# The Emergence of International Judiciaries in Sub-Regional Africa: The Case of EAC, ECOWAS and SADC.

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

By

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February, 2017.

## Declaration

I, MAIMUNA DUBOW JELLE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

## Dedication

This work has been dedicated first of all to the Almighty, Most Merciful and Most Gracious Allah.

And

Secondly to my parents, Mr. Dubow Jelle and Mrs. Fatuma Haji Ahmed.

**Acknowledgement**

First and most importantly, I would like to acknowledge the Almighty Allah who has granted me the strength, perseverance and the chance to complete my four years of law school with little impediment. Allah has been my guide and light from birth and continued to illuminate the way through the process of writing this research paper and the four years.

Secondly, I would like to acknowledge my supervisor Harrison Otieno, your suggestions, criticisms and attention to detail contributed a great deal to my work. I really appreciate your help. Harrison, Thank you, for the guidance and support from the word go.

Thirdly, I would like to appreciate my parents, Mr. Dubow Jelle and Mrs. Fatuma Haji Ahmed. Their constant encouragement and source of courage has guided me through the sleepless nights while burning the midnight oil. My gratitude towards my parents cannot be expressed using any form of words, my adoration for their patience and motivation is beyond expression.

I would also like to acknowledge my brothers and sisters, for constantly listening to my complaints and finding it in them to push me forward. Ibrahim Rashid, Mohamed Sabir, Mohamed Feisal, Ahmed Yasin, Leila Jelle, Hannan Jelle and Hothan Jelle. Thank you for your never-ending support and unwavering confidence in me.

Finally, to all my friends who's support I could not do without, their confidence and constant motivation that the "end is near", I am grateful.

## List of abbreviations

| | |
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| ACHPR: | African Charter on Human and Peoples' Rights |
| ACtHPR: | African Court on Human and Peoples' Rights |
| ACmHPR: | African Commission on Human and Peoples' Rights |
| ACRWC: | Africa Charter on the Rights and Welfare of the Child |
| AEC: | African Economic Community |
| AHR: | African Human Rights System |
| AU: | African Union |
| EAC: | East Africa Community: |
| EACJ: | East Africa Court of Justice |
| ECCJ: | ECOWAS Community Court of Justice |
| ECOWAS: | Economic Community of the West African States |
| OAU: | Organisation of African Unity |
| REC: | Regional Economic Community |
| SRICs: | Sub- Regional International Courts |
| SADC: | Southern African Development Community |
| SADCC: | Southern African Development Community Conference |
| SADCT: | Southern African Development Community Tribunal |
| PCIJ: | Permanent Court of Justice |

## List of International Instruments

### Africa Charter

*African Charter on Human and Peoples Rights (African Charter),* 21st October 1986, CAB/LEG/67/3. Rev. 5, 21 I.L.M 58, Adopted in Banjul, the Gambia.

*Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (Entry into force, 25th January 2004).

*Treaty Establishing the African Economic Community (AEC) (Abuja Treaty)* (Entry into force, May 12th 1994).

### East African Region

*Amended Treaty for the Establishment of the East Africa Community,* (Entry into force, 7th July, 2000).z

### West African Region

*Treaty of the Economic Community of West African States (ECOWAS)*, (Entry into force, 28th May, 1975) 35 I.L.M. 660.

*Revised Treaty of Economic Community of the West African States* (Entry into force, 23rd August, 1995).

*Supplementary Protocol A/SP.2/06/06 Amending Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice,* (Entry into force, 2006).

### Southern African Region

*Declaration and Treaty of the Southern African Development Community* (Entry into force, 30th September, 1993) 32 ILM 116, 5 AJICL 418.

*SADC Protocol on the Tribunal and Rule of Procedure Thereof*, (Entry into force, 7th August, 2000).

## List of Cases

### ECOWAS Community Court

*Decision regarding communication, Social and Economic Rights Action Centre vs. Nigeria.* Case No 155/96 ACHPR/COMM) AO44/1, (2001).

*Manneh v The Gambia (2008)* AHRLR 171 (ECOWAS 2008).

### East African Court of Justice

*James Katabazi v. Secretary General of the EAC 20 November 2007*, EACJ First Instance Division, Ref. No. 1 of (2007).

*Nyong'o v Attorney Gen. of Kenya*, Ref. No. 1 of 2006.

*The Attorney General of the Republic of Rwanda v Plaxeda Rugumba,* Appeal No. 1 of 2012.

### Southern African Development Tribunal

*Mike Campbell and other vs. Republic of Zimbabwe*, SADC (T) No 2/2007.

### Permanent Court of Internatioanal Justice

*S.S. Lotus, France VS. Turkey*, PCIJ Series A, No. 10, 18, (1927).

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## CHAPTER ONE

## RESEARCH PROPOSAL

### 1.1 Introduction

International human rights litigation in Africa is evolving in ways that few could have foreseen only a decade ago.[1] Human rights attorneys and civil society groups now focus much of their advocacy efforts not on the judicial and quasi-judicial bodies of the African Charter on human rights[2] system, (the African Court and Commission on Human and Peoples' Rights) but on sub-regional courts associated with economic integration communities in East, West, and Southern Africa.[3] The East African Court of Justice (EACJ),[4] the Court of Justice of the Economic Community of West African States (ECOWAS),[5] and the Tribunal of the Southern African Development Community (SADC)[6] have received few suits challenging trade restrictions and barriers to trade in the sub-regional sphere.[7] Instead, and surprisingly, these courts' dockets are dominated by complaints alleging violations of international human rights law.[8]

The sub-regional economic courts (also known as Regional Economic courts, from here henceforth known as SRICS, Sub-Regional International Courts) in West, East, and Southern Africa share a number of similarities.[9] These judiciaries were not created to hear cases alleging violations of international human rights law.[10] Instead, they were tasked with improving the enforcement of the regional integration, regional trade, and thus as a result of this mandate they are known as sub-regional economic courts (SRICs).[11]

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[1] Laurence R. Helfer Sub-regional Courts in Africa: "Litigating the Hybrid Right to Freedom of Movement" iCourts Working Paper Series, No. 32, (2015).
[2] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June (1981).
[3] Laurence R Helfer, Litigating the Hybrid Rights to Freedom of Movement, 5.
[4] The Amended Treaty for the Establishment of the East Africa Community (as amended on 14 December 2006 and 20 August 2007).
[5] The Revised Treaty of Economic Community of the West African States (as amended in 1993).
[6]The Declaration and Treaty of the Southern African Development Community (1980).
[7] Laurence R Helfer, Litigating the Hybrid Rights to Freedom of Movement, 5.
[8] Laurence R Helfer, Litigating the Hybrid Rights to Freedom of Movement, 5.
[9] Laurence R Helfer, Litigating the Hybrid Rights to Freedom of Movement, 5.
[10] Laurence R Helfer, Litigating the Hybrid Rights to Freedom of Movement, 5.
[11] James Gathii, Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy, 249, 250 (2014).

For the EACJ and the SADC Tribunal, the variation to human rights occurred through a purposive interpretation of the governing treaties' principles and objectives clauses adopted by sub-regional judges in response to advocacy by law societies and private litigants.[12] In West Africa, the expansion into human rights resulted from an extrajudicial advocacy campaign by international judges, civil society groups, and Community officials to convince member states to broaden the ECOWAS Court's jurisdiction.[13] In West Africa, the consideration into human rights resulted from an advocacy campaign by international judges, civil society groups, and Community officials to convince member states to broaden the ECOWAS Court's jurisdiction.[14]

In effect, the SRICs have introduced a new layer of supranational protection and promotion of human rights in Africa. These courts now play an important role in the protection of human rights through the determination of human rights cases. This study underscores the significance of this role and its impact on the protection of human rights in Africa.

### 1.2 Statement of problem

The sub- regional courts in Africa were not created with the intent of handling human rights cases.[15] However, the entry of SRICs as an avenue for protection of rights is generally favorably hailed.[16] There is a particular need to establish the place of SRICs within the African human rights system (AHRS) and their relationship with the regional human rights institutions specifically the African Court on Human and People's Rights.[17] Although it may be advantageous to have as many institutions as possible to enhance the promotion and protection of human rights. The consequence of this is the overlapping judicial powers of organs, which raise concerns such as the possibility of divergent conclusions on the same issues and duplication of efforts, particularly when different courts have jurisdiction over the same case.[18] There is also

[12] James Gathii, Mission Creep or a Search for Relevance, 249, 250.
[13] James Gathii, Mission Creep or a Search for Relevance, 249, 250.
[14] Karen J. Alter, Laurence R. Helfer and Jacqueline McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 AM. J. INT'L L. 737, 737–39 (2013).
[15] Treaty Establishing the East Africa Court of Justice (Adopted 30 Nov. 1999, into force 7 July 2000) (establishing a regional economic community between Burundi, Kenya, Rwanda, Uganda and Tanzania), Treaty Establishing the Economic Community of West African States (adopted and enacted 24 July 1993), Treaty Establishing the Southern African Development Community (adopted and entered into force 17 Aug. 1992).
[16] F Viljoen International Human Rights Law in Africa (2007) Oxford University Press for a general discussion on the changing trend in the RECs 497-8.
[17] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June (1981).
[18] F Viljoen International Human Rights Law in Africa, 497.

concern over their capacity to effectively exercise the new competence in light of the economic focus of their founding treaties.[19]

### 1.3 Justification of the study

The foundation of this research is based on international law, application of international law and jurisdiction of sub-regional courts in Africa. It is important to have this research conducted since it will fill the gaps in the literature by giving the reasons why it is crucial that the SRIC's integrate human rights into the domain of regional economic communities. This study is justified on the basis of analyzing the jurisdiction and addressing the issue of the human rights jurisdiction, and economic jurisdiction of SRIC's on a sub-regional basis, while at the same time looking at the ACtHPR on a regional and continental basis.

This study contributes to the debate surrounding the suitability of SRICs as avenues for protection of human rights in view of the economic focus of SRICs. It identifies adjustments that can be made within the African Human Rights Systems (AHRS) to deal with the challenges associated with the development of SRICs both in the interim and in the long-term.

Lastly, the member states have been criticizing the SRIC's human rights jurisdiction and therefore, it would be essential that this research discuss the issue of backlash from states and clearly relate the function of SRIC's not only as economic adjudicators but also as human rights courts.

### 1.4 Statement of Objectives

The general objective of this study is to explain the mandate of the Regional Economic Courts in Africa, and critically discuss the overlapping jurisdiction of the Regional Economic Courts and the African Court and African Commission of Human and People's Rights. The specific objectives will be to:

1. To discuss the historical development of the SRICs and the Human Rights Courts specifically in Africa.
2. Explain and analyze the courts established as SRICs and those established as Human Rights Courts.

[19] James Thuo Gathii "African Regional Trade Agreement as Legal Regimes" 264 (2011).

3. To discuss the backlash that the SRICs are facing from the States which the courts exercise jurisdiction over.

## 1.5 Research Questions

This study will address the following interrelated questions:

1. What are the Sub-Regional Economic Courts and what are the mandates of the SRICs?
2. What effect will the granting of jurisdiction to SRICs have on the ACHPR?
3. What explains the backlash from States within Africa to the expanded jurisdiction of the SRICs to hear human rights cases?

## 1.6 Hypothesis

This research proceeds on the presumption that:

1. The sub- regional courts in Africa should maintain the mandate which was given as SRICs.
2. The human rights jurisdiction should be left to the African Court of Human and People's Rights and the African Commission on Human and People's Rights.
3. The member states of the regional communities will be unwilling to cooperate with the Sub-regional Economic Courts.

## 1.7 Research Methodology

The work is based on desktop research. The information used is obtained from secondary sources particularly text books, journals, case law and internet resources. The work uses the example of the East African Court of Justice, the ECOWAS Community Court of Justice and the Southern African Development Community Tribunal to illustrate the issues surrounding human rights mandate of SRICs. The conclusions which shall be drawn from the secondary sources will assist in understanding and creating a basis for answering the research questions, and further disregard or support the hypothesis.

In furtherance of answering the research questions, the work also uses primary research, through an interview of a leading human rights advocate in Kenya Mohamed Ruwange and a questionnaire that shall be filled in by the Legal officer of the African Court of Human and People's Rights.

## 1.8 Limitations

There are several other SRICs however due to the limited scope of this study the main focus will be on the three courts discussed above, ECOWAS, EACJ and SAC. In addition, due to my bias towards the importance of human rights especially in African states I may have slight bias leaning towards complete and compulsory jurisdiction being awarded to the SRICs.

## 1.9 Literature Review

There is a growing body of literature regarding the role of sub-regional courts in the protection of human rights. Over the past decades, apart from the creation of the continental body known as the African Union (AU), there has been an expanse of sub-regional economic communities (RECs).[20]

SRICs serve as the building blocks for the economic integration of Africa.[21]While pursuing these goals, they recognize the enhanced role of human rights, *inter alia*, as a means to their economic development.[22] For purposes of comparison in the Algiers Declaration,[23] African leaders identified a political environment in which human rights are observed as a precondition to economic growth, they also recognized that conflict, one of the obstacles to economic growth, may arise from the violation of human rights[24] therefore an indication of the recent emergence of SRICs as human rights courts.

Oliver Ruppel asserts that although SRICs, as sub-regional institutions, do not explicitly have human rights at the core of their agenda, it becomes increasingly evident that human-rights-related topics play an important role in their legal framework and implementation[25]. This is as a

[20] These were formed under various treaties such as the Treaty Establishing the East African Community (1999), which was adopted in 1999 and became operational on 18 July 2010; the Treaty of the Economic Community of West African States (1975) (hereinafter referred to as the Treaty of ECOWAS); and the Treaty of the Southern African Development Community (1999), (SADC Treaty). See Viljoen International Human Rights Law 488.

[21] Art 88(1), Treaty Establishing the African Economic Community, adopted in 1991 in Abuja, Nigeria and entered into force in 1994.

[22] Magdalena Sepúlveda et. al. (2004), Human Rights Reference Handbook (San Jose: University for Peace), p.403; Oliver Christian Ruppel 'Regional economic communities and human rights in East and southern Africa' in Anton Bösl & Joseph Diescho (eds) (2009).

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

[24] Rachel Murray (2004), Human Rights in Africa: from the OAU to the African Union (Cambridge: Cambridge university Press), p.126.

[25] Oliver Ruppel, "Regional economic communities and human rights in East and southern Africa".

result of many African countries recently committing themselves to respecting human rights by acceding to human rights treaties, conventions and declarations.[26]

Viljoen offers a background to the development of SRICs in Africa while highlighting the gradual evolution of rights into their agenda and the development of a human rights competence for SRICs. He highlights the significant contribution of SRICs to the protection of human rights in the region and potential benefits of their continued role in this regard.[27]

Reginald Nsekela further identified the importance of broadening the jurisdiction of the EACJ stating that it is important that the EACJ treaty[28] be amended to give the EACJ the authority to handle and try human rights violations.[29] The Community Court Protocal also authorized individuals to bring cases of violations of human rights before the Community Court of Justice under the ECOWAS treaty.[30] Karen J. Alter asserts the fact that the ECOWAS Court also has broadened access and standing rules that permit individuals and NGOs to bypass national courts and file suits directly with the court thus eliminating the requirement to exhaust domestic remedies.[31]

With regard to jurisdiction Ruppel argues that in the absence of express provisions vesting human rights jurisdiction on them, the content of their founding treaties notwithstanding, they lack such jurisdiction.[32]

In all the SRICs the judges themselves asserted the authority to adjudicate human rights claims. In Africa, the political and legal consequences of these bold assertions of competence are still

[26] Oliver Ruppel, "Regional economic communities and human rights in East and southern Africa" in Anton Bösl & Joseph Diescho (eds) (2009) Human Rights Law in Africa: Legal perspectives on their protection and Promotion Mc Millan Education Namibia 319 – 350.
[27] F Viljoen International Human Rights Law in Africa (2007) Oxford University Press for a general discussion on the changing trend in the RECs 497-8.
[28] Treaty Establishing the East African Community (1999).
[29] President of the East Africa Court of Justice, H.R. Nsekela, "The Role of East African Court of Justice in the Integration Process," presentation during the 3rd East African Community Media Summit (2009).
[30] Community Court Protocol A/P.1/7.91 Art 10(d).
[31] Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister, A New International Human Rights Court For West Africa: The Ecowas Community Court of Justice, Vol. 107:737 (2013).
[32] OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' 319 – 350.

unfolding, but early evidence indicates that the EACJ and the SADC Tribunal have faced greater opposition from governments than has the ECOWAS Court.[33]

For all three sub-regional communities, membership brought with it the compulsory jurisdiction of a sub-regional court. Unilateral withdrawal from the court's jurisdiction was not a legally viable option without exiting the Community as a whole. All three courts also provided direct access by private litigants alleging state violations of Community treaties, which expressly or implicitly incorporate references to human rights.[34]

The above assertions by the scholars have comprehensively discussed the value of the SRICs as human rights courts, this however has not been discussed through looking at the performance of these courts in making decisions and the sufficiency of the remedies available to the victims. This research will seek to answer such questions through an analysis of the literature.

[33] Solomon Tamarabrakemi Ebobrah, Litigating Human Rights Before Sub-regional Courts in Africa, 17AFR. J.INT'L&COMP. L. 79(2009); James Gathii, The Under- appreciated Jurisprudence of Africa's Regional Trade Judiciaries, 12OR. REV. INT'LL.245(2010).

[34] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27 (2016).

# CHAPTER TWO

# THEORETICAL BACKGROUND

## 2.1 Introduction

The purpose of this chapter is to present the theoretical background to this study. This foundation creates a basis for answering the research questions posed in the earlier chapter and seek to either support the hypothesis or the reality, which was introduced through the literature review.

This chapter will first of all discuss in depth the theoretical background relating to this research study and give a breakdown of the historical development of SRICs through the literature review.

## 2.2 Classical Theory by Jeremy Bentham

Classical positivists such as Jeremy Bentham and Blackstone coined the term international law and this is crucial to show the enforceability and the reasons for compliance problems of international laws. This concept of International law was derived as a result of the principle of the "law of nations" which categorically stated,

*"the law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each."*[35]

Jeremy Bentham further elaborated on the word "international law" in 1789,[36] when he categorized the law into five different categories. These different categories were, the extent of the law, political quality, time, expression and punishment, these five being the "circumstances that have given rise to the principal branches of jurisprudence.[37] In categorizing International law, Jeremy Bentham posited that it should considered as a branch of political quality,[38] he explains this by stating that international law was created so as to balance national laws and act

[35] W. Blackstone, Commentaries on The Laws Of England (a facsimile of the first edition 1765-1769, University of Chicago ed. 1979)
[36] J. Bentham, an Introduction to The Principles of Morals and Legislation (Burns & Hart eds.) (1970).
[37] M. W. Janis, Jeremy Bentham and the Fashioning of "International Law", The American Journal of International Law, Vol. 78, No. 2, 405-418 Apr, (1984).
[38] M. W. Janis, Jeremy Bentham and the Fashioning of "International Law", The American Journal of International Law, Vol. 78, No. 2, 405-418 Apr, (1984).

as a counter to political influence.[39] Jeremy Bentham further expounds on this and states that when it is an individual who is subject to the law, then this is governed by internal law, however, when it is states then international law is the governing law.[40]

In Bentham's theory of international law there are two assumptions which are propagated, first, he assumed that international law was exclusively about the rights and obligations of states *inter se* and not about rights and obligations of individuals.[41] Second, he assumed that foreign transactions before municipal courts were always decided by internal, not international, rules. The assumptions above create the basis of international law as was and as it still is, thus implying that the explanation given by Bentham was the basis of international law.[42]

The above definition was however, denied by John Austen who states that, *"The law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. The law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected."*[43] This express opposition to Jeremy Bentham's introduction to international law is based on the positivist theory, stating that international is not law but is a moral undertaking between countries.[44] This nullifies the essence of Bentham's denominating factor that international law is the law which governs the relations between states.[45]

By way of introduction it is evident that the theory by Jeremy Bentham to a certain extent has merit, however, by means of comparison with the theory that shall be discussed below, this paper is posited based on the contemporary theorist of positive law H. LA. Hart.

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[39]M. W. Janis, Jeremy Bentham and the Fashioning of "International Law", The American Journal of International Law, Vol. 78, No. 2, 405-418 Apr, (1984).
[40] M. W. Janis, Jeremy Bentham and the Fashioning of "International Law", The American Journal of International Law, Vol. 78, No. 2, 405-418 Apr, (1984).
[41] M. W. Janis, Jeremy Bentham and the Fashioning of "International Law", The American Journal of International Law, Vol. 78, No. 2, 405-418 Apr, (1984).
[42] M. W. Janis, Jeremy Bentham and the Fashioning of "International Law", The American Journal of International Law, Vol. 78, No. 2, 405-418 Apr, (1984).
[43] J. Austin, The Province of Jurisprudence Determined 201 (ed. 1954)
[44] M. W. Janis, Jeremy Bentham and the Fashioning of "International Law", The American Journal of International Law, Vol. 78, No. 2, 405-418 Apr, (1984).
[45] J. Bentham, an Introduction to The Principles of Morals and Legislation (Burns & Hart eds.) (1970).

## 2.3 Contemporary Positivism by H. LA. Hart

This study will rely on the legal positivist theory which is mainly backed by HLA Hart.[46] The contemporary positivist accounts of international law, as they were developed in the late 19th and early 20th centuries, basically began with the voluntarist theories of international law. Georg Jellinek,[47] for example, saw the basis for obligations under international law in an act of auto-limitation by states.[48] Heinrich Triepel refined this voluntarist theory surrogating the will of the individual states with the common will of states.[49] This voluntarist approach to international law found its expression in the famous *Lotus* decision of the Permanent Court of Justice (PCIJ) in which the court held that 'international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law'.[50]

As a doctrine, legal positivism is based on three pillars, the first is that international law has fixed sources and also fixed rules for making these laws.[51] The second is the subjects of this law are the rightful participants in the system of rules, thus including states and citizens of the states.[52] Lastly, are the sanctions which allow the international judicial bodies to securing compliance with the rules.[53] As for the system and the rules created, the system of consent is just a basis but, more recently, the international judiciaries have formulated new methods. Which although,[54] are based on consent such consent is not express, for instance the rules of international customary law as a source of international law.[55]

Positivism thereby seems to imply not only a strong notion of sovereignty but also a strictly consensual character of international law: no state can be bound by a rule of international law

[46] The Concept of International Law in the Jurisprudence of H.L.A. Hart (2011).
[47] Jochen von Bernstorff, "Georg Jellinek and the Origins of Liberal Constitutionalism in International Law" 3, 659-675, (2012).
[48]G. Jellinek, G. Die rechtliche Natur des Staatsverträge: ein Beitrag zur juristischen Construction des Völkerrechts. Vienna, Hoelder.), at 2, 48–49. 26, (1880).
[49] H. Triepel, Völkerrecht und Landesrecht, at 32, 81. 27, (1899).
[50] S.S. Lotus, France VS. Turkey, PCIJ Series A, No. 10, 18, (1927).
[51] Francesco Parisi, George Mason University, International Legal Theory, Publication of The American Society of International Law Interest Group on The Theory of International Law, VOL 1 (1), (1995).
[52] Francesco Parisi, George Mason University, International Legal Theory, Publication of The American Society of International Law Interest Group on The Theory of International Law, VOL 1 (1), (1995).
[53] Francesco Parisi, George Mason University, International Legal Theory, Publication of The American Society of International Law Interest Group on The Theory of International Law, VOL 1 (1), (1995).
[54] Francesco Parisi, George Mason University, International Legal Theory, Publication of The American Society of International Law Interest Group on The Theory of International Law, VOL 1 (1), (1995).
[55] Article 38, United Nations, *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.

unless it has explicitly or tacitly consented to it.[56] The traditionally tight relationship between legal positivism and voluntarist conceptions of international law has led many scholars to believe that positivism necessarily implies a voluntarist approach to international law.[57] Such an assessment constitutes a one-sided view of legal positivism which, in its international law dimension, does not have to be equated with voluntarism.[58] The main assertion of legal positivism lies in the perception that all legal facts are determined by social facts alone, social facts are the will of states.[59]

One of the propositions rejected by Hart is that the recognition of international law is based on the principle of sovereignty, which asserts that the sovereign is, by definition, above the law. [60] Hart rejects this assumption and adopts an understanding of sovereignty as autonomy. Sovereignty exists only within the limits of international law and only to the extent that the rules of international law allow.[61]

The theories described above links the essence of the treaties created and the treaty bodies in existence to sovereignty, what this implies is that states are independent and have the right to decline the interference of international law. It further builds a foundation for the argument that states are to some extent against the jurisdiction of the SRICs.

### 2.4 The Fiduciary Theory of Human Rights

The fiduciary theory will be informed by Evan Criddle and Evan Fox Decents conception of a fiduciary relationship.[62] The principle contends that sub regional courts, because of the mere fact that they're adjudicating institutions on an international scale, are fiduciary in nature. Human rights are best conceived as norms arising out of a fiduciary relationship between a state and citizens.[63] Human rights are rights that all human beings share simply by virtue of their common

[56] J. Austin, The Province of Jurisprudence Determined, (ed. W.E. Rumble, 1995), The Concept of International Law in the Jurisprudence of H.L.A. Hart (2011), 971.
[57] Ratner and Slaughter, The methods of international law, Washington, D.C, American Society of International Law, 293 (2004).
[58] Bruno Simma & Andreas L. Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, (1999); 304, 307.
[59] H. Kelsen, Reine Rechtslehre (2nd edn, 1960), at 196.
[60] The Concept of International Law in the Jurisprudence of H.L.A. Hart (2011).
[61] H.L.A. Hart, The Concept of Law (2nd edn, 1994).
[62] Criddle E, Fiduciary Foundations of Administrative Law, UCLA Law Review, (2006).
[63] Fox Decent & Criddle, "The Fiduciary Constitution of Human Rights," William & Mary Law School Scholarship Repository, (2009).

humanity.[64] There are a plethora of theories as to the formation of human rights, however none of the theories adequately encapsulate their reason for being so jealously protected.[65] Uncertainty regarding the scope of human rights the philosophical basis for human rights has impeded efforts to clarify its scope, justifiability, and cross cultural relevance.[66] This lacunae is best filled by the fiduciary theory of international law or the principal agent theory of international law. It explains the reason why sub regional courts, although enshrined with jurisdiction to hear a given category of disputes, will exercise their discretion to hear matter pertaining to the human rights of citizens. Immannuel Kant's theory of fiduciary relations must first be adumbrated in order to adequately capture the grasp of the principal agent relationship. This relationship avers that state and its institutions stand in fiduciary relationship to the citizens and non-citizens subject to it.[67] The basic conception of Kant's fiduciary underpinnings are the moral underpinnings of one person to place another under legal obligations whenever the former is subject to the unilateral administrative power of the former.[68] What are these moral underpinnings? These moral underpinnings are the duty of sub regional courts, although not in the traditional scope of their jurisdiction, to hear and adjudicate over the rights of the subjects it stands in trust for. Sub Regional courts attain they're legitimacy from the delegated jurisdiction accorded to them by the states that are signatories to they're constitutive documents. These courts must protect human rights because they are constitutive of the state's legal authority to provide security and legal order as a fiduciary.[69]This supports the reason that SRICs charge themselves with human rights adjudication, owing to the fact that socio-economic rights are those rights that give people access to certain basic needs necessary for human beings to lead a dignified life.[70]Because economics and human rights can't be separated as regards the rights owed to the citizen, then conceivably they are held in trust by the state and all state organs, which include sub regional economic courts.

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[64] Donnelly J, *International Human Rights*, Westview Press, (1998).
[65] Fox Decent & Criddle, "The Fiduciary Constitution of Human Rights," *William & Mary Law School Scholarship Repository*, (2009).
[66] Fox Decent & Criddle, "The Fiduciary Constitution of Human Rights," *William & Mary Law School Scholarship Repository*, (2009).
[67] Criddle E and Fox-Decent E. "*A fiduciary theory of Jus Cogens.*" Yale Journal of International Law 34 (2009).
[68] Fox Decent & Criddle, "The Fiduciary Constitution of Human Rights," *William & Mary Law School Scholarship Repository*, (2009).
[69] Fox Decent & Criddle, "The Fiduciary Constitution of Human Rights," *William & Mary Law School Scholarship Repository*, (2009).
[70] Khoza S, Socio Economic Rights in South Africa, 2007

## 2.5 The Principle Agent Theory

The principle agent theory is based on a delegation between the states and the international organizations and in this case the international judiciaries.[71] This theory is proposed by Karen J Alter and bases the Agent- trustee relationship as a result of three facets, on is that the agent is selected because of their personal reputation or professional norms, secondly it is given independent authority to make decisions according to their best judgment or professional criteria, and third it is empowered to act on behalf of a beneficiary.[72] With regard to international courts and the human rights mandate accorded to this court all decisions have to be made bearing in mind the relationship and duty towards the principles who are the states and the members of the state.[73] The proponent of the theory has expressed that the principle agent relationship is based on the principle's right to re-contract if at any point the principle is dissatisfied with the agreement. The option to re-contract may have a negative impact if the intention is with malicious intent.[74] The SRICs were initially formed with the clear intention of ensuring economic cohesion, the reaction however, to the newly accorded human rights jurisdiction created the implication of a negative re-contracting as will be discussed in a chapter below.

The entire mandate, treaty and appointment of judges in an international court is a delegated task by the states.[75] The state has the power to formulate the terms of the treaty, the rules and mandate of the international court and the judge who will sit in the court. Although, the states cannot easily replace a judge of an international court, they may in future opt to not reappoint the judge for a further term.[76] This power awarded to the principle in this case the member states of the economic communities, may lead to unfair practices because the state is the final decision maker.

[71] Alter, Karen J, Agents of trustees? International courts in their political context, TranState working papers, No. 8 (2004).
[72] Alter, Karen J, Agents of trustees? International courts in their political context, TranState working papers, No. 8 (2004).
[73] Alter, Karen J, Agents of trustees? International courts in their political context, TranState working papers, No. 8 (2004).
[74] Alter, Karen J, Agents of trustees? International courts in their political context, TranState working papers, No. 8 (2004).
[75] Alter, Karen J, Agents of trustees? International courts in their political context, TranState working papers, No. 8 (2004).
[76] Alter, Karen J, Agents of trustees? International courts in their political context, TranState working papers, No. 8 (2004).

## CHAPTER THREE

## REGIONAL ECONOMIC COMMUNITIES AND HUMAN RIGHTS IN AFRICA

### 3.1 Introduction into the historical development of SRIC's

Regional integration in post-colonial Africa began in 1963, with the adoption of the Charter of the Organisation of African Unity (OAU).[77] After the demise of colonial rule in Africa, mainly in the 1960s, the reality of the political and economic fragility of post-colonial African states became apparent.[78] In response to this reality, African states were called upon to integrate politically and economically in order to achieve development and to undo the balkanization of Africa brought by colonialism.[79]

The agenda of a stronger African continent was to be achieved through the development of the creation of a larger and united Africa which would develop the trade relations and increase the potential of poorer economies.[80] Though this agenda was not immediately achieved at the regional level, states began to come together in their respective sub-regions following a pattern of geographical proximity.[81] The idea to divide Africa into various Sub-regions was developed through the OAU (Organisation of African Unity), where Africa was as a result divided into 5 main regions along geographical lines.[82] As a consequence thereof, many REC's have been categorized into Sub- Regional communities, based on geographical proximity.[83]

In 1980, the OAU adopted the Lagos Plan of Action addressing the political and economic crisis affecting African states.[84] The Lagos plan envisioned a united Africa, which has regional, sub—regional and national institutions in pursuit of the objective of the Plan, self-reliance and self-

[77]Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June (1981).
[78] KN Lolette "Regional integration: concepts, advantages, disadvantages and lessons of experience" (2005).
[79]KN Lolette "Regional integration: concepts, advantages, disadvantages and lessons of experience" (2005) unpublished paper available at http://www.sarpn.org.za/documents/d0001249/P1416-RI-concepts_May2005.pdf accessed on 05 September 2005.
[80]K Thoko "SADC human security: fitting human rights into the trade matrix" African Security Review 13(1) (2004).
[81]Economic Commission for Africa Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities (2006) ECA Addis Ababa Ethiopia.
[82] R Ajulu (ed) The making of a region: revival of the East Africa Community Institute For Global Dialogue 19 (2005).
[83] F Viljoen International human rights law in Africa Oxford University Publishers (2007) 488.
[84]Article 1 Organization of African Unity Lagos Plan of Action for the Economic Development of Africa (1980 – 2000).

centered development.[85] It was through the Lagos Plan that the Abuja Treaty establishing the Africa Economic Community (AEC). [86] This treaty sets out the legal framework of the AEC and entrenches the position of SRICs as its building blocks.[87]

This chapter will first of all give a breakdown of the historical development of SRICs through the literature review. It will further analyze the relationship between the SRICs and the African Human Rights System.

### 3.2 Evolution of SRICs into Human Rights Mandated Courts

At inception the SRICs stuck to their economic focus leaving the political issues to the wider continental forum.[88] With respect to human rights, the feeling among some African leaders was that the issue was too political and could be used as a 'pretext for intervening in their countries' internal affairs' hence it was argued that the 'treatment of human rights more appropriately belonged in other international fora'.[89]

With time, however, this position has been changed and there has been a shift in the initial economic focus of the SRICs to a human rights based approach. First, is through the adoption of the African Charter which made human rights a common feature in interstate relations on the continent and therefore, an important aspect of the communities.[90] The obligations of states emanating from the Charter and other human rights treaties to which African states are party, oblige them to reflect human rights protection in subsequent commitments such as those arising from SRIC treaties.[91] Second, human rights coupled with good governance create an appropriate investment climate that is critical to furthering economic development.[92] The adoption of strong human rights values and institutions creates confidence for investors and trading partners and ensures effective participation of individuals.

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[85] RN Kouassi "The itinerary of the African integration process: an overview of the historic landmarks" Africa Integration Review Vol 1 No. 2 July 2007.
[86] Abuja Treaty establishing the African Economic Community (AEC) (1991) Abuja Treaty.
[87]Article 4(2) (a) Abuja Treaty establishing the African Economic Community.
[88] Henry H Mwinuka, Regional Human Rights System: Challenges Facing the East African Court of Justice in Realizing Human Rights in the East African Community, (2013).
[89] C.E. Welch, 'Human rights as a problem in contemporary Africa', in C.E. Welch Jr & R.I. Meltzer (eds) Human Rights and Development in Africa State University of New York Press (1984) 217.
[90] Ebobrah, S.T, Litigating human rights before sub-regional courts in Africa: prospects and challenges. African Journal of International and Comparative Law (2009) 80.
[91] Thoko, K.SADC and human rights: fitting human rights into the trade matrix. African Security Review (2004).
[92] Ruppel, O. Regional economic communities and human rights in East and Southern Africa. In: BÖSL, A.; Diescho, J. (Ed.). Human Rights Law in Africa: Legal perspectives on their Protection and Promotion (2009).

SRICs tend to have an institutional structure that includes a court which is the judicial or principal legal organ of the community to deal with controversies relating to the interpretation or application of the SRIC's law.[93] As the organs vested with such responsibility, they have, as a result of the incorporation of human rights into the agenda of SRICs, been required to adjudicate over cases, to interpret provisions of their treaties or to advise their principals on questions with implications for human rights. The treaties of most SRICs have therefore gradually moved towards according SRIC courts competence to hear human rights cases.[94]

To fully understand the SRICs development and evolution in the human rights adjudication, it is therefore imperative to analyse the SRIC Courts individually to grasp the depth of the necessity and the approaches in use by the various communities.

### 3.3 Economic Community of West African States

The Economic Community of West African States was established on the 28th May 1975.[95] The organization is head quartered in Abuja, Nigeria and was the outgrowth for the movement of West African self-reliance as a reaction to the collapse of colonialism in Africa.[96] The Community's primary goal as defined by the Treaty, were to promote corporation and development amongst member states in a wide array of issues such as, commerce, agriculture, natural resources, monetary and financial policy, security, social and cultural matters.[97]

The ECOWAS Community Court of Justice (ECOWAS Court) is the judicial arm and the principal legal organ of ECOWAS.[98] It is charged with resolving disputes related to the Community's treaty, protocols and conventions. Another objective of the ECOWAS Court is to resolve disputes relating to key ECOWAS instruments and programs, including the Protocol on Free Movement of Persons, Residents and Establishment, the Trade Liberalization Scheme, the Agricultural Cooperation Program and the Protocol on Community Enterprises.[99]

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[93] Ruppel, O. Regional economic communities and human rights in East and Southern Africa (2009).
[94] Ebobrah, S.T, Litigating human rights before sub-regional courts in Africa: prospects and challenges. African Journal of International and Comparative Law (2009) 80.
[95] Bruce Zagaris, The Economic Community of West African States (ECOWAS): An Analysis and Prospects, (1978).
[96] Article 4 (b) Treaty of the Economic Community of West African States.
[97] Treaty of the Economic Community of West African States, May 28, 1975, 1010 UNTS 17, 14 ILM 1200.
[98] Article 6 (1) (e) Treaty of the Economic Community of West African States.
[99] Protocol A/P1/11/84 Relating to Community Enterprises, Nov. 23, (1984).

The human rights jurisdiction accorded to ECOWAS Court can be traced as far back to the 1990, when it was initiated as a result of the Liberian civil war. It was recognized that although regional integration was the backbone of the ECOWAS Community, it was equally important to establish and incorporate political objectives, which also encompassed a human rights approach and mandate. Principle 4 of the Declaration of Political Principles of the Economic Community of West African States,[100] provides that all member states must "respect human rights and fundamental freedoms in all their plentitude". Principle 5, further emphasizes this by stating all member states "will promote and encourage the full enjoyment by all our peoples of their fundamental human rights, especially their political, economic, social, cultural and other rights inherent in the dignity of the human person and essential to his free and progressive development".

The Protocol on ECOWAS did not confer human rights jurisdiction on the court initially.[101] The court acquired jurisdiction in human rights matters as a result of the Supplementary Protocol of 1991.[102] The Human rights jurisdiction of the ECOWAS Court is the power to hear cases for violations of the "so called community rights" endowed on ECOWAS citizens and the power of the court to receive cases on violations of the African Charter. The former is similar to the inter-state complaint mechanism of the African Charter,[103] as the ECOWAS Court acquired access to bring human rights cases against a member state, where the state fails to perform its human rights obligation under ECOWAS legal regime.[104]

The ECOWAS Court's jurisdiction on human right is largely due to the recognition that human rights and access to justice in the sub-region are fundamental values of the ECOWAS Community enshrined in Article 4 (g), 56(2), and 63(2) of the 1993 revised ECOWAS Treaty and Articles 9(4) and 10 (d) of the 2005 Supplementary Protocol. Further, individuals can also

[100] Declaration A/DCL 1/1/7/91; hereafter Declaration of Political Principles.
[101] Ebobrah, S.T, Litigating human rights before sub-regional courts in Africa: prospects and challenges. African Journal of International and Comparative Law 80 (2009).
[102]Protocol A/P/1/7/91 on the Community Court of Justice adopted on 6 July 1991 in Lagos, Nigeria and entered into force on 5 November 1996.
[103]Enyinna S. Nwauche 'Regional economic communities and human rights in West Africa and the African Arabic countries' in Anton Bösl & Joseph Diescho Human rights in Africa: Legal perspectives on their protection and promotion (eds) (2009) 332.
[104]Solomon Ebobrah), 'A Rights-Protection Goldmine or A Waiting Volcanic Eruption? Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court of Justice', African Human Rights Law Journal, Vol. 7 (2007) 312.

bring complaints that allege the violation of the African Charter and other human rights instruments before the EOWAS Courts. [105]

The ECOWAS Court was faced with one of its first human rights matters in *Manneh vs. The Gambia,*[106] a case submitted against The Gambia by legal counsels of Chief Ebrimah Manneh, a Gambian journalist who was arrested by the national intelligence agency officials of the Gambia without a warrant of arrest, and a reason for arrest. He was secluded for a whole year and as a result the matter was instituted in the ECOWAS Courts, claiming the defendant had violated Articles, 4,5,6, and 7 of the African Charter.[107] The Court in this matter found the Gambia to have been in contravention of Articles, 2, 6 and 7 (1), of the African Charter and thus made an ex-parte decision ordering the defendant to pay US$ 100,000 to the plaintiff as damages.

### 3.4 The East African Community

The integration between the East African states was the first of its kind for time immemorial in Africa, established through the early form was inspired by a colonialist and imperialist purpose. Envisioned through the coordinated exploitation of East African resources by the British,[108] especially from the end of the First World War period when Tanganyika, an ex-German colony, joined Kenya and Uganda as British administered territories.[109] The EAC was both a fully-fledged Customs Union and a Common Market. A customs union is a form of trade agreement under which certain countries preferentially grant tariff free market access to each other's imports and agree to apply a common set of external tariffs to imports from the rest of the

[105] Enyinna S. Nwauche 'Regional economic communities and human rights in West Africa and the African Arabic countries' in Anton Bösl & Joseph Diescho Human rights in Africa: Legal perspectives on their protection and promotion (eds) (2009) 332.
[106] Manneh v The Gambia (2008) AHRLR 171 (ECOWAS 2008).
[107] **Article 4** Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. **Article 5** every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. **Article 6** every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained. **Article 7 (1)**. Every individual shall have the right to have his cause heard. This comprises: a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) the right to be presumed innocent until proved guilty by a competent court or tribunal; c) the right to defense, including the right to be defended by counsel of his choice; d) the right to be tried within a reasonable time by an impartial court or tribunal.
[108] E.S. Atieno Odhiambo, T.I. Ouso, J.F.M. Williams, A history of East Africa, (1977).
[109] JUMA V. MWAPACHU, EAC: Past, Present and future.

world.[110] A common market on the other hand is, an agreement between two or more countries to eliminate all trade barriers and allow free movement of goods, labour and capital between the signatories of the agreement.[111] The EAC therefore, shared railways and harbors, airlines, civil aviation, inland waterways, road transport systems, post and telecommunications, power and lighting, customs and tax management, health and medical research and aviation training.[112]

The East African Court of Justice (EACJ), formerly known as Court of Appeal for Eastern Africa,[113] the formal legal and judicial organ of the East African Community, was established by the Treaty for the establishment of the East African Community.[114] The first mandate of the EACJ is to ensure the adherence to law in the interpretation and application of and compliance with this Treaty.[115] The jurisdiction of the EACJ is clearly spelt out by Article 27 of the EAC Treaty, which states that "The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council."[116] To achieve the objectives set out above of economic, social and cultural integration,[117] the EAC Treaty sets out fundamental and operational principles that include the promotion and protection of human rights.[118]

With the lack of directly conferred human rights jurisdiction on the EACJ, in 2005, the secretariat of the EAC,[119] developed a draft protocol[120] for the expansion of the EACJ's jurisdiction to include human rights.[121] The process of consultation on the draft was scheduled to

[110] Edward Kameero, Customs Law of the East African Community in light of WTO Law and the Revised Kyoto Convention, (2009).
[111] Edward Kameero, Customs Law of the East African Community in light of WTO Law and the Revised Kyoto Convention, (2009).
[112] JUMA V. MWAPACHU, EAC: Past, Present and future.
[113] L.L. Kato, The Court of Appeal For East Africa: From A Colonial Court To an International Court, 7 E. Afr. L.J. 1 (1971).
[114] Article 9, Treaty for the Establishment of the East Africa Community.
[115] Article 23, Treaty for the Establishment of the East Africa Community.
[116] Article 27, Treaty for the Establishment of the East Africa Community.
[117] Magdalena Sepúlveda et. al. (2004), Human Rights Reference Handbook (San Jose: University for Peace), p.403.
[118] Art 6(d) & 7(2), EAC Treaty. "The Partner States undertake 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."
[119] CM Peter The Protectors: Human Rights Commissions and Accountability in East Africa (2008).
[120] Draft Protocol to Operationalize the Extended Jurisdiction of the East Africa Court of Justice, (2005).
[121] W Oluoch "The East Africa Court of Justice: review of its composition, administration and jurisdiction" in Reinforcing judicial and legal institutions: Kenya and regional perspectives, Vol. 5 Judiciary Watch Series, The Kenya Chapter of the ICJ Nairobi Kenya (2007) 57.

be completed by August 2006, but this target was not met even as at the date of this work was unrealistic and created a gap for political influence because of the rush.[122]

However, even with the express lack of human rights jurisdiction the EACJ did adjudicate over human rights matters, for instance, in the case of *James Katabazi vs. Secretary General of the EAC*,[123] where fourteen applicants were detained and charged with treason, during a mention of their case in the High Court of Uganda, the detainees were granted bail and released. While leaving the court building, they were surrounded by security forces and re-arrested for possession of firearms and terrorism. The Court held that while it does not have jurisdiction over human rights violations per se, it may still consider cases if they fall under one of the provisions of Article 27(1), which sets out the jurisdiction of the Court, even if it also includes a human rights violation. One role of the Court is to interpret the Treaty, which includes "respect for the rule of law".[124]

### 3.5 The SADC tribunal

The apartheid system in South Africa united many African states, influenced the regional integration of Southern African countries, and moved them to work together in the fight against the then white-minority rule in South Africa.[125] As a result the Southern Africa Development Co-ordination Conference, a loose association of states, was created in 1980 in Lusaka, Zambia and the resulting main goal was economic liberation.[126] The Conference was transformed into the Southern African Development Community (SADC)[127] in 1992 in Windhoek, Namibia.[128] The development of the SADC was due to insufficient funding of the former SADCC since, member

[122] Tom Ojienda 'Alice's adventures in wonderland": preliminary reflections on the jurisdiction of the East African Court of Justice' (2004) East African Journal of Human Rights and Democracy 94.
[123] James Katabazi v. Secretary General of the EAC 20 November 2007, EACJ First Instance Division, Ref. No. 1 of (2007).
[124] Article 6 (d) of the EAC Treaty.
[125] Viljoen, International Human Rights Law in Africa; Lieberman ES "Organizational cloaking in Southern Africa, South Africa and the SADCC after apartheid transformation" (1997) 492.
[126] Munetsi Madakufamba (2007), 'SADC in the twenty-first century', Open Space: a digest of Open Society Initiative for Southern Africa vol. 2 p. 90.
[127] Declaration and Treaty of the Southern African Development Community as Amended in 2001
[128] Mbugua Mureithi 'The Impact of regional courts in Africa in fostering regional integration and the development of international human rights jurisprudence' in George Mukundi Wachira (ed.) (2007).

states funded the activities of the organization and it also failed one of the main objectives of liberalizing the then apartheid South Africa.[129]

The SADC Community's main objectives were envisaged to be the promotion of sustainable and equitable economic growth and socio-economic development; the promotion of common political values, systems and other shared values transmitted through democratic, legitimate and effective institutions; the consolidation, defense and maintenance of democracy, peace, security and stability; and the promotion of self-sustaining development on the basis of collective self-reliance and the interdependence of member states.[130]

SADC Tribunal was formed through the ideology and vision of the drafters of the 1992 Treaty, however, this vision was realized through the 2000, Tribunal Protocol.[131] The mandate of the tribunal is spelt out in the Treaty "the Tribunal shall be constituted to ensure adherence to and proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate any such disputes as may be referred to it."[132]

The SADC Tribunal was originally established to resolve economic disputes. However, this does not mean that the Tribunal was precluded from adjudicating human rights issues in that the preamble to the Treaty and its article 4(c) indeed refer to "human rights".[133] A case in point is *Mike Campbell vs. Republic of Zimbabwe,* where the constitution of Zimbabwe granted the state aright to compulsorily acquire agricultural land while also taking away a corresponding right to access to a judicial remedy. It ruled that the ouster clause in the Zimbabwean Constitution that precluded the Applicants from litigating their case in the Zimbabwean courts violated the rule of law as well as Zimbabwe's international human rights treaty obligations.[134]

[129] Maxi Schoeman, From SADCC to SADC and Beyond: The Politics of Economic Integration, http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemaar_fromsadcctosadc.pdf. Accessed on 12th December, 2016.
[130] Article 5 of the SADC Treaty.
[131] Protocol on Tribunal in the Southern African Development Community. (2000).
[132] Article 16 of the SADC Treaty.
[133] Article 4(c) principles to the SADC Treaty.
[134] Mike Campbell and other vs. Republic of Zimbabwe, SADC (T) No 2/2007.

### 3.6 SRICs as human rights courts

As it was at the continental level, the realization of human rights was initially not the focus of SRICs since they were primarily established for economic purposes.[135] However, as challenges such as restricted individual access to the African Court on Human and Peoples' Rights (ACtHPR) increase frustration and dissatisfaction with the continental human rights framework, victims of human rights violations and non-governmental organisations (NGOs) have increasingly turned to the developing regimes in the sub-regions for recourse.[136]

### 3.7 The African Human Rights System and the SRIC Courts

A human rights system comprises of a set of norms and institutions accepted by states as binding.[137] In the AHRS, these are contained in the African Charter on Human and Peoples' Rights (ACHPR) and its protocols and the African Charter on the Rights and Welfare of the Child (ACRWC). These treaties establish the African Commission on Human and Peoples' Rights (ACHPR),[138] the African Court on Human and Peoples' Rights (ACtHPR)[139] and the Committee of Experts on the Rights and welfare of the Child (The Committee)[140] respectively.

Generally, national and international human rights are best protected at the domestic or national level, which has been described as an 'inner layer, forming the core of protection'.[141] Where the victim of violation is unable to find protection at the national sphere, international mechanisms for the protection of rights existed at the global and regional spheres as a last resort.[142] Within the African regional development and as a result of post-colonialism, the African human rights system has been viewed as a "western" culture and thus, used by African leaders to ignore or negate the international human rights obligations.[143] Therefore, with time, the sub-regional

[135] Laurence R. Helfer Sub-regional Courts in Africa: "Litigating the Hybrid Right to Freedom of Movement" iCourts Working Paper Series, No. 32, (2015).
[136] Solomon T Ebobrah, African Human Rights Law Journal, "Human rights developments in African sub-regional economic communities during" (2011).
[137] M Freeman, Human rights: an interdisciplinary approach, (2002) Cambridge: Polity 53.
[138] Article 30 of the, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
[139] Article 1 of the Protocol to the ACHPR on the Establishment of an ACtHPR, 1998/2004 (Court Protocol).
[140] Chapter 2, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality", 16 April 2014, ACERWC/GC/02 (2014).
[141] F. Viljoen, International Human Rights Law in Africa, Oxford University Press 490 (2007).
[142] F. Viljoen, International Human Rights Law in Africa, Oxford University Press 490 (2007).
[143] F. Viljoen, International Human Rights Law in Africa, Oxford University Press 490 (2007).

communities began the formation of human rights standards which was widely accepted by the member states and thus, eliminating the façade of "western indoctrination".[144]

With regard to the AHRS system, the African 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.[145] The complaints mechanism is clearly outlined in the African Charter, the Commission may exercise the prerogative of carrying out investigations of any human rights violation of any member state,[146] or through the communication of gross human rights violations from another state.[147] Although, the commission has been mandated the above powers to investigate and request for a state's report, they lack the enforcement powers to condemn a state's action or award damages, they may only make recommendations. [148] This therefore, only allows for a shaming mechanism of the offending state, and thus an ineffective means of dealing with the issue of grave human rights violations.[149]

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.[150] The mandate of the Court was to act as a complimentary institution to the African Commission, to complement the protective mandate of the Commission.[151] 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. The court can only

[144] I.L. Claude, Swords into Plowshares: The Problems and Progress of International Organisations, Random House 103 (1971).
[145] See The Status on Submission of State Reports to the African Commission, available on http://www.achpr.org/english/-info/statereport-considered-en.html.
[146] Article 46, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June (1981).
[147] Article 47, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June (1981).
[148] NJ. Udombana, 'Toward the African Court on Human and Peoples' Rights: Better late than Never', 3Yale Hum. Rts and Dev't L.J., 67 (2000).
[149] NJ. Udombana, 'Toward the African Court on Human and Peoples' Rights: Better late than Never', 3Yale Hum. Rts and Dev't L.J., 67 (2000).
[150] Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June (1998).
[151] Article 2 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

allow references by individuals and NGOs if the state has made a declaration accepting the competence of the Court.[152]

The development of SRICs into human rights courts, created an implication of a complex form of human rights system, since the African Court and African Commission no longer have the initial monopoly over human rights across the region.[153] Within the framework of the SRICs, a separate institution solely dealing with human rights is yet to be formed and this gap implies that this is a sub-regional integration of governments all with a concern for human rights.[154]

The evolution of the African system is captured in the following developments. The interpretation of the charters claw back clauses in a manner that is practically nullifying and eroding the right channel for human right cases.[155] Then there is the strategic manipulation by the African commission of its own rules of procedure to further enhance its ability to chart a course that diverges from the course set at the inception of the African human rights system.[156] The commission has also confronted and overcome the dilemmas associated with the enforceability of economic, social and cultural rights. This has been done through the clarification of the meaning of the African charter's economic, social and cultural rights and through the creation of the economic courts.

The assertions that the AHRS does not include the role of SRICs must be understood to refer to the AHRS as established in the formal documents and institutions of the AU.[157] However, it is submitted that in view of the depth of integration of human rights into the economic and other agenda of the AU, it is difficult to understand human rights in Africa without recognizing the

[152] Article 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.
[153] OC Ruppel "Regional economic communities and human rights in East and Southern Africa" in Anton Bösl & Joseph Diescho (eds)(2009) Human Rights Law in Africa: Legal perspectives on their protection and Promotion Mc Millan Education Namibia (319 – 350) 280.
[154] F Viljoen International human rights law in Africa Oxford University Press 10 (2000).
[155] Christof Heyns, The African Human Rights Systems: "In Need of Reform", African Human Rights Law Journal, (2001).
[156] Andreas O'Shea, A Critical Evaluation of The Proposed African Court on Human and People's Rights, African Human Rights Law Journal, (2001).
[157] Lucyline Nkatha Murungi and Jacqui Gallinetti The Role of Sub-Regional Courts in the African Human Rights System, International Journal on Human Rights, VOL 7, (2010).

role of SRICs. It is further arguable that despite the absence of an express linkage between SRICs and the AHRS, it is undeniable that SRICs sit in a relationship with the AU.[158]

Strengthening the existing SRICs and establishing new ones where none exist are the first steps on the road towards the agenda of African human rights pursued by the AU.[159] Thus, it is argued that SRICs as part of the African Economic Courts have a duty to respect and promote human rights in their jurisdictions hence the relationship with African human rights system.[160]

By analogy, SRIC courts, to the extent that they preside over matters of human rights, can be deemed to be in an informal relationship with the African Court and the African Commission. Following this, the SRICs act to fill the gaps created by the regional courts, since there is no obligation on states to first go the SRICs before submitting a matter to the regional courts.[161]However, it is a pre-requisite that the State first exhaust its local remedies before proceeding to apply for a hearing in the regional court.[162] Therefore, it is doubtful that the ACHPR or ACtHPR could decline to admit a matter on the basis that it has not been heard by the relevant SRIC court or even that this question might arise at all.

[158] Lucyline Nkatha Murungi and Jacqui Gallinetti The Role of Sub-Regional Courts in the African Human Rights System, International Journal on Human Rights, VOL 7, (2010).
[159] Solomon T Ebobrah, The African Human Rights System: An eventful journey from doom and gloom,
[160] Lucyline Nkatha Murungi and Jacqui Gallinetti The Role of Sub-Regional Courts in the African Human Rights System, International Journal on Human Rights, VOL 7, (2010).
[161] Viljoen F "Communications under the African Charter: procedure and admissibility" in M Evans & R Murray (eds) The African Charter on Human and Peoples' Rights, 2nd edition Cambridge University Press 78 (2008).
[162] Article 56, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), (1982).

## CHAPTER FOUR

## ANALYSIS OF THE SUITABILITY AND THE IMPLICATIONS OF SRICS AS HUMAN RIGHTS COURTS

### 4.1 Introduction

The sub-regional courts are similar in many ways. Each of the court was created by virtue of the existence of a regional economic community whose primary purpose was economic liberalization and supplementation of human rights. The aspect of human rights has eventually become the most heard cases in the Sub-regional Courts.[163] ECOWAS, EAC, and SADC are each comprised of a mix of emerging or fragile democracies and authoritarian regimes, all which include national legal systems with little tradition of judicial independence and at least some countries where the rule of law is fragile or illusory.[164] Since many African countries have a tradition of a strong executive arms of government and weak judiciaries, then the SRICs are likely to be influenced through the strong executives.[165]

This chapter will analyze the debate surrounding the suitability of the SRICs as avenues for the protection of human rights, considering the economic focus of the courts. It further discuss the backlash against International Courts from member states. Through the analysis of different state decision's to either, adhere, negate or simply ignore a court order by seeking the decisions of the Courts.

### 4.2 An analysis of SRICs as avenues for human rights protection

#### 4.2.1 The Abuja Treaty Establishing the African Economic Community

Many African leaders perceive economic integration as promising vehicles for achieving and enhancing socio–economic development in their respective countries.[166] This can come about through the creation of strong economic community[167]. The movement of Pan-Africanism tried

[163] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[164] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[165] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[166] Ombeni N. Mwasha, The Benefits of Regional Economic Integration for Developing Countries in Africa: A Case of East African Community (EAC), (2007).
[167] M. Ndulo " African economic community and the promotion of intra-african trade 2 (1992).

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.[168]

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.[169]

It was with the signing of the Treaty of Abuja that created the AEC, the Common Market of Africa that the foundations of a future economically integrated and united Africa can be seen.[170] The Treaty envisages the creation of an African Economic Community over a period of thirty-four years using six defined stages of evolution.[171] 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.[172]

The Abuja Treaty changed the form of Africa's integration process by providing for the creation of a Pan-African Parliament, Court of Justice and a Solidarity and Compensation Fund.[173] It also envisioned the economic integration of Africa in six notable stages, and one of its key features is that RECs are recognized to be the building blocks of an economically integrated continent.[174]

The intended strategy for achieving the key integration objectives, as enshrined in the Abuja Treaty, involves: promoting gradual liberalization of regional and intra-regional trade; coordination and harmonization of activities of all RECs;[175] the establishment of free trade areas (FTA) and a customs unions at REC level; and finally achieving both a monetary and economic union, final stages in the establishment of an African Economic Community.[176]

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[168] M. Ndulo " African economic community and the promotion of intra-african trade 2 (1992).
[169] Treaty Establishing the African Economic Community 1991 (Abuja Treaty).
[170] Manelisi, genge; Francis Kornegay and Stephen, Rule, African Union and Pan-African Parliament: Working Papers, (2007).
[171] RF. Oppong, 'The AU, AEC and Africa's RECs: untangling a complex web' 93 (2010).
[172] Article 4 of the Abuja treaty.
[173]http://www.au.int/ar/sites/default/files/Issue%20paper%20on%20Governance%20of%20Integration%20%20en.pdf.
[174]RF. Oppong, 'The AU, AEC and Africa's RECs: untangling a complex web' 93 (2010).
[175] Gilbert M. Khadiagala, ADB Working Paper Series on Regional Economic Integration, Institution Building for African Regionalism, 85, (2011).
[176] Gilbert M. Khadiagala, ADB Working Paper Series on Regional Economic Integration, Institution Building for African Regionalism, 85, (2011).

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[177]. 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.'*

### 4.2.2 Promoting human rights: A mandate for RECs?

Assuming that the responsibility for upholding human rights and fundamental freedoms rests primarily on the individual states themselves, the question may arise as to the role that SRICs play when it comes to the protection of human rights, and whether or not – and if so, how – SRICs can function as guardians of human rights.[178] In some way or another, SRICs have incorporated the respect for and/or promotion of human rights into their constitutive instruments. Therefore, SRICs do indeed have the duty to translate human rights principles and ideals into practice.[179]

The adoption of the Abuja Treaty, came up with the use of SRICs as pillars for continental economic integration. Thus the link created by the SRICs, AU and AEC needed to align the principles of the SRICs with the policy and principles of the AU and AEC. Thus, some of the SRICs 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.

SRICs 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.[180] Therefore, SRICs incorporated human rights in to their constitutive

[177] Article 3(9) of the Abuja treaty.
[178] OC. Ruppel. 'RECs and human rights in east and southern africa' AHRLJ, 275-316. 275 (2009).
[179] OC. Ruppel. 'RECs and human rights in east and southern africa' AHRLJ, 275-316. 275 (2009).
[180] OC. Ruppel. 'RECs and human rights in east and southern africa' AHRLJ, 275-316. 275 (2009).

instrument, using their various institutions, respect, promote and enforce human rights that are laid down in their legal instruments, in the African Charter or in other various instruments.[181]

Enforcing and promoting human rights outside of courts is, in the first place, realized by merely administrative means.[182] The legal instruments of SRIC places the onus on member states and institutional organs to act in accordance with specific principles such as the rule of law, democracy or respect for human rights.[183] Therefore, in my view, SRICs decision-making processes should always be guided by human rights principles laid down in such legal instruments, or that apply because they are general principles of customary law.[184] Thus, it can be stated that specific principles of human rights are authoritative when it comes to decisions taken by SRIC.[185]

On the judicial side, the enforcement of human rights within SRICs works through the activities of regional community courts or similar institutions.[186] Most SRICs have judicial bodies that deal with any controversies relating to the interpretation or application of community law.[187] Depending on how human rights are incorporated into the legal frameworks of different SRICs, sub-regional organizations have a number of options open to them in respect of enhancing the protection of human rights.[188]

Considering that human rights do, to some extent, form part of the community law of all SRICs, their regional community courts can unquestionably contribute towards the promotion and protection of human rights, provided that decisions by regional judicial institutions are properly enforced at a national level.[189]

Finally, a critical issue faced by SRIC on upholding human rights is the issue of concurrent jurisdiction and overlapping memberships.[190]

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[181] OC. Ruppel. 'RECs and human rights in east and southern africa' AHRLJ, 275-316. 275 (2009).
[182] Nlerum S. Okogbule, Access to justice and human rights protection in Nigeria: problems and prospects, (2005).
[183] Nlerum S. Okogbule, Access to justice and human rights protection in Nigeria: problems and prospects, (2005).
[184] Nlerum S. Okogbule, Access to justice and human rights protection in Nigeria: problems and prospects, (2005).
[185] Nlerum S. Okogbule, Access to justice and human rights protection in Nigeria: problems and prospects, (2005).
[186] Clara Marsan Raventós, The Role of Regional Human Rights Mechanism, EXPO/B/DROI/2009/25, (2010).
[187] Clara Marsan Raventós, The Role of Regional Human Rights Mechanism, EXPO/B/DROI/2009/25, (2010).
[188] Clara Marsan Raventós, The Role of Regional Human Rights Mechanism, EXPO/B/DROI/2009/25, (2010).
[189] A Possi 'Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice' 15 African Human Rights Law Journal 192-213 (2015).
[190] Ayelet Shachar, Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies, (2005).

The issue of the conflicting jurisdiction of regional courts on the African continent will become a prominent one with specific importance in cases involving violations of human rights, as many regional judicial bodies have the jurisdiction over human rights cases.[191] For the time being, the consequence of overlapping jurisdiction is that a claimant may in fact choose to which judicial body a case is submitted, since a competent court may not decline jurisdiction on the grounds that another court may be competent as well.[192] In terms of regional integration, the absence of a judicially integrated Africa is, however, undeniably a problem because different judicial bodies may interpret one normative source differently.[193]

### 4.3 Analysis of SRICs

The regional economic courts have certain important features that are common to them and they include:

#### 1. Lack of complementarity across SRICs

Almost all regional economic integration communities have trade protocols, but these are different despite the provision that they will eventually adopt a single continental trade agreement.[194] Because regions priorities are different, each protocol emphasizes different issues.[195] They therefore, implement programs that vary in intensity, schedule, effect on national policies and other features.

#### 2. Lengthy negotiation process

All protocols have taken time to conclude and as a result these delays have made it difficult to adhere to the provision of the treaties for instance most trade liberalization had to be rescheduled because negotiations of trade Protocols took time to be concluded and meet the target dates.[196]

[191] A Possi 'Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice' 15 African Human Rights Law Journal 192-213 (2015).
[192] Clara Marsan Raventós, The Role of Regional Human Rights Mechanism, EXPO/B/DROI/2009/25, (2010).
[193] Clara Marsan Raventós, The Role of Regional Human Rights Mechanism, EXPO/B/DROI/2009/25, (2010).
[194] Trudi Hartzenberg, Regional Integration in Africa, World Trade Organization Economic Research and Statistics Division, (2011).
[195] Trudi Hartzenberg, Regional Integration in Africa, World Trade Organization Economic Research and Statistics Division, (2011).
[196] Clara Marsan Raventós, The Role of Regional Human Rights Mechanism, EXPO/B/DROI/2009/25, (2010).

### 3. Uneven signing, ratification and implementation.

Some, if not most, member countries in Africa do not sign or ratify protocols, or even submit them timeously.[197] For example, in the case of the SADC, the Summit review ed

and approved 15 protocols, but the DRC has neither ratified nor signed any protocol. No member state has ratified more than 11 protocols, except for Botswana.[198]

### 4. Uneven interest in the provision of protocols

Some member countries are not that eager to implement certain protocols.[199] This has been reported to be mainly island countries which have little interest in protocols on rail, road, or inland water

way transport. In other cases, countries sign but show less interest and commitment in ratifying p rotocols, because they stand to benefit less than other parties or even.[200]

The challenges facing the economic and human rights integration process are among others the existence of political instability in Africa is a move against the efforts to integrate African economy.[201] Another major challenge to the integration process is inadequate infrastructures, especially in the transportation and telecommunications among African countries.[202] 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.[203]

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[197] Aileen Kwa, Peter Lunenborg, Wase Musonge, African, Caribbean and Pacific (ACP) countries' position on Economic Partnership Agreements (EPAs), (2014).
[198] Aileen Kwa, Peter Lunenborg, Wase Musonge, African, Caribbean and Pacific (ACP) countries' position on Economic Partnership Agreements (EPAs), (2014).
[199] Aileen Kwa, Peter Lunenborg, Wase Musonge, African, Caribbean and Pacific (ACP) countries' position on Economic Partnership Agreements (EPAs), (2014).
[200] Curtis A. Bradley, Unratified Treaties, Domestic Politics, and the U.S. Constitution, volume 48, number 2, (2007).
[201] Mark Chingono* and Steve Nakana, The challenges of regional integration in Southern Africa, African Journal of Political Science and International Relations Vol. 3 (10), 396-408, (2009).
[202] Mark Chingono* and Steve Nakana, The challenges of regional integration in Southern Africa, African Journal of Political Science and International Relations Vol. 3 (10), 396-408, (2009).
[203] Ombeni N. Mwasha, The Benefits of Regional Economic Integration for Developing Countries in Africa: A Case of East African Community (EAC), (2007).

The role of SRICs in the protection and promotion of human rights in Africa is relatively new.[204] The contribution of SRIC Courts to the protection of rights in Africa notwithstanding, there are concerns respecting their suitability in this regard and how this impacts on the discourse on human rights in the continent.[205]

Whether the SRICs newly established mandate is a "blessing" or a "curse" depends on the advantages of the sub-regional human rights system as opposed to the regional human rights system.[206]

### 5. Exhaustion of local remedies

At the regional level of the human rights system, before instituting a matter in the African Court or the African Commission, the state must first of all exhaust all local remedies, *"Communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission, shall be considered if they: Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."* [207]

The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matter through its own local system.[208] This prevents the Commission from acting as a court of first instance rather than a body of last resort.[209]

It is clear in the African context that the struggle between the African Charter supported human rights legal framework, on the one hand, while on the other lies domestic legal systems heavily

[204]Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[205] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[206] Victor A.O. Adetula, African Conflicts, Development and Regional Organisations in the Post-Cold War International System, (2012).
[207] Article 56 (5) of the Banjul Charter.
[208] Silvia D'Ascoli, Kathrin Maria Scherr, The Rule of Prior Exhaustion of Local Remedies in The International Law Doctrine and Its Application in The Specific Context of Human Rights Protection, (2007).
[209] Jawara vs. The Gambia, Communication no 149/96 (Application No) 27th ordinary session (27 April-11 May 2000).

influenced by autocratic State regimes seemingly "disconnected" from the human rights demands of their populace is the impediment to the rule of exhaustion of local remedies.[210]

This rule can have a dual effect as per Mr. Ruwange, the first is the positive where it enables the parties to have a fair remedy and justice to be served, if the state is an oppressive and it is likely that the is no partiality. This would be contrary to Article 10 of the Universal declaration of Human Rights which provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations".[211] The negative one is when the case is then gripped with multiple cases from all facets of the law and this creates an implication of a court which is "a jack of all trades and a master of none."[212] This double effect means that the court must base their decision of which case to admit based on the strict interpretation of the treaty's provisions.

### 4.4 The question of human rights and trade

The underlying aim of the regional and sub-regional trade facets are based on the main aim of trade liberalization and the end game being a global economy. Jokes about economists often build on the notion that economists rarely agree with each other. Yet, there is at least one proposition on which virtually all economists agree—trade liberalization raises living standards in the aggregate.[213] There is essentially only one argument for free trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe.[214]

In turn, the growth in real income that results from more open trade will promote human rights to the degree that the demand for human rights is likely "income elastic."[215] There are good reasons to believe that this will be true for many rights. Note that almost all human rights are, in one

[210] Felix M. Ndahinda, " Human Rights in African Political Institutions: Between Rhetoric, Practice and the Struggle for International Visibility" 20 (2007).
[211] Article 10, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948.
[212] Interview with Mohamed Ruwange, on 31st January, 2017.
[213] Frederick M. Abbott, Christine Kaufmann, Thomas Cottier, International Trade and Human Rights: Foundations and Conceptual Issues.
[214] Paul A. Samuelson, Economics 692 (9th ed. 1973).
[215] John M. Olin Law & Economics Working Paper No. 188 2d Series, (2003).

manner or another, costly. The protection of rights generally requires a legal system that is effective and credible, and such systems do not come free.[216]

The interrelationship between human rights and economic development has become closer over the past few years due to increasing discussions in the world community on the issue.[217] This interconnection can be seen as a two-way relationship insofar as economic development is obliged to respect human rights in a democratic society. Conversely, human rights can be given more effect through economic growth, as one outcome of economic growth is the increasing availability of resources, resulting in the reduction of poverty and a higher standard of living.[218]

With regards to SRICs, all SRICs analyzed here have, to some extent, incorporated human rights into their treaties. In most cases, a general tribute to recognizing and protecting human rights can be found in the basic legal concepts underpinning SRICs.[219] One of the reasons for the development of human rights into the SRICs structure certainly is that states have committed themselves to respecting human rights by acceding to specific human rights treaties, conventions or declarations on the international, regional and sub-regional level, including the Universal Declaration of Human Rights;[220] the International Covenants on Civil and Political Rights[221] and on Economic, Social and Cultural Rights;[222] the Convention on the Elimination of Racial Discrimination;[223] or the African Charter on Human and Peoples' Rights.[224]

[216] John M. Olin Law & Economics Working Paper No. 188 2d Series, (2003).
[217] Oliver C Ruppel, Regional economic communities and human rights in East and southern Africa.
[218] Oliver C Ruppel, Regional economic communities and human rights in East and southern Africa.
[219] Article 4 (g) of the Treaty of the Economic Community of West African States (1975), Article 6 (d) of the Treaty Establishing the East African Community.
ity (1999), and Article 4 (c) the Treaty of the Southern African Development Community (1999), (SADC Treaty)
[220] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[221] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[222] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[223] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
[224] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

# CHAPTER 5

# BACKLASH FROM AFRICAN STATES

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## 5.1 Introduction

This section of the paper discusses the attempt by African states to suppress the decisions of the Sub-regional Economic Courts, as a response to politically incriminating decisions by the Courts.[225] In the EAC, the revolutions against the SRICs began as a result of a decision nullifying an election into the sub-regional legislature. The Southern-African Region's revolution however, was due to a decision against the Government of Zimbabwe for Human dignity violations and racial discrimination. Lastly, the ECOWAS revolution was instigated by the non-compliance by the President of the Gambia, thus, the lack of any enforcement mechanism led to the suppression of ECOWAS Community Court.[226]

This analysis will be done based on individual analysis of the courts, with regard to case law and the reasons which led to the backlash.

## 5.2 Reasons for backlash

The African state has been such a notorious human rights violator that skepticism about its ability to create an effective regional human rights system is appropriate.[227] The African system has been deeply rooted in the vesting of all powers in one individual, in this case the president.[228] According to Mr. Ruwange, the above assertion is in the affirmative since, many leaders across Africa lead with an iron fist and are not willing to relinquish or share the power that has been vested in them.[229] Therefore, in this context the legislature and judiciary can be easily coerced and controlled by the executive.[230]

[225] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[226] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[227] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[228] A. Cassese, International Law in a Divided World Oxford: Clarendon Press, 69 (1986)
[229] Interview with Mohamed Ruwange, on 31st January, 2017.
[230] Interview with Mohamed Ruwange, on 31st January, 2017.

### 5.3 The Economic Community of West African States Court

In 2005 the Economic Community of West African States passed a Supplementary Protocol which extended the human rights jurisdiction of the ECOWAS Court through Article 3 and 4.[231] The Article respectively provide that, *"The Court has jurisdiction to determine case of violation of human rights that occur in any Member State*,"[232] and that "*Individuals and corporate bodies in proceedings from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies."*[233]

This expansion of jurisdiction was challenged by the Gambian case, which was filed by an NGO, The Media Foundation for West Africa, on behalf of a journalist who had been arrested and supposedly tortured for publishing news articles which were crucial to the government.[234] The country of Gambia has been one of the most undemocratic states in Africa and ruled by an iron fist which was led by the ideologies of a police state. The security organs were the strongest forces in the state and operated on the basis of detention and torture towards any individual who was against the establishment.[235]

Due to the repressive and autocratic nature of the Gambian government, the ECOWAS interference in the matter caused an uproar and at the same time received a deafening response full of silence.[236] It was said by a human rights lawyer, "Jammeh (the "former" president of Gambia) had already "conquered his own judiciary," and he "refused to be bound by a court in Abuja" (the state in which ECOWAS Court sits).[237]

The ECOWAS Court ordered the Gambia to comply on many occasions, however, the state defied all orders and did not make any appearances or file any documents as evidence to the

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[231] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 Am. J. Int'l L. 737 (2013).
[232] Article 3 of the, Supplementary Protocol A/Sp.1/01/05 Amending The Preamble And Articles 1, 2, 9 And 30 Of Protocol A/P.1/7/91 Relating To The Community Court Of Justice.
[233] Article 4 of the, Supplementary Protocol A/Sp.1/01/05 Amending The Preamble And Articles 1, 2, 9 And 30 Of Protocol A/P.1/7/91 Relating To The Community Court Of Justice.
[234] Manneh v. The Gambia, ECW/CCJ/JUD/03/08 (June 5, 2008); Saidykhan v. The Gambia, ECW/CCJ/RUL/05/09 (June 30, 2009).
[235] S. Department of State, Country Reports on Human Rights Practices for 2013, the Gambia: Executive Summary.
[236] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 Am. J. Int'l L. 737 (2013).
[237] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 Am. J. Int'l L. 737 (2013).

contrary of the allegations above. In this matter, the ECOWAS Court finally gave an "ex-parte" judgment against the Gambia, finding the Gambia responsible for torture and other human rights abuses and ordering the government to release the journalist from detention and pay him U.S. $100,000.[238]

The case above is a clear illustration of the backlash from the West African state of Gambia, however, a conclusive illustration is the recommendations by the member states of the creation of a Judicial Council,[239] to screen applications for open judgeships and recommend a slate of the best qualified candidates to the member states.[240] The aim of this was to ensure a delay in the institutions proceedings and also hinder the access by individuals and NGO's to the court.[241]

The Vienna Convention on the Law of Treaties, Article 26 provides for the doctrine of "Pacta Sunt Servada," it states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." [242]The ECOWAS Treaty, subscribes and dictates the jurisdiction of the court over any and all matters between member state which are in accordance or contrary to the treaty and that all judgments rendered by the ECOWAS Court is binding on all states members of the ECOWAS Community.[243] The action by the government of Gambia is in contravention of the Articles mentioned above, since, the State of Gambia is a member of the ECOWAS Community, and by this virtue accepted the jurisdiction of the Court.

However, the push towards recusing the ECOWAS Court's human rights jurisdiction was not limited to the ignorance of the Courts decision, the president of Gambia went further to request the Secretariat of ECOWAS permission to revise the ECOWAS Treaty.[244] The proposal by the Gambia included clauses to ensure that before the ECOWAS grants a state standing, the party must ensure that they have exhausted all local remedies, and even after this process the party

[238] Manneh v. The Gambia, ECW/CCJ/JUD/03/08 (June 5, 2008); Saidykhan v. The Gambia, ECW/CCJ/RUL/05/09 (June 30, 2009).
[239] Decision A/Dec.2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006). The Council comprises the presidents and chief justices from member states not then represented on the seven-member ECOWAS Court.
[240] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 Am. J. Int'l L. 737 (2013).
[241] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 Am. J. Int'l L. 737 (2013).
[242] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969.
[243] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27, (2016).
[244] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, (2016).

may only institute the claim after twelve months.[245] Such a provision was aimed at weakening the Court especially in regard to the human rights jurisdiction and in effect reduce the Courts ability to deal with tyrannical governments.[246]

Although the Gambia, strongly pursued the ECOWAS Court to ensure its failure, this campaign however, had the opposite effect, where the Court has continued to hear matters relating to human rights.[247] Especially so after the swearing in of new judges into the court, the human rights enthusiasm has now received a new fresh solid foundation.[248]

### 5.4 The East African Court of Justice

The most controversial aspect of the EACJ is the human rights jurisdiction it has been conferred, since unlike the ECOWAS Court and the SADC Tribunal, the EAC Treaty does not directly allow the EACJ to infer the human rights jurisdiction.[249] The EAC Treaty specifies that, "the EACJ shall have a human rights jurisdiction as will be determined by the [EAC] Council at a suitable subsequent date" once member states have agreed to a Protocol to extend the jurisdiction.[250] This in the case of the EAC is yet to be done.

The case of *Rugumba vs. Secretary General of East African Community*,[251] where a Rwandan citizen had been held incommunicado without trial for a period of five months, the EACJ therefore, interpreted their jurisdiction through Article 6 (d), 7 (2) and 27(2) of the EAC treaty which all identified and discussed the human rights aspect of the agreement. Further to this the court also made reference to Article 7 (2) of the African Charter of Human and People's Rights,[252] and asserted that "these provisions were not decorative or cosmetic parts of the Treaty

[245] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, (2016).
[246] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, (2016).
[247] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, (2016).
[248] Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, (2016).
[249] James Gathii, Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy, 24 Duke J. Comp. & Int'l L. 249 (2014).
[250] Article 27(2) Treaty for the Establishment of the East African Community, Nov. 30, 1999, 2144 U.N.T.S. 255.
[251] The Attorney General of the Republic of Rwanda v Plaxeda Rugumba, Appeal No. 1 of 2012.
[252] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

but were "meant to bind Partner States."[253] The court declined to hold that exhaustion of the Treaty's statute of limitations was a bar to bringing the suit.[254]

However, the case which disputed the jurisdiction and caused a revolt against the EACJ was the Kenyan case of *Anyang Nyong'o v. Attorney General of Kenya* (hereinafter Nyong'o case),[255] where the opposition disputed the division of candidates for the East African Legislative Assembly based on the national parliament's political strength. The EACJ decided this case in favour of the opposition and rejected the list of candidates. As a result of this decision, Kenya reacted by threatening to revoke the two judges sitting on the EACJ, one of whom was the president of the court.[256] The reasoning behind the formal application for recusal was that Kenya claimed "argued that because the judges had been suspended from their duties on Kenyan courts due to allegations of corruption, they could not render a fair judgment in the Nyong'o case". This move by Kenya, was centered on making the EACJ a powerless force, also that the doctrine of state sovereignty was breached by the EACJ when they interfered with sensitive local matters.[257]

With regard to the efforts by Kenya, the stronghold of the EAC was upheld since, Uganda and Tanzania stood by the EAC and refused to back the efforts by Kenya to cripple the EACJ and to recuse its judges.[258]

The second chapter of this research paper discusses the legal positivist theory, such school of thought would argue that the action by the EACJ, is ultra-vires based on the provisions in the treaty, whereas it can be argued that the EACJ is trying to re-write the judicial authority of the Treaty.[259] It is however important to also acknowledge the forms of statutory interpretation in international law, first would be that which supports the positivist school of thought, as per Article 31 of the Vienna Convention, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of

[253] James Gathii, Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy, 24 Duke J. Comp. & Int'l L. 249 (2014).
[254] The Attorney General of the Republic of Rwanda v Plaxeda Rugumba, Appeal No. 1 of 2012.
[255] Nyong'o v Attorney Gen. of Kenya, Ref. No. 1 of 2006.
[256] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 Am. J. Int'l L. 737 (2013).
[257] Nyong'o v Attorney Gen. of Kenya, Ref. No. 1 of 2006. 20.
[258] Gitau Warigi, Our Free Wheeling Politics May Frustrate Regional Unity, Daily Nation, Dec. 3, 2006 available at http://allafrica.com/stories/200612040362.html.
[259] James Gathii, Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy, 24 Duke J. Comp. & Int'l L. 249 (2014).

its object and purpose. This means that although the court may consult other sources to realize the meaning of the text within the treaty, they will only interpret that meaning in the ordinary and natural meaning regardless of the unfair outcome.[260] If this school of thought was to take the day then it would be decided that the EACJ was acting ultra vires, since the treaty does not confer any direct human rights on the court. The treaty only provides for the importance of upholding good governance and adherence to the African Charter on Human and People's Rights.[261] This being the basis of the Kenyan government when condoning the decision against them by the EACJ in the *Nyongo Case,* a counter argument was given in the case of *Katabazi* described below.

On the other hand, Article 2 of the Vienna Convention[262] also provides for the purposive interpretation of the Treaty, which looks to the text of the treaty, any annexes of the treaty and any agreement relating to the treaty made between states. The case of *James Katabazi and 21 Others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda*,[263] where although the Court conceded that Article 27 of the EAC Treaty did not confer direct human rights jurisdiction to the EACJ,[264] it held that this fact does not limit the court from having jurisdiction in matters of any violation of the treaty's provisions. In this regard, therefore, the court ruled that there had been a violation of rule of law and thus, the state as held accountable.

### 5.5 The South African Development Tribunal

The SADC Tribunal, being in the hub of many African autocratic rule, where states are not willing to relinquish their sovereignty in favor of the regional integration.[265] The court was faced with its major human rights case in the first year of its existence, which was filed by Mike Campbell, a white settler, for violation of his right to property, also alleging discrimination on

[260] Mehrish, Travaux Preparatoires as an Element in the Interpretation of Treaties, 11 INDIAN J. INT'L L. 39 (1971); see also Schaffer, Current Trends in Treaty Interpretation and the South African Approach, 7 AUSTL. Y.B. INT'L L. 129, 130 (1981).
[261] Article 6 (d), East African Community Treaty.
[262] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969.
[263] James Katabazi and 21 Others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda, REF NO. 1 of 2007
[264] Article 27, East African Community Treaty, "A Partner State which considers that another Partner State or an organ or institution of the Community has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court for adjudication."
[265] Laurie Nathan, The Disbanding of the SADC Tribunal: A Cautionary Tale, 35 Hum. Rts. Q. 870, 876-77 (2013), Solomon Ebobrah, Human Rights Developments in Sub-Regional Courts in Africa During 2008.

the basis of race, lack of due process in the deprivation of property, and denial of access to the courts.[266] The argument that the SADC Tribunal lacked jurisdiction in hearing human rights cases was summarily dismissed by the court, and Zimbabwe was further found to have been in violation of the "white" land-owners right in three ways, denying access to justice, discriminating on the basis of race, and failing to provide fair compensation.[267]

The decision by the SADC Tribunal against Zimbabwe was not received well by the President Mugabe, who began to challenge the courts credibility and its jurisdiction.[268] At the August 2010 Summit, Mugabe "threatened to block any discussion of Zimbabwe and its human rights record,[269] since, the state viewed the decision by the Court as an interference of the sovereignty and independence if Zimbabwe.[270] The demise of the SADC Tribunal was initiated by this Zimbabwean case, where in 2010, the heads of states within the SADC community suspended the Tribunal for six months, and therefore, allowing Zimbabwe to assert that due to the suspension, the holding against the state was unenforceable.[271] In this regard, the heads of state further declined to reappoint the judges to the Tribunal, and thus leaving the court inquorate and inoperative.[272]

In 2011, there had been a formal request for an external review of the SADC Tribunal's decision against Zimbabwe, the independent expert charged with this review issued a report.[273] This report confirmed the validity of the Tribunal's constitution, and its authority to review human rights complaints initiated by private litigants.[274] This report only goes to assert the formal jurisdiction of the SADC Tribunal to hear any cases that are in contravention of the SADC Treaty.[275]

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[266] Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe (2008), SADCT 2/2007.
[267] Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe (2008), SADCT 2/2007
[268] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 Am. J. Int'l L. 737 (2013).
[269] Frederick Cowell, The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction, 131 HUM. RTS. L. REV. 153, 161 (2013).
[270] Laurie Nathan, The Disbanding of the SADC Tribunal: A Cautionary Tale, 35 Hum. Rts. Q. 870, 876-77 (2013).
[271] Laurie Nathan, The Disbanding of the SADC Tribunal: A Cautionary Tale, 35 Hum. Rts. Q. 870, 876-77 (2013).
[272] Laurie Nathan, The Disbanding of the SADC Tribunal: A Cautionary Tale, 35 Hum. Rts. Q. 870, 876-77 (2013).
[273] E. Tendayi Achiume, The Sadc Tribunal: Socio□Political Dissonance and The Authority of International Courts, Research Paper No. 17-04.
[274] Lorand Bartels, Review of the Role, Responsibility and Terms of Reference of the SADC Tribunal—FINAL REPORT 6 (2011).
[275] Article 16(5) of the Declaration and Treaty of the Southern African Development Community as Amended in 2001.

In an interview with Mr. Ruwange, he stated that International law is like a "dog without teeth," and without any enforcement mechanism this court will remain to be at the mercy of the heads of state.[276] This is clearly the case with the SADC Tribunal where as a result of the decision of the Court (the Campbell case) a head of state was able to cripple the Court. The decision of this court however, in theory should be binding to all states that are members of the SADC Community. [277] In this matter the government of Zimbabwe quickly dismissed the decision by the SADC Tribunal finding Zimbabwe to have violated human rights of the "white settlers," and initiated the lobbying towards the disbandment of the Tribunal and the removal of the individual's access to the court.

[276] Interview with Mohamed Ruwange, on 31st January 2017.
[277] Article 16(5) of the Declaration and Treaty of the Southern African Development Community as Amended in 2001.

# CHAPTER SIX

# CONCLUSION AND RECOMMENDATIONS

This chapter will give an overview of the discussions made in all other chapters and thus make findings on all the issues which have been assessed through the research, it will endeavor to answer the research questions provided. This being the last chapter of the research paper, it will summarize the discussion and make the relevant recommendations and conclude on the issue of the SRICs as human rights courts.

## 6.1 Summary of research findings

The research was analyzing the suitability of SRIC's as human rights courts through an in-depth analysis of the historical development of the courts and also the development of their human rights mandate. In addition, the research further analyzed the court in relation to the African Human Rights System and the relationship between the SRICs and the African states.

It was established that the hypothesis asserted in the first chapter were all false, since after the research conducted, the analysis finalized and a comparison done between the regional and sub-regional system, the contrary is the truth. The sub-regional system is the most effective form of ensuring adherence to human rights law, because many states have realized that a stable human rights system would lead to an effective and efficient economic system and thus further the main aim of the SRICs trade liberalization and economic growth of member states.

It is therefore, my finding that the SRICs are not only efficient, but also more effective as human rights advocates and adjudicators as opposed to their regional counterparts, the African Court of Human and People's Rights and the African Commission.

## 6.2 Recommendations

The African Commission on human rights and the African Court on human and people's rights constitute the core institutional machinery for the promotion and protection of human rights under the African Human Rights System. In light of the infancy of the African human rights system, the elaboration and alignment of policies and approaches, while respecting key institutional differences, is yet to be undertaken. The upshot is that its function has been realized

only to a very limited extent. Towards this end, the following part raises key issues on how SRIC's as human rights court efficiency can be improved

### 1. Pro-active Complementarity between the African Human Right's System and the SRIC'S

Although the enhancement of the efficiency of the protective mandate is the main locus between the African human rights system and the SRIC's, the African Charter and the preamble to the Court's constitutive instrument suggest that complementarity between the institutions is not confined to the to the protective sphere[278]. The African Human rights constitutive instrument invokes complementarity as the guiding principle for its relation with the African commission, though it provides little guidance on the nature of objectives of complementarity as an organizing principle.

Complementarity's meaning and implication can be constructed from the structure of the human rights system and its overriding purpose can be understood namely as; First, the primary objective of complementarity as functional; its purpose is to enhance the efficiency and effectiveness of the system[279]. Second, complementarity as a relation purpose[280], to organize and regulate the relationship between the commission and the court under a system of shared jurisdictional competence and collective enforcement. Finally complementarity as normative; to act as an inspirational medium for realizing the norms and constitutional goods envisaged under the African Human Rights System.

Another avenue where complementarity can be useful is on amicable settlements; this has been lost from the text of the new protocol.[281] It could be argued that since this is best done by quasi-judicial bodies like the African Commission,[282] cases for amicable settlement are among those that the court may have transferred under this provision. Also, the rules of Procedure of the court should lay down detailed conditions under which the court shall consider cases brought before it,

[278] Article 45(1)(c) of the African charter grants the commission express power to "co-operate with other African and International institutions concerned with the promotion and protection of human rights".
[279] Solomon T. Ebobrah, "Towards a positive Application of Complementarity in the African Human Rights System: issues of function and Relations" 22 EJIL 663 (2011).
[280] Solomon T. Ebobrah, "Towards a positive Application of Complementarity in the African Human Rights System: issues of function and Relations" (2011).
[281] Article 9 of the 1998 Protocol on the Establishment of the ACtHPR.
[282] African Human Rights Journal 2, 995 et seq (199-201) (2002).

bearing in mind the complementarity between the commission and the court.[283] This can be interpreted as granting the commission some functions of filtering cases, or at the very least, advising the Court on admissibility of cases.[284]

### 2. Direct access for Individuals and NGOs

Under Article 5 (1) of the 1998 Protocol, only the African Commission, State Parties and African Intergovernmental Organizations had automatic access to the court. In contrast, the Court had the discretion to allow NGOs with observer status at the African Commission and individual to institute cases directly before it,[285] provided that the state party concerned had made a declaration accepting the competence of the Court to receive such cases at the time of ratification of the protocol or anytime thereafter.[286]

While the granting of locus stand to individuals and NGOs to the new court regardless of whether they are victims or directly affected by the complaint is a progressive move, the key concern remains the restricted direct access of Individuals and NGOs under the Protocol and statute to the new court. Direct access of individuals to any human rights system is based on; first, the *leitmotif* of human rights is to insulate the individual from the "predatory state",[287] a scheme which necessitates platforms accessible to individuals to complain in cases of violations. This view is based on the liberal theory of human rights that further rests on the thesis that individuals are the foremost consumers of human rights system of which the African court is part. The same state, presented on an image of the poacher,[288] cannot be granted the primary remit to seek redress on behalf of individuals whose rights it has violated through its acts or omissions.

Secondly, the underlying intent of human rights law is to provide legal remedy in cases of violations of rights guaranteed. Human rights are not intended to be pious platitudes, but rather justiciable claims through among other means, adjudication. The vindication of these rights is

[283] Article 8 of the 1998 Protocol.
[284] Human Rights Law review 8, 356 et seq (357) (2008).
[285] Article 5(3) of the 1998 Protocol on the Establishment of the ACtHPR.
[286] Article 34(6) of the 1998 protocol.
[287] M. Mutua, "Savages, Victims and Saviors: The metaphor of human rights", Harv. Int'l L.J 42,201 et seq (221) (2001).
[288] D. Juma, "Access to African Court on Human and Peoples Rights: A Case of the Poacher Turned Gamekeeper," *essex human rights review 4* et seq (7-21) *(2007).*

generally to be initiated by individual claimants and bearers of these rights. The case for unfettered access of individuals and NGOs to the African Court is thus to be viewed from the optic of enabling aggrieved parties to seize the Court for obtaining justice or remedies to which they are entitled. Consequently, this will also have the effect of elucidating the scope of the African Charter and other human rights instruments which the Court will apply.

### 3. Increased role of interveners

It is no longer in dispute that international law is not exclusively the law of nations. States are no longer considered the only players in international law and governance, but also other non-state entities like individuals.[289] Nowhere is this better illustrated than in international human rights law, where individuals and NGOs are influential participants in standard setting, monitoring, reporting, advocacy, litigation, enforcement and other human rights protection measures. The latter has entailed actions before judicial or quasi-judicial organs, ranging from instituting cases as parties or petitioning requests for advisory opinions to acting as interveners or amici curiae in contentious cases or advisory opinions.

In the African human rights system, NGOs have played a phenomenal role in human rights protection. Most individual communications before the African Commission have been lodged by or at the initiative of these organizations,[290] even where they are not "victims" or "directly affected" by the violations alleged.[291] This implies that the African Charter, as was held in *SERAC v. Nigeria*,[292] allows actio popularis. By the same token, there has been a practice of amicus curiae briefs before the African Commission, albeit limited. However, it is not clear if the Commission also allows interveners before it.

The exclusion of these entities may have an effect since interveners have different rights in a judicial process as they generally become parties to the proceeding, with the rights and obligations attached to that status.[293]

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[289] H. J. Steiner, " Individual claims in a world of massive violations: What role for the human rights committee", P. Alston/ J. Crawford(eds), The future of UN human rights treaty monitoring, 15, (2000).
[290] For the cases, see http://www.achpr.org.
[291] Article 56 of the African Charter of Human and People's Rights.
[292] Decision regarding cimmunication 156/96 (2001), social and economic rights action centre vs Nigeria. Case No 155/96 ACHPR/COMM) AO44/1, para . 3
[293] R.Owens, "Interveners: The role of the courts in a modern democracy", Adelaide law review 29, 193, et seq, (1998).

## 6.3 Conclusion

The role that has been played by the SRICs as human rights adjudicators and advocates cannot be denied, and therefore it is crucial that the Regional human rights courts and the SRICs find a means of working together, so as to avoid an instance of overlap of jurisdiction and contradicting decisions. Generally, this new form of Courts has employed a new form of thirst for human rights surety and created an implication of Africa's vision towards a committed human rights upholding continent. The success of the SRICs as human rights courts will highly depend on the willingness of states to revisit the AHRS and to align the operations of the SRICs with the regional framework.

The issue of backlash from African states has absolutely hindered the progress of the SRICs as human rights adjudicators and enforcers, this through the research conducted has been as a result of the unwillingness to surrender power, through corporation with the courts.

The fact that there are multiple courts which have human rights jurisdiction across the AHRS, means that the states and citizens of the states will scout for standing in any court that will hear their matter. This creates the implication that the courts effect among member states will be less and therefore in the long run lead to a destruction of any form of compliance. Thus as has been suggested above, to avoid this a hierarchical structure be implemented and the doctrine of complementarity be in the framework of the AHRS.

The issue of culture and tradition has been seen as a stumbling block for the SRICs progression in the African human rights scope, this is based on mentality and the disruption of the internal systemic conditions. Although, there are legal agendas linked to the SRICs stumbles, the cultural denomination is the underlying factor, it would therefore, be imperative that states recognize the importance of a progressive human rights system if economic growth is an agenda.

## Bibliography

Amended Treaty for the Establishment of the East Africa Community (as amended on 14 December 2006 and 20 August 2007)

Declaration and Treaty of the Southern African Development Community as Amended in 2001

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

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004)

Revised Treaty of Economic Community of the West African States as amended in 1993

SADC Protocol on the Tribunal and Rule of Procedure Thereof, 2000

Supplementary Protocol A/SP.2/06/06 Amending Protocol A/P.1/7/91 on the ECOWAS Community Court of Justice, 2006

Treaty of the Economic Community of West African States (ECOWAS), May 1975

Treaty Establishing the African Economic Community (AEC) 1991 (Abuja Treaty)

### Books

A.Barak, The Judge in a Democracy 37 (2006).

C. F. A. W. Bradley & K. D. Ewing, Constitutional and Administrative Law 105 (12th ed. 1997).

G. Jellinek, Die rechtliche Natur der Staatenverträge 48–49. 2(1880).

H. Triepel, Völkerrecht und Landesrecht (1899), at 32, 81. 27.

James Thuo Gathii "African Regional Trade Agreement as Legal Regimes" (2011) 264.

J. Austin, The Province of Jurisprudence Determined (ed. W.E. Rumble, 1995).

J. Coleman et al, The Oxford Handbook of Jurisprudence and Philosophy of Law 34 (2004).

Magdalena Sepúlveda et. al. (2004), Human Rights Reference Handbook (San Jose: University for Peace), p.403.
Rachel Murray, Human Rights in Africa: from the OAU to the African Union (Cambridge: Cambridge university Press), 126 (2004).

Viljoen, F (2007) International Human Rights Law in Africa Oxford University Press (2007).

W. Friedman, the Changing Structure of International Law ('the role of international courts and tribunals in the evolution of international law is still a modest one') 141(1964).

William Halverson, A concise introduction to philosophy, 356 (1976).

Yuval, S. The competing jurisdiction of international courts and tribunals Oxford University Press Oxford, (2003).

**Journals and Articles**

Bruce Zagaris, The Economic Community of West African States (ECOWAS): An Analysis and Prospects, (1978).

C.E. Welch, 'Human rights as a problem in contemporary Africa', in C.E. Welch Jr & R.I. Meltzer (eds) Human Rights and Development in Africa State University of New York Press 217(1984).

D'Amato, Anthony, "The Relation of Theories of Jurisprudence to International Politics and Law" (2011). Faculty Working Papers. Paper 1.

D. Juma, " Access to African Court on Human and Peoples Rights: A Case of the Poacher Turned Gamekeeper," *essex human rights review 4* et seq (7-21) *(2007).*

F Viljoen International human rights law in Africa Oxford University Publishers 488(2007).

Frederick Cowell, The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction, 131 HUM. RTS. L. REV. 153, 161 (2013).

Felix M. Ndahinda, "Human Rights in African Political Institutions: Between Rhetoric, Practice and the Struggle for International Visibility" 20 (2007).

Hamilton, 'The Federalist Papers No. 78: The Judiciary Department', Independent Journal (1788), 2.

H. J. Steiner, " Individual claims in a world of massive violations: What role for the human rights committee", P. Alston/ J. Crawford(eds), The future of UN human rights treaty monitoring, 15, (2000).

Henry H Mwinuka, Regional Human Rights System: Challenges Facing the East African Court of Justice in Realizing Human Rights in the East African Community, (2013).

James Gathii, Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy, 24 DUKE J. COMP. & INT'L L. 249, 250 (2014).

James Gathii, The Under- appreciated Jurisprudence of Africa's Regional Trade Judiciaries, 12OR. REV. INT'LL.245 (2010).

J. L. Goldsmith and E. A. Posner, "The Limits of International Law" (2005).

Jochen von Bernstorff, "Georg Jellinek and the Origins of Liberal Constitutionalism in International Law" (2012).

Karen J. Alter, Laurence R. Helfer and Jacqueline McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 108 AM. J. INT'L L. 737, 737–39 (2013).

Karen J. Alter, James T. Gathii and Laurence R. Helfer, Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences, European Journal of International Law, vol. 27 (2016).

KN Lolette "Regional integration: concepts, advantages, disadvantages and lessons of experience" (2005).

Laurence R. Helfer Sub-regional Courts in Africa: "Litigating the Hybrid Right to Freedom of Movement" iCourts Working Paper Series, No. 32, (2015).

Lorand Bartels, Review of the Role, Responsibility and Terms of Reference of the SADC Tribunal—FINAL REPORT 6 (2011).

Laurie Nathan, The Disbanding of the SADC Tribunal: A Cautionary Tale, 35 Hum. Rts. Q. 870, 876-77 (2013).

Munetsi Madakufamba, 'SADC in the twenty-first century', Open Space: a digest of Open Society Initiative for Southern Africa vol. 2 90 (2007).

M. Mutua, " Savages, Victims and Saviors: The metaphor of human rights", Harv. Int'l L.J 42(2001) ,201 et seq (221).

Mehrish, Travaux Preparatoires as an Element in the Interpretation of Treaties, 11 INDIAN J. INT'L L. 39 (1971); see also Schaffer, Current Trends in Treaty Interpretation and the South African Approach, 7 AUSTL. Y.B. INT'L L. 129, 130 (1981).

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

Oliver Christian Ruppel 'Regional economic communities and human rights in East and southern Africa' in Anton Bösl & Joseph Diescho (eds) (2009).

R Ajulu (ed) The making of a region: revival of the East Africa Community Institute For Global Dialogue 19 (2005).

RN Kouassi "The itinerary of the African integration process: an overview of the historic landmarks" Africa Integration Review Vol 1 No. 2 July 2007.

Solomon Tamarabrakemi Ebobrah, Litigating Human Rights Before Sub-regional Courts in Africa, 17AFR. J.INT'L&COMP. L. 79(2009).

The Concept of International Law in the Jurisprudence of H.L.A. Hart (2011).

Thoko, K.SADC and human rights: fitting human rights into the trade matrix. African Security Review (2004).

**Conference Papers**

Ebobrah, TS 'Addressing sub-regional challenges to the unity of African international human rights law' Paper presented to the conference on 'Unity or fragmentation of international law: the role of the international and national tribunals', Oslo 14 -15 May, (2009).

Economic Commission for Africa Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities ECA Addis Ababa Ethiopia (2006).

E. Tendayi Achiume, The Sadc Tribunal: Socio□Political Dissonance and The Authority of International Courts, Research Paper No. 17-04.

Alter, Karen J, Agents of trustees? International courts in their political context, TranState working papers, No. 8 (2004).

President of the East Africa Court of Justice, H.R. Nsekela, "The Role of East African Court of Justice in the Integration Process," presentation during the 3rd East African Community Media Summit (2009).

S. Department of State, Country Reports on Human Rights Practices for 2013, the Gambia: Executive Summary.