the Tights of Women in Africa has been sent to the Republic of Cape Verde.

Despite its broad mandate and powers, the protective mandate of the Commission suffers lack of enforcement power and remedial authority. The Commission is not empowered to award damages or compensation and condemn an offending state but only make recommendations to the parties. These recommendations are some times not observed by states parties. Udombana concurs that 'disregarded of the Commissions' recommendations, orders and pronouncement by member states has become the norm in Africa'.¹¹⁹ The Commission in its eleventh Annual Activity Report reveals that 'the non-compliance by some states parties with the Commissions' recommendations affects its credibility'.¹²⁰ However, the publication of the report of the Commission up on the decision of the Assembly of Heads of State and Government creates 'mobilization of shame' up on the states that are not observed the recommendations of the Commission.

3.2.2. **The African Court on Human and Peoples' Rights**

In the European and Inter-American Human Rights Systems, Governments respect the orders of the respective courts and, thus, the systems are effective mechanisms for the protection of human rights in their regions.¹²¹ However, in the 1980s and 1990s, Africa has experienced massive human rights violations. In such periods, the African Human Rights System was without a court. Though the Commission has the protective mandate, it was not powerful and effective mechanism to stop the abuses of human rights that were committed by undemocratic African leaders. Thus, learning from the experiences of the European and inter- American Human Rights systems, the establishment of an African human rights court makes necessary. Hence, the Protocol Establishing the African Court on Human and Peoples' Rights was adopted by the 34th ordinary session of the General Assembly of OAU, in June 1998 in Burkina Faso.¹²²

¹¹⁹ NJ. Udombana, *'Toward the African Court on Human and Peoples' Rights: Better late than Never'*, 3Yale Hum. Rts and Dev't L.J., 2000, at 67

¹²⁰ Report on the Eleventh Annual Activity Report, 1997-98, African Commission on Human and Peoples' Rights, 22nd -23rd ordinary Session, Para. 38

¹²¹ NJ Udombana, 2000, ,(above note 119), 78

¹²² 51 countries with the exception of Eritrea and Cape Verde; and ratified by 25 countries sign the protocol until 06 August 2010.

The Court is established to complement the protective mandate of the Commission. Thus, it is required to function as an effective body for the protection of human and peoples' rights filling the gaps of the Commission. The Court is empowered to enforce the provisions of the Banjul Charter and other human rights instruments that states party are ratified or acceded. It is, therefore, mandated to deliver binding judgments and to make appropriate orders for remedies, including orders for the payment of fair compensation and reparations.¹²³

The Court has been established in 2006. It is composed of 11 Judges elected by the Assembly of AU, nominated by the states parties taking in to consideration of adequate gender representation; representation of the main regions of Africa and of their principal legal traditions. Cases can be submitted to the Court by states parties and the African Commission. References to the Court to be made by individuals and NGOs are up on the will and discretion of states parties to the protocol. In order for the Court to hear cases filed by NGOs and individuals, the state must expressly declare the acceptance of the competence of the Court to receive petitions from individuals and NGOs.¹²⁴ The subject matter jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol Establishing the Court and any other relevant human rights instruments ratified by the states concerned.¹²⁵ Furthermore, the Court is authorized to give advisory opinions at the request of a member state of the OAU/ AU, the OAU/AU, any of its organs or any African organization recognized by the OAU/AU.¹²⁶

In terms of enforcement of the African Court's remedial and provisional orders, the protocol provides that states parties '*undertake to comply with the judgment in any case to which they are parties with in the time stipulated by the court and to guarantee its*

¹²³ Article 27 of the protocol of the African Court of Human Rights

¹²⁴ Id article 34(6)

¹²⁵ Id article 3

¹²⁶ Id article 4(1)

execution'.¹²⁷ If states parties have failed to comply with its judgments, the Court is required to specifically list them in its annual reports to the AU.¹²⁸ Moreover, the Executive Council is mandated to monitor the execution of judgments on behalf of the Assembly of Heads of State and Government.¹²⁹ The Court is ultimately expected to be merged with the African Court of Justice when the Protocol Establishing the Statue of the Court of Justice and Human Rights comes in to effect.¹³⁰

3.2.3. **The African Committee of Experts on the Rights and Welfare of the Child**

The African Children's Charter establishes the African Children's Rights Committee. The Committee is composed of 11 members elected by the OAU/AU Assembly from a list of persons nominated by states parties.¹³¹ Members of the Committee serve for a five year term and are eligible for re-election.¹³² The first Committee was elected in 2001 and held its first meeting in 2002. The functions of the Committee is to exercise its quasi-judicial powers vested under the African Children's Rights Charter such as receiving inter-state and individual communications; receiving and reviewing state reports and undertaking fact-finding missions to states parties.¹³³ The Committee does not have the power to deliver binding decisions but to make recommendations on communications sent to it. Article 42(c) of the African Children's Charter stipulates that the Committee has the competence to interpret the African Children's Charter at the request of relevant parties. Since its establishment, the Committee has received very few communications.¹³⁴ The Committee should actively involve in the promotion and protection of the rights of children in Africa. However, due to the limited activity of the

¹²⁷ Id article 30

¹²⁸ Id article 31

¹²⁹ Id article 29(2)

¹³⁰ See Viljoen, 2007, ,(above note 11), 225

¹³¹ Articles 32-34 of the African Children's Charter

¹³² Id article 36

¹³³ See Viljoen, 2007, ,(above note 11), 220

¹³⁴ See the communication submitted by the Centre for Human Rights against Uganda for massive violations on the rights of children in the conflict-ridden Northern part of the country (2005).

Committee, there have been calls for the African Commission to be mandated to assume responsibility for implementation of the African Children's Charter.¹³⁵

3.2.4. **Evaluating the African Human Rights System**

Compared with the European and Inter-American Human Rights Systems, the African Human Rights System is the weakest system in terms of enforcement and development of jurisprudence. Though the system is now in a better situation in terms of having a significant impact on the promotion and protection of human rights in Africa, the African human rights system still faces challenges and obstacles that should be addressed. The major challenge of the system is less enforcement of judgments rendered by the Commission. There is lack of commitment on the side of political organs such as OAU/AU General Assembly to supervise the implementation of the decisions of the Commission. The Commission also lacks the competent to render binding decision. Since the Commissioners are not full-time employees, there is no speedy trial. Furthermore, the confidentiality procedure of the Commission also creates uncertainty about the result of a communication. Though the establishment of the African Court on Human and Peoples' Rights adds the impact on the protection of human rights of the system, the optional nature of the right to individual petition to the court paralyses the effective nature of the court. Because, NGOs and individuals play significant roles for the effective implementation of human rights instruments. Finally, lack of financial resources; the issue of over due reports and other normative and structural problems can be mentioned. Therefore addressing such and other problems of the African Human Rights System for the better protection of human rights in the continent need to be developed. However, due to the problem related to its normative and structural framework, the system is not that much effective. Thus, complementary form of human rights protection system is necessary, and applied by RECs, for the effective enforcement and protection of human rights in the continent.

¹³⁵ See Viljoen, 2007, ,(above note 11) 222-224

3.3. Normative Framework and Protection of Human Rights under the Regional Economic Communities

There are at least 14 main regional integration initiatives in Africa.¹³⁶ Among these organizations, eight of them were given official recognition by the AU Assembly in 2006. These groupings are viewed as the major RECs representing the main regions of the continent. Thus, there will be brief introduction about these regional integration schemes and their activities in the promotion and protection of human rights.

3.3.1. The Arab Maghreb Union-(AMU)

The AMU was established in 1989 with the signing of the Treaty of Marrakech between Algeria, Libya, Mauritania, Morocco, and Tunisia.¹³⁷ Article 2 of the Treaty states the main aim of AMU as to strengthen ties among member states; introduce the free circulation of goods, services and persons within the territories of the member states and to pursue a common policy in diplomatic cooperation, defense, the economy and culture. The organs of the Community are the Presidential Council, which is composed of Heads of State and Government and is the supreme body of the AMU, Council of Foreign Ministers, Secretary-General, a Consultative Council and a Judicial Organ consisting of two judges from each state.

3.3.1.1. Protection of Human Rights within AMU

The Treaty of Marrakech does not make any specific reference to human rights. Thus, the protection of human rights in the AMU can only be indirect. This means that the decision-making processes of the organs of AMU should be guided by human rights principles since they are considered as general customary laws. On the judicial side, the enforcement of the Treaty or other legal instruments adopted by the Presidential Council, works through the activities of the Community Court of Justice. The

¹³⁶ See Viljoen, 2007, (above note 11), 488

¹³⁷ Ibid

jurisdictional competencies of the Court are to settle disputes related to the interpretation and application of the Treaty and agreements concluded within the framework of AMU; to deliver advisory opinions on any legal question submitted by the Presidential Council and advisory opinions on the relations between the AMU and its employees.¹³⁸ For the Court to hear cases, the Presidential Council or one of the disputing parties must submit the dispute. Individuals and NGOs have been denied access to the Court. The Court does not have express mandate to entertain cases relating to human rights. Moreover, the absence of reference to human rights in the Constitutive Act and the restrictive access to the Court by individuals and NGOs, the Court may indirectly protect human rights through the interpretation and application of the Treaty and subsidiary agreements.¹³⁹ However, the Community Court of Justice does not yet come in to operation.

3.3.2. The Community of Sahel – Saharan States (CEN-SAD)

The CEN-SAD was established on 4 February 1998 in Tripoli. The Community as its membership comprises of 28 countries located in the North, Central and West African regions. The objectives of CEN-SAD are the establishment of a global economic union; the removal of all restrictions to regional integration of the member states; the promotion of economic cooperation and social development; environment, gender, peace and security and agriculture.¹⁴⁰ The Community, further, aims to ensure the free movement of persons, capital, goods and services; guarantee the right of establishment and ownership; and ensure the exercise of economic activity and free trade among member states. CEN_SAD qualifies as one of the RECS in 2000 and recognized by the AU in 2006 as building block for the establishment of AEC. The organs of the Community include a Conference of Heads of State and Government, an Executive Council, a General Secretariat, the Sahel-Saharan Investment and Trade Bank and the Economic, Social, and Cultural Council. The Community does not have a Court of Justice.

¹³⁸ See Article 13 of the AMU Treaty; for more on the Statute, <http://www.aict-ctia.org>

¹³⁹ See generally, E. Nwauche, '*Regional Economic Communities and Human Rights In West Africa and the African Arabic Countries*', in B. Anton and D. Joseph, '*Human Rights In Africa: Legal Perspectives on their Protection and Promotion*', Macmillan Education Namibia, (2009),

¹⁴⁰ See <http://www.cen-sad.org>

3.3.2.1. Human Rights Protection With in CEN-SAD

The Community of CEN_SAD neither incorporates human rights norms in its treaty nor establishes a judicial organ. Member states and individuals do not have channel to settle their disputes and resolve their grievances. Thus, it is difficult to imagine how disputes are solved. The realization of human rights in the Community may be achieved through realizing its objectives. However, this is the weakest system of protection.

3.3.3. The Common Market for Eastern and Southern Africa (COMESA)

Established as a successor organization to the Preferential Trade Area for Eastern and Southern African (PTA) that was in existence since 1981, COMESA was established in 1994 with in the OAU framework to improve economic cooperation between member states.¹⁴¹ It aims to achieve economic integration in the region in all fields of development. The COMESA Treaty establishes organs of the Community; namely the COMESA Authority that is composed of Heads of State or Government, Council of Ministers, Court of Justice, the Committee of Governors of Central Banks, the Inter-Governmental Committee, the Technical Committees, the Consultative Committee and the Secretariat. COMESA as one of the recognized RECs signed the OAU/AU_RECS Protocol and maintains formal relations with other RECS especially with SADC and EAC.¹⁴²

3.3.3.1. Human Rights Protection with in COMESA

The Treaty establishing COMESA makes specific references to ‘recognition, promotion and protection of fundamental human rights’ though the main objective of COMESA is the promotion of regional integration through trade and investment. The protection of human rights is part of its activity. The preamble of the Treaty refers that the principles of international relations between sovereign states, the principles of liberty and

¹⁴¹ For more details on COMESA, visit <http://www.comesa.int>

¹⁴² See ‘Deepening COMESA-EAC-SADC Integration’, available at <http://about.comesa.int/attachments/078-Final-Comminique-Kampala-22-10-08.pdf>

fundamental freedoms as well as a democratic system of good governance are the fundamental principles of COMESA.¹⁴³ Article 6 of the COMESA Treaty is the most relevant provision concerning the recognition, promotion and protection of human rights in accordance with the African Charter. The Treaty establishes it as one of the fundamental principles of COMESA. Realizing pervasive conflicts as a major challenge for economic development, the principles of the Treaty calls for peaceful settlement of disputes, which is prerequisite for economic development and the *status quo* of human rights.¹⁴⁴

The Treaty provides that to protect the fundamental human rights and best needs of the Community, a state party may impose restrictions on trade.¹⁴⁵ However, such restrictions or prohibitions on trade shall be informed to the Secretary-General of the Community about its intention prior to taking the restrictive measures. The measure taken should be proportional in respect of achieving the goal, necessary and non-discriminatory.¹⁴⁶ The COMESA Treaty also provides the protection of environment recognizing that clean and healthy environment is a prerequisite for economic growth. Hence, provision is made for any action having an environmental impact to contain the objective; to preserve, protect and improve the quality of the environment; to contribute towards protecting human health and to ensure the rational utilization of natural resources.¹⁴⁷

3.3.3.2. Judicial Enforcement of Human Rights with in COMESA

The COMESA Court of Justice was established in 1984 'to ensure the adherence to law in the interpretation and application of the Treaty'.¹⁴⁸ The Court has the jurisdiction to hear disputes and adjudicate up on all matters that may be referred to it pursuant to the

¹⁴³ Article 6(g) and (h) of the COMESA Treaty

¹⁴⁴ Article 6(j) of the COMESA Treaty

¹⁴⁵ Id, article 50(1) (c) and (f)

¹⁴⁶ Id, article 50(3)

¹⁴⁷ Id, article 122(2) and (5). See also OC. Ruppel, '*Regional Economic Communities and Human Rights in East and Southern Africa*', in B. Anton and D. Joseph, '*Human Rights In Africa: Legal Perspectives on their Protection and Promotion*', Macmillan Education Namibia, (2009), at 286-87

¹⁴⁸ Id, article 19.

COMESA Treaty. COMESA member states, the Secretary–General, NGOs and individuals may bring complaints to the Court, which is of specific importance with regard to human rights–related matters. Furthermore, residents in member states may approach the Court to determine the legality of any act, regulation, directive or decision of the Council or of a member state on the ground that such act, regulation, directive or decision is unlawful or an infringement of the provisions of the COMESA Treaty.¹⁴⁹ However, before approaching the Court, individuals are required to exhaust local remedies before the national courts of member states of COMESA. Decisions rendered by the Community Court on the interpretation and application of the Treaty or the subsequent agreements have precedence over the decisions rendered by national courts. Furthermore, national courts may ask the Court of COMESA for preliminary ruling concerning the interpretation and application of the Treaty provided that the domestic courts consider that the ruling on the question is necessary to render judgment.¹⁵⁰ The decisions rendered by the Community Court of Justice are final and not open to appeal.¹⁵¹

The judgments delivered by the COMESA Court of Justice are expected to be enforced by the concerned member states, or the Council may take appropriate measures necessary to implement the judgment. If a party fails to fulfill its obligations pursuant to the decision of the Court, the Court has the competence to prescribe such sanctions, as it considers necessary to be imposed against the party.¹⁵² Since individuals specifically can access the Court of Justice and since the treaty mentions human rights, the Court has the potential to contribute for the promotion and protection of human rights in the region if it arises in the course of disputes on the interpretation and application of the Treaty and subsidiary agreements.

¹⁴⁹ Id, article 26

¹⁵⁰ Id, article 30

¹⁵¹ Id article 31(1)

¹⁵² Ibid article 34(3) and (4)

3.3.4. The East African Community (EAC)

The EAC was originally founded in 1967 by Kenya, Tanzania and Uganda, when Presidents Kenyatta, Nyerere and Obote signed the East African Cooperation Treaty. After ten years of operation, the Cooperation was dissolved due to differences in economic policies, ideological differences and political instability in the region.¹⁵³ With the renewed regional integration interactive at the continental level, the Treaty Establishing the EAC was ratified in 1999 and entered in to force in 2000. The EAC Treaty is unique because states parties undertook to establish among themselves a customs union, a common market, a monetary union and ultimately a political federation. Thus, the EAC aims at widening and deepening cooperation among its member states in political, economic, social and cultural fields.¹⁵⁴

The states parties pledged themselves to develop policies and programs specifically aimed at widening and deepening cooperation among themselves in the political field in addition to economic, social and cultural areas. To implement the Community objectives, the EAC Treaty provides organs; namely the Summit of Heads of State and Government, the Council of Ministers, the Coordination Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat. With the admissions of Rwanda and Burundi in 2007, currently the EAC have five member states. The AU recognizes the EAC in 2006 as one of the building blocks of AEC.

3.3.4.1. Human Rights Protection with in EAC

The EAC Treaty provides provisions on the protection of human rights and principles relating to the protection of human rights that states parties should take cognizance and respect for it. The Treaty establishes good governance, democracy, rule of law, equality and the recognition, promotion and protection of human rights in accordance with the

¹⁵³ Many reasons have been cited for the dissolution of EAC in 1977.see Viljoen, 2007, 490

¹⁵⁴ Article 5 of the EAC Treaty. The 1999 Treaty of EAC has been amended in December 2006 and August 2007. The Treaty is available at <http://www.eac.int>

provisions of the African Charter as fundamental principles.¹⁵⁵ The Treaty, further, requires that any other state wishing to become a member must be seen to adhere to universally acceptable principles of good governance, democracy, rule of law and observance of human rights and social justice.¹⁵⁶ Article 7(2) of the Treaty provides for partner states under taking to abide by the 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. These provisions reflect the realization of human rights in the Community that the EAC undertakes as a main organizational objective.

The EAC Treaty further focuses on specific human– rights-related issues to pursue as part of its programmes. As one of its specific objectives, the Community endeavors to enhance the role of women in the cultural, social, political, economic and technological development.¹⁵⁷ Gender equality is recognized as one of the fundamental principles of the EAC and should be observed in the appointment and composition of staff in EAC organs and institutions.¹⁵⁸ To enhance the role of women and improve their situation in the socio-economic development, chapter 22 of the Treaty comprises a broad range to promote effective education awareness programmes aimed at changing negative attitudes towards women. Chapter 22 urges member states to take appropriate legislative and other measures to abolish legislations and discourage customs that discriminate against women; promote effective education awareness programmes aimed at changing negative attitudes towards women; and take measures to eliminate prejudices against women and promote gender equality in every respect.¹⁵⁹

The EAC Treaty contained provisions on peace and security that is closely related to the protection of human rights and prerequisite for effective socio-economic development and achieving the EAC objectives. The Treaty envisages fostering and maintaining a conducive atmosphere of peace and security through cooperation and

¹⁵⁵ Article 6 of the EAC Treaty

¹⁵⁶ Id, article 3(3)(b)

¹⁵⁷ Id, article 5(3)(e)

¹⁵⁸ Id, articles 6(d) and 9(5)

¹⁵⁹ Id, see articles 121 and 122

consultation with a view to the prevention, resolution and management of disputes and conflicts between member states.¹⁶⁰ The EAC Treaty further included human-rights-related provisions with regard to the free movement of persons, labor, goods and services; the right of establishment and residence;¹⁶¹ agriculture and food security;¹⁶² health, cultural and social activities;¹⁶³ and management of the environment and natural resources.¹⁶⁴

The EAC Council of Ministers adopted the EAC Plan of Action on Promotion and Protection of Human Rights in the region in 2008.¹⁶⁵ The Plan of Action provides for a framework of policies, strategies and activities that address promotion and protection of human rights. It is guided by the EAC Treaty, which upholds the principle of respect for human rights in accordance with the African Charter. It envisages to enhance and complement partner states' laws, policies, strategies and programmes in inculcating the culture of human rights in line with the Community's fundamental principles; namely, the principle of mutual trust, political will and sovereign equality; the principle of peaceful co-existence and good neighborliness; the principle of peaceful settlement of disputes and conflicts; the principle of good governance (including adherence to the rule of law, accountability and transparency) and the principle of social justice, equal opportunities, gender equality as well as recognition, promotion and protection of human rights in accordance with the African Charter. The Plan of Action also envisages to achieve the establishment of new and the strengthening of existing national human rights institutions; the development of training manuals and guidelines for human rights actors and agencies and the training of actors involved in the promotion and protection of human rights including judges/judicial officers, electoral commissioners, policy makers and implementers, legislators and civil society.

¹⁶⁰ Id, article 124(1)

¹⁶¹ Id, see chapter 17

¹⁶² Id, see chapter 18

¹⁶³ Id, see chapter 21

¹⁶⁴ Id, see chapter 19

¹⁶⁵ EAC, 16th meeting of the Council of Ministers; Report of the Meeting, Arusha International Conference Centre, Arusha, Tanzania, 13 September 2008, Para. 20

The EAC also adopted a Protocol on Environment and Natural Resources, which was ratified by EAC member states in 2008.¹⁶⁶ The protocol gives recognition to the fact that clean and healthy environment is a prerequisite for sustainable development and beneficial to present and future generations.¹⁶⁷ Thus, the protocol included provisions for cooperation in environmental and natural resource management, covering a wide range of sectors such as forestry, biodiversity, wildlife, water, mining and energy resources, drought, climate changes and the ozone layer.¹⁶⁸ The protocol makes provisions for environmental impact assessments and audits and for the establishment of a Sectoral Committee on environment and natural resources.

The provisions of the EAC Treaty and subsidiary agreements demonstrate an intention on the part of the member states to pursue some human-rights-related activities in the form of gender, the protection of environment and the promotion of peace, security and stability. These activities can loosely be located in the objectives of the EAC. Viljoen has observed that concern for human rights is an integral part of the EAC regime.¹⁶⁹ The provisions related to human rights and principles contained in the Treaty can only be beneficial to the citizens of the community where there is actual protection of human rights within the institutional framework of the Community. This is because no organ of the Community does expressly confer the mandate to promote and protect human rights. This does not mean that the system for the protection of human rights in the region does not exist.

In March 2008, the EAC Council of Ministers urged Ministries responsible for human rights in member states to include the implementation of the EAC Plan of Action on the promotion and protection of human rights in their annual budgets. It also urged the introduction of the mechanisms for the development of National Action Plans on the protection and promotion of human rights.¹⁷⁰ The Council of Ministers also authorized

¹⁶⁶ Id, at 15

¹⁶⁷ See the Preamble of the EAC Protocol on Environment and Natural Resource Management (2008)

¹⁶⁸ Ibid, see chapter 3 of the Protocol

¹⁶⁹ Viljoen, 2007, (above note 11), 498

¹⁷⁰ See Decisions of the EAC Council of Ministers, available at <http://www.eac.int/council-decisions/decisions.php>, last accessed on 27 July 2010

the EAC Secretariat to host meetings of Heads of National Human Rights Commissioners (NHRCs) of the member states. Furthermore, the Secretariat has been mandated to promote capacity building in the field of human rights through initiating projects aimed at strengthening the work of NHRCs and other national human rights actors. These initiatives can best be considered as advocacy efforts of the EAC for the promotion and protection of human rights in the region.

Provisions in the EAC Treaty place the onus on member states and institutional organs to act in accordance with specific principles such as the rule of law, democracy and respect for human rights. Thus, decisions to be taken by member states or the organs of EAC should be guided by human rights principles laid down in the Treaty.

3.3.4.2. Judicial Enforcement of Human Rights with in EAC

The East African Court of Justice (EACJ) is mandated to ensure adherence to law in the interpretation and application of the Treaty and compliance with the Treaty.¹⁷¹ Judicial protection of human rights in the region is, therefore, the responsibility of the EACJ. It has the jurisdiction to interpret and apply the Treaty. The Court consists of a First Instance Division and Appellate Division.¹⁷² The member states, the EAC Secretary General and legal and natural persons may make references to the Court.¹⁷³ Thus, individuals and NGOs may approach the Court being parties to a dispute. National courts can ask the EACJ for a preliminary ruling concerning the application and interpretation of the Community law. The Court is also mandated to give advisory opinions on the request of the Summit, the Council or partner states.

Concerning the cases on human rights and human-rights-related-matters, the EACJ has no jurisdiction up on such matters. Article 27 (2) of the EAC Treaty provides that jurisdiction on human-rights-related matters is subject to a respective protocol that would trigger the human rights competence of the EACJ which has not yet been

¹⁷¹ See article 23(1) of the EAC Treaty

¹⁷² Id, article 23(2)

¹⁷³ Id, articles 28-30

adopted. Thus, currently, the EACJ does not have any express mandate to hear disputes and adjudicate up on allegations concerning violations of human rights that may refer to the Court under the EAC framework. In 2005, the so-called 'Zero Draft Protocol'¹⁷⁴ to operationalize the Court's extended jurisdiction was emanated by the Secretariat' though the meeting of the Council of Ministers had not approved it.¹⁷⁵ The Draft Protocol provided for original, human rights and appellate; and other jurisdiction including alternative dispute resolution.

In the absence of a clear mandate on human rights, the EACJ may rely on the concept of general principles of law that confer some form of human rights jurisdiction. The Court can extend its interpretative mandate to the provisions of articles 6 and 7 and may assume an implied human rights jurisdiction. One writer argues that EACJ has an option to accept human rights related matters on the basis of an implicit jurisdiction.¹⁷⁶ In a similar way, Viljoen stated that to the extent that the '*Treaty itself contains references to human rights, Article 27(2) does not foreclose the individual referrals on the basis of human rights*'.¹⁷⁷ The EACJ has actually received cases with obvious link to human rights. In Katabazi case,¹⁷⁸ the EACJ claim that 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.¹⁷⁹ The Court has also heard some cases with link to and implications for human rights but the Katabazi case is the one where obvious human rights issues were raised.¹⁸⁰ Even though there has been very limited judicial and quasi-judicial protection of human rights in the region, the EAC is considered as

¹⁷⁴ The Community Secretariat drafted it on the direction of the Sectoral Council on Legal and Judicial Affairs because of the need to provide for the handling of disputes in accordance with article 27(2) of the EAC Treaty.

¹⁷⁵ See Ruppel, 2009, (above note 147), at 307

¹⁷⁶ *ibid*

¹⁷⁷ Viljoen, 2007, (above note 11), 504

¹⁷⁸ Katabazi and 21 others V Secretary General of the EAC and the Attorney General of the Republic of Uganda (2007), AHRLR, 119

¹⁷⁹ Katabazi case, Para 39

¹⁸⁰ See professor Nyoung'o and 10 others V The Attorney General of Kenya and Others ; Reference 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

one of the developed regional schemes in the protection and promotion of human rights with both of the ECOWAS and SADC Communities.

3.3.5. The Economic Community of Central African States (ECCAS)

The dawn of ECCAS can be traced back to the 1981 when the Summit of Leaders of the Customs and Economic Union of Central African (UDEAC) concluded an agreement to create an economic community for Central African States to widen the trading area. In 1983, the UDEAC member states including Burundi, Rwanda, and DRC signed the Treaty establishing ECCAS in Libreville, Gabon and it became operational in 1985. However, the conflicts in the region and the failure of member states to pay their dues paralyzed the activities of the Community. Learning from its experience, the Community goes beyond economic issues and incorporates the issue of peace and security in its operations by establishing the Council for Peace and Security in Central Africa in order to promote, maintain and consolidate peace and security in the region. The main objectives of ECCAS are to achieve collective autonomy; raise the standard of living of its populations; maintain economic stability through harmonious cooperation and ultimately establishing a Central African Common Market.¹⁸¹ The organs established under the ECCAS Treaty are the Assembly of Heads of State and Government, Council of Ministers, General Secretariat, the Court of Justice, the Consultative Commission and Specialized Technical Committees or organs set up by the Treaty. The ECCAS is one of the RECs recognized by the AU as building block of the AEC.

3.3.5.1. Human Rights Protection with in ECCAS

The Treaty establishing ECCAS does not explicitly refer to human rights protection. However, the Treaty indicates that states parties should observe the principles of international law. Article 3 of the ECCAS Treaty imposed obligations on states parties to observe the principles of international law governing relations between states in particular the principles of sovereignty, equality and independence of all states, good

¹⁸¹ See for more details on ECCAS, <http://www.ecac-eccas.org/index/php>

neighborliness, non-interference in their internal affairs, and non-use of force to settle disputes and the respect of the rule of law in their mutual relations. Therefore, human rights law that form customary law principles of international law can be considered as the principles that member states of ECCAS should respect as it forms part of ECCAS legal regime.

ECCAS, like other RECS, is involving in the promotion and maintenance of peace and security in the region by establishing the Council for Peace and Security; on gender equality by adopting of the ECCAS Gender Policy and in the promotion of health especially on HIV/AIDS through adopting a Declaration on the Fight against HIV/AIDS (2004) and Strategic Framework for the Fight against HIV/AIDS in Central Africa. Furthermore, the Community focuses on the free movement of persons, goods, services and capital. These activities contribute towards enhancing human rights in the region.

Disputes that arise on the interpretation and application of the Treaty are primarily to be settled amicably by the parties. If the parties fail to reach on agreement for the dispute, the Court of Justice of ECCAS will decide on the issue concerned. However, though the Treaty under article 16 provides for the establishment of the ECCAS Court of Justice, it is not yet operational. It is difficult to claim the violations of human rights at least indirectly, through interpreting and applying the Treaty. To sum up, the protection of human rights is not mentioned expressly in the Treaty as well as there is no established judicial organ to deal with cases concerning violations of human rights.

3.3.6. Intergovernmental Authority on Development –(IGAD)

Intergovernmental Authority on Drought and development (IGADD) was established in 1986 in order to address the recurring and other natural disasters occurred in the Eastern African region. The Assembly of Heads of State and Government signed the Letter of Instrument to Amend the IGADD Charter /Agreement which establishes the Intergovernmental Authority on Development (IGAD) on 21 March 1996 in Nairobi, Kenya. The main objectives of IGAD are promoting economic cooperation and

integration; achieving regional food security; sustainable development of natural resources and environmental protection; promoting peace and stability in the region and promoting and realizing the objectives of COMESA and AEC.¹⁸² The organs of IGAD are the Assembly of Heads of State and Government, the Council of Ministers, the Committee of Ambassadors and the Secretariat. IGAD is a recognized REC by AU and strives for the establishment of AEC. IGAD is headquartered in Djibouti.

3.3.6.1. Protection of Human Rights with in IGAD

Article 6 of the IGAD Agreement incorporated principles and objectives, many of which are related to the protection of human rights. The most relevant provision for the protection of human rights is article 6(A), which states that the ‘recognition, promotion and protection of human rights in accordance with the provisions of the Banjul Charter’ is one of its main principles. The Agreement also focuses on specific human-rights-related issues; such as the promotion of food security and the free movement of goods, services and peoples with in the region; the combating of drought; the protection of environment and the promotion of peace and security in the region.¹⁸³ Further human-rights-related provisions have been included in the IGAD Agreement with regard to humanitarian activities; gender issues and the prevention and treatment of HIV/AIDS. There is neither a Court of Justice nor an administrative tribunal in the IGAD. The protection of human rights in the IGAD is tied with the realization of its objectives. In the absence of judicial organ, it is difficult to settle disputes in the region. Therefore, violations of human rights cannot be enforced in the region.

3.3.7. The Southern African Development Community (SADC)

SADC was established in 1992 in Windhoek, Namibia, to supersede the Southern African Development Coordination Conference (SADCC) that was founded in 1980. The SADC aims at achieving economic development and growth; alleviating poverty;

¹⁸² For more detail on IGAD, see <http://www.igad.org/index.php>

¹⁸³ Article 7 of IGAD Agreement

enhancing the standard and quality of life; the evolution of common political values, systems and institutions; promoting peace and security; and achieving sustainable utilization of natural resources and effective protection of the environment with the ultimate objective of establishing an economic community.¹⁸⁴ The organs of SADC are the Summit of Heads of State and Government, the Organ on Politics, Defense and Security Cooperation,¹⁸⁵ the Council of Ministers, the Integrated Committee of Ministers, the Standing Committee of Officials, the Secretariat, the Tribunal and the SADC National Committees. The AU recognized SADC as one of the building blocks of the AEC. The headquarters of SADC is in Gaborone, Botswana.

3.3.7.1 Human Rights Protection With in SADC

The Treaty establishing the SADC was established in 1993 following the Declaration made by Leaders of Southern African States committing themselves to establish the Community at Windhoek, Namibia in August 1992. The 1993 Treaty was amended in 2001 resulting substantial and structural changes.¹⁸⁶ When compared with the 1993 Treaty, it is possible to find an intention on member states to provide some form of human rights guarantees in the Amended Treaty. The Amended Treaty contains human rights and human-rights-related provisions that laid down a basis for the promotion and protection of human rights within the Community though it is not listed as the main objectives of the organization.

The preamble of the Treaty provides the popular involvement in the integration process through guaranteeing democratic rights and observing human rights and the rule of law.¹⁸⁷ Further, the Treaty provides the commitment by SADC and its member states to act in accordance with the principles of human rights, democracy and the rule of law. In other words, article 4(c) of the Treaty states that SADC as an institution and its member states committed themselves to respect human rights, democracy and the rule of law.

¹⁸⁴ Article 5 of the SADC Treaty. For more detail on SADC, visit <http://www.sadc.int/>

¹⁸⁵ Article 9 of the Amended SADC Treaty. The organ on Politics, Defense and Security Cooperation was established as an additional institution of SADC with the Amendment of the 1993 SADC treaty in 2001

¹⁸⁶ Viljoen, 2007,(above note 11), 492

¹⁸⁷ Paragraph 5 of the preamble of the Amended Treaty

Furthermore, the objectives, principles and general undertaking of member states in the SADC Treaty links to human–rights–related issues such as alleviating and eventually eradicating poverty; the maintenance and consolidation of democracy, peace, security and stability; the promotion of common political values; combating HIV/AIDS and other deadly and communicable diseases and mainstreaming gender in the Community building.¹⁸⁸ Article 6(2) of the Treaty further provides that states parties are undertaking not to discriminate against any person on the basis of gender, religion, political views, race, ethnic origin, culture, ill health, disability or any other ground as may be determined by the Summit. Furthermore, in order for a state to accede the organization of SADC, it shall observe the principles of democracy, human rights, good governance and the rule of law in accordance with the African Charter.¹⁸⁹

Other than the Treaty, the protection of human rights is mentioned in many legal instruments; one category of which is the SADC protocols. These protocols directly or indirectly link with the protection of human rights. Developed out of an earlier SADC Declaration on Gender and Development, the SADC Protocol on Gender and Development is adopted in August 2008.¹⁹⁰ The protocol is binding legal instrument expressly addressing issues such as affirmative action, access to justice, marriage and family rights, gender based violence, health, HIV/AIDS and peace-building and conflict resolution.¹⁹¹ Member states to the protocol undertake to tackle discrimination and commit themselves to implement the provisions of the protocol.¹⁹² Article 17 of SADC Gender Protocol confers jurisdiction up on the Tribunal to hear disputes relating to the protocol.

¹⁸⁸ Id, article 5

¹⁸⁹ See <http://www.sadc.int/>. In 2003, the Summit amended the admission criteria developed in 1995 by adding the requirement that there should be a commonality of '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 organization. See GH. Oosthuizen, 'The Southern African Development Community The Organization, its policies and Prospects', Johannesburg Institute for Global Dialogue, 2006, quoted in Viljoen, 2007, (above note 11), 499

¹⁹⁰ See Ruppel, 2009, (above note 147), 293

¹⁹¹ Ibid

¹⁹² Paragraph 1 and 2 of the preamble and article 14 of the SADC Gender Protocol

The SADC Protocol on Politics, Defense and Security Cooperation, which is adopted in 2001,¹⁹³ makes reference to the observance of universal human rights provided for in the Charters and Conventions of the OAU/AU and the United Nations.¹⁹⁴ Recognizing the principles and objectives of SADC Treaty and the integration issues, the Summit of Heads of State and Government adopted protocols concerning education and training, on the facilitation of movement of persons, combating corruption, and many others that have relevance to the promotion and protection of human rights. Apart from the SADC Treaty and the SADC protocols, the Community adopted non-binding legal instruments that are important human rights documents.

The Charter of Fundamental and Social Rights in SADC were adopted by member states in 2003. The SADC Charter specifies the rights on labor and employment issues such as the right to freedom of association, the right to equality, the right to protection of specific groups in society such as children, the elderly and persons with disabilities.¹⁹⁵ Thus, the SADC Charter provides basically for the rights of workers; and it also makes reference to general human rights instruments like the UDHR and the African Charter.¹⁹⁶

With respect to HIV/AIDS, the SADC member states signed a Declaration on HIV/AIDS in 2003. The Declaration recognizes the human rights and fundamental freedoms of peoples living with HIV/AIDS.¹⁹⁷ The Declaration strives to realize the objectives of SADC Treaty.¹⁹⁸ In relation to free, fair and periodic election, soft law developed on the platform of SADC including the Principles and Guidelines Governing democratic Elections which establishes the SADC Electoral Observation Missions that member states can invite to observe their elections.¹⁹⁹ The Guidelines provides for guidelines on the observation of elections; a code of conduct for election observers and the rights and

¹⁹³ The protocol entitles SADC to undertake enforcement action as a last resort. Further, it mandates the Organ on Politics, Defense and Security to seek to resolve significant inter-state and intra-state conflict in SADC members.

¹⁹⁴ Preamble of the Protocol on Politics, Defense and Security Cooperation

¹⁹⁵ Article 3 of the SADC Charter

¹⁹⁶ Id, articles 5 and 7

¹⁹⁷ The Declaration on HIV/AIDS, available at <http://www.sadc.int/>

¹⁹⁸ Ruppel, 2009, (above note 147), 295

¹⁹⁹ Ibid, 294, see also <http://www.sadc.int/>

duties of member states holding elections.²⁰⁰ Further, the 2003 Declaration on Agriculture and Food Security aims at achieving the promotion of sustainable and equitable economic growth and socio-economic development and ultimately eradication of poverty; sustainable utilization of natural resources and effective protection of the environment; mainstreaming of gender equality in the process of community and nation building.²⁰¹ The Declaration is of specific importance for the human rights to food, enhancement of gender equality and human health and the mitigation of chronic diseases such as AIDS.²⁰²

The SADC Treaty does not confer an express human rights mandate on any of the institution's organs. Thus, the SADC human rights practice spreads across the functions of the various institutions; and thus, the SADC institutions have been involved in the observation and monitoring aspects of human rights work at the community level. In the SADC Secretariat, a Gender Unit exists to coordinate the SADC activities in the area of gender development and to advise SADC institutions and member states on gender issues.²⁰³ The SADC Gender Unit largely involved in activities such as coordinating and monitoring activities in the region; coordination and monitoring of women's empowerment programs and facilitating the acceleration of women's involvement in social, economic and political participation.²⁰⁴ The SADC Secretariat also involves in supportive programmes to enhance gender equality and promote national implementation of SADC and National Plans of Actions to combat violence against women.²⁰⁵

Similar to gender aspect, an HIV/AIDS Unit was set up in the SADC Secretariat to coordinate SADC activities such as combating the disease in constant review of Millennium Development Goals and promote the right to health, especially in relation to

²⁰⁰ *ibid*

²⁰¹ *Id* at 295

²⁰² *ibid*

²⁰³ Viljoen, 2007, (above note 11), 512

²⁰⁴ Visit <http://www.sadc.int/archieves>

²⁰⁵ *Ibid*

HIV/AIDS.²⁰⁶ The SADC Protocol on Politics, Defense and Security Cooperation established the Organ on Politics, Defense and Security (OPDS). This Organ 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 violations of human rights.²⁰⁷ In the event of intervention, the Organ may employ the methods including preventive diplomacy, negotiations, conciliation, mediation, good offices, arbitration and international adjudication.²⁰⁸ To sum up, the engagement of SADC in the realization of human rights has shown that it has the potential to impact on the work of continental human rights institutions.

3.3.7.3 **Judicial Enforcement of Human Rights with in SADC**

Article 9 of the SADC Treaty established the SADC Tribunal as one of the institutions of the Community. Article 16 (2) of the Treaty mandates the SADC Summit of Heads of State and Government to adopt a protocol for the purpose of defining the composition, powers, functions and procedures of the Tribunal. Adopting the Protocol on the Tribunal and the Rules of Procedure in 2000, the Summit appointed the Judges of the Tribunal during its summit in Gaborone, on 18 August 2005. In accordance with article 4(4) of the protocol, the Tribunal has the Jurisdiction to hear and adjudicate on disputes between states, and between natural and legal persons in the SADC Community.²⁰⁹ Thus, the Tribunal is mandated to exercise jurisdiction up on all matters relating to the interpretation and application of the Treaty, protocols as well as subsequent agreements; the validity of protocols and other legal instruments and of acts (decisions) of the institutions of the Community. Further, references to the Tribunal may be made by member states, individuals /NGOS and the institutions of the Community. The SADC Tribunal lacks an express mandate over cases of human rights violations despite the provisions relating to human rights in the Treaty. Thus, it can be concluded that a

²⁰⁶ Viljoen, 2007, (above note 11), 511

²⁰⁷ Article 2(b) of the SADC Protocol on Politics, Defense, and Security Cooperation

²⁰⁸ Id, article 3

²⁰⁹ Article 15(2) of the protocol of 1991

human rights jurisdiction would only be granted through adopting a separate human rights instrument.²¹⁰

Though the Tribunal primarily set up to resolve disputes arising from economic and political issues, the current practices of the Tribunal demonstrate that the Tribunal has competence to hear cases relating to violations of human rights. In *Campbell and 78 others v Zimbabwe*²¹¹, the Tribunal stated that ‘it is competent to hear cases alleging violations of human rights contrary to the provisions of the SADC Treaty’. In its final judgment, the Tribunal stressed that it is clear that it has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law.²¹² This indicates that the Tribunal of SADC pays attention to human rights issues even beyond the expectations raised by the limited rights related Treaty and other protocol provisions. Therefore, SADC has some practice in the field of human rights protection and thus it is the focus of this work.

3.3.8. The Economic Community of West African States (ECOWAS)

Originally, ECOWAS was established on the 28th of May 1975 in Lagos, Nigeria. The main objectives of the Community are to promote cooperation and integration in economic, social and cultural activity with the ultimate goal of establishing an economic and monetary union.²¹³ Further, it aims to raise the living standard of its people; maintain and enhance economic stability and foster relations among member states. Due to the proliferation of internal conflicts in member states of the Community, ECOWAS woke up to the need to go beyond economic development and integration and incorporate efforts towards peace and security in to its wider operations, which led to the establishment of the ECOWAS multilateral armed and peacekeeping force known

²¹⁰ Viljoen, 2007, (above note 11), 505

²¹¹ *Mike Campbell and 78 others (PVT) Limited V The Republic of Zimbabwe*, SADC (T) Case No 2/2007. The Case was filed in 2007 and judgment was delivered on 28 November 2008.

²¹² Campbell case, Para 25

²¹³ Article 3 of the Revised Treaty

as the ECOWAS Monitoring Group (ECOMOG).²¹⁴ ECOWAS and SADC have gone further than other RECs by converting the commitment towards peace and security in to an involvement in peacekeeping, peace enforcement and humanitarian intervention.²¹⁵

The 1975 Treaty was revised in 1993 and entered in to force in 1995. The ultimate goal of the revision was accelerated and sustained economic development through integration taking in to consideration of the necessity of regional peace and security and the increasing demand for democratization, development and respect for human rights.²¹⁶ This paved the way for ECOWAS to pay greater attention to human rights realization.

Article 6 of the Revised Treaty set out the organs to be the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, the Executive Secretariat, the Fund for Cooperation, Compensation and Development and Specialized Technical Committees. ECOWAS is a recognized REC and is a foundation party to the OAU/AU-RECS protocol. The Community is headquartered in Abuja, Nigeria.

3.3.8.1. Protection of Human Rights with in ECOWAS

The protection of human rights with in ECOWAS is built on the legal framework of the organization. In the existing human rights architecture of the ECOWAS regime, the ECOWAS Revised Treaty, Protocols, Conventions and legislative products of the ECOWAS Community Organs constitute the material sources of rights in the ECOWAS framework. The Revised Treaty makes ample references to human rights protection.

²¹⁴ N. Nwogu, 'Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS' *Journal of Human Rights* 6, (2007), 345-360, at 348. ECOMOG is the first regional peacekeeping initiative on the African Continent. After the overthrow of the Kabbah Government of Sierra Leone in 1997, the ECOMOG intervened to restore peace and provide humanitarian assistance. Further, the ECOMOG was deployed in Guinea-Bissau and Cote D'Ivoire in order to maintain peace. The Protocol o Conflict Management formally establishes and provides a legal basis for ECOMOG intervention in member states to alleviate human suffering and the mechanism may be triggered by serious and massive human rights violations and when a democratically elected government has been overthrown. See articles 17 and 25 of the Protocol.

²¹⁵ Viljoen, 2007, (above note 11), 518.

²¹⁶ Preamble of the Revised Treaty of 1993

The first express mention of human rights is contained in the preamble where the Treaty acknowledges human rights instruments such as the African Charter and the Declaration of Political Principles of ECOWAS.²¹⁷ Article 4(g) of the Revised Treaty affirmed the recognition, promotion and protection of human rights in accordance with the provisions of the African Charter as fundamental principles of ECOWAS Community. In article 4, the ECOWAS member states affirmed and declared the observance and adherence of the principles of peace, security and stability, accountability, economic and social justice, popular participation in development, and democratic system of good governance.²¹⁸ The provisions provided are important foundation for the recognition, promotion and protection of human rights in the ECOWAS regime.

In addition to the provisions contained in the Treaty, the most elaborate provisions relating to human rights are provided for in the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Protocol on Conflict Management)²¹⁹ and the Protocol on Democracy and Good governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Protocol on Democracy and Good Governance),²²⁰ are sources of substantive rights where the member states alluded to the provisions of the Charters of UN, OAU, the African Charter and the UDHR, as fundamental principles to implement the objectives of the Community.²²¹

The Protocol on Conflict Management establishes Mechanism for conflict prevention, management, resolution, peacekeeping and security. The objectives of the Mechanism are to prevent, manage and resolve internal and interstate conflicts; to implement the relevant provisions of the protocols on non-aggression and mutual assistance; free movement of persons and the right to residence and establishment; to strengthen

²¹⁷ All member states of ECOWAS have ratified the African Charter

²¹⁸ Article 4(e), (h) and (j) of the Revised Treaty of 1993

²¹⁹ The Protocol adopted and entered in force on 10 December 1999

²²⁰ The protocol adopted in 2005

²²¹ Article 2 of the Protocol on Conflict Management and article 1(h) of the Supplementary Protocol on Democracy and Good Governance; the texts are available at <http://www.ecowas.int/>

cooperation in the areas of conflict prevention; early warning systems; peace keeping operations; the control of cross-border crime; international terrorism and the proliferation of small arms and anti-personal mines; to maintain and consolidate peace, security and stability within the Community; to formulate and implement policies on anti-corruption, money laundering and illegal circulation of small arms; to protect the environment and take steps to restore degraded environment to its natural state and safeguard the cultural heritage of member states.²²²

The Supplementary Protocol on Democracy and Good Governance contains provisions on principles that declared to be constitutional principles of all member states, and democratic standards that complement the Mechanism.²²³ These creates rights on elections, popular participation, freedom of association, the press, right to education, culture, religion and non-discrimination and many others, and guarantees rights to women, children and the youth; and also creates obligations on member states and hence, they undertake to provide for the basic needs of their populations; to fight poverty; to ensure equitable distribution of resources and income and to enhance the economic integration of the region.²²⁴ The provisions of these protocols clearly indicate that the respect for human rights is essential for economic integration.

Apart from the Revised Treaty and the Protocols, the ECOWAS Community has other instruments such as the Declaration on Political Principles of ECOWAS, and Armed Forces Code of Conduct that are not binding. However, in the absence of human rights catalogues with adequate human rights content in the ECOWAS legal framework, these non-binding instruments carry greater significance for the promotion and protection of human rights in the Community. At the Community level, the institutions of the organization such as the Authority, the Council of Ministers, the Community

²²² See paragraph 3 of the Protocol on Conflict Management

²²³ E. Nwauche, 2009, (above note 139), 325-6

²²⁴ Ibid, See also section 5 of the Supplementary Protocol

Parliament²²⁵, the Economic and Social Council and the Executive Secretariat play roles in the realization of human rights.

3.3.8.2. Judicial Enforcement of Human Rights with in ECOWAS

Under article 6(1) of the Revised Treaty of 1993, the Community Court of Justice is created as one of the institutions of the ECOWAS Community. Pursuant to article 15(2) of the Treaty, details relating to the structure, composition, and powers of the Court were left to be determined by the Authority and thus a Protocol concerning the composition, powers, and structures of the Court was established in 1991. Article 15 (4) of the ECOWAS Treaty states that judgments rendered by the Court of Justice are binding on member states, the Community institutions, individuals and corporate bodies. The Supplementary Protocol of 2005 amended the 1991 Protocol of the Court.

Under the 1991 protocol, only member states could bring disputes on behalf of their citizens against other member states or institutions of ECOWAS.²²⁶ With the adoption of the Supplementary Protocol, individuals and corporate bodies can bring disputes before the Court.²²⁷ Under the new article 9 of the Protocol, the Court has the competence to hear disputes relating to the interpretation and application of the Treaty and subsequent agreements and to determine the legality of Community legislations and decisions. Concerning the jurisdiction of the Court over human rights issues, the expanded competence of the Court mandated to hear violations of human rights. Thus, the Court has the competence to receive and determine complaints of the violations of human rights from states parties, the institutions of the Community, individuals and corporate bodies. As such, the Court entertains different human rights cases. Currently, the Court of Justice is one of the most developed judicial organs that have the competence to determine violations of human rights. Thus, the current practices of the Court are the focus of this study.

²²⁵ ECOWAS, SADC and EAC have functioning Community Parliamentary structures while others such as ECCAS allow for such a possibility.

²²⁶ See article 9(3) of the 1991 Protocol

²²⁷ See new article 10 in article 4 of the Supplementary Protocol

CHAPTER FOUR

JUDICIAL ENFORCEMENT OF HUMAN RIGHTS IN THE ECOWAS AND SADC COMMUNITIES: A COMPARATIVE ANALYSIS IN LIGHT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

4.1 Introduction

Enforcement of human rights is likely to be more easily realized with the establishment of a court.²²⁸ The establishment of a court having jurisdiction to hear cases related to human rights creates a system that does not permit human rights violators to go unpunished. This makes a human rights court indispensable component of an effective mechanism for the protection of human rights. Accordingly, the African human rights system established a Court of Human Rights to enhance the efficiency of protection of human rights in the continent. The Court is intended to solve the problems related with enforcement faced by the African Commission. The Court is also necessary for sustaining constitutional democracies and facilitating the fulfillment of human rights in the domestic sphere.

Despite their economic focus, RECs contain fundamental human rights provisions in their founding Treaties and Subsequent legal instruments. However, containing human rights provisions in their legal framework does not confer any particular right to any body in the absence of enforcement mechanism. With the growing importance for human rights, RECs are widely involved in sustaining or improving human rights within states or across state borders beyond recognizing the norms of human rights. The actual realization of human rights in RECs is further grounded on the enforcement of human rights through their Courts of Justice. These Courts are involved in the interpretation and application of human rights provisions and determine the legality of subsidiary legislations and decisions of the institutions of the respective Communities. The judicial organs, particularly the ECOWAS Court of Justice and the SADC Tribunal, have taken

²²⁸ VO Orlu Nmeihelle, 'The African Human Rights System', Martinus Nijhoff Publishers, 2001, 253

some steps towards giving human rights a more prominent place in their respective regions through entertaining and enforcing the norms of human rights.

With the judicial enforcement of human rights, using the current practices of the Court of ECOWAS and the Tribunal of SADC, the writer tries to thoroughly and critically analyze their human rights mandate and practices in light of the mandate and practices of the African Court of Human Rights.

4.2. Responsibility to Implement and Enforce Human Rights in Africa

In a democratic society, respect for the human rights of others is largely observed and hence, it is part of their culture and belief. The notion of human rights is intertwined with the notions of peace and development. Respect for the rights of others is a prerequisite to preserve peace and make development possible. Professor Asante concurs that 'there is a strong link between national political stability and successful economic integration' and thus the need arises to address areas of possible conflict in integrating countries.²²⁹ Further, for a state to accede supranational organization, it is required to observe the norms and principles of human rights, democracy, good governance and the rule of law in accordance with international human rights norms. Despite the above facts, human rights may be violated even in countries that have ratified international human rights instruments. In such situation, there must be an organ that has the mandate to render an effective remedy. In order to ensure the enforcement of human rights, legal protection is offered at domestic, continental and global levels.

The responsibility for upholding human rights and fundamental freedoms rests primarily on the individual states. African states have ratified the main African and UN human rights treaties. The mere fact of ratification does not have a demonstrable positive effect. With some notable exceptions, the constitutions of almost all African countries in one way or another recognized the norms of human rights and accept human rights

²²⁹ SKB Asante, 'The Political Economy of Regionalism in Africa', Praeger, 1986; cited in ST. Ebobrah, ' *Litigating Human Rights Before the Sub-Regional Courts in Africa*', 17 RADIC 2009, 88

standards as fundamental principles. The domestic level is the most important level on which human rights could potentially be enforced²³⁰. It could be said that the protection of human rights in the domestic sphere is direct and has the potential of stronger pressure against the violators. The domestic application of human rights depends ultimately on the judicial bodies. National courts are an important institutions for the effective enforcement of human rights. However, though recognized in constitutions and other legislations, either no clear constitutional provision is made for recourse to judicial or administrative enforcement of human rights, or where such provision of recourse is made, in practice it has often not been used to any significant effect.²³¹ Thus, where the victim of violation is unable to find protection at the national level, supranational mechanisms for the protection of rights existed at the continental and global levels as a last resort.²³²

Regional human rights protection becomes at the forefront when states failed to effectively enforce human rights domestically. In an increasingly interdependent world, regional protection of human rights is a reaction against the failings of states operating on the assumption that the pooled resources of regional undertaking will overcome the weaknesses of national human rights systems.²³³ Thus, the supranational enforcement of human rights depends on the existence of a web of trade relations as well as diplomatic and other links between the respective states.²³⁴ RECs involve in the realization of human rights alongside their initial aim of effective economic integration. Further, their judicial bodies interpret and apply human rights provisions found in their Treaties, and subsidiary instruments taking the African Charter as one of the instruments recognized as a source of law and a standard to be achieved by the Communities. Comparing with the continental human rights system, peer pressure in RECs is easier to exert in a smaller circle of friends.²³⁵ The emergence of human rights

²³⁰ Heyns and Viljoen, 1999, (above note 77), 424

²³¹ *ibid*

²³² Ebobrah, TS '*Litigating human rights before sub-regional courts in Africa: prospects and challenges*', (2009) *African Journal of International and Comparative Law* Vol.17 Issue 1, at 86

²³³ Nwauche, 2009, (above note 139), 319

²³⁴ Heyns and Viljoen, 1999, (above note 77), 424

²³⁵ *Id*, 423

protection in the RECs is a response to the continental human rights protection system that has not completely effective. Thus, effective system of human rights in RECs can consequently complement the continental system in important ways.

At the continental level, the African human rights system established its own monitoring and enforcement bodies to determine whether violations have occurred. These are the African Commission and the African Court on Human and Peoples' Rights. The Commission lacks binding mandate and thus it make non-binding recommendations. In the absence of binding decisions, enforcement of human rights may not be effectively realized. Thus, the African Court of Human Rights was established to complement the protective mandate of the Commission. Hence, the Court has the competence to make legally binding decisions about whether there have been violations of human rights. However, though the Court is now in operation, cases that could be brought to the Court is limited since individuals and NGOs are excluded from directly approaching the Court in the absence of a special declaration made by the state concerned.

The global or the UN human rights protection system also works for Africa. African States have ratified the main UN human rights instruments. Enforcement of such instruments takes place through reporting and individual and inter-state communications that are the weakest form of realization of human rights.

4.3 Judicial Protection of Human Rights

Judicial dispute resolution mechanisms are established for the purpose of resolving disputes between states and between states and non-state actors. In Africa, there are now a multiplicity of regional courts and tribunals with the mandate of interpretation and enforcement of human rights in their respective regions. These are the Courts of ECOWAS, COMESA and the Tribunal of SADC. Each has a contentious and advisory jurisdiction. The mandates of these Courts overlap with that of the African Court of Human Rights. Taking into account the current practices in the enforcement of human

rights, the writer try to comparatively analyze the mandates and practices of the Court of ECOWAS and the Tribunal of SADC with that of the African Court of Human Rights.

4.4 The Human Rights Jurisdiction

The Court of ECOWAS and the Tribunal of SADC as well as the African Court of Human Rights are conferred with both contentious and advisory jurisdictions. Thus, the personal and subject matter jurisdiction of each Court will be discussed. Below, I consider the Courts' contentious jurisdiction on human rights by looking at the Treaties; protocols and rules of procedures of the above judicial bodies for personal and subject matter jurisdiction as well as the procedures before them.

4.4.1. The Human Rights Jurisdiction of the Court of ECOWAS

The human rights jurisdiction of the ECOWAS Community Court of Justice is not included in the Revised Treaty or in the 1990 Protocol of the Court. The Court's jurisdiction on human rights matters was established under a 2005 Supplementary Protocol.

A. Personal Jurisdiction

Under the 1991 protocol, Article 9(3) stipulates that only member states could bring complaints on behalf of their citizens against other member states or institutions of ECOWAS. The revision of the ECOWAS Treaty in 1993 did not expand its jurisdiction to hear cases submitted by individual and NGOs. Hence, the competence of the Court was restricted to member states and institutions of ECOWAS. The Revised Treaty under Article 15(4) declares that the judgments of the Court bound member states, ECOWAS institutions, individuals and corporate bodies. In one case²³⁶, the Court faced with the

²³⁶ Olajide Afolabi V Federal Republic of Nigeria, 2004/ECW/CCJ/04. In Afolabi case, the Plaintiff brought allegations against the Government of Nigeria alleging that the unilateral closure of border by Nigeria with neighboring Benin violated his right to free movement, which is guaranteed in the ECOWAS Treaty, the Protocol on Free Movement of Persons, Goods, and Services, and the African Charter.

question of individual access to the Court to bring allegations of violations of rights by states parties. The Court decided that the individual '*cannot bring proceedings against his country or member state which by law is saddled with the responsibility instituting proceedings on his behalf.*'²³⁷ It was this decision that woke up the judges of the Court to consider its jurisdiction and made appeal to the Authority that resulted the adoption of legislation that expands the competence of the Court in the case of human rights violations. Analyzing the arguments presented by the parties in the Afolabi case, Viljoen argues that had the Court developed judicial activism, it could have viewed the matter differently.²³⁸

The jurisdictional change stipulated in the 2005 Supplementary Protocol of the Court expands all the material, personal, temporal and territorial competency of the Court with respect to human rights. Thus, the Supplementary Protocol, under Article 4 broadens the original jurisdiction of the Court and allows access to the Court by individuals and corporate bodies. The Supplementary Protocol provides that access to the Court is open to individuals and bodies corporate for relief for violation of their human rights.²³⁹ Consequently, the Court is conferred with an increased jurisdiction that comprises competence in complaints of human rights violation involving member states, ECOWAS institutions, bodies corporate (whether bodies corporate involves NGOs is not yet clear)²⁴⁰ and nationals of members' states.

An important point to be addressed is that there is no provision, which regulates against whom, individual complaints can be exercised for violations of human rights. It is obvious that in most cases, allegations on violations of human rights are brought against member states. In addition, the combined reading of the new Articles 9 and 10 of the Court Protocol provides that in addition to member States, the Community itself, each Community institution and Community officials can be respondents for their acts or inactions before the Court. However, there is no legislation, which provides that

²³⁷ Afolabi case

²³⁸ Viljoen, 2007, (above note 11), 507

²³⁹ New article 10(c) and (d) of article 4 of the Supplementary Protocol of 2005

²⁴⁰ Since NGOs has not brought proceedings before the Court, its omission from the Supplementary Protocol leaves room for the exercise of discretion by the Court in its interpretation and application of the Supplementary Protocol

individuals can be defendants. In *Ukor V Laleye Case*,²⁴¹ all the parties were individuals though the case was decided inadmissible for lack of merit.

B. Subject Matter Jurisdiction

The Court of ECOWAS is empowered to adjudicate on directives, decisions and other subsidiary legal instruments adopted by ECOWAS; the legality of regulations, directives, decisions and other subsidiary legal instruments adopted by the Community; the failure by member states to honor their obligations under the Treaty, conventions and protocols, regulations, directives, or decisions of ECOWAS; the provisions of the Treaty, conventions and protocols, regulations, directives or decisions of ECOWAS member states; the Community and its officials; and the action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions.²⁴² The Court, under the Supplementary Protocol, is also mandated

‘To determine any non-contractual liability of the community and may order the Community to pay damages or make reparation for official acts or omission of any Community institution or Community officials in the performance of official duties or functions.’²⁴³

The Supplementary Protocol further gives jurisdiction to the Court on matters relating to disputes arising out of a contract where the Court is given jurisdiction by the contractual agreement.²⁴⁴ Therefore, the Court of Justice has jurisdiction over all matters provided for in any other agreements that member states may conclude among themselves or within the Community, and that confer jurisdiction to the Court. The Supplementary Protocol grants the power to the Authority to refer matters other than these specified in the Article 9 of the protocol. Hence, the Court will have the power to adjudicate on any

²⁴¹ *Ukor V Laleye*, Unreported Suit No ECW/CCJ/APP/01/04

²⁴² New article 9(1) in article 3 of the Supplementary Protocol of 2005

²⁴³ New article 9(2) in article 3 of the Supplementary Protocol of 2005

²⁴⁴ New article 9(6) in article 3 of the Supplementary Protocol of 2005

specific dispute that is referred to it by the Authority.²⁴⁵ The Court is also competent to act as arbitrator for the purpose of Article 16 of the Treaty.²⁴⁶

Decisions of the Court on the interpretation and application of the provisions of the Revised ECOWAS Treaty have precedence over decisions of national courts. Thus, national courts can ask the ECOWAS Court to interpret the ECOWAS Treaty, protocols, conventions and other subsidiary legal instruments if national courts of member states consider that a ruling on the issue is necessary to render judgments.²⁴⁷ The decisions of the Community Court demonstrate that the competence of the Court does not restrict it from scrutinizing human rights compliance to economic freedoms whether from the perspective of Community institutions or member state institutions.²⁴⁸

Though the Supplementary Protocol allows for individual and corporate bodies to litigate human rights violations before the Court, it does not clearly indicate whether the rights applicable are provided in the ECOWAS instruments or the rights found in the reference documents. The Community does not have any particular human rights instrument over which the Court can claim competence. However, there are human rights provisions found in the revised Treaty, conventions and protocols of the Community. Thus, the rights contained in these instruments could be the basis for an individual action for the violations of rights. Accordingly, the Court of Justice, in one case²⁴⁹ demonstrates that

‘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.’

²⁴⁵ New article 9(8) in article 3 of the Supplementary Protocol of 2005

²⁴⁶ New article 9(5) in article 3 of the Supplementary Protocol of 2005

²⁴⁷ New article 10(f) in article 4 of the Supplementary Protocol of 2005

²⁴⁸ ST. Ebobrah, ‘Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice’, Journal of African Law, 54 (2010), 1-25, 13

²⁴⁹ Keita V Mali, Unreported Suit no ECW/CCJ/APP/05/06; Judgment no ECW/CCJ/APP/03/07, on 22 March, 2007; Para 27

The rights provided in any of the ECOWAS instruments adopted for the pursuit of economic integration form part of ECOWAS legislation and the non-observance of these documents justifies its applicability. Further, under different ECOWAS instruments, references are made to human rights instruments such as the African Charter and the UDHR.²⁵⁰ Human rights instruments referred to in the ECOWAS legislative instruments directly or indirectly have impacts on the promotion and protection of human rights in the region. References to human rights instruments in preambles and statements of fundamental principles of ECOWAS instruments would be sufficient to entrench such instruments as sources of human rights law in the ECOWAS context.²⁵¹ The Court of Justice in Ugokwe case²⁵² stated that

“In Articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloging of various human rights but by the provisions of Article 4 paragraph (9) of the Treaty of the Community, the member states... are enjoined to adhere to the principles including ‘the recognition, promotion and protection of human and people rights in accordance with the provisions of the African charter on Human and Peoples’ Rights’. The combined effect of the provisions indicates that any violation of human rights in any member state may be brought by individual or corporate bodies before this Court for adjudication ... where in the Court is empowered to apply the general principles of the law recognized by civilized nations. Even though there is no cataloging 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 behaves 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.”

²⁵⁰ Article 4(g) of the Revised Treaty makes recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human & Peoples’ Rights a fundamental principle of ECOWAS. Further, article 2 of the Protocol on Conflict Management states that member states are committed themselves to the principles contained in the African Charter and the UDHR. Also, see article 1(h) of the ECOWA Democracy Protocol

²⁵¹ Ebobrah, 2010,(above note 248), 18

²⁵² Ugokwe V Nigeria, suit no ECW/CCJ/APP/02/05, para 29

From this perspective, the provisions found in the African Charter can be used as part of the human rights instruments of the Community, and thus, the Court can apply it.

Since the UDHR is a non-binding instrument, it can be used as an interpretative guide. However, the Court has used the UDHR in three of its decisions though it has not been so expressive of the reasons for its use of it.²⁵³ Furthermore, the Court has relied on the ICESCR,²⁵⁴ the CEDAW²⁵⁵ and the Slavery Conventions.²⁵⁶ Though the CEDAW Convention is mentioned in the Supplementary Protocol on Democracy and Good governance of 2001, the other conventions are not get mentioned in any of the legal instruments of the Community. However, the writer believes that the Court might relied on Article 1(h) of the ECOWAS Democracy Protocol which 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. Thus, the mandate of the Court on complaints alleging violations of rights entrenched in the continental or international instruments that are in furtherance of the mandate of the Court to ensure the observance of the Revised Treaty, Protocols, and Conventions of the Community.²⁵⁷ The jurisdiction of the Court on human rights especially the application of human rights instruments that are referred as principles of the Community may be convenient to human rights activists though it may undermine the legitimacy of the system and pose a risk of conflicts of interest.²⁵⁸ To sum up, the human rights jurisdiction of the Court covers violations of human rights that occur against the citizens of the Community in the territory of any member state, ECOWAS institutions or member states of the Community.

²⁵³ Ebobrah, 2010, (above note 248), 18

²⁵⁴ In *Essien V The Gambia*, unreported suit no ECW/CCJ/APP/05/05. The complaint focused on the right to satisfactory working conditions with out discrimination

²⁵⁵ *Korau V Niger*, unreported suit no. ECW/CCJ/APP/08/08. This case focused on freedom from slavery.

²⁵⁶ *Korau case*

²⁵⁷ Nwauche, 2009, (above note 139), 332

²⁵⁸ Ebobrah, 2010, (above note 248), 19

C. Procedure before the Court

The ECOWAS Community Court of Justice adopted its rules of procedure in 2003 pursuant to the power granted to it under Article 32 of the 1991 Protocol. However, at that time, the Court does not have the competence to receive cases on human rights from individuals, and thus, fail to put the admissibility conditions. The Supplementary Protocol under Article 10(d) provides two admissibility requirements to be fulfilled in order for a case to be entertained by the Court. One of these procedures is that the complaints must indicate their authors, to mean that authors must give their full identity. The other requirement is that complaints must not have been instituted before another international court for adjudication. Other international judicial and quasi-judicial institutions require for individuals and/or groups to exhaust local remedies before coming to such organs. For instance, the SADC Tribunal, the African Court and Commission require that communications must not be submitted before all available local remedies have been exhausted, if any, unless it is obvious that there is unduly prolonged.²⁵⁹ However, the Rules of Procedure of the ECOWAS Court of Justice does not contain such a requirement. In one of the cases, the Court declared that the requirement to exhaust local remedies does not apply to human rights cases brought under the Supplementary Protocol of 2005.²⁶⁰ The Community Court is not part of domestic judicial systems of member states. Thus, it may create difficulty in prioritizing jurisdiction between the domestic courts and the Community Court of Justice. Moreover, it does not give the first opportunity to member states to attempt to settle disputes at the national level.²⁶¹ Though there are some developments in receiving cases that are decided by national courts, the Community Court had hesitated to consider itself as an appellate court.²⁶²

²⁵⁹ Article 15(2) of the SADC Tribunal Protocol; article 56(5) of the African Charter and Rule 40(5) of the Interim Rules of the African Court of Human Rights.

²⁶⁰ Essien case

²⁶¹ Ebobrah, 2009, (above note 232), 91

²⁶² Ibid

4.4.2 The Human Rights of Jurisdiction of the SADC Tribunal

The Tribunal is one of the institutions of the SADC Community that are established under Article 9 of the Treaty. The functions of the Tribunal are stated in Article 16. The basis of personal and subject matter jurisdiction of the Tribunal as well as its procedure is discussed below.

A. Personal Jurisdiction

The SADC Tribunal was primarily established to protect the interests and rights of member states and citizens of the Community. By virtue of Article 15 of the SADC Tribunal protocol, access to the Tribunal is open to member states, the institutions of the Community, natural and legal persons. In other words, access to the Tribunal is not only open to member states and the institutions of the Community but also to individuals and NGOs. In terms of human rights jurisdiction, the SADC Tribunal lacks the express human rights mandate that the Court of ECOWAS is conferred with. The inclusion of the mandate on human rights of the Tribunal was considered but rejected²⁶³. However, since the SADC Treaty imposes the obligation on states not to discriminate on certain grounds, SADC has a more general human rights mandate.²⁶⁴ In terms of access to bring cases of a human rights nature, the position of the SADC Tribunal is more liberal and is actually judicial activist.²⁶⁵

Access to the Tribunal may be for proceeding for the determination of an act or inaction of a Community or Community officials, which violates the rights of individuals, or for the determination of the validity of protocols and other legal instruments of SADC.²⁶⁶ Any member state, institution of the Community or individual or legal person may allege that their rights have been violated. In other words, any member state, individual or institution of the Community or the Community or the Community official can be an applicant before the Tribunal. Though the protocol is silent against which a compliant

²⁶³ Viljoen, 2007, (above note 11), 505

²⁶⁴ Ibid; also see article 6(2) of the SADC Treaty

²⁶⁵ Ibid

²⁶⁶ Article 16(2) of the SADC Tribunal Protocol. Member states of SADC adopted the protocol at Windhoek Summit in 2000

can be brought, the close reading of Article 15 reveals that member states, officials of the Community or institutions of SADC can be respondents before the Tribunal.

The SADC Tribunal has exclusive jurisdiction over all disputes between states and the Community; between natural/ legal persons and the Community and between the Community and its staff relating to their conditions of employment.²⁶⁷

Member states of SADC may fail to comply with its obligations arising from the Treaty, protocols or other legal instruments. Further, either SADC itself; or an official of SADC may violate rights in his official capacity. However, there is no clear provision on non-state entities being applicants and respondents. The Tribunal has not been faced with cases whose parties are non-state actors. However, subject to the exhaustion of local remedies, the Tribunal may adjudicate on disputes between individuals.

B. Subject Matter Jurisdiction of the Tribunal

Both the Revised Treaty of 1993 and the 2000 Protocol of SADC Tribunal empower the Tribunal to adjudicate on disputes relating to the interpretation or application of the Treaty, the protocols and all other subsidiary instruments of the Community.²⁶⁸ Article 16(1) of the Treaty provides for the mandate of the Tribunal stating that

'The Tribunal shall be constituted to ensure adherence to and the proper interpretation and application of the provisions of the Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it'.

Article 14 of the SADC Tribunal Protocol goes further to give the Tribunal jurisdiction on matters relating to the validity of regulations and subsidiary legal instruments adopted within SADC and of acts of the Community's institutions and on all matters specifically provided for in any other agreements concluded among the states parties or within the

²⁶⁷ See articles 17-19 of the SADC Tribunal Protocol.

²⁶⁸ Article 32 of the Treaty states that any dispute arising from the interpretation or application of the Treaty, which cannot be settled amicably, shall be referred to the Tribunal. Also see article 14 of the Protocol

states parties or within the Community conferring jurisdiction on the Tribunal. In this context, Article 18 of the SADC Protocol on Gender and Development confer jurisdiction to the SADC Tribunal over any dispute arising from the interpretation or application of the protocol that cannot be settled amicably.²⁶⁹ Further, the Tribunal has the competence to resort to applicable Treaties, general principles and rules of international law and the rules and principles of states to develop its own jurisprudence.²⁷⁰

Odinkalu argues that Article 14 of the protocol is wide enough to give the Tribunal Subject matter jurisdiction over the interpretation and application of the African Charter on Human and Peoples' Rights being one of the instruments recognized as a source of law and authority for the Organ of Politics, Defense and Security Cooperation which is a subsidiary organ of the SADC.²⁷¹ The Tribunal may look to the African Charter and jurisprudence to elucidate the meaning of an obligation to respect human rights in a regional economic treaty such as in Article 4 of the SADC Treaty.²⁷² In Campbell case, the Tribunal has taken the position that it is competent to hear cases alleging violations of human rights. In its final judgment, on the above case, the Tribunal holds and declares that it has jurisdiction in respect of any dispute concerning human rights, democracy, and the rule of law. The Tribunal did not consider that as in the case of ECOWAS, as separate protocol on human rights was needed to enable it exercise jurisdiction over human rights matters.²⁷³ Thus, the Tribunal's jurisdiction covers violations of human rights that are committed in any member state of the SADC

²⁶⁹ Ruppel, 2009, (above note 147), 297

²⁷⁰ Article 21 of the SADC Tribunal Protocol

²⁷¹ CA. Odinkalu, 'Complementarity, Competition or Contradiction: the Relationship between the African Court of Human and Peoples' Rights and Regional Courts in Eastern and Southern Africa', Unpublished paper presented at the Conference of East & Southern African States on the Protocol Establishing the African Court on Human & Peoples' Rights, Gaborone, Botswana, 9-10 December 2003, 9

²⁷² In Campbell case, the Tribunal in deciding its subject matter jurisdiction, referred to article 21 (b) which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs to do so '*having regard to applicable treaties, general principles and rules of public international law ' which are sources of law for the Tribunal. Thus, this provision 'settles the question whether the Tribunal can look elsewhere to find answers where it appears that the Treaty is silent. In any event, the judges do not consider that there should first be a protocol on human rights in order to give effect to the principles set out in the Treaty, in light of the express provision of article 4(c) of the Treaty which states that 'SADC member states are required to act in accordance with the principles of human rights, democracy and the rule of law'.*

²⁷³ See generally the Case of Campbell, available at <http://www.kubatana.net/docs/landr/sadc-tribunal-campbell-case-081128.doc> last accessed on 7 October 2010.

Community. Accordingly, the human rights mandate of the Tribunal is applicable in the territories of all SADC member states. Thus, the Tribunal has jurisdiction over the territories, citizens, institutions and member states of SADC.

C. Procedure before the Tribunal

Unlike the Court of ECOWAS, the criterion governing the admissibility of cases before the Tribunal is only the exhaustion of all available domestic remedies. The Court of ECOMAS does not require the exhaustion of local remedies to receive cases from individuals but that the application should not be anonymous and should not have been instituted before another international court. On the other hand, the African Court requires applicants to fulfill conditions listed under Rule 40 of its Interim Rules. However, applicants to the Tribunal shall only comply with the condition of exhaustion of local remedies. All other admissibility requirements under other international procedures do not apply in human rights cases before the Tribunal. Article 15(2) of the protocol stipulates that 'No natural or legal person bring an action against a state unless s/he has exhausted all available remedies or is unable to proceed under the domestic jurisdiction. The current rules of procedure of the Tribunal are generally adequate even for the purpose of the human rights competence.

4.4.3. The Jurisdiction of the African Court of Human Rights

Unlike the RECs courts, the African Court of Human Rights is primarily established to enhance the efficiency, and to complement and reinforce the functions of the African Commission.²⁷⁴ Article 2 of the protocol states that '*the Court shall complement the protective mandate of the African Commission conferred upon it by the African Charter*'. Therefore, the question will be whether the African Court will be able to overcome the problems experienced by the Commission in its protective mandate.²⁷⁵ Thus, its jurisdictional provisions are the heart of the protocol as they determine who will have

²⁷⁴ Preamble and article 2 of the Protocol of the Court.

²⁷⁵ F. Viljoen, '*African Human Rights Court for Africa and Africans*', 30 Brooklyn J.Int.L. 1(2004/2005), 1-66, 13

access to the Court, under what conditions and what types of violations will be redressed.²⁷⁶ Below, I consider the personal and subject matter jurisdiction by reviewing the provisions provided for in the protocol and the Interim Rules of the Court.

A. Personal Jurisdiction

The African Court of Human Rights has jurisdiction to adjudicate on disputes brought against a state party to the protocol in which it is alleged that the state has violated the African Charter or any other human rights instruments that it has ratified.²⁷⁷ Concerning who can file a complaint before the Court, Article 5 of the protocol lists those that can bring a case before the Court. Article 5(1) of the protocol allows five categories of claimants to access the Court directly; these are the Commission, the state party that has lodged a complaint to the Commission; the state party against which a complaint has been lodged; the state party whose citizen is a victim of a human rights violation; and African inter-governmental organizations upon the state's ratification of the protocol. For individual and NGOs with observer status before the Commission, the protocol provides for optional jurisdiction. Article 5(3) of the protocol provides that

'The Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of the protocol'. Article 34(6) of the protocol stipulates that 'At the time of the ratification of this protocol, or any time there after, the state shall make a declaration accepting the competence of the Court to receive petitions under Article 5(3) of this protocol. The Court shall not receive any petition under Article 5(3) involving a state party which has not made such declaration'.

In the *Yogogombaye V Senegal* case, the Court stated that for it to hear cases brought directly by individual against a state party, there must be compliance with, inter alia, Articles 5(3) and 34(6) of the protocol; and consequently, since Senegal has not made

²⁷⁶ Udombana, (2000), (above note 119), 85

²⁷⁷ Ibid, also see article 3 and 7 of the Protocol

the declaration provided for in Article 34(6) of the protocol, the Court has denied jurisdiction to hear the case instituted directly against the state by the applicant.²⁷⁸ The discretion to allow direct access to the Court by individual and NGOs, lies with the concerned state. On the other hand, in order for the Court to hear a case filed by an individual or NGOs, the state must have made an express declaration accepting the Court's jurisdiction to hear such cases.²⁷⁹ Matters may also be referred to the Court by a state party acting as a third party intervener, if it considers that it has an interest in a case in which it was initially not involved.²⁸⁰

B. Subject Matter Jurisdiction

The subject matter jurisdiction of the Court has an impact on the Court's adjudicatory functions.²⁸¹ The subject matter jurisdiction of the Court contends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the protocol and any other relevant human rights instrument ratified by the states concerned.²⁸² Article 7 of the protocol further provides that '*the Court shall apply the provisions of the Charter and any other human rights instruments ratified by the states concerned.*' These provisions give the Court a wide range of jurisdiction to exercise direct application of all continental and global human rights instruments ratified by the states concerned. This extends to all regional, sub-regional, bilateral, multilateral and international treaties.²⁸³ The jurisdiction of the Court, thus, extended to all treaties dealing with the protection of human rights of the person in the region. The importance of this wide range of discretion is that it will give a chance to rely on other international and regional human rights instruments in case the applicant believes that the Banjul Charter is inadequate to protect his/her rights. Thus, an aggrieved party could bring a

²⁷⁸ Michelot Yogogombaye V Senegal, Application no 001/2008; African Court on Human and Peoples' Rights, Judgment, 15 December 2009, Para 31 & 46

²⁷⁹ Udombana, 2000, (above note 119), 86

²⁸⁰ Article 5(2) of the Protocol

²⁸¹ VO Orlu Nmehielle, '*Towards an African Court of Human Rights: Structuring and the Court*'; 6Ann.Surv.Int. & comp. L. (2000) 27-60, 52

²⁸² Article 3 of the Protocol

²⁸³ Udombana, 2000, (above note 119), 89

case to the Court under another international treaty that better protected his/her rights.²⁸⁴

The inclusion of the phrase '*any other relevant human rights instruments ratified by the states concerned*' in the Court's jurisdictional scope seems logical considering the problematic nature of dispute resolution mechanisms inherent in many of the African treaties.²⁸⁵ African human rights declarations and resolutions of the African Commission are excluded from Serving as a basis for a contentious case because of their non-binding nature.²⁸⁶ Even treaties, which are not 'human rights' instruments, will not be the basis of the Court to render judgments. Some treaties have a significant impact on human rights, but are not human rights instruments. The main dividing line is that ratifying human rights treaties mean that states assume obligations 'towards all individuals with in their jurisdiction' and not merely in relation to other states.²⁸⁷ Thus, OAU/AU treaties that have important human rights implications such as the 1968 African Convention on the Conservation of Nature and Natural Resources, and the 1977 Convention for the Elimination of Mercenarism in Africa are not included under the Court's jurisdiction of Article 3. This is because of the fact that these instruments do not provide direct entitlements or rights available to individuals.²⁸⁸

C. The Procedure before the Court

The procedure of the African Court is regulated by the protocol establishing the Court and its rules of procedure. The Court is empowered to adopt its own rules of procedure under Article 33. The Interim Rules of the Court laid down the detailed conditions under which the Court consider cases brought before it, bearing in mind the complementary between the Commission and the Court.²⁸⁹ Article 6 of the Protocol contains provisions that are significant to the procedure of the Court. Article 6 (2) of the Protocol stipulates

²⁸⁴ Id, 90

²⁸⁵ Viljoen, 2004/2005, (above note 275), 45

²⁸⁶ Ibid

²⁸⁷ Id, 45-6

²⁸⁸ Ibid

²⁸⁹ See Article 8 of the protocol. The Interim Rules of the Court was adopted and entered in to force on 20 June 2008.

that the Court shall rule on the admissibility of cases taking into account the provision of Article 56(5) of the African Charter. Article 56 of the Charter stipulates the admissibility criteria to be applied to individual communications. Taking Article 56(5) of the Charter, Rule 40 of the Interim Rules of the Court lists the conditions to be fulfilled.

The criteria governing the admissibility of cases that should be fulfilled under Rule 40 are; disclosing the identity of the Applicant of the case even where she/he may wish to request anonymity; complying with the Constitutive Act of the Union and the Charter; that the applications should not contain any disparaging or insulting language; that the applications shall not be based exclusively on news disseminated through the media; that the applications shall be sent to the Court within a reasonable period after exhausting local remedies; and that the applications shall not deal with cases that have been settled in accordance with the principles of the Charter, or the UN, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the AU. All the conditions have to be met to be admissible before the Court.

Of all the admissibility criteria, the exhaustion of local remedies is one which is premised on the principle that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual. It gives states parties the first opportunity to attempt to resolve cases at the national level before exposing them to international adjudication. The other criterion is that cases should have not been settled before another international jurisdiction. The reason behind this is that it serves the aims of certainty and finality in international adjudication.

4.5 Advisory Jurisdiction

In addition to adjudicatory jurisdiction, the Court of ECOWAS, the Tribunal of SADC and the African Court of Human Rights have competence to render advisory opinions.²⁹⁰

²⁹⁰ Article 10 of the 1991 ECOWAS Court Protocol; article 20 of the SADC Tribunal Protocol; and article 4 of the Protocol of the African Court

The advisory jurisdiction of the judicial bodies is rendering of legal opinions on issues presented before it. Advisory opinions have no binding legal effect in the form of requiring positive or negative action from the parties. Though it is not legally binding, it can go a long way to affect the conduct of states with respect to human rights. It is important in the protection of human rights in the sense that it may be the only way a court can have the benefit of looking in to an issue involving a state not a party to the instrument vesting jurisdiction on the merits in the court.²⁹¹ It will also be highly relevant in those provisions of the Charter or other human rights instruments where the question of justiciability as a result of the nature of the rights may be in doubt.²⁹² Advisory opinions can also serve as a preventive measure with regards to human rights violations as member states can seek opinions on conduct that may be perceived as or may indeed result in the violations of human rights.²⁹³ Further, in countries where democracy is at infant stage, governments found it easier to give effect to an advisory opinion than to comply with a contentious decision in a case they lost.

4.6. Judgments of the Courts

Both the Court of ECOWAS and the Tribunal of SADC were primarily established to settle disputes arising from the economic integration. However, due to the development of human rights and judicial activism in the regions, those judicial bodies involve in the enforcement of human rights in their respective regions.²⁹⁴ The Court of ECOWAS begins to see complaints of human rights violations with the adoption of the 2005 Supplementary Protocol. Before the adoption of the supplementary protocol, the Court declined to see the *Afolabi case* brought before it. With the adoption of the Supplementary Protocol, the Court of Justice has made remarkable changes in the enforcement of human rights being one of the judicial organs of the Community. Hence, individuals approach the court seeking reparations, and thus, so far the court entertains not less than 33 cases.

²⁹¹ Orlu Nmehielle, 2000, (above note 281), 54

²⁹² Ibid

²⁹³ Nwogu, 2007, (above note 214), 354

²⁹⁴ The Court of ECOWAS entertains not less than 33 cases since 2005, while the SADC Tribunal has heard more than 17 cases since 2007.

While the SADC Tribunal, for the first time faced with a human rights case, which gives it the opportunity, whether it was willing to accommodate disputes relating to cases of human rights. The case, commonly known as the Campbell case, was filed by Mike Campbell (pvt) Limited and William Michael Campbell before the Tribunal challenging the acquisition by the Government of Zimbabwe of agricultural land in the Republic of Zimbabwe. The case was pending before the domestic court; and thus, the Applicants filed an application for an interim measure restraining the Respondent from removing or allowing the removal of Applicants from their land, pending the determination of the matter.²⁹⁵

The Applicants argued that the Constitutional Amendment Act of the Respondent state was illegal and racist by virtue of Article 6 of the SADC Treaty and the African Charter, which outlaws arbitrary and racially motivated government action.²⁹⁶ The Amendment Act effectively vests the ownership of compulsory acquired agricultural lands in the hands of the Government with no payment of compensation and ousts the jurisdiction of the domestic courts to entertain any challenge concerning such acquisitions. It is on the basis of these facts that the Applicants brought the matter into the attention of the Tribunal. The Tribunal adopted provisional measures through its ruling ordering the respondent not to *'take steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence and beneficial use of'* the Applicants farm land²⁹⁷.

However, the Respondent failed to comply with the decision of the Tribunal regarding the interim reliefs granted to the Applicants. Then, the Applicants, on 20 June 2008, referred the failure of the state to observe the interim measures to the Tribunal and challenge the compulsory acquisition of their agricultural lands under the Land Reform Programme undertaken by the Government of Zimbabwe.

²⁹⁵ See article 28 of the Protocol & Rule 61 (2) – (5) of the rules of Procedure of the Tribunal

²⁹⁶ The Government of Zimbabwe enacted a Constitutional Amendment Act No 17 of 2005, which regulates the expropriation of land. See section 16B of Amendment 17.

²⁹⁷ See Campbell case

After due consideration of the facts of the case in light of the submissions of the parties, the Tribunal settles the matter for determination considering that whether or not the Tribunal has jurisdiction to entertain the application; whether or not the Applicants have been denied access to the courts in Zimbabwe; whether or not the Applicants have been discriminated against on the basis of race; and whether or not compensation is payable for the lands compulsorily acquired from the Applicants by the Government of Zimbabwe.

To determine the question of jurisdiction, the Tribunal put the very reasons for its establishment and its functions. It is established to ensure adherence to and the proper interpretation of the provisions of the Treaty and the subsidiary instruments made there under, and to adjudicate up on such disputes as may be referred to it.²⁹⁸ The bases of jurisdiction are, among others, all disputes and applications referred to the Tribunal, in accordance with the Treaty and the protocol, which are related to the interpretation and application of the Treaty.²⁹⁹ Article 15(1) of the Protocol states the scope of the jurisdiction to adjudicate up on 'disputes between states, and between natural and legal persons and states'. However, article 15(2) restricts the applicability of Article 15(1) stating that no person may bring an action against a state before, or without first exhausting all available remedies or unless is unable to proceed under the domestic jurisdiction of such state.

Concerning the exhaustion of local remedies, the Applicants first commenced proceedings in the Supreme Court of Zimbabwe, the final court in that country, prayed the court to rule in their favor that Amendment 17 obliterated their right to equal treatment before the law, to a fair hearing before an independent and impartial courts of law or tribunal, and their right not to be discriminated against on the basis of race or place of origin, regarding ownership of land. In delivering its judgment, the Supreme Court of Zimbabwe dismissed the Applicants' claims in their entirety saying, among

²⁹⁸ See article 16 of the SADC Treaty

²⁹⁹ Article 14(a) of the Protocol

others, that the question of what protection an individual should be afforded in the constitution in the use and enjoyment of private property, is a question of political and legislative character, and that as to what property should be acquired and in what manner is not a judicial question. The court further said that, by the clear and unambiguous language of the constitution, the legislature, in the proper exercise of its powers, had lawfully ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land may be sought.³⁰⁰ Thus, it is clear that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law which the very issues in the present application. Moreover, the Tribunal satisfied that the Applicants have established that they have been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law and consequently the Tribunal hold that the Government has acted in breach of Article 4(c) of the Treaty.

Concerning the issue of racial discrimination, the Applicants contended that the Land Reform Program is based on racial discrimination in that it targets white Zimbabwean farmers only. Even if Amendment 17 made no reference to the race and color of the owners of land acquired, the Applicants argue that the legislative intent directed only at white farmers since only white owned farms were targeted by the Amendment. They further contended that the targeted farms were expropriated and given to a class of politically connected beneficiaries.³⁰¹ Thus, the Applicants concluded that the

³⁰⁰ The Supreme Court of Zimbabwe explicitly acknowledge this in its judgment stating that 'By the clear and unambiguous language of S 16B (3) of the Constitution, the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of S 16B (2) (a) of the constitution could be sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited in effect to providing protection from the judicial process to the acquisition of agricultural land identified in a notice published in the Gazette in terms of S 16B (2) (a). An acquisition of the land referred to in S 16B (2) (a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There can not be any clearer language by which the jurisdiction of the courts is excluded'

³⁰¹ The beneficiaries, whom the applicants referred to as 'chefs', were 'senior political or judicial, or senior member of the armed services'.

Respondent is in breach of Article 6(2) of the Treaty, which prohibits discrimination, by enacting and implementing Amendment 17.³⁰²

The Respondent, refuted the allegations stating that not only lands belonging to white Zimbabweans have been targeted for expropriation but also those of the few black Zimbabweans who possessed large tracts of land for the benefit of people who were disadvantaged during colonialism and it is with in this context that the Applicants' farms were identified for acquisition by the Respondent. Therefore, the Government of Zimbabwe has not discriminated against white Zimbabwean farmers and has not acted in breach of Article 6(2) of the Treaty.

The Tribunal taking the facts and the judgment of the Supreme Court³⁰³ into account holds that by implementing Amendment 17, the Respondent has discriminated against the Applicants on the basis of race and there by violated its obligation under Article 6(2) of the Treaty. Because, the criteria adopted by the respondent in relation to the Land Reform Programme had been arbitrary but not reasonable and objective; fair compensation was not paid in respect of the expropriated lands; and the lands expropriated were not distributed to poor, landless and other disadvantaged and marginalized individual or groups and thus the differential treatment afforded to the Applicants constitute racial discrimination.³⁰⁴

³⁰² Article 6(2) of the SADC Treaty states that 'SADC and Member States shall not discriminate against any person on the ground of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or any other ground as ay be determined by the Summit'.

³⁰³ The Supreme Court of Zimbabwe in *Commercial Farmers Union V Minister of Lands* 2001(2) SA 925, para 9, where it dealt with the history of land injustice in Zimbabwe and the need for land Reform Programme under the rule of law stated that: 'we are not entirely convinced that the expropriation of white farmers, if it I done lawfully and fair compensation is paid, can be said to be discriminatory. But there can be no doubt that it is unfair discrimination...to award the spoils of expropriation primarily to ruling party adherents'.

³⁰⁴ H.E. Justice Dr. Onkemetse Tshosa, in his dissenting opinion, stated that 'Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the Respondent's obligation under article 6(2) of the Treaty'. He further argued that 'the target of Amendment 17 is agricultural land and not people of a particular rail group and that, although few in number, not only white Zimbabweans had been affected by the amendment '. See *Campbell case*, dissenting opinion of H.E. Justice Dr. Onkemetse B. Tshosa. Judgment was delivered on 8 November 2008

Therefore, the Tribunal, in its judgment further holds and declares that the respondent is in breach of its obligations under Article 4(c) of the Treaty and Article 6(2) of the Treaty; Amendment 17 is in breach of Articles 4(c) and 6(2) of the Treaty; and thus the respondent is directed to take all necessary measures, through its agents to protect the possession, occupation and ownership of the lands of the Applicants, and it is also directed to pay fair compensation on or before 30 June 2009 to the three Applicants³⁰⁵ who had already been evicted from their lands.

This decision paved the way to the Tribunal and hence individuals approach the Tribunal seeking remedies for violations of human rights. Of all cases heard by the Tribunal so far have dealt with, no case is submitted concerning disputes among member states; rather 15 cases relate to disputes between natural or legal persons and member states; and 2 cases relate to disputes between SADC employees and institutions.³⁰⁶

The African Court on Human and Peoples' Rights ought to have started hearing cases since the time the protocol that establishes the Court came into force.³⁰⁷ Nevertheless, as of October 2010, the Court entertained one case only.³⁰⁸ On 11 August 2008, Mr. Michelot Yogogombaye, Chadian national, filed an application against Senegal to the African Court. The Applicant sought a suspension order of the Court on the ongoing criminal proceedings instituted by Senegal against his former President and Head of State of Chad, Mr. Hissene Habre who has been residing in Senegal since December 1990.³⁰⁹ He argued that, Mr. Habre enjoys political asylum in Senegal since December 1990.³¹⁰ Further, the applicant alleged that by decision of July 2006,

³⁰⁵ Namely, Christopher Mellish Jarret, Tengwe Estates (pvt) Ltd. and France Farm (pvt) Ltd.

³⁰⁶ Ruppel, 2009, (above note 147), 301; also see, <http://www.aict-ctia.org/courts-subreg/sadc-home.html>.

³⁰⁷ The Protocol entered in force on 25 January 2004.

³⁰⁸ Yogogombaye case

³⁰⁹ Yogogombaye case Para 1. See generally, CB. Murungu, 'Judgment in the First case Before the African Court on Human and Peoples' Rights: A Missed Opportunity or Mockery of International Law in Africa?' (2010), available at <http://ssrn.com/abstract=1526539>, last accessed on 7 October 2010

³¹⁰ Mr. Habre was suspected of complicity in crimes against humanity, war crimes and acts of torture in the exercise of his duties as Head of State.

*‘the AU had mandated Senegal to consider all aspects and implications of the Hissene Habre case and to take all appropriate steps to find a solution, or that failing, come up with an African solution to the problem posed by the criminal prosecution of the former Head of State of Chad’.*³¹¹

Based on the above arguments, Mr. Yogogombaye asked the Court to rule in his favor on the following points;³¹² rule that the application is admissible; declare that the application has the effect of suspending the ongoing execution of the July 2006 AU’s mandate to the Republic and State of Senegal; Rule that Respondent has violated several provisions of the African Charter and the principle of universal jurisdiction; rule that the charges brought against Mr. Habre have been abused and abusively used; order the Republic of Chad and Senegal to establish a ‘National Truth, Justice and Reconciliation Commission’ for Chad and Recommend that other states of the AU assist Chad and Senegal in establishing and putting into operation of the said Commission.

The respondent submitted that for Court to be able to deal with applications brought by individuals, the respondent state must first have recognized the jurisdiction of the Court to receive such applications in accordance with Article 34(6) of the protocol establishing the Court.³¹³ Thus, Senegal argued that ‘it did not make such declaration accepting the jurisdiction of the Court to hear applications submitted by individuals’.³¹⁴ Further, Senegal denied the allegations made by the Applicant. Thus, on its part, Senegal requested the Court to rule that Senegal has not made a declaration accepting the jurisdiction of the Court to hear applications submitted by individuals and hence declare that the application is inadmissible.³¹⁵

³¹¹ The author distorts the facts and reality regarding the decision of AU. The truth is that the AU only mandated a Committee of Eminent African Jurists to study the case against Habre and to come up with recommendations on where Habre should be tried, giving priority to African Solution. The AU only mandated Senegal to try Habre in its own domestic courts, doing so in the ‘interests of the AU but not ask Senegal to consider the implications. Yogogombaye case, Para 1; Also See Murungu, 2009, 4

³¹² Yogogombaye case, Para 23 of the Judgment

³¹³ Id, para 24

³¹⁴ Id, para 25

³¹⁵ Id, para 27

The Court before going to the merits of the case began to consider the preliminary objections raised by the Respondent against the Applicant. Regarding the personal jurisdiction of the Court, the law is clear under Articles 34(6) and 5(3) of the Protocol.³¹⁶ The Court considering the effects of Articles 5(3) and 34(6) of the Protocol stated the 'direct access to the Court by an individual is subject to the deposit by the respondent state of special declaration authorizing such a case to be brought before the Court'.³¹⁷ Upon checking the list of states that have ratified and made declarations under Article 34(6) of the Protocol, the Court decided that 'pursuant to Article 34(6) of the Protocol, it does not have jurisdiction to hear the application' and based on Article 34(6) 'it has no jurisdiction to hear the case instituted by Mr. Yogogombaye against Senegal'.³¹⁸

Judge Fatsah Ouguerouz, in his separate opinion reflects that since Articles 5(3) and 34(6) of the Protocol are closely related, the issues of the Court's 'jurisdiction' and 'access to the court' are no less distinct, it is precisely this distinction that explains why the Court did not reject the application given the manifest lack of jurisdiction, by means of a simple letter issued by the Registry, and why it took time to rule on the application by means of a very solemn judgment.³¹⁹ Furthermore, he challenged Senegal's act of transmitting the names of its representatives before the Court. At this stage,

'Senegal could have limited itself to indicating that it had not made the declaration provided for in article 34(6) of the Protocol and that consequently, the Court had no jurisdiction to deal with the application on the grounds of the provisions of article 5(3) of the Protocol'.

However, by notifying the Court of the names of its representatives, it gave room for the suggestion that it did not exclude appearing before the Court and of participating in its

³¹⁶ Article 5(3) of the protocol provides that 'the court may entitle relevant NGOs with observer status before the commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of the protocol. Article 34(6) of the protocol stipulates that 'At the time of the ratification of this protocol, or any time there after, the state shall make a declaration accepting the competence of the court to receive petitions under Article 5(3) of this protocol. The court shall not receive any petition under Art 5(3) involving a state party which has not made such declaration'.

³¹⁷ Yogogombaye case, para 34

³¹⁸ Id, para 3 & 46

³¹⁹ Separate Opinion, In the Matter of M. Yogogombaye V Senegal case, Para 12

proceedings, with doubts as to the object of its participation; to contest the Court's jurisdiction; contest the admissibility of the application or to defend itself on the merits of the case'. And he believes that the act of submitting the names of representatives to the Court by the Respondent had a constructive effect of an implied recognition of the Court.³²⁰ He made it clear that the practice of Senegal, such as asking the Court for an extension of time to enable it to better prepare a reply to the application; filling a statement of defense and notifying the Court of its representatives, despite the fact that it had not made a declaration in terms of Article 34(6) of the Protocol, viewed it as accepting the jurisdiction of the Court; and it left open the possibility of accepting the jurisdiction of the Court to deal with its application.³²¹ However, the judgment of the Court did not go into the merits of the case but ended up at the preliminary stage of objections.

Unlike the Regional Courts, the African Court does not offer direct accessibility to individuals. Access to the Court by individuals before the Court is optional jurisdiction and which is under the willingness and discretion of states parties to the protocol. In the *Yogogombaye* case, the Applicant did not get the opportunity to be heard before the Court. Had the Court gone into the merits and substance of the case, it could have been an important opportunity to the Court to clarify and contribute on fundamental issues of international law such as 'universal jurisdiction, immunity of Heads of State, retroactive application of criminal law to international crimes and the legality of the Court to suspend the AU decision requiring a state to act on the decision of the AU and prosecute former Head of State for international crimes and on their concepts.'³²²

Judgments of all the above judicial organs are final, binding on the parties and not subject to appeal by any other court.³²³ Thus, upon delivery, it will be immediately enforced. Furthermore, the parties are considered exhausting their right of appeal. For cases coming before the Court of ECOWAS without exhausting local remedies, the right

³²⁰ Separate Opinion in *Yogogombaye* case, Para 18

³²¹ Murungu, 2010, (above note 309), 16

³²² Ibid

³²³ Article 19(2) of the ECOWAS Court Protocol

to appeal would generally be extinguished when the choice is made to bring the case before it without first giving national courts chance to hear the case. Though the judgment of the African Court is final and not subject to appeal, the Court may review its decisions in case new evidence, which is fundamental to change the result of the decision, is discovered.³²⁴ A party may discover new evidence that was not with in his/her knowledge at the time of judgment. In such situation, the party may apply to the Court to review the judgment notifying the discovery of new evidence. The application shall be within six months after that party acquired knowledge of the evidence so discovered.³²⁵ The application shall specify the judgment in respect of which revision is requested; contain the information necessary to show that new evidence is discovered; the newly discovered evidence was not in the knowledge of the party at the time the judgment was delivered; and the application is submitted within six months after the applicant acquired such evidence.³²⁶ A copy of all relevant supporting evidences shall accompany the application. The Court, however, may not suspend the execution of the judgment unless the Court decides otherwise.³²⁷

In all of the above judicial bodies, when they find that there have been violations of human rights, they will take 'appropriate orders' to remedy the violation, including the payment of fair compensation or reparation.³²⁸ Thus, the remedial competence of the Courts may award reparation to victims; order injunctive relief and order the violating state to remedy the consequences of the violation through investigating the facts giving rise to the violations; punishing those responsible; amending, adopting or repealing domestic law of judicial decisions; ordering the state to refrain from a particular course of action; and by demanding that the state issues an apology. The ECOWAS Court of Justice, in the Korau case, for instance, awarded monetary damages to the plaintiff,³²⁹ while the SADC Tribunal, in Campbell case, directed the Respondent to pay fair

³²⁴ Article 28(3) of the Protocol

³²⁵ Rule 67(1) of the interim Rules of the Court

³²⁶ Id, Rule 67(2)

³²⁷ Id , Rule 67(5)

³²⁸ See article 27 of the protocol of the African court

³²⁹ Korau case, new article 24(1) of the Supplementary Protocol of 2005 states that 'judgments of the Court that have financial implications for nationals of member states or member states re binding'.

compensation to the three Applicants.³³⁰ The African Court is also empowered to render judgments that have financial implications.³³¹ The Courts may also provide interim measures in the form of provisional relief.³³² In all of the above Courts and the Tribunal, judgments are required to be read in open court.³³³ The openness of the Courts creates certainty as to the result of complaints and reputational pressure on member states to comply with the decisions of the Courts or Tribunal.³³⁴

4.7. Enforcement of Judgments

The decisions of the above Courts and Tribunal are final and immediately enforceable. The difficulty of enforcing decisions equally affects the African Court and the Regional Courts. All of the Courts and the Tribunal '*do not have the benefits of institutions with powers of coercion to enforce their judgments*'³³⁵. In the context of the African Court, the mandate to supervise the compliance of judgments is under the Assembly of AU; and the Executive Council, on behalf of the Assembly, monitor the execution of judgments of the Court.³³⁶ Furthermore, the states parties undertake to comply with the judgment of the Court in any case to which they are parties within the time specified by the Court and to guarantee its execution.³³⁷ If states failed to comply with its judgment, the Court is required to specify, in its report, the cases in which states has not complied with.³³⁸ In such cases, the Executive Council may take a binding decision and thus, non-compliance with this decision exposes the state to the imposition of sanctions and 'other measures of a political and economic nature to be determined by the Assembly of AU'.³³⁹

³³⁰ Campbell case

³³¹ Article 27(1) of the protocol of the African court

³³² Based on article 28 of the Protocol, the SADC Tribunal granted 'interim measure to the applicants ordering the respondent not to take any steps or permit steps to be taken, to evict from or interfere with the peaceful residence on, and beneficial use of the applicants' farmland.

³³³ Article 19(2) of the ECOWAS Court Protocol; Article 28(5) of the African Court of human Rights

³³⁴ Nwogu, 2007, (above note 214), 355

³³⁵ Ebobrah, 2009, (above note 232), 96

³³⁶ Article 29(2) of the Protocol; and Rule 64(2) of the Interim Rules of the Court states that 'the Executive Council shall be notified of the judgment and shall monitor its execution on behalf of the Assembly'.

³³⁷ Article 30 of the Protocol

³³⁸ Id, article 31

³³⁹ Article 23(2) of the AU Constitutive Act; also see Viljoen, 2007, (above note 15), 453

The Court of ECOWAS and the Tribunal of SADC

*'either have to rely on pressure generated by the political arms of the respective communities, the indigence of national executives or the good will of national courts to implement the judgments'.*³⁴⁰

Member states and Community institutions are required to take all necessary measures to ensure execution of the decision of the Court or Tribunal. In the context of ECOWAS, the judgment of the Court is to be implemented according to the rules of civil procedure of the member states. New Article 24(2) of the Protocol states that *'execution of any decision of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant member state for execution according to the rules of civil procedure of that member state'*.³⁴¹ All member states are obliged to determine the national authority competent to receive a writ of execution from the Community Court that process the execution of the judgments and notify the Court accordingly.³⁴² However, Ebobrah noted that ECOWAS member states had not yet furnished the Court with the relevant information.³⁴³

The execution of judgment in the SADC regime differs from the above Court and the African Court as well. The judgments of the Tribunal are to be executed by the relevant states in the manner that foreign judgments are enforced.³⁴⁴ Hence, the procedures used for enforcing foreign judgments will be applied to enforce the decision of the Tribunal.³⁴⁵ In case a state fails to comply with the judgments of the Tribunal, the latter will ultimately rest on the power of SADC Summit. In other words, if the Tribunal establishes the existence of such failure, it will report its findings to the summit for the

³⁴⁰ Ebobrah, 2009, (above note 232), 96

³⁴¹ In the same fashion, in the EAC context, the Rules of Civil Procedure of the particular partner state regarding any pecuniary obligation on any person to make good any amount of any decree of the court governs execution of any judgments of the Court.

³⁴² New article 24(6) in article 6 of the 2005 Supplementary Protocol

³⁴³ Ebobrah, 2009, (above note 232), 97

³⁴⁴ Article 32(1) of the SADC Protocol

³⁴⁵ This gives local courts the opportunity to hear motions before determining the enforceability of judgments from foreign jurisdiction.

latter to take appropriate action.³⁴⁶ In the ECOWAS context, if a state fails to comply with the decisions of the Court, the Authority of ECOWAS is empowered to sanction on such state for failure to fulfill Community obligations.³⁴⁷

There are challenges in the enforcement of the judgments of the Courts and the Tribunal. The concerned states may be politically unwilling to implement the judgments. Political will to comply with the judgments of the Courts is significant for the existence of a better enforcement mechanism at the regional level. The absence of relevant procedures to activate the process of enforcement is another challenge. Further, the human rights mandate of the Tribunal is ambiguous to some extent. In the Campbell case, the Respondent argued that there are numerous protocols under the Treaty but none of them is on human rights pointing out that there should first be a protocol on human rights in order to give effect to the principle set out in the Treaty; and in the absence of such instruments, the Respondent concluded that 'the Tribunal appears to have no jurisdiction to rule on the Land Reform Programme carried out in Zimbabwe.'³⁴⁸ As a result, the Respondent failed to comply with the judgments of the Tribunal.

Though it may not directly link to the enforcement of human rights, low level of intra-community trade may be an obstacle to enforce judgments by the Courts of the Communities. Views of state sovereignty, short-term domestic political interests and the nature of adjudication by supranational organ are some of the realities that will pose an obstacle to enforcement, which remains a handicap of the Communities' Courts.³⁴⁹

4.8. Amicable Settlement

The African Court is mandated to exercise conciliatory jurisdiction in cases pending before it.³⁵⁰ The Court may contact the parties and take appropriate measures to

³⁴⁶ Article 32(5) of the SADC Tribunal Protocol

³⁴⁷ Article 77 of the SADC Treaty. The sanction may extend to the suspension of the state from participating in the activities of the Community.

³⁴⁸ See Campbell case

³⁴⁹ Nwogu, 2007, (above note 214), 355

³⁵⁰ Article 9 of the African court protocol And Rule 57 of the Interim Rules

facilitate amicable settlement of disputes based on the respect for human and peoples' rights. During an initial oral hearing, the parties may indicate their desire to settle the dispute amicably and ask the Court for its assistance.³⁵¹ Hence, the Court may offer to the parties 'its good services'. Any negotiations entered into with a view to reaching an amicable settlement have to remain confidential, and the parties are not required to observe the proceedings of the Court.³⁵² Up on reaching an argument, the Court will render a judgment with limited brief of statement of the facts and of the solution adopted.³⁵³

The Protocol of SADC Tribunal is silent on friendly settlement of disputes. In the case of the ECOWAS Court of Justice, the Supplementary Protocol provided for the establishment of the arbitration Tribunal and pending its establishment, the Court is mandated to act as an arbitrator for the purpose of Article 16 of the ECOWAS Treaty.³⁵⁴

4.9 Relation between the Regional Courts and the African Court of Human Rights

The Treaties and protocols of the RECs are silent on how the Communities' Courts are to relate with the African Court. In the African Court side, the Protocol touches on relations between the Court and regional mechanisms involved in the field of human rights. Article 4 and 5 of the Protocol authorized African intergovernmental organizations, which includes RECs to submit cases to the Court for adjudication, and to request, for advisory opinion. However, these provisions fail to outline the nature of operational relation between the Court and the Communities' Courts. In other words, there is no clear indication that the alleged victims should approach first. Besides, the decisions of Regional Courts are binding on the parties, immediately enforceable and not subject to appeal. On the other hand, an application is inadmissible before the African Court if it has been settled under an international dispute settlement procedure. These make the relationship more complex.

³⁵¹ There must be explicit consent on both parties. Even if the parties to settle amicably notice the court, the court may decide to proceed with hearing of the application. Also see Rule 57(4).

³⁵² Rule 57(2) of the Interim Rules

³⁵³ Rule 57(3) of the Interim Rules

³⁵⁴ New article 9(5) in article 3 of the 2005 Supplementary Protocol

There are some reasons to believe that the African Court stands superior position than the Communities' Courts. First, the African Court is a specialized continental Court for human rights issues while the Communities' Courts are primarily established to settle disputes on the economic integration of the respective regions. Thus, the African Court should enjoy supremacy over Communities' Courts in relation to competences on human rights issues. Second, the Protocol empowers the African Court to receive complaints for adjudication as well as advisory opinions upon it from intergovernmental organizations such as ECOWAS and SADC. This envisages the greater competence for interpretation and adjudication that lie upon the continental Court. This, however, does not mean that the African Court has an exclusive jurisdiction over the interpretation and application of the African Charter. Further, it does not specify an appellate relationship.

Concerning Regional Courts, the regional protection system is closer to applicants alleging the violations of their human rights. Thus, the Communities' Courts should first be approached before bringing the case to the African Court. These regional systems are playing a supporting role in the protection of human rights using the African Charter as a common standard for human rights realization in the respective regions. Thus, the Regional Courts, including the Court of ECOWAS and the Tribunal of SADC stand in a complementary relation with the African Court for the realization of human rights in the continent. Hence, they should use and apply the interpretations and jurisprudence of the African Court over the African Charter on Human and peoples' rights.

4.10 Evaluating the Roles of Regional Courts in the Realization of Human Rights

It would generally be agreed that the three main traditional levels for the realization of human rights are the domestic/national, the continental and global human rights system. In the African context, the domestic human rights system, the African/AU human rights system and the global or UN human rights system. Since a couple of decades, a new system, a sub-system to the complete African human rights system emerges. The RECs are involved in the protection of human rights. The regional system uses the

African Charter as a common standard for the realization of human rights in the respective regions. Moreover, the judicial bodies of regional system entertain cases on human rights. In the judicial sector, the continental human rights system mandated the African Court to exercise jurisdiction on human rights. Therefore, the involvement of Regional Courts in the enforcement of human rights would be arguable. Nevertheless, they are playing a great role in the protection of human rights in their respective regions. Thus, to determine the role of the Regional Courts in the realization of human rights, it would be necessary to further explore what the continental enforcement problems are and why the former involve in the protection system.

Access to the African Court is open to states parties to the protocol, the African Commission and African intergovernmental organizations. Individual and NGOs with observer status before the Commission may directly approach the Court if the concerned states have made the declaration required by Article 34(6) of the Protocol. In effect, NGOs and individuals will not have direct access to the Court. Article 34(6) restricts the individuals' right of access to international human rights organs. Here, the right of individual appeal is generally the subject of an optional clause, and the competence of the Court to examine individual petitions is made subject to the state's having declared its recognition of this competence.³⁵⁵ The jurisdictional framework established for the protection of human rights in Africa could have been optimum had the individual been granted easy access to the Court. It is difficult to imagine that states will rush to be the first to declare their recognition of the Court's competence to examine individual petitions. Thus, for lack of a significant number of states declarations recognizing the competence of the Court to examine individual petitions, the jurisdiction of the Court would basically be reduced to the more examination of inter-state communications.³⁵⁶

The problem with regard to the African Court is not only the optional nature of direct access of individual before the Court but also the emergence of frustration of universal

³⁵⁵ See <http://www.uneca.org/itca/governance/Documents/African%20Court.pdf>, last accessed on 7 October 2010

³⁵⁶ Ibid

regional acceptance.³⁵⁷ Viljoen notes that all AU member states may not adopt the Protocol establishing the Court and many more states will not accept direct individual access to the Court.³⁵⁸ Further stated that

*‘as long as universal regional acceptance of the Court’s jurisdiction, “has not been attained, the African regional human rights system will operate differently for different states, there by undermining the development of common institutions and norms’.*³⁵⁹

From the human rights complaints perspective, the jurisdiction of the Regional Courts extends to all citizens of the respective regions. Access to the Courts against any member state under the respective instruments other than member states and Communities’ institutions are available to all natural and legal persons. In the context of ECOWAS, access for proceedings for the determination of act or inaction of a Community official, which violates the rights of individual or corporate bodies, is open to individuals and corporations.³⁶⁰ In the same way, access to the SADC Tribunal is open to nature/legal persons.

Furthermore, an individual other than direct access to the Court can bring cases without exhausting local remedies before the Court of ECOWAS. Moreover, the Court of ECOWAS and the Tribunal of SADC are physically accessible to the respective communities. Geographical Proximity benefits an individual in terms of cost and production of evidences. It is cost effective and makes ease of litigation in presenting witnesses. The comparative cost advantages as compared to the use of African Court justify resorting to the Regional Courts. They are closer to applicants and relatively

³⁵⁷ States may not accept the jurisdiction of the court for two main reasons; reliance on national sovereignty to avoid the disruption of their domestic legal order resulting from the court’s jurisdiction, and a professed African suspicion of judicial settlement of disputes. African states have preference for non-judicial methods of conflict resolution and hence believe that African justice is essentially conciliatory. See generally, A. Stemmet, ‘A Future African Court for Human and Peoples’ Rights and Domestic Human Rights Norms’, 23 SAYIL 233 (1998),

³⁵⁸ Viljoen, 2007, (above note 11), 463

³⁵⁹ Ibid

³⁶⁰ New article 10(C) in article 4 of the 2005 Supplementary Protocol

chapter to access them.³⁶¹ Furthermore, the flexibility of the Courts with respect to their sittings allows applicants to enjoy the possibility of accessing the Courts since the Courts are able to move to different locations within the respective Communities.³⁶² Thus, the Regional Courts are better suited for addressing issues raised in the region.

The difficulty of enforcing decisions of the African Commission and the African Court equally affects the decisions of the Regional Court of ECOWAS and the Tribunal of SADC. However, the binding decisions of the latter Courts are best alternative for enforcement of rights. At the regional level, there are strong political and geographical as well as psychological ties. The economic and cultural ties between states in the respective Communities 'amplify the chances of sanctions for failure to comply with decisions of the supervisory bodies'.³⁶³ Peer pressure created with in smaller number of countries is a better environment for willingness to comply with the decisions of the judicial organs.

At the regional level, laws taking the form of treaties, protocols, conventions and other legal instruments are legally binding and enforceable with in national legal systems. The purpose and nature of RECs allows laws to be applicable domestically. States undertake to translate the principles and objectives of the Communities in to practice. The principles and objectives include provisions on human rights and human-rights-related matters. Further, they use the African Charter as minimum standard. Thus, the Courts are potential for better standards of rights and leave a room to develop better standards. These enrich the human rights framework and develop the jurisprudence of national legal systems.

³⁶¹ Ebobrah, 2009, (above note 232), 87. Article 13 o the Protocol allows the Tribunal to relocate and sit any where with in the Community 'if it considers t desirable'. The ECOWAS Court may move and sit in the territory of any other member state if it considers necessary.

³⁶² Ibid

³⁶³ Ibid

4.11. Challenges Facing Regional Courts in the protection of Human Rights

The involvement of Regional Courts in the protection of human rights unquestionably contributes towards the promotion and protection of human rights. However, in respect of the enforcement of human rights within Regional Courts, there are some problems that can be considered as hurdles in respect of developing the jurisprudence of the continent. Thus, some critical issues with regard to the enforcement of human rights within Regional Courts and the emergence of challenges to these Courts need to be discussed here. These issues refer to forum shopping, the human rights competence and vast responsibility of the judges, potential to varying interpretations of the African Charter and other issues that are specifically obstacles for the realization of human rights in the respective Communities.

Many African states are members to various RECs.³⁶⁴ Hence, due to the multiplicity of courts, the Regional Courts will have concurrent jurisdiction on the same matter. Odinkalu states,

*“There is considerable overlap and resulting competition between the subject matter, personal and geographical jurisdictions of these respective courts. National courts as well as a multiplicity of regional courts and tribunals... have jurisdiction to consider the case.”*³⁶⁵

Further, a person who alleges the violation of his/her rights may choose among the possibilities to submit his/her complaints. To curb this possibility, many of the Regional Courts apply the principle of *res judicata*. For instance, the Protocol of ECOWAS Court and the SADC Treaty provide for the finality of judgments.³⁶⁶ This approach excludes the other Regional Courts to entertain the case that have been decided by these Regional Court or Tribunal. Viljoen argues that the principle of *res judicata* applied to Regional Courts ‘*should not be followed with respect to the African Court of Human*

³⁶⁴ Of the 53 African states, only seven belongs to one regional economic community,; and one country is a member of four regional communities. See generally, Annual review of integration in Africa, available at <http://uneca.org/adfiii/ariaoverview.htm>, last accessed on 1 June 2010

³⁶⁵ Odinkalu, 2003, (above note 271), 10

³⁶⁶ See articles 19(2) and 22(1) of the ECOWAS Court Protocol; see also article 16(5) of the SADC Treaty

*Rights. In principle, further recourse from REC Courts should be allowed to the African Court.*³⁶⁷ This implies a need for institutional coordination between Regional Courts and the African Court. Odinkalu concurs that

*“The African Court on Human and Peoples’ Rights, the African Commission and the Regional Economic Courts and Tribunals will need to share information on their pending and completed cases. This should place these institutions in a position to anticipate and respond to cases to unwarranted forum shopping.”*³⁶⁸

However, in respect of the ECOWAS Court as well as the SADC Tribunal, this will not be the case as that Court’s protocol and the SADC Treaty provides for the finality of judgments by the respective Regional Court and Tribunal.

Regional Courts are combined courts of justice and human rights. This means that they are mandated with a two-pronged objective to provide for justice and human rights under one root.³⁶⁹ Setting disputes in economic matters and human rights is a vast responsibility to the Regional Courts for two different reasons. The number of judges in Regional Courts is very few in number.³⁷⁰ Thus, it is difficult to manage complaints received from member states, the respective Community institutions as well as issues coming from natural and legal persons. The other problem is related to the human rights competence of judges. In respect to the appointment of the judges to the Regional Courts, though actually qualified and possessing the necessary experience for appointment to an international position, the nominees are not required to possess the qualifications and experience in human rights as is set out for selection as a judge to the African Court of Justice and Human Rights.³⁷¹

³⁶⁷ Viljoen, 2007, (above note 11), 502

³⁶⁸ Odinkalu, 2003, (above note 271), 12

³⁶⁹ In this respect, regional courts are some how similar with the African Court of Justice and Human Rights due to the Dual nature of the mandate of the courts both as courts of justice and Courts of Human rights.

³⁷⁰ The ECOWAS Community Court of Justice comprised of the President of the Court, Chief registrar and seven judges; while the Tribunal of SADC consists of not less than ten members; among these five of them are regular members who sit wherever the Tribunal sits and the remaining five members consist of a pool from which members can be drawn from time to time. See article 3 of the SADC Tribunal Protocol

³⁷¹ See article 4 of the protocol on the Statute of the African Court of Justice and Human Rights

Setting the African Charter as a common standard³⁷², Regional Courts determine disputes through interpreting the Charter and applying the human rights rules. The interpretation of the Charter by different courts and tribunals may bring contradictory interpretations. These differences undermine the movement towards African Unity and legal integration. The problem of divergent interpretations of one normative source by Regional Courts and Tribunals develops varying jurisprudence. This eventuality could be curbed if Regional Courts follow the interpretations of the African Court, if any or working out a system of referral to the African Court, for interpretive guidance in other cases.³⁷³ Odinkalu stipulates that *'by sharing jurisprudence in completed cases, these bodies will also be able to minimize the opportunities for contradictory jurisprudence on the African Charter'*.³⁷⁴ Further, he stated that

*"Cooperative arrangements may need to be evolved so that the African Court on Human and Peoples' Rights may receive referrals on questions of Charter interpretation since as the Court who personnel have utmost expertise on human rights issues."*³⁷⁵

The AfCHPR recently organized and hosted a colloquium for continental and regional human rights judicial and quasi-judicial bodies responsible for the promotion and protection of human rights in Africa so as to initiate judicial dialogue among these institutions, with a view to exploring ways and means of ensuring cooperation and coordination.³⁷⁶ The participants of the Colloquium agreed that the co-existence of the regional courts and the continental institutions is prerequisite for co-ordination and hence, they

³⁷² Viljoen stated that the direct reference of the African Charter and the direct application of human rights rules in determining trade disputes and interpreting agreements, make the African Charter 'as a kind of bill of rights for the African regional human rights system. See Viljoen, 2007, (above note 11), 501

³⁷³ Id, 502

³⁷⁴ Odinkalu, 2003, (above note 271), 12

³⁷⁵ Ibid

³⁷⁶ The African Court on human and peoples' Rights, Final Communiqué of the Colloquium of African Human Rights Courts and Similar Institutions; from 4-6 October, 2010, in Arusha, United Republic of Tanzania. The colloquium was attended by the ECOWAS Community Court of Justice, The SADC Tribunal, The EACJ and The EAC Chief Justices Forum in addition to the African Commission, the African Committee on the Rights of Children, and the judicial and quasi-judicial human rights bodies established at the continental level by the African Union.

*‘stressed the need to put in place systems for the proper exchange of information, to facilitate a coherent human rights jurisprudence and approach and to avoid the same matter being adjudicated upon in two or more international jurisdictions at the same time’.*³⁷⁷

The participants agreed that, with a view to enhancing cooperation and networking, the bureaus of the participating institutions should meet at least once a year. The participants requested the African Court ‘to serve as a temporary secretariat’. This secretariat will ‘explore the possibility of hosting a data base, communication portal and website to share information and prepare for the next Colloquium’.

The problems related to the Court of ECOWAS and the Tribunal of SADC are conflicting interests with the jurisdiction of the national courts and the human rights competence respectively. The Court of ECOWAS is in conflict with the jurisdiction of the national courts of the Community due to the silence of the Protocol on the requirement, exhaustion of all available local remedies. Exhaustion of domestic remedies provides a ‘compromise between state sovereignty and international supervisory mechanisms’ since it recognizes the competence of national judicial system.³⁷⁸ The requirement to exhaust local remedies prevents the flooding of human rights complaints to the Regional Courts and gives the first opportunity to national legal systems to address the complaints raised. The absence of this requirement hesitates to the ECOWAS Court to review decisions rendered by the national courts. In Keita case, the Court declared that it was not a Court of appeal for decisions of national courts as in the case of the European Court of Human Rights.³⁷⁹ In effect, the absence of such a requirement may affect the effectiveness of enforcement of its decisions.

The question of competence of the SADC Tribunal to receive human rights complaints is another issue to be addressed. In the absence of an express mandate to entertain human rights complaints, the Tribunal exercises jurisdiction over human rights matters.

³⁷⁷ Ibid

³⁷⁸ Ebobrah, 2009,(above note 232), 92

³⁷⁹ Keita case, Para 22

Ebobrah notes that “*the challenge of competence in the SADC Tribunal is neither as precarious as the East African Court of Justice, nor is it as secure as it is in the ECOWAS regime*”.³⁸⁰

The Tribunal obviously faced with the challenge of enforcing its decisions. In Campbell case, though the Tribunal held that the Republic of Zimbabwe was in breach of Articles 4(c) and 6(2) of the SADC Treaty and made the necessary order to be taken, enforcement of the decision is more complex to the Tribunal. Despite the failure to observe the decision of the Tribunal, the Government of Zimbabwe continued to violate the decision of the Tribunal and endangered the lives, liberty and property of all those applicants whom the decision meant to protect.³⁸¹ Further, the Government of Zimbabwe informed the Tribunal that “*any decisions that the Tribunal may have made or may make in the future against the Republic of Zimbabwe are null and void*”.³⁸² What the Tribunal can do is that it simply reports the non-compliance of the state with its decisions, to the Summit. The Tribunal reported the failure to the Summit to take appropriate action in terms of Article 32(5) of the Protocol.³⁸³

³⁸⁰ Ebobrah, 2009, (above note 232), 91

³⁸¹ See Campbell case, case no SADC (T) 01/2010; Judgment of the Tribunal, Delivered on 16 July 2010; available at <http://www.sadc-tribunal.org/docs/case032009.pdf>. last accessed on 12 October 2010

³⁸² Ibid

³⁸³ Article 32(5) of the protocol provides that ‘if the Tribunal establishes the existence of such failure, it shall report its findings to the Summit for the latter to take appropriate action.’ Until 14 October 2010, the Summit did not take any measure against the government of Zimbabwe.

CHAPTER FIVE

CONCLUSION and RECOMMENDATIONS

5.1. Conclusion

The realization of human rights is prerequisite for the pursuit of regional economic integration in different regions of the continent, and ultimately to establish the African Common Market. This is due to the fact that there is an organic relationship between human rights and regional economic integration. Thus, it is not possible to build sustainable economic integration without guaranteeing human rights. Considering the importance of human rights for the realization of an integrated economic community, RECs incorporated human rights provisions in their Constitutive Treaties and subsidiary legal instruments. In this regard, the Treaties of EAC, COMESA, ECOWAS and SADC constitute provisions on human rights and provisions relating to human rights. Further, there is an increasing pattern of adopting conventions and protocols on human rights and makes reference to continental and international human rights instruments. Such provisions form part of the fundamental principles of the respective Communities, where each partner state must act in accordance with the principles. However, human rights are not accorded an equally significant place in all the regional arrangements.

Having established the legal framework for the realization of human rights, the organs and institutions of RECs involve in the promotion and protection of human rights. Among the recognized RECs, IGAD and CEN-SAD do not have Courts of justice even in their Constitutive Treaties. The Courts of Justice of AMU and ECCAS are not in operation though they are main organs of the respective Communities. The Court of Justice of COMESA does not yet hear cases on human rights even though it has potential legal basis to hear such cases. The EAC Court of Justice is denied to hear cases of human rights unless a respective protocol that authorizes to do so is adopted. The Courts of the rest of Communities are entertaining cases concerning violations of

human rights. This is especially important in the judicial sector where the practices of the ECOWAS Court of Justice and the SADC Tribunal are greater in relation to the protection of rights. Both of these Regional Courts exercise competence over human rights matters. The African Charter is a common standard of these Courts and the RECs, in general, to be achieved by all member states of the respective Communities.

Judicial protection of rights through the Regional Courts is best alternative due to ease access to individuals. On the one hand, Regional Courts allow direct individual access before the Courts, and on the other hand, the physical or geographical access of the Courts to litigants since both the Court of ECOWAS and the Tribunal of SADC hear cases in the territories of member states wherever the Court/Tribunal considers it necessary. Further, unlike the African Court of Human Rights, Regional Courts serve on a full-time basis. The optional nature of individual access before the African Court makes the Regional Courts more attractive.

The Court of ECOWAS differs from the Tribunal of SADC from their nature of normative basis and structural framework. The Court of ECOWAS granted express human rights mandate to exercise competence over human rights cases committed within the territories of member states. Furthermore, the admissibility requirement is silent on the exhaustion of all available local remedies. With respect to the human rights competence of the SADC Tribunal, it does not have an express mandate to determine cases of violations of human rights. However, the combined readings of articles 14 and 15 of the protocol, with Article 4(c) of the Treaty, grant the Tribunal to exercise human rights jurisdiction. What makes the Tribunal differ from the ECOWAS Court of Justice is that the former, like many other international judicial and quasi-judicial organs, it requires the exhaustion of all available national remedies.

The competence over human rights matters of the Regional Courts creates overlapping jurisdiction with the continental human rights institutions particularly the African Court of Human Rights. Further, the proliferation of judicial institutions has also negative impact on the legal integration of the continent. The Regional Courts and the continental Court

interpret the African Charter, which is potential risk due to the possibility of divergent interpretations of the same normative source. These problems can be solved with the adoption of cooperative arrangements between the Regional Courts and the African Court of Human Rights.

5.2. Recommendations

- Understanding the relationship between human rights and economic integration, African RECs are advised to build human rights regimes. In this regard, the organs and institutions of the Communities will be dedicated to the promotion and protection of human rights. Thus, the protection of human rights at the RECs strengthens and assists the national human rights system as well as the continental human rights system.
- The East African Court of Justice Jurisdiction on human rights is subject to a respective protocol, which has not yet been adopted. Hence, the promise in Article 27(2) of EAC Treaty should be realized. This is crucial to the upholding, enforcement and realization of human rights within the community and the effective integration of the Community.
- As in the case of the ECOWAS human rights regime, the Summit of SADC should reconsider the jurisdiction of the Tribunal for the expansion of the competence of the Tribunal on human rights matters in order to be fully accepted by partner states of the Community.
- The Regional Courts may divergently interpret one normative source of the African Charter. This should be curbed following the African Court's interpretations; or regional systems may adopt a specific authorizing instrument that allows a system of referral to the African Court for the purpose of interpretative guidance.
- If the rationale behind the establishment of the African Court of Human Rights is the strengthening of the complaints mechanism by providing a Court to redress the

deficiencies inherent in the Commissions findings, then the Court should be allowed to play as far-reaching a role as is possible³⁸⁴. Hence, direct access to the Court should be arranged to individuals and NGOs through adopting an instrument allowing such access.

- Partner states in any of the RECs shall realize the compliance and observance of judgments of the Regional Courts. Furthermore, they should condemn human rights violations committed by one of the partner states in a Community.

- Partner states should involve in the processes so as to developing in the areas of human rights and democratization.

- The participants of the Colloquium organized by the African Court should strongly work for the realization to institutionalize the Colloquium. Furthermore, the African Court, the Commission, the ECOWAS Community Court of Justice, the EACJ and the SADC Tribunal pledged themselves to work together to improve implementations of their decisions and to share information on best practices in this respect. This promise should be continue with strong commitments. Further the institutions should develop the sharing of information and expertise among themselves, which is important to enhance co-ordination and co-operation for the effective protection of human rights in the continent.

³⁸⁴ R. Murray, 'A Comparison Between the African and European Courts of Human Rights', (2002), 2AHRLJ 195, 215; also see Viljoen, 2007, (above note 11), 439

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