

**AN APPRAISAL OF THE ROLE OF ECOWAS COURT OF JUSTICE AND THE
SOUTHERN AFRICAN DEVELOPMENT (SADC) TRIBUNAL IN THE PROTECTION
OF HUMAN RIGHTS**

BY

FA'IZA ABUBAKAR

**DEPARTMENT OF PUBLIC LAW
FACULTY OF LAW
AHMADU BELLO UNIVERSITY,
ZARIA**

DECEMBER, 2015.

**AN APPRAISAL OF THE ROLE OF ECOWAS COURT OF JUSTICE AND THE
SOUTHERN AFRICAN DEVELOPMENT (SADC) TRIBUNAL IN THE PROTECTION
OF HUMAN RIGHTS**

BY

**Fa'iza ABUBAKAR
LL.M/LAW/10267/2010/2011**

**A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES
AHMADU BELLO UNIVERSITY, ZARIA**

**IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF
MASTER OF LAWS DEGREE– LL.M**

**DEPARTMENT OF PUBLIC LAW
FACULTY OF LAW
AHMADU BELLO UNIVERSITY,
ZARIA, NIGERIA**

DECEMBER, 2015.

DECLARATION

I hereby declare that this Dissertation entitled: **“An Appraisal of the Role of Ecowas Court of Justice and the Southern African Development (SADC) Tribunal in the Protection of Human Rights”** has been written by me and that it is a record of my own research work. It has never been presented in any previous research work for the award of Degree of Master of Laws (LL.M). All quotations and references are indicated with specific acknowledgements.

Fa’iza ABUBAKAR

CERTIFICATION

This Dissertation entitled, “**An Appraisal of the Role of Ecowas Court of Justice and the Southern African Development (SADC) Tribunal in the Protection of Human Rights**” meets the regulations governing the award of Master of Laws Degree- LL.M of Ahmadu Bello University, Zaria and is approved for its contribution to legal knowledge and literary presentation.

Dr. Yusuf Dankofa
Chairman, supervisory Committee

Date

Dr. I. F. Akande
Member, supervisory Committee

Date

Dr. K. M. Danladi
Head, Department of Public Law

Date

Prof. K. Bala
Dean, School of Postgraduate Studies

Date

DEDICATION

This Dissertation is dedicated to Almighty *Allah Subhanahu Wa-Ta-Ala* who gave me the ability, wisdom and knowledge to accomplish this programme. It is also dedicated to my husband Group Captain L.M. Danzangi and my brother Mohammed Lawal Hamidu for their immeasurable support all through my life.

ACKNOWLEDGEMENTS

My gratitude goes to Almighty Allah for His love, favour, protection and for enabling me to complete this programme successfully.

My gratitude goes to my humble supervisors: Dr. Yusuf Dankofa and Dr . I.F. Akande without whom this work would have been incomplete. Thank you very much for your kind assistance.

To my husband Group Captain L.M. Danzangi and my son Abubakar (Akhar) Danzangi, my mothers Hajiya Sa'adatu Hamidu, Dr. B.B. Maiha, my brothers and sisters and my friends and colleagues, I appreciate you all for your prayers, support and understanding. May Allah continue to promote and sustain you in all your endeavors.

To my mentor Dr. A.I. Bappah, thank you for all your advice and support. May Allah lift you higher.

To all the lecturers of the Faculty of Law, Ahmadu Bello University, Zaria and their supporting staff for the kind consideration they gave me towards the successful accomplishment of my course work and this research. Thank you.

ABSTRACT

The concept of Human Rights is a very fundamental subject in international law. Human Rights aim at promoting and protecting humanity through the courts. The ECOWAS community court of justice and the southern African Development community tribunal play a very important role in the area of promoting and protecting Human rights in their respective regions. The aim of this dissertation is to appraise the role of ECOWAS community court of justice and the southern African Development community tribunal in the protection of Human Rights in Africa. The objective of this dissertation therefore is to highlight some weaknesses in the promotion and protection of Human Rights and to suggest some workable recommendations. One major finding of this dissertation is the issue of enforcement of the court decisions. The decisions of the ECOWAS community court of justice and the Southern African Development Community Tribunal are usually not enforceable. They rely mainly on the commitment of member states. This dissertation therefore recommends that the courts should engage in massive sensitization of judicial authorities of member states on the issues of enforcement as justice without enforcement is impotent. To achieve this, the doctrinal method of research will be adopted.

TABLE OF CASES

<i>Amouzou Henry vs. Cote d'Ivoire</i> (2009) ECW/CCS/APP/01/09	- - -	75
Bach's Transport (Pty) Ltd vs Democratic Republic of Congo (2008) SADC (T) 14-		121
Committee of US Citizens in Nicaragua vs Reagan (US Court of Appeals) 85 ILR -		87
Canada vs France 82 ILR 814-	- - - - -	42
George E. Warren Corporation vs United States (US 2nd Circuit Court of Appeals) 9 ILR 1-4,	- - - - -	86
Gondo and Others vs Zimbabwe (2005) ZCC 15	- - - - -	76
<i>Habre vs. Senegal</i> (2013) ECW/CCJ/JUD/03/03	- - - - -	73
Hadijatou Mani Koroua vs Republic of Niger(2008)ECW/CCJ/JUD/06/08, 27 October 2008	- - - - -	59
Libya vs Chad (ICJ) 100 ILR 1-114	- - - - -	133
Mike Campbell (Pvt) Ltd & Others vs Zimbabwe (2007) ZCC14	- - - - -	129
Richardson vs Forestry Commission (Australian High Court) 77 ILR (SERAP) vs. Federal Government and UBEC (2009) ECW/CCJ/APP/09/07	- - - - -	91 76
Victrawl Pty vs AOTC Ltd (Australian Federal Court) 100 ILR 487	- - - - -	90
World Health Organization v. Egypt 62 ILR -	- - - - -	80
Zimbabwe Human Rights NGO Forum v Zimbabwe Communication (2006) ZCC42		-118

TABLE OF STATUTES

1999 Constitution, Cap C10 L.F.N. 2004

African Charter on Human and Peoples' Rights Cap A9 L.F.N. 2004

Child's Rights Act, Cap C2 L.F.N. 2004

Universal Basic Education Act, Cap U5 L.F.N. 2004

ECOWAS Energy Protocol

ECOWAS Protocol Relating to the Application of Compensation Procedures for Loss of Revenue Incurred by ECOWAS Member States as a Result of the Trade Liberalization Scheme Protocol and Supplementary Protocols on the Free movement of Persons, Right of Residence and Establishment;

Protocol on the Assessment of Loss of Revenue by Member States;

Protocol Relating to Community Enterprises;

Protocol Relating to Mutual Administrative Assistance in Customs Matters;

Protocol Relating to the Definition of Community Citizens;

Protocol Relating to the Fund for Cooperation Compensation and Development of the Economic Community of West African States;

Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security;

Protocol Relating to the Re-exportation within the Economic Community of West African States of Goods Imported from Third Countries;

Slave Trade Act 1807

Slavery Abolition Act 1833

The American Convention on Human Rights,

The American Declaration of the Rights and Duties of Man

The Charter of the Organization of American States,

The European Convention on Human Rights (1950)

The International Covenant on Economic, Social and Cultural Rights (1966).

The International Covenant on Civil and Political Rights (1966)

Universal Declaration of Human Rights, 1948

Virginia Declaration of Rights of 1776

ECOWAS Treaty of Lagos, May 28, 1975

ABBREVIATIONS

ACHPR	-	African Commission on Human and People's Rights
AEC	-	African Economic Community
AHRLR	-	African Human Rights Law Reports
AMCHR	-	Al Mezan Center for Human Rights
AU	-	African Union
BOCISCOZ	-	Botswana Civil Society Solidarity Coalition for Zimbabwe
CAT	-	Convention against Torture
CEAO	-	Communaute Economique de l'Afrique de l'Ouest
CEDAW	-	Convention on the Elimination of All Forms of Discrimination Against
CERD	-	Convention on the Elimination of All Forms of Racial Discrimination
CRC	-	Convention on the Rights of the Child
CRCLO	-	Constitutional Rights and Civil Liberties Organization
CRPD	-	Convention on the Rights of Persons with Disabilities
DAW	-	Division for the Advancement of Women
DRC	-	Democratic Republic of Congo
EAC	-	East African Community
EACJ	-	East African Court of Justice
ECCJ	-	ECOWAS Community Court of Justice
ECOMOG	-	ECOWAS Monitoring Group
ECOWAS	-	Economic Communities of West African States
HIV/AIDS	-	Human Immune Virus/Acquired Immune Deficiency Syndrome
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICJ	-	International Court of Justice
ICPC	-	Independent Corrupt Practices and Other Related Offences Commission
ICRMW	-	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILR	-	International Law Report
MWC	-	Migrant Workers Convention

NATO	-	Northern Atlantic Treaty Organization
NGO	-	Non Governmental Organisation
OAU	-	Organization of African Unity
OHCHR	-	Office of the High Commissioner on Human Rights
REC	-	Regional Economic Community Courts
RECHR	-	Regional economic communities and human rights
RECs	-	Regional Economic Communities
SADC LA	-	Southern African Development Community Lawyers Association
SADC	-	Southern African Development Community
SADCT	-	Southern African Development Community Tribunal
SALC	-	Southern Africa Litigation Centre
SERAP	-	Socio-Economic Rights and Accountability Project
SSR	-	Soviet Socialist Republic
UBEC	-	Universal Basic Education Commission
UDAO	-	Union Duoaniere de l’Afrique de l’Ouest
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNDR	-	Union Nationale pour la Démocratie et le Renouveau
UNECA	-	United Nations Economic Commission for Africa
UNESCO	-	United Nations Educational, Scientific and Cultural Organization
UNGAR	-	UN General Assembly Resolutions
UNHCHR	-	UN High Commissioner for Human Rights
USSR	-	Union of Soviet Socialist Republic
WAEC	-	West African Economic Community
WHO	-	World Health Organization

TABLE OF CONTENTS

Declaration	-	-	-	-	-	-	-	-	-	-	-i
Certification	-	-	-	-	-	-	-	-	-	-	-ii
Dedication	-	-	-	-	-	-	-	-	-	-	-iii
Acknowledgement	-	-	-	-	-	-	-	-	-	-	-iv
Abstract	-	-	-	-	-	-	-	-	-	-	-v
Table of Cases-	-	-	-	-	-	-	-	-	-	-	-vii
Table of Statutes	-	-	-	-	-	-	-	-	-	-	-ix
Abbreviation	-	-	-	-	-	-	-	-	-	-	-xi
Table of Contents	-	-	-	-	-	-	-	-	-	-	-xv

CHAPTER ONE

GENERAL INTRODUCTION

1.1	Background to the Study	-	-	-	-	-	-	-	-	1
1.2	Statement of the Research Problem	-	-	-	-	-	-	-	-	5
1.3	Aim and Objectives of the Research	-	-	-	-	-	-	-	-	6
1.4	Scope of the Research-	-	-	-	-	-	-	-	-	7
1.5	Justification/Significance of the study-	-	-	-	-	-	-	-	-	7
1.6	Literature Review	-	-	-	-	-	-	-	-	8
1.7	Research Methodology	-	-	-	-	-	-	-	-	17
1.8	Organizational Layout	-	-	-	-	-	-	-	-	18

CHAPTER TWO

ANALYSIS OF LEGAL REGIME FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN AFRICA

2.1	Nature and Scope of Human Rights in Africa	-	-	-	-	-	-	-	-	20
2.2	Nature and Scope of Obligations/Duties to promote and protect Human Rights in Africa	-	-	-	-	-	-	-	-	30
2.3	Institutional frameworks on the promotion and protection of Human Rights	-	-	-	-	-	-	-	-	

in Africa	-	-	-	-	-	-	-	-	-	39
-----------	---	---	---	---	---	---	---	---	---	----

CHAPTER THREE

THE ROLE OF ECOWAS COURT IN THE PROTECTION OF HUMAN RIGHTS

3.1	Establishment, Mandate, Jurisdiction and Powers of ECOWAS Court of Justice	-	-	-	-	-	-	-	-	54
3.2	Nature and Scope of Human Rights Mandate of ECOWAS Court	-	-							64
3.3	Analysis of Case Law on Human Rights protection in ECOWAS region	-								73

CHAPTER FOUR

THE ROLE OF SADC COURT TOWARDS PROTECTION OF HUMAN RIGHTS IN AFRICA

4.1	Introduction	-	-	-	-	-	-	-	-	80
4.2	Establishment, Mandate, Jurisdiction and Powers of SADC Tribunal	-								81
4.3	Nature and Scope of Human Rights Mandate of the SADC Tribunal	-								95
4.4	Analysis of Case Laws on Human Rights Protection in the SADC Region-	-								95
4.4.1	<u>Kanyama vs SADC Secretariat-</u>	-	-	-	-	-	-	-	-	95
4.4.2	Kethusegile-Juru vs Southern African Development Community Parliamentary Forum	-	-	-	-	-	-	-	-	107
4.4.3	<u>Mondlane vs SADC Secretariat</u>	-	-	-	-	-	-	-	-	107
4.4.4	<u>Swissbough Diamond Mines (Pty) Ltd and Others vs Kingdom of Lesotho-</u>									116
4.4.5	<u>Bach's Transport (Pty) Ltd vs Democratic Republic of Congo-</u>	-	-							121
4.4.6	<u>Fick and Another vs Republic of Zimbabwe--</u>	-	-	-	-	-	-	-	-	129
4.5	Challenges and Prospects in Human Rights Protection in SADC Region-	-								131

CHAPTER FIVE

SUMMARY FINDINGS AND RECOMMENDATIONS

5.1	Summary	-	-	-	-	-	-	-	-	136
5.2	Findings	-	-	-	-	-	-	-	-	136
5.3	Recommendations	-	-	-	-	-	-	-	-	138

Bibliography - - - - - 139

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Human Rights mean that human rights serve to protect and promote the dignity of human beings worldwide¹. Human rights can be seen as a legal codification of the concept of human dignity. Despite different regional perceptions and arguments relating to cultural relativism, the concept of human rights and their universality is generally accepted, although these always have to be seen in their specific contexts². Human rights, as a legal concept and codification of human dignity, were late to arrive in Africa. Its evolution in Africa is to be seen against the background of the dynamic development of human rights within the United Nations system and that of international law, although the impetus of this evolution is owed to the struggles within African states in the colonial and post-independence eras³.

The role of the Organization of African Unity (OAU) and its successor, the African Union (AU), must also be acknowledged here. Since the OAU's inception in 1963, several organizations' instruments and mechanisms have come to the fore, aiming at promoting and protecting human rights in Africa. The adoption of the African Charter on Human and Peoples' Rights in 1981 is considered a milestone in this regard, as are the establishment of the African Commission on Human and Peoples' Rights and the associated African Court of Human and Peoples' Rights. In addition, regional economic communities have set up their own organizations and instruments aiming at promoting human rights in their respective regions⁴.

1 Eborah, S.T (2009) Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges, African Journal of International and Comparative Law. p.45-84

2 ibid

3 ibid

4 Bosel, A, and Diacho, J. (2009) Human Rights Law in Africa: Legal Perspective on their promotion and protection, McMillan Education Namibia. p. 319-350.

The ECOWAS Court of Justice for example had made a number of rulings on human rights issues. In 2008, the Court took a pioneering decision concerning slavery: The State of the Niger was convicted having violated the human rights of one of its citizens. While the Court found that Niger was not itself responsible for the discrimination– the plaintiff was subjected to by a non-State actor, namely her former master – the country was found in violation of its international obligations to protect Mrs Hadijatou Mani from slavery under international as well as national law because of its tolerance, passivity, inaction, and abstention with regard to the practice. Niger had to pay reparations in the amount of 10 million CFA francs (more than 20,000 US-Dollar)⁵. The judgment⁶ has been referred to as historic, because this is one of the first slavery cases ever to be won at the international level.

This is the first judgment of the ECOWAS court to address serious human rights violations. It heralds an important role for this and potentially other regional economic courts in the determination of human rights issues. While less experienced in human rights law than certain other bodies, the court showed itself open and receptive to international and comparative law arguments. It sat in the state where the violations occurred, therefore allowing critical access by the victim, witnesses and civil society to the court proceedings, with an important impact on the debate on slavery in Niger. The court heard the case and issued judgment in a relatively short period of time. Critically, this court issues binding judgments⁷ which the state must implement. This case illustrates the potential importance of this court's role in the protection of human rights in West Africa⁸.

5 Ladan, M.T. (2009) Introduction to ECOWAS Community Law and Practice: Integration, Migration, Human Rights, Access to Justice, Peace and Security Ahmadu Bello University Press Limited Zaria, Kaduna State, Nigeria.p 253.

6 Hadijatou Mani Koraou v.s Niger,

7 SERAP v.s Nigeria, (2009) Judgment, ECW/CCJ/APP/0808, Oct. 27.

8 ibid

On the other hand the Southern Africa Development Community (SADC)'s judicial arm, the SADC Tribunal, has been taken backward in its mandate to bring justice and rule of law to the people of the region, when leaders decided that it will no longer preside over cases brought forward by individuals. This is despite the fact that most cases that the Tribunal presides over are cases brought forward by individuals against their governments. Withdrawal of the SADC Tribunal's human rights mandate until such time as States Parties have concluded a protocol to this end is likely to jeopardize the implementation of the SADC Treaty, central to which is the observance and protection of human rights. This is reiterated by the former President of the SADC Tribunal Justice Ariranga Pillay, who states that "eighty percent of the applications before the Tribunal involve cases of individuals against states and most often, they complain of violations of human rights, democracy and the rule of law."⁹

The Tribunal had been in limbo since August 2010 after the SADC Summit suspended it, following intense lobbying by Zimbabwe who was unhappy with previous findings of the Tribunal. In addition to human rights violations and violence, some of the cases were brought forward by farmers who were dispossessed of farm land during Zimbabwe's expedited land reform initiative. With member states reluctant to enforce Tribunal's orders against Zimbabwe and instead showing solidarity with then by suspending the Tribunal, indications had always pointed to a curtailment of the Tribunal's jurisdiction.

The suspension of the Tribunal was further extended from March 2011 to August 2012. Leaders demanded a review of its powers and functions, led by Zimbabwe who questioned the jurisdictional mandate of the tribunal¹⁰. The human rights status of the region as a whole stands

9 Rupell, O.C. (2009) Regional Economic Communities and Human Rights in East and South Africa in: Bosel, A, and Diacho, J. (Eds 2009) Human Rights Law in Africa: Legal Perspective on their promotion and protection, McMillan Education Namibia. pp. 319-350.

10 *ibid*

in free fall as there is no recourse for its people. However, this organ is undermined by non-compliance by SADC countries. Furthermore it is trite that States are yet to espouse human rights cases on behalf of the nationals of other States before the SADC Tribunal.

A SADC without the capacity to entertain direct complaints of human rights violations against its Member States is severely limited in its ability to enforce its principles, which include human rights and the rule of law, and in its supervisory capacity over the domestic policies of Member States in observance of human rights and rule of law principles. Furthermore allowing for a situation where rights conferred by the SADC community law go without remedies leaves doubts as to ability to sustain the rule of law in domestic contexts, and at the supranational level. Furthermore it creates a potential for impunity to reign, as opposed to enforcement.

However, despite the consensus in academic literature that African human rights systems are weak and ineffective, the fact that a protection and promotion system is in place needs to be acknowledged. However, such systems have to be filled with serious commitment and professional efficiency. Though the ECOWAS Court and SADC Tribunal have proved to be the major regional human rights mechanisms, their effectiveness has been weakened by challenges over implementation of their mandates and judgments by offending member states.

The issues highlighted above and other problems of research influenced the current writer to embark on the study and appraise the role of ECOWAS Court and the Southern African Development Community (SADC) Tribunal in the promotion and protection of Human Rights in Africa for the purpose of identifying challenges that are weakening the effective promotion and protection of human rights in Africa, at least, to provide workable recommendations that will enhance their mandate.

1.2 Statement of the Research Problem

- i. There is a depth of ignorance among the ECOWAS citizens about the existence of ECOWAS and its Court, the limits of its jurisdiction and how to access it. Granted that this Court has been in actual existence for five years now, adequate awareness of it has not been created as to equip the people with the basic information required to access the Court.
- ii. People are generally skeptical about the outcome of their cases as the general belief is that political influence will affect the decisions on the case. To allay their fears the Court must take positive steps to ground the people's confidence in it.
- iii. The location of the Court and the attendant problems of transportation across the Member States also pose problems which militate against the people's utilization of the Court.
- iv. There is the issue of high cost of litigation in a sub region the majority of whose citizens are poor. There is need to explore the possibility of providing free legal services for indigent citizens by the Community.
- v. Article 15 (3) of the Treaty of ECOWAS provides for the independence of the Court from the Member States while Article 3 (i) of the Protocol provides for the independence of the Judges. However, Member States under the council of minister exercise control over the budgetary allocation to the Court. A situation may arise where the Court gives a judgment against some Member States who at the same time may be required to decide on the budget of the Court. This may pose a problem but then how should the Court be funded so as to shield it from this situation while at the same time limiting its spending?
- vi. The problem of judicial delay challenges the human rights of individuals and erodes the faith of the peoples on the judiciary. The need for prompt and unhindered exercise of

available remedies by the Court is especially important in cases involving the right to life, personal liberty, livelihood and property. There are however problems which if not properly addressed may lead to delays in the prosecution of cases by the Court. One of these is the problem of translation of documents filed in the Court. Article 32 (2) provides for the translation of pleadings filed by institutions. No similar provision has been made with respect to pleadings filed by private individuals and corporate bodies. The Court is therefore left with the responsibility of translating documents filed into the working languages of the Court –viz English, French and Portuguese. The result of this is that prosecution of cases may be adjourned where the documents have not been translated due to the work load on the translators.

- vii. While Article 15(4) of the ECOWAS Treaty makes the Judgment of the Court binding on Member States, institutions of the Community and individuals and corporate bodies, Article 76 (2) provides for the finality of the decision of the Court. Also Article 19(2) of the 1991 Protocol provides that the decisions of the Court shall be final and immediately enforceable. The question now is, how can the Court ensure the enforcement of its judgments against Member States? Strictly speaking the Court has no direct means of doing this but will rely mainly on the respect by member states of the commitments made by them under the Treaty and other legal instruments.

1.3 Aim and Objectives of the Dissertation

The aim of this dissertation is to appraise the role of ECOWAS Court and the Southern African Development Community Tribunal in the promotion and protection of Human Rights in Africa, therefore, the dissertation has the following objectives;

- i. to examine the general overview of the promotion and protection of human rights in Africa;
- ii. to appraise the role of ECOWAS Court and the Southern African Development Community Tribunal in the promotion and protection of Human Rights Africa;
- iii. Identify and highlight some weaknesses in the promotion and protection of Human Rights Africa and suggest some recommendations to the identified problems for the purpose of enhancing the means of protecting of human rights in Africa.

1.4 Scope of the Research

This dissertation work covers international, regional and national instruments that are relevant to protection of human rights in Africa, with particular reference to ECOWAS and SADC and their courts. As such this research covers the ECOWAS Community Court of Justice and the Southern African Development Community Tribunal. These two courts represent the Western and Southern regions of Africa. The scope of this research further focuses on the protection and promotion of human rights in Africa with particular reference to those two sub-regions. This includes equality, solidarity; non-aggression; maintenance of regional peace, stability and security; peaceful settlement of disputes; recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; accountability, economic and social justice, and popular participation; promotion and consolidation of a democratic system of governance in each region.

1.5 Justification of the Dissertation

The emergence and role of the ECOWAS & SADC and cases of the ECOWAS Community Court of Justice (ECCJ), the Southern African Development Community Tribunal (SADCT) towards protection of human rights in those sub-regions. The findings of this research

work explores recent ideas in respect of knowing the fundamental objectives of ECOWAS and SADC and their courts and the problems and prospects to the protection of human rights in Africa.

It also improves the existing literatures on the knowledge of ECOWAS and SADC and their courts and the role they played in the promotion and protection of human rights in Africa. It further contributes positively to the legal knowledge of ECOWAS and SADC and their courts, particularly to lecturers and students as well as provides materials for future research on the subject.

1.6 Literature Review

In order to capture the overall concept and extent of ECOWAS and SADC and their courts, particularly as it affects the protection of human rights in Africa, emphasis has been placed on current materials and means of research, both at municipal and foreign levels. For example, textbooks, articles, journals, seminar papers, internet sources, etc. were all used and acknowledge. The dissertation will contain the views, opinions and ideas of enormous writers on the field alternative dispute resolution.

Eborah¹⁰ in his work titled, “Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges”¹¹, discussed on Regional Economic community Courts, he explores some salient concerns underlying the development of human rights underlying the Human rights mandate of the ECOWAS Community Court of Justice and the Southern African Development Tribunal as will be highlighted in this work. Africa has, since then, taken various steps towards enhancing the process of economic and political integration on the continent².

11 Eborah, op cit p.84

The dawn of regional economic communities (RECs) in Africa can be traced back to the 1960s, when the United Nations Economic Commission for Africa (UNECA) encouraged African states to incorporate single economies into sub-regional systems with the ultimate objective of creating a single economic union on the African continent. In order to realize this aim, the Organization of African Unity (OAU, predecessor of the African Union, AU) identified the need to enhance Regional integration within the organization, recognizing that each country on its own would have little chance of, inter alia, attracting adequate financial transfers and the technology needed for increased economic development.

The road has been paved by several decisions and declarations relating to regional economic and political integration such as the 1980 Lagos Plan of Action, and the Abuja Treaty, realizing the establishment of the AEC, the African Union's economic and umbrella institution for RECs. In order to ensure compliance with all the treaties, regional courts were therefore established. Ruppel¹² traces the development of human rights into the agenda of the Regional Economic Courts.

Ladan¹³ discussed on the role of the ECOWAS Community Court of Justice. According to the author, the ECOWAS community Court of Justice was established pursuant to the provisions of Articles 6 and 15 of the Revised Treaty of ECOWAS protocol A/P1/7/91 relating to the community court of justice clearly states that the court is the principal legal organ of ECOWAS with the main function of resolving disputes relating to the interpretation and application of the provisions of the revised Treaty and the annexed protocols and conventions. The ECOWAS Community Court has been entrusted with the mandate of the interpretation and application of the Texts of the community, the Treaty, conventions, protocols, regulations, legal

12 Ruppel, O.C. op cit. pp. 319-350.

13 Ladan, M.T. op cit p. 253.

instrument adopted by the community. He mentioned cases but did not talk about implementation.

The present research identified the features and major trends in the literature which can be a useful basis upon which the study could be conducted. The first feature relates to the disagreement among scholars on the proper definition and perhaps the scope of the African human rights system. The conventional discourse of the African human rights system is torn between two conceptions. Gutto argued that a distinction should be made between the broader African human rights system and the narrower African Charter system.¹⁴

According to Gutto, the reason for this distinction 'rests on the fact that there are a number of African regional human and peoples' rights instruments or generalized instruments that incorporate important rights issues but which do not fall directly within the promotion and protection mandates of the commission'.¹⁵ Thus, whereas the African Charter system centers around two enforcement institutions; namely, the African Commission and Court, the African human rights system goes beyond to include the political institutions and other organs created under the AU.¹⁶

Odinkalu¹⁷, on the other hand, contended for a much broader definition of the African human rights system. According to him, the system encapsulates not only regional human rights mechanisms but also supra-national, pan-continental systems and mechanisms and the domestic legal systems in Africa.¹⁸ This depiction, however, is overbroad and misleading. This is because, whereas supra-national and domestic systems in Africa may enforce regional human rights

14 Gutto S. (1992) 'The reform and renewal of the African regional human and peoples' rights system', p. 176.

15 Ibid, p. 176.

16 Ibid.

17 Odinkalu C (2001) 'The role of case and complaints procedures in the reform of African regional human rights system', (2001) 2 African Human Rights Law Journal, p. 227.

18 Ibid.

norms, the regional system cannot enforce supra-national or domestic laws. It may only enforce the human rights norms created under it.

Kofi Annan, the former UN Secretary-General criticised the relativism notion at an OAU Summit meeting, maintaining that human rights are ‘fundamental to humankind itself that belong to no government and are limited to no continent.’¹⁹ He strongly disagreed with the African leaders who viewed concern for human rights as a conspiracy imposed by the industrialised West.²⁰ Similar sentiments had been expressed earlier by Annan’s predecessor Boutros-Ghali at the 1993 World Conference on Human Rights held in Vienna when he categorically stated:

The human rights that we proclaim and seek to safeguard can be brought about only if we transcend ourselves, only if we make a conscious effort to find our common essence beyond our apparent divisions, our temporary differences, our ideological and cultural barriers. In sum, what I mean to say, with all solemnity, is that the human rights we are bound to discuss here at Vienna are not the lowest common denominator among all nations, but rather what I should like to describe as the ‘irreducible human element’, in other words, the quintessential values through which we affirm together that we are a single human community. As an absolute yardstick, human rights constitute the common language of humanity.²¹

Arguably, the ‘common language of humanity’ contemplated by Boutros-Ghali could still be formulated within the context of ideological and cultural diversity and still maintain its essence. In other words, human rights could still be applied contextually without compromising their universal character, which is to protect human dignity. Whether this ‘common language of humanity’ should be the premise when discussing the African human rights system, notwithstanding the ideological and philosophical expressions of disquiet to the contrary, has

19 Gaer F. (1998) ‘Human rights: What role in U.S Foreign Policy?’, *Great decisions*, special issue, p. 33.

20 Aka P. (1998) ‘The military, globalisation and human rights in Africa’, p. 367.

21 Acheampong K. (2009) ‘Reforming the substance of the African Charter on Human and Peoples’ Rights: Civil and political rights and socio-economic rights’, p. 188.

therefore not been sufficiently addressed in the existing literature. There is the need, therefore, to know, in no uncertain terms, the philosophical basis of the African human rights system.

Another issue that has not been sufficiently addressed is the nexus between democracy and the regional enforcement of human rights in Africa. Studies have been conducted on the relationship between democracy and human rights in individual African states. However, such studies fail to sufficiently address the role of democracy in the African regional human rights system. If the African system is to be reformed, such reformation should consider the concept of democracy and the rule of law.²²

There are a number of questions that have been neglected or are insufficiently addressed in the literature reviewed in this study. The first question relates to whether Africa has made any positive contribution in the field of international human rights law. Some scholars opine that Africa's contribution in this field of law has been neglected or altogether ignored.²³ According to Viljoen:

Africa is associated more with human rights problems and humanitarian crises than with their solutions, more with the need for international human rights law than its applications, and more with the failure of international law than with its success. If Pliny had the opportunity of writing today, he would probably have coined the phrase: 'Out of Africa, always something terrible.'²⁴

In spite of its contribution to the development of international human rights law, Africa has often been viewed in terms of its poor human rights record, and its regional human rights system has always been contemptuously dismissed.²⁵ For example, the African Commission has

22 Ibid, p. 192.

23 Viljoen F. (2001) 'Africa's contribution to the development of international human rights and humanitarian law', 1 African Human Rights Law Journal, p. 18.

24 Ibid.

25 Heyns C. (2007) 'The African regional human rights system: In need of reform?', p.156.

been accused of not being independent.²⁶ The Charter is also purported to have ushered in a weaker regional normative regime than was initially anticipated.²⁷ Some of the norms are allegedly out of tune with municipal legislation in some member states, making their enforcement difficult and even impossible.²⁸

While it cannot be gainsaid that the system is lacking in a number of areas, the efforts towards a more effective regional human rights system should also be appreciated.²⁹ An uncritical attitude to the African human rights system ‘is as damaging as the cynical approach that one sometimes encounters, according to which nothing good can be expected ...’ from Africa.³⁰ There is the need for engaged, positive criticism of the system to enable it to overcome its shortcomings. This solicits for extensive research in order to show that the exclusive negativity on the African human rights system is misplaced.³¹

The African human rights system has also been given considerable attention in the reviewed literature. Scholars have addressed many issues pertaining to the system, including: its genesis and evolution; its normative and enforcement mechanisms; its strengths, weaknesses and challenges; and possible ways of reinvigorating it. Okafor, for example, provides a detailed discussion on the conventional conceptions of the system.³²

From the bulk of the literature, one would definitely agree with Murray that no regional human rights system attracts as much criticism, contempt or disdain as the African regional

26 Murray R. (2008) *Human rights in Africa*, p. 52.

27 Reisman W, ‘Through or despite governments: Differentiating responsibilities in human rights programs’, (1987) 72 *Iowa Law Review*, p. 392; Hopkins K, ‘A new human rights era dawns on Africa?’

28 Mbondenyi. M, & Sifuna. N. (2009) ‘A review of procedural and jurisdictional challenges in enforcing international human rights Law under the African Charter regime’, p. 14.

29 Acheampong K. (2001) ‘Reforming the substance of the African Charter on Human and Peoples’ Rights: Civil and political rights and Socio-economic rights’, 2 *African Human Rights Law Journal*, p. 185.

30 *Ibid.*

31 Viljoen F, ‘op cit, p. 18.

32 Okafor, C.(2007) ‘The African human rights system, activist forces and international institutions (2007), pp. 63-90.

system.³³ Criticism has been leveled, for example, on the normative provisions of the Charter as well as its enforcement mechanisms the African Commission and Court on Human and Peoples' Rights.

According to some authors, the African Charter was from its inception beset with legitimacy crisis.³⁴ Others perceived it as 'the product of the ideological cleavages of the Cold War and post-independence and 'nation-building' projects in post-independence Africa.'³⁵ According to Dankwa, it reflects a compromise between the various ideological and belief systems, including 'atheists, animists, Christians, Hindus, Jews and Muslims; and over 50 countries and islands with Marxist-Leninist, capitalist, socialist, military, one-party and democratic regimes.'³⁶

Initially, it was doubted that the Charter would ever come into force³⁷ and if so, whether it could be enforceable.³⁸ Gittleman thought that it gave African states 'wide latitude for repressive human rights exceptionalism.'³⁹ According to Mutua, the Charter was '... a yoke that African leaders have put around our necks.' Generally, the Charter was regarded as problematic because, among other allegations, it is 'opaque and difficult to interpret.'⁴⁰ Further, it is a document that 'might honestly have been entitled the African Charter for keeping rulers in

33 Murray R 'op cit, p. 1.

34 *ibid*, p. 1; Mutua M, 'The African human rights system in a comparative perspective', p. 5 11.

35 Asante K. (1969) 'Nation building and human rights in emergent African nations', (1969) 2 *Cornell International Law Journal*, p. 72.

36 Dankwa, V. (1991) 'The African Charter on Human and Peoples' Rights: Hopes and fears', in African Law Association (eds.) *The African Charter on Human and Peoples. Rights: Development, context, significance* (1991), p. 18.

37 Ojo O & Sesay A. (1986) 'The OAU and human rights: Prospects for the 1980s and beyond (1986) 8 *Human Rights Quarterly*, p. 101.

38 Bondzie-Simpson E. (1988) 'A Critique of the African Charter on Human and Peoples' Rights', 31 *Howard Law Journal*, p. 643.

39 Gittleman R. (1982) 'The African Charter on Human and Peoples' Rights: A legal analysis', p. 689.

40 Odinkalu C. (1998) 'The individual complaints procedure of the African Commission on Human and Peoples' Rights: A preliminary assessment' 8 *Transnational Law and Contemporary Problems*, p. 398.

power.⁴¹ However, some moderate scholars, such as Heyns, thought the Charter's provisions were adequate enough to fulfill the objectives of human rights promotion and protection.⁴² According to this argument, the Charter system is not perfect, but at least in reality, it is operational.⁴³

The African Commission has also been lambasted with the same fervency as the Charter. Naldi and Magliveras, for instance, pointed out that it has relatively weak enforcement and investigation powers.⁴⁴ Welch doubted that the commission would ever have the power, resources and willingness to fulfil its functions.⁴⁵ He lamented that 'the political will to interpret the wording of the African Charter broadly has not been present.'⁴⁶

Additionally, the commission has been accused of lack of capacity to consider petitions alleging human rights violations⁴⁷ and to award remedies for such violations.⁴⁸ The commissioners, it is said, are not independent of their governments,⁴⁹ and their meetings 'are always disorganised and often verge on the absurd.'⁵⁰

In their 1998 study, Naldi and Magliveras concluded that 'the commission does not give hope for optimism'⁵¹ because, in their opinion, it adopts 'a generally pusillanimous approach too

41 Robertson G. (2000) *Crimes against humanity: The struggle for global justice*, p. 63.

42 Heyns C, 'op cit, p. 157.

43 Ibid.

44 Naldi G & Magliveras K. (1998) 'Reinforcing the African system of human rights: The Protocol on the establishment of a regional court of human and peoples' rights', p. 432.

45 Welch C. (1998) 'The African Charter and freedom of expression in Africa', (1998) 4 *Buffalo Human Rights Law Review*, p. 114.

46 Ibid, p. 113.

47 Murray R. (1997) 'Decisions by the African Commission on Human and Peoples' Rights on individual communications under the African Charter on Human and Peoples' Rights', (1997) 46 *International and Comparative Law Quarterly*, p. 413.

48 Benedek W. (1993) 'The African Charter and Commission on Human and Peoples' Rights: How to make it more effective', 11 *Netherlands Quarterly of Human Rights*, p. 31.

49 Robertson G. (2000) *Crimes against humanity: The struggle for global justice* (2000), p. 63.

50 Ibid.

51 Naldi G & Magliveras K op cit, p. 432.

respectful of state sovereignty.⁵² Further, the African Court, which is not yet in operation, has also already had a share of criticism. Some scholars are sceptical of its potential to improve the human rights situation in the region.⁵³ Those aspects of the court that have contributed to this scepticism include its jurisdiction⁵⁴, access⁵⁵ and its relationship with the commission, AU and other relevant human rights bodies in the region.⁵⁶ These and other aspects shall be discussed in detail elsewhere in this thesis.

Suffice it to state that, the image of the African human rights system, at least on the basis of the reviewed literature, is not inspiring. One would therefore agree with Odinkalu that the perception of the system that is often conveyed in much of the available literature is that the system is a juridical misfit, with a treaty basis and institutional mechanisms that are dangerously inadequate.⁵⁷ The perceived inadequacy of the system has led to the call for its reform.⁵⁸

The reviewed literature, however, indicates some prospects for a reinvigorated and efficient human rights system. For instance, so far the passive OAU has been replaced by the

52 Ibid.

53 Heyns C, op cit, pp. 166-171; Udombana N, 'Toward the African Court on Human and Peoples' Rights: Better late than never', p. 90.

54 Mutua M, 'op cit, p. 339.

55 Kaguongo W. (1998) 'The questions of locus standi and admissibility before the African Court on Human and Peoples' Rights', in Viljoen F (ed), *The African Human Rights System: Towards the co-existence of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*, p. 81-85.

56 O'Shea A. (2002) 'A Critical reflection on the proposed African Court on Human and Peoples' Rights', p. 293;

57 Odinkalu C 'Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights', (2001) 23 *Human Rights Quarterly*, p. 328.

58 Heyns C, op cit, pp. 155-174; Gutto S, op cit, pp. 175-184; Acheampong K, op cit, pp. 185-204; Murray R. (2001) 'A feminist perspective on reform of the African human rights system, 2 *African Human Rights Law Journal*, pp. 205-224.

AU, whose Constitutive Act, as already stated, attaches more significance to human rights than its predecessor, the Charter of the Organization of African Unity (OAU).⁵⁹

The progressive attitude of the AU towards human rights promotion and protection is clear in the Preamble of the Constitutive Act and in its objectives and guiding principles.⁶⁰ The Act also provides for the creation of organs within the AU framework, some of which could be used to enhance the promotion and protection of human rights in the continent.⁶¹

Additionally, the AU has also adopted programmes and initiatives that further its role in human rights promotion and protection in the region. These are, for example, the New

According to the Preamble of the Act, member states have pledged their determination to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law.

Partnership for Africa's Development (NEPAD), African Peer Review Mechanism (APRM) and the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA). Scholars have reviewed the prospects of these institutions in enhancing human rights enforcement in the region.⁶²

1.7 Research Methodology

The researcher will use doctrinal method of research, using library materials such as books, articles, journals, periodicals, seminar papers, as well as internet/websites, etc.

59 Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the Union in Lomé, Togo on 11 July 2000; entered into force on 26 May 2001.

60 Baimu E. (2001) 'The African Union: Hope for a better protection of human rights in Africa?' 2 African Human Rights Law Journal, p. 311.

61 CAAU, Art. 5 (1) & (2).

62 Mangu A. (2005) 'The changing human rights landscape in Africa: Organization of African Unity, African Union, New Partnership for Africa's Development and the African Court', , pp. 379-408; 'The missing agenda', (2004) African Human Rights.

1.8 Organizational Layout

This dissertation work is going to be arranged on a five chapter basis.

Chapter one will deal with the general background of the research work. It will start with the general introduction of the work, statement of problem, scope of the research, and the significance/ Justification of the research. It will also consist the literature review of the existing literatures, research methods adopted and the organizational plan of the thesis.

Chapter two will provide the historical antecedents and scope of human rights.. Under it, Introduction, Historical Development and impact of Human Right, Scope of Human Rights, Instruments of Human Right, Universal Declaration of Human Rights and The Historical Development of the Community Courts in the protection of Human Rights in Members States, will also be defined and discussed.

Chapter three will discuss on evolution & importance of economic communities of West African states and ECOWAS court towards protection of human rights in Africa. Under that sub-topic, Introduction, Historical Background of Economic Community of West African State (ECOWAS), ECOWAS Community Court of Justice (ECCJ), The Impact and Significance of the ECOWAS in the Protection of Human Rights in Members States and Problems and Prospects of ECOWAS & ECOWAS Court (ECCJ) in the Protection of Human Rights in Members States shall all be discussed.

Chapter four will highlight on the evolution & importance of the Southern African Development Community (SADC) towards protection of human rights in Africa. Under that sub-topic, Introduction, Historical Background of the Southern African Development Community (SADC) and its Community Court of Justice, The Impact and Significance of the Southern African Development Community (SADC) in the Protection of Human Rights in Members States

and Problems and Prospects of the Southern African Development Community (SADC) & its Court) in the Protection of Human Rights in Members States shall all be discussed. Chapter five will be the concluding part of the work. The summary of the whole work, observations/findings, recommendations and concluding remarks will be provided there under.

CHAPTER TWO

ANALYSIS OF LEGAL REGIME FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN AFRICA

2.1 Nature and Scope of Human Rights in Africa

As international concern, Human rights issues are among the most widely debated in the world today. This is because the question of Human Rights is fundamental to mankind.¹ For a long time they have remained an issue strictly within national jurisdiction², that is until the end of the 1940's, when they became internationalized³. This process of internationalization, as Azinge points out, is traceable to some international instruments which recognize the need to promote and preserve human rights for the ultimate attainment of world peace⁴. In this respect, the United Nations has been able to consolidate the principle that human rights are a matter of international concern and that international community is entitled to discuss and to protect human rights⁵ through the 1948 Universal Declaration of human rights⁶. In the African context, the OAU Charter was the first regional instrument that dealt with the protection of human rights in the continent. However, it contained very little references to the concepts of human rights⁷ and made reference to the protection of human rights as well as general statements regarding the welfare and well

1 Azinge E. (1992) "Millstone Decision on Human Rights" in (ed) A U. Kalu & Y Osinbayo Perspective on Human Rights Vol 12, p197.

2 The Magna Carta 1215 in England, The French Declaration of 1789,

3 African chapter on humans and people's right Cap A9 LFN 2004

4 Azinge E. (2005) p 200; Internationalization of human rights through modern treaties founded its origin in the p.200.

5 Azinge op cit p 200.

6 M. Killander (2006) "The African human rights systems and others regional system: A comparison" in (ed) Viljoen F The African Human Rights System/ 5 Judiciary Watch Report, p 177.

7 Mangu AMB "The changing Human Rights Landscape in Africa : Organization of African Unity, African Union, New Partnership for Africa's Development and the African Court" 2005 Netherlands Quarterly of Human Rights p 379 381.

being of Africans⁸. The OAU was pre-occupied with more pressing issue such as unity, non interference in internal affairs and liberation⁹. Practically, the OAU has served as talking shop for African states but has displayed considerable reluctance in intervening in systematic human rights abuses by various regimes in the region¹⁰. That is what made Keba Mbaye¹¹ to state that African Governments appeared clearly to have sacrificed rights and freedoms for the sake of development and political stability¹². With both the domestic and international pressure, African leaders adopted in 1986 the African Charter on Human and People Rights¹³ which is the major instrument aimed at protecting human and peoples' rights in Africa.

Human rights are commonly understood as "inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being."¹⁴ Human rights are thus conceived as universal (applicable everywhere) and egalitarian (the same for everyone). These rights may exist as natural rights or as legal rights, in both national and international law. The doctrine of human rights in international practice, within international law, global and regional institutions, in the policies of states and in the activities of non-governmental organizations, has been a cornerstone of public policy around the world. *The idea of human right* states, "if the public discourse of peacetime global society can be said to have a common moral language, it is that of human rights." Despite this, the strong claims made by the doctrine of human rights continue to provoke considerable skepticism and debates about the content, nature and

8 Ankumah E. A.(1996) 'The African Commission on Human and Peoples'Rights p 4; the OAU Charter did not proclaimed individual rights for African people.

9 OAU Constitutive Act, Preamble Article 2.

10 Smith R. K. M. (2005) Textbook on International Human Rights P 132;

11 ibid

12 Mbaye K and B Ndiaye (1982) "The Organization of African Unity" in VISAK (ed) The International Dimensions of Human Rights vol2 (1982) pp 585, 593.

13 African charter on Human and people's Right Cap A9 LFN 2004.

14 Azinge, E. Milestone Decision on Human Rights, in ; A.U. Kalu & Y. Osinbayo (eds.) Perspective on Human Rights, vol. 12, p.197

justifications of human rights to this day. Indeed, the question of what is meant by a "right" is itself controversial and the subject of continued philosophical debate.¹⁵

Many of the basic ideas that animated the human rights movement developed in the aftermath of the Second World War and the atrocities of The Holocaust, culminating in the adoption of the *Universal Declaration of Human Rights* in Paris by the United Nations General Assembly in 1948. The ancient world did not possess the concept of universal human rights. Ancient societies had "elaborate systems of duties... conceptions of justice, political legitimacy, and human flourishing that sought to realize human dignity, flourishing, or well-being entirely independent of human rights". The modern concept of human rights developed during the early Modern period, alongside the European secularization of Judeo-Christian ethics. The true forerunner of human rights discourse was the concept of natural rights which appeared as part of the medieval Natural law tradition that became prominent during the Enlightenment with such philosophers as John Locke, Francis Hutcheson, and Jean-Jacques Burlamaqui, and featured prominently in the political discourse of the American Revolution and the French Revolution. From this foundation, the modern human rights arguments emerged over the latter half of the twentieth century. Gelling as social activism and political rhetoric in many nations put it high on the world agenda.¹⁶

However, still there exists series of arguments as to whether or not Africa has had a tradition of human rights, an academic debate that has endlessly pitted African against Western scholars.¹⁷ Those in support of the African perspective have argued, for example, that Africa has

15 ibid

16 Ankumah E A. (1996) *The African Commission on Human and Peoples' Rights* (1996) p 4.

17 Mangu A. (2005) 'Netherlands Quarterly of Human Rights', p.379

had a tradition of human rights and that the concept is not unique to the West.¹⁸ Further, although Africa's pre-colonial societies differed in a number of ways, there is ample information to prove that there not only existed legal systems but also some measure of protection of human rights in pre-colonial Africa.¹⁹ The failure of Eurocentric Western scholars to locate human rights in African cultures has been criticized by a number of African scholars who laboured to vindicate that African cultures were after all not devoid of the concept. These scholars include, but are not limited to, Quashigah, Cobbah, Hountondji, Shivji and Wiredu.²⁰

Quashigah analyzed the emergence of the concept of human rights in the Western world through the application of the methodologies of philosophical idealism and philosophical materialism.²¹ His analysis served to acknowledge that both Western and African traditions are similar because each contains an inherent contradiction of respecting and violating human rights at the same time. Wiredu and Hountondji attempted to locate human rights in some African cultures. While Wiredu dwelt more on Africa's past cultural experiences in the evolution of an Akan conception of rights,²² Hountondji underscored the colonial and post-colonial periods of Africa.²³

On his part, Shivji attempted to contrast the philosophical foundations of human rights in Africa and the Western world.²⁴ He explained that the philosophical basis of Western human rights conceptions is contrary to the African way of thinking. According to him, in Africa, the

18 M'Baye, K. (1982), 'The international dimensions of human rights, p.583;

19 Eze, O. (1982) Human Right in Africa.

20 Quashigah K.(1996) 'The philosophic basis of human rights and its relations to Africa' p.22.

21 Ibid, p.30.

22 Wiredu K. (1998) 'Democracy and consensus in African traditional politics: A plea for a non-party polity', p. 303-305.

23 Hountondji P.(1998) 'The master's voice: The problem of human rights in Africa', pp. 319-321.

24 Shivji I., (1980) 'The concept of human rights in Africa II, pp. 24-30.

collective is given more emphasis than the individual.²⁵ His views were similar to those of Cobbah who concluded that:

Africans do not espouse a philosophy of human dignity that is derived from natural rights and individualistic framework. African societies function within communal structure whereby a person's dignity and honour flow from his or her transcendental role as a cultural being.... We should pose the problem in this light, rather than assuming an inevitable progression on non-Westerners toward Western lifestyle.²⁶

Nyerere and Wai attested to this when they argued, separately, that pre-colonial societies emphasised respect for individuals' dignity and did not allow gross inequalities between members.²⁷ This position was confirmed by studies conducted by a number of other scholars, including Busia, Wilks and Rattray.²⁸ Nzongola-Ntalaja condemned the Eurocentric attitude of perceiving Africans as being incapable of determining their own affairs and, by extension, having no history of democracy and human rights. He emphasized that: Such an approach not only glosses over the impact of the Atlantic slave trade on political institutions and practices in West and Central Africa but also minimizes the role of colonial despotism as a school of post-colonial rulers.²⁹ Further, Mamdani ruled out the Western 'paternity' of the concept of human rights. According to him:

It is difficult to accept, even in the case of Europe, that human right was a concept created by 17th century Enlightenment philosophy. True, one can quote Aristotle and his ideological justification of slavery as evidence that the idea of human rights was indeed foreign to the conscience of the ruling classes in ancient Greece...What was unique about Enlightenment philosophy, and about the writings of the French and American Revolutions, was not a conception of human rights, but a

25 Ibid.

26 Cobbah J. (1990) 'African values and the human rights debate: An African perspective', p. 331.

27 Wai D. (1968) 'Human rights in Sub-Saharan Africa', in Human rights perspectives, p. 115-144; Nyerere J, Essays on socialism, p. 33.

28 Busia K. (1967) 'Africa in search of democracy;

29 Nzongola-Ntalaja G & Lee. (1997) M (eds.), The state and democracy in Africa (1997), p.11-12.

discussion of these in the context of a formally articulated philosophical system.³⁰

Fernyhough³¹ is one of the few non-African scholars to objectively claim the existence of human rights in pre-colonial Africa. According to him:

There is a fundamental rejection of this as a new, if rather subtle, imperialism, and explicit denial that human rights evolved only in Western political theory and practice, especially during the American and French revolutions, and not in Africa. Behind this protest is the very plausible claim that human rights are not found in western values alone but may also have emerged from very different and distinctive African cultural milieus.³²

From the foregoing, it is inevitable to observe that no country has the monopoly of human rights respect or abuses. Nor can any society claim to be a paradise for human rights. Dismissing the Western ‘paternity’ of democracy and constitutionalism, Mangu rightly noted that Athens and Rome that allegedly ‘invented’ democracy ended up in authoritarianism and dictatorship, while Greece, the supposed ‘mother of Western democracy’, was still a dictatorship in the 1970s.³³ Unfortunately, it is too easy for Western scholars to give lessons and present themselves as the ‘model’ for human rights.³⁴

Following this argument, it seems possible to conclude that indeed the concept of human rights emanated naturally from human existence. It is therefore inconceivable that Africa would lack a culture of human rights whereas it was inhabited by people, even prior to foreign intrusion. The sincerity of the proponents of the ‘Western origin’ of human rights should therefore be questioned in as far as it purports to dismiss the existence of the concept in pre-

30 Mamdani M. (1998) et al (eds.), *Social movements, social transformation and the struggle for democracy in Africa*, p. 236-237.

31 Fernyhough T.(1993) ‘Human rights and pre-colonial Africa’, in Cohen R, et al (eds.), *Human rights and governance in Africa*, p. 40-41.

32 Ibid.

33 Mangu, A. (2005) ‘The road to constitutionalism and democracy in post-colonial Africa’, p. 249.

34 Ibid, p. 250.

colonial Africa. Busia was therefore right in discrediting the Westernized analyses of the concept of human rights as ‘facile generalizations not reflecting the entire reality of human rights in pre-colonial social formations of Africa.’³⁵

Those Western scholars who deny the existence of human rights in pre-colonial Africa have hence been accused of advancing imperialistic (Euro-centric) scholarly views which do no more than bring back pictures of colonialism.³⁶ It has been argued that Western scholars failed to appreciate the existence of the human rights in pre-colonial Africa because of the ‘unique’ ways in which different communities observed the concept.³⁷

The insistence on a ‘unique African human rights concept’ is, however, problematic to a certain extent. This argument, which is largely prescriptive of an autochthonous African human rights concept, is at best an exaggeration aimed at countering the universalism concept. Consequently, it dilutes, or altogether nullifies, the argument about the existence of human rights in pre-colonial Africa.

It should be recalled that the human rights concept is dynamic and not all that are considered today as human rights were recognized as such, in the formative years of the evolution of the concept. No wonder some African authors such as Baah, after attempting to draw parallels between certain indigenous African traditions that allegedly enhanced human dignity in the pre-colonial epoch, and the primary objective of human rights of protecting human dignity, concluded that Africans have had human rights all along.³⁸

35 Busia, K. (1992) ‘The status of human rights in pre-colonial Africa: Implications for contemporary practice’, p. 49.

36 Nmehielle O. (1998) ‘The African human rights system, p. 15.

37 An-Na’im A & Deng F (eds.), Human rights in Africa: cross-cultural perspectives,

38 Baah R. (2005) Human rights in Africa, p 29. ;

This view, however, failed to impress those who conceptualized the origin of human rights from the 'Western' perspective.³⁹ According to Shivji, such a conclusion 'fails to understand the correct material and philosophical basis of certain community-oriented conceptions and practices in some of the more or less classless societies in Africa... and endeavours to prove that they are similar to Western human rights.'⁴⁰

Tibi dismissed the assertion that African societies have had human rights all along as the confusion of African societies' indigenous means of securing human dignity among a particular people, with the concept of human rights.⁴¹ By simply following the evolution of the modern human rights concept, Tibi further contended, one should be able to tell where the author states 'Non-Westerners tend to confuse human rights with... human dignity. If one is talking about the latter, there is no doubt that fully developed notions of human dignity exist in many non-Western cultures.' that the concept is a Western idea.⁴² According to this assertion, the philosophical foundation of human rights can be traced directly to the historical experiences of France, England, and the United States. Pollis and Schwab posit, the Western political philosophy upon which the (UN) Charter and the Declaration are based provides only one particular interpretation of human rights, and that this Western notion may not be successfully applicable to non-Western areas.... Efforts to enforce the provisions of the Universal Declaration on Human Rights in states that do not accept its underlying values are bound to fail.⁴³

39 Howard R, *Human rights in Commonwealth Africa* (1986), pp. 1-36; Donnelly J, 'Human rights and Western liberalism', in An-Na'im A & Deng F (eds.), *Human rights in Africa*, pp. 31-58.

40 Shivji I. (2005) 'The concept of human rights in Africa', p. 44.

41 Tibi, B. 'The European tradition of human rights and the culture of Islam', in An- Na'im A & Deng F (eds.), *op cit*, pp. 104-132,

42 *Ibid.*

43 Pollis A & Schwab P. (2005) 'Human rights: A Western construct with limited applicability', p. 1.

Howard and Donnelly, for example, are some of the Western scholars in the forefront of the argument that human rights did not exist as a concept in pre-colonial Africa.⁴⁴ Donnelly asserted that recognition of human rights simply was not the way of traditional Africa.⁴⁵ Howard stretched this view further when she contended that African proponents of the concept confuse human dignity with human rights. Accordingly:

The African concept of human rights is actually a concept of human dignity, or what defines the inner (moral) nature and worth of the human person and his or her proper (political) relations with society. Despite the twinning of human rights and human dignity in the preamble of the Universal Declaration of Human Rights and elsewhere, dignity can be protected in a society not based on rights. The notion of African communalism, which stresses the dignity of membership in, and fulfillment of one's prescribed social role in a group (family, kinship group, tribe), still represents how accurately how many Africans appear to view their personal relationship to society.⁴⁶

Some scholars who harbour similar views contend that even democracy and constitutionalism, which are fundamental in the promotion and protection of human rights, are also foreign to Africa.⁴⁷ These concepts have been said to have no future in the continent because they are unsuitable, especially in Black Africa.⁴⁸ Thus, the West has been perceived as the model of human rights, constitutionalism and democracy.⁴⁹

This perception is not only championed by European and American scholars but also some African scholars.⁵⁰ Simiyu, for example, insisted that democracy had no roots in Africa no

44 Howard R. (1984) 'Group versus individual identity in the African debate on human rights, in An-Na'im A & Deng F, Human rights in Africa, p. 159;

45 Howard, R. Ibid.

46 Howard R. (1984) 'Group versus identity in the African debate on human rights', p. 165-166.

47 Mangu A. (2005) 'The road to constitutionalism and democracy in post-colonial Africa', chapter 3.

48 Wiseman J, Democracy in black Africa, p. ix & xi.

49 Mangu A, op cit, p. 236.

50 Nzongola-Ntalaja M, 'The state and democracy in Africa, p. 10.

matter how organized the traditional political systems were.⁵¹ This position was also echoed by Akindes who considered the ancient Dahomey as typical of the authoritarianism of pre-colonial Africa.⁵² Kedourie also argued that ‘Africa and Asian societies are victimized by their own despotic traditions.’⁵³

Despite all the arguments advanced in some of the ‘Western-inclined’ literature, it is evident that indeed there are certain elements that reveal the existence of a human rights tradition in Africa. The assertion that European ‘liberalism’ is the foundation of the concept of human rights in Africa therefore destroys the claim that human rights are universal.⁵⁴ The universality of human rights does not derive from Western imposition of the concept on colonized societies. After all, human beings share certain common moral values.

The literature reviewed in this study also comprises historical features. Some authors have endeavoured to trace the historical origins of the African human rights system as well as the origin of the human rights concept. Numerous anthropological, sociological, economic and historical works have unraveled the mysteries surrounding Africa’s past and have greatly contributed in providing useful information on her past human rights situations.⁵⁵

The historical origin, scope and evolution of human rights law in Africa have been documented in a number of studies.⁵⁶ Eileen McCarthy-Arnolds and others, for example, briefly discussed philosophical foundations of human rights then proceeded to introduce an attractive historical background on evolution of human rights in pre-colonial and colonial Africa.⁵⁷ Some

51 Simiyu, A. (2005) ‘The democratic myth in African traditional societies’.

52 Akindes F.(1992) *Les mirages de la transition democratique ...*p178-179.

53 Kedourie E.(2004) quoted by Mangu A, *ibid*.

54 Mutua M, *op cit*, p. 339.

55 Rodney W. (1972) ‘How Europe underdeveloped Africa, (1972); Davidson B, *Old Africa rediscovered*, (1970).

56 Umozurike U. (2004) ‘The African Charter on human and people’s rights’, p.360;

57 McCarthy-Arnolds E. (1994), *Africa, Human rights and the global system*, chapter 1.

of the literature bearing historical components discussed theories of human rights in the African context.⁵⁸ Generally, however, the historical texts that were reviewed in the course of this study were found to be limited. In the main, they lacked ample legal information. Consequently, they could not be relied on when analysing the various African legal systems or even the promotion and protection of human rights on the continent, more so, from the legal perspective.

In addition to being historical, most of the literature reviewed in this study tended to be descriptive in nature.⁵⁹ They described, for example, the origin, scope and evolution of the African human rights system, its enforcement mechanisms as well as the procedural and other parameters.

2.2 Nature and Scope of Obligations/Duties to Promote and Protect Human Rights in Africa

The modern sense of human rights can be traced to Renaissance Europe and the Protestant Reformation, alongside the disappearance of the feudal authoritarianism and religious conservatives that dominated the Middle Ages. Human rights were defined as a result of European scholars attempting to form a "secularized version of Judeo-Christian ethics".⁶⁰ Although ideas of rights and liberty have existed in some form for much of human history, they do not resemble the modern conception of human rights. According to Jack Donnelly, in the ancient world, "traditional societies typically have had elaborate systems of duties... conceptions of justice, political legitimacy, and human flourishing that sought to realize human dignity, flourishing, or well-being entirely independent of human rights. These

58 Shepherd G, Jr, & Mark A. (1990) (eds.), *Emerging human rights: The African political economy context*, studies in human rights, number 8.

59 Viljoen F, *op cit*;

60 Mangu, A.M.B. (2005) "The changing Human Rights Landscape in Africa : Organization of African Unity, African Union, New Partnership for Africa's Development and the African Court" 2005 *Netherlands Quarterly of Human Rights* pp 379 381.

institutions and practices are alternative to, rather than different formulations of, human rights".⁶¹ The most commonly held view is that concept of human rights evolved in the West, and that while earlier cultures had important ethical concepts; they generally lacked a concept of human rights. For example, McIntyre argues there is no word for "right" in any language before 1400.⁶² Medieval charters of liberty such as the English Magna Carta were not charters of human rights, rather they were the foundation⁶³ and constituted a form of limited political and legal agreement to address specific political circumstances, in the case of Magna Carta later being recognized in the course of early modern debates about rights.

One of the oldest records of human rights is the statute of Kalisz (1264), giving privileges to the Jewish minority in the Kingdom of Poland such as protection from discrimination and hate speech.⁶⁴ The basis of most modern legal interpretations of human rights can be traced back to recent European history. The Twelve Articles (1525) are considered to be the first record of human rights in Europe. They were part of the peasants' demands raised towards the Swabian League in the German Peasants' War in Germany. In Spain in 1542 Bartolomé de Las Casas argued against Juan Ginés de Sepúlveda in the famous Valladolid debate, Sepúlveda maintained an Aristotelian view of humanity as divided into classes of different worth, while Las Casas argued in favor of equal rights to freedom of slavery for all humans regardless of race or religion. In Britain in 1683, the English Bill of Rights (or "An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown") and the Scottish Claim of Right each made illegal a range of oppressive governmental actions. Two major revolutions occurred during the

61 Killander. (2006) "The African human rights systems and others regional system: A comparison" in (ed) Viljoen F The African Human Rights System/ 5 Judiciary Watch Report , p 177.

62 Azinge op cit, p 200.

63 Smith R K M. (2005), ' Textbook on International Human Rights, p. 132.

64 Mbaye, K, and Ndiaye. (1982) 'The Organization of African Unity' in VISAK (ed) The International Dimensions of Human Rights vol2, pp 585, 593.

18th century, in the United States (1776) and in France (1789), leading to the adoption of the United States Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen respectively, both of which established certain legal rights. Additionally, the Virginia Declaration of Rights of 1776 encoded into law a number of fundamental civil rights and civil freedoms.

These were followed by developments in philosophy of human rights by philosophers such as Thomas Paine, John Stuart Mill and G.W.F. Hegel during the 18th and 19th centuries. The term *human rights* probably came into use sometime between Paine's *The Rights of Man* and William Lloyd Garrison's 1831 writings in *The Liberator*, in which he stated that he was trying to enlist his readers in "the great cause of human rights".

In the 19th century, human rights became a central concern over the issue of slavery. A number of reformers, such as William Wilberforce in Britain, worked towards the abolition of slavery. This was achieved in the British Empire by the Slave Trade Act 1807 and the Slavery Abolition Act 1833. In the United States, all the northern states had abolished the institution of slavery between 1777 and 1804, although southern states clung tightly to the "peculiar institution". Conflict and debates over the expansion of slavery to new territories constituted one of the reasons for the southern states' secession and the American Civil War. During the reconstruction period immediately following the war, several amendments to the United States Constitution were made. These included the 13th amendment, banning slavery, the 14th amendment, assuring full citizenship and civil rights to all people born in the United States, and the 15th amendment, guaranteeing African Americans the right to vote.

Many groups and movements have achieved profound social changes over the course of the 20th century in the name of human rights. In Europe and North America, labour unions

brought about laws granting workers the right to strike, establishing minimum work conditions and forbidding or regulating child labor. The women's rights movement succeeded in gaining for many women the right to vote. National liberation movements in many countries succeeded in driving out colonial powers. One of the most influential was Mahatma Gandhi's movement to free his native India from British rule. Movements by long-oppressed racial and religious minorities succeeded in many parts of the world, among them the African American Civil Rights Movement, and more recent diverse identity politics movements, on behalf of women and minorities in the United States.

The establishment of the International Committee of the Red Cross, the 1864 Lieber Code and the first of the Geneva Conventions in 1864 laid the foundations of International humanitarian law, to be further developed following the two World Wars.

The World Wars, and the huge losses of life and gross abuses of human rights that took place during them, were a driving force behind the development of modern human rights instruments. The League of Nations was established in 1919 at the negotiations over the Treaty of Versailles following the end of World War I. The League's goals included disarmament, preventing war through collective security, settling disputes between countries through negotiation and diplomacy, and improving global welfare. Enshrined in its charter was a mandate to promote many of the rights later included in the Universal Declaration of Human Rights.

At the 1945 Yalta Conference, the Allied Powers agreed to create a new body to supplant the League's role; this was to be the United Nations. The United Nations has played an important role in international human-rights law since its creation. Following the World Wars, the United Nations and its members developed much of the discourse and the bodies of law that now make up international humanitarian law and international human rights law.

The philosophy of human rights attempts to examine the underlying basis of the concept of human rights and critically looks at its content and justification. Several theoretical approaches have been advanced to explain how and why human rights have become a part of social expectations.

One of the oldest Western philosophies of human rights is that they are a product of a natural law, stemming from different philosophical or religious grounds. Other theories hold that human rights codify moral behavior which is a human social product developed by a process of biological and social evolution (associated with Hume). Human rights are also described as a sociological pattern of rule setting (as in the sociological theory of law and the work of Weber). These approaches include the notion that individuals in a society accept rules from legitimate authority in exchange for security and economic advantage (as in Rawls) – a social contract. The two theories that dominate contemporary human rights discussion are the interest theory and the will theory. Interest theory argues that the principal function of human rights is to protect and promote certain essential human interests, while will theory attempts to establish the validity of human rights based on the unique human capacity for freedom.

The strong claims made by human rights to universality have led to persistent criticism. Philosophers who have criticized the concept of human rights include Jeremy Bentham, Edmund Burke, Friedrich Nietzsche and Karl Marx. Political philosophy professor Charles Blattberg argues that discussion of human rights, being abstract, demotivates people from upholding the values that rights are meant to affirm.⁶⁵ The Internet Encyclopedia of Philosophy gives particular attention to two types of criticisms: the one questioning universality of human rights and the one

65 Pityana, NB. (2002) 'Hurdles and Pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' SAYIL Vol 2 n 2, pp 110, 112.

denying them objective ground.⁶⁶ Alain Pellet, an international law scholar, criticizes "human rightism" approach as denying the principle of sovereignty and claiming a special place for human rights among the branches of international law;⁶⁷ Alain de Benoist questions human rights premises of human equality.⁶⁸ David Kennedy had listed pragmatic worries and polemical charges concerning human rights in 2002 in *Harvard Human Rights Journal*.⁶⁹

Human rights can be classified and organized in a number of different ways, at an international level the most common categorization of human rights has been to split them into civil and political rights, and economic, social and cultural rights.

Civil and political rights are enshrined in articles 3 to 21 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Civil and Political Rights (ICCPR). Economic, social and cultural rights are enshrined in articles 22 to 28 of the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The UDHR included economic, social and cultural rights and civil and political rights because it was based on the principle that the different rights could only successfully exist in combination: The ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his social, economic and cultural rights.

This is held to be true because without civil and political rights the public cannot assert their economic, social and cultural rights. Similarly, without livelihoods and a working society, the public cannot assert or make use of civil or political rights (known as the *full belly thesis*).

66 Mangu, AMB ibid, p 379, 383.

67 The African Union (2007) .

68 Churc, J. (2007) 'Human Rights from a Comparative and International Law Perspective , p. 259.

69 The Universal Declaration of Human Rights(1948), The International Covenant on Civil and Political Rights (1966), The International Covenant on Economic, Social and Cultural Rights (1966).

The indivisibility and interdependence of all human rights has been confirmed by the 1993 Vienna Declaration and Programme of Action, All human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis⁷⁰.

Although accepted by the signatories to the UDHR, most do not in practice give equal weight to the different types of rights. Some Western cultures have often given priority to civil and political rights, sometimes at the expense of economic and social rights such as the right to work, to education, health and housing. Similarly the ex Soviet bloc countries and Asian countries have tended to give priority to economic, social and cultural rights, but have often failed to provide civil and political rights.

Opponents of the indivisibility of human rights argue that economic, social and cultural rights are fundamentally different from civil and political rights and require completely different approaches. Economic, social and cultural rights are argued to be:

- i. *positive*, meaning that they require active provision of entitlements by the state (as opposed to the state being required only to prevent the breach of rights)
- ii. *resource-intensive*, meaning that they are expensive and difficult to provide
- iii. *progressive*, meaning that they will take significant time to implement
- iv. *vague*, meaning they cannot be quantitatively measured, and whether they are adequately provided or not is difficult to judge
- v. *ideologically divisive/political*, meaning that there is no consensus on what should and shouldn't be provided as a right
- vi. *socialist*, as opposed to capitalist

⁷⁰ Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993.

vii. *non-justifiable*, meaning that their provision, or the breach of them, cannot be judged in a court of law

viii. *aspirations or goals*, as opposed to real 'legal' rights

Similarly civil and political rights are categorized as:

i. *negative*, meaning the state can protect them simply by taking no action

ii. *cost-free*

iii. *immediate*, meaning they can be immediately provided if the state decides to

iv. *precise*, meaning their provision is easy to judge and measure

v. *non-ideological/non-political*

vi. *capitalist*

vii. *justifiable*

viii. *real 'legal' rights*

Olivia Ball and Paul Gready argue that for both civil and political rights and economic, social and cultural rights, it is easy to find examples which do not fit into the above categorization. Among several others, they highlight the fact that maintaining a judicial system, a fundamental requirement of the civil right to due process before the law and other rights relating to judicial process, is positive, resource-intensive, progressive and vague, while the social right to housing is precise, justiciable and can be a real 'legal' right.⁷¹

Another categorization, offered by Karel Vasak, is that there are *three generations of human rights*: first-generation civil and political rights (right to life and political participation), second-generation economic, social and cultural rights (right to subsistence) and third-generation solidarity rights (right to peace, right to clean environment). Out of these generations, the third

71 The European Convention on Human Rights (1950).

generation is the most debated and lacks both legal and political recognition. This categorization is at odds with the indivisibility of rights, as it implicitly states that some rights can exist without others. Prioritization of rights for pragmatic reasons is however a widely accepted necessity.

Human rights expert Philip Alston argues:

If every possible human rights element is deemed to be essential or necessary, then nothing will be treated as though it is truly important.⁷² He, and others, urge caution with prioritization of rights: the call for prioritizing is not to suggest that any obvious violations of rights can be ignored. Priorities, where necessary, should adhere to core concepts (such as reasonable attempts at progressive realization) and principles (such as non-discrimination, equality and participation).⁷³

Some human rights are said to be "inalienable rights". The term inalienable rights (or unalienable rights) refers to "a set of human rights that are fundamental, are not awarded by human power, and cannot be surrendered."

In the aftermath of the atrocities of World War II, there was increased concern for the social and legal protection of human rights as fundamental freedoms. The foundation of the United Nations and the provisions of the United Nations Charter provided a basis for a comprehensive system of international law and practice for the protection of human rights. Since then, international human rights law has been characterized by a linked system of conventions, treaties, organizations, and political bodies, rather than any single entity or set of laws.

72 Philip, A. Human Rights: A new Dimension Oxford Publishers.

73 Olivia,

2.3 Institutional Framework for the Promotion and Protection of Human Rights in Africa

Human rights abuses are monitored by United Nations committees, national institutions and governments and by many independent non-governmental organizations, such as Amnesty International, International Federation of Human Rights, Human Rights Watch, World Organization Against Torture, Freedom House, International Freedom of Expression Exchange and Anti-Slavery International. These organizations collect evidence and documentation of alleged human rights abuses and apply pressure to enforce human rights laws.

Wars of aggression, war crimes and crimes against humanity, including genocide, are breaches of International humanitarian law and represent the most serious of human rights violations. In efforts to eliminate violations of human rights, building awareness and protesting inhumane treatment has often led to calls for action and sometimes improved conditions. The UN Security Council has interceded with peace keeping forces, and other states and treaties (NATO) have intervened in situations to protect human rights.

The provisions of the United Nations Charter provide the basis for the development of international human rights protection. The preamble of the charter provides that the members "reaffirm faith in fundamental human rights, in the equal rights of men and women" and Article 1(3) of the United Nations charter states that one of the purposes of the UN is: "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".⁷⁴ Article 55 provides that:

74 Ouguerouz. (2003) ' The African Charter on Human and Peoples' Rights, p 56.

The United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems; c) international cultural and educational cooperation; d) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Of particular importance is Article 56 of the charter: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." This is a binding treaty provision applicable to both the Organization and its members and has been taken to constitute a legal obligation for the members of the United Nations.⁷⁵ Overall, the references to human rights in the Charter are general and vague. The Charter does not contain specific legal rights, nor does it mandate any enforcement procedures to protect these rights⁷⁶. Despite this, the significance of the espousal of human rights within the UN charter must not be understated. The importance of human rights on the global stage can be traced to the importance of human rights within the United Nations framework and the UN Charter can be seen as the starting point for the development of a broad array of declarations, treaties, implementation and enforcement mechanisms, UN organs, committees and reports on the protection of human rights.⁷⁷ The rights espoused in the UN charter would be codified and defined in the International Bill of Human Rights, composing the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

75 the European Social Charter, adopted on 18 October 1996, the Additional Protocol amending the European Social Charter of 21 October 1999;

76 Ouguergouz. (2003) 'The African Charter on Human and Peoples' Rights', p 56.

77 *ibid*

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948, partly in response to the atrocities of World War II. Although the UDHR was a non-binding resolution, it is now considered by some to have acquired the force of international customary law which may be invoked in appropriate circumstances by national and other judiciaries.⁷⁸ The UDHR urges member nations to promote a number of human, civil, economic and social rights, asserting these rights as part of the "foundation of freedom, justice and peace in the world." The declaration was the first international legal effort to limit the behaviour of states and press upon their duties to their citizens following the model of the rights-duty duality.

The UDHR was framed by members of the Human Rights Commission, with former First Lady Eleanor Roosevelt as Chair, who began to discuss an *International Bill of Rights* in 1947. The members of the Commission did not immediately agree on the form of such a bill of rights, and whether, or how, it should be enforced. The Commission proceeded to frame the UDHR and accompanying treaties, but the UDHR quickly became the priority.⁷⁹ Canadian law professor John Humphrey and French lawyer René Cassin were responsible for much of the cross-national research and the structure of the document respectively, where the articles of the declaration were interpretative of the general principle of the preamble. The document was structured by Cassin to include the basic principles of dignity, liberty, equality and brotherhood in the first two articles, followed successively by rights pertaining to individuals; rights of individuals in relation to each other and to groups; spiritual, public and political rights; and economic, social and cultural rights. The final three articles place, according to Cassin, rights in the context of limits,

78 the situation of socio-economic rights in the South Africa Constitution.

79 Ondinkalu, C.A. (2003) in: Evans & Murray (eds.) 'The African Charter on Human and Peoples' Rights', p 178, 186.

duties and the social and political order in which they are to be realized.⁸⁰ Humphrey and Cassin intended the rights in the UDHR to be legally enforceable through some means, as is reflected in the third clause of the preamble:⁸¹

*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*⁸².

Some of the UDHR was researched and written by a committee of international experts on human rights, including representatives from all continents and all major religions, and drawing on consultation with leaders such as Mahatma Gandhi.⁸³ The inclusion of civil, political, economic, social and cultural rights was predicated on the assumption that all human rights are indivisible and that the different types of rights listed are inextricably linked. This principle was not then opposed by any member states (the declaration was adopted unanimously, Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, Union of South Africa, USSR, Yugoslavia.); however, this principle was later subject to significant challenges.⁸⁴

The Universal Declaration was bifurcated into treaties, a Covenant on Civil and Political Rights and another on social, economic, and cultural rights, due to questions about the relevance and propriety of economic and social provisions in covenants on human rights. Both covenants begin with the right of people to self-determination and to sovereignty over their natural

80 Ibid

81 Ibid

82 Preamble to the Universal Declaration of Human Rights, 1948

83 Umozurike U.O op.cit, p907.

84 Ouguergouz .F, p 379.

resources.⁸⁵ This debate over whether human rights are more fundamental than economic rights has continued to the present day.

The drafters of the Covenants initially intended only one instrument. The original drafts included only political and civil rights, but economic and social rights were also proposed. The disagreement over which rights were basic human rights resulted in there being two covenants. The debate was whether economic and social rights are aspirational, as contrasted with basic human rights which all people possess purely by being human, because economic and social rights depend on wealth and the availability of resources. In addition, which social and economic rights should be recognized depends on ideology or economic theories, in contrast to basic human rights, which are defined purely by the nature (mental and physical abilities) of human beings. It was debated whether economic rights were appropriate subjects for binding obligations and whether the lack of consensus over such rights would dilute the strength of political-civil rights. There was wide agreement and clear recognition that the means required to enforce or induce compliance with socio-economic undertakings were different from the means required for civil-political rights.⁸⁶

This debate and the desire for the greatest number of signatories to human-rights law led to the two covenants. The Soviet bloc and a number of developing countries had argued for the inclusion of all rights in a so-called *Unity Resolution*. Both covenants allowed states to derogate some rights. Those in favor of a single treaty could not gain sufficient consensus.⁸⁷

In 1966, the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) were adopted by the

85 Réunion des experts pour l'élaboration d'un avant-projet de Charte Africaine des droits de l'Homme et des Peuples 1-2 (mimeo 1979) as quoted by Gittleman, 1982 *Virginia Journal of International Law* p 667.

86 See Gittleman. R opat, p 677.

87 Article 29 of the UNDR.; Article 32 of the AmCHR.

United Nations, between them making the rights contained in the UDHR binding on all states that have signed this treaty, creating human-rights law.

Since then numerous other treaties (pieces of legislation) have been offered at the international level. They are generally known as *human rights instruments*. Some of the most significant, referred to (with ICCPR and ICESCR) as "the seven core treaties", are:

- i. Convention on the Elimination of All Forms of Racial Discrimination (**CERD**) (adopted 1966, entry into force: 1969)
- ii. Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) (adopted 1979, entry into force: 1981)
- iii. United Nations Convention Against Torture (**CAT**) (adopted 1984, entry into force: 1984)
- iv. Convention on the Rights of the Child (**CRC**) (adopted 1989, entry into force: 1989)
- v. Convention on the Rights of Persons with Disabilities (**CRPD**) (adopted 2006, entry into force: 2008)
- vi. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (**ICRMW** or more often **MWC**) (adopted 1990, entry into force: 2003)

In addition to the political bodies whose mandate flows from the UN charter, the UN has set up a number of *treaty-based* bodies, comprising committees of independent experts who monitor compliance with human rights standards and norms flowing from the core international human rights treaties. They are supported by and are created by the treaty that they monitor, With the exception of the CESCR, which was established under a resolution of the Economic

and Social Council to carry out the monitoring functions originally assigned to that body under the Covenant, they are technically autonomous bodies, established by the treaties that they monitor and accountable to the state parties of those treaties - rather than subsidiary to the United Nations. Though in practice they are closely intertwined with the United Nations system and are supported by the UN High Commissioner for Human Rights (UNHCHR) and the UN Center for Human Rights.⁸⁸

Each treaty body receives secretariat support from the Human Rights Council and Treaties Division of Office of the High Commissioner on Human Rights (OHCHR) in Geneva except CEDAW, which is supported by the Division for the Advancement of Women (DAW). CEDAW formerly held all its sessions at United Nations headquarters in New York but now frequently meets at the United Nations Office in Geneva; the other treaty bodies meet in Geneva. The Human Rights Committee usually holds its March session in New York City.

International human rights regime's are in several cases "nested" within more comprehensive and overlapping regional agreements. These regional regimes can be seen as relatively independently coherent human rights sub-regimes.⁸⁹ Three principle regional human rights instruments can be identified, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights (the Americas) and the European Convention on Human Rights. The European Convention on Human Rights has since 1950 defined and guaranteed human rights and fundamental freedoms in Europe. All 47 member states of the Council of Europe have signed the Convention and are therefore under the jurisdiction of the European Court of Human Rights in

88 Murray as quoted by J Churc et al. opat, p 261.

89 Article 15 of the ACHPR.

Historically, all regional systems of human rights protection derive from the universal system set by the United Nations and the African system is regarded as the youngest⁹⁰. As consequence, to undertake the present essay requires to make a comparison of the African system with its predecessors. In such respect a great emphasis will be laid on the main instruments, the rights entrenched and the enforcement machinery. These benchmarks are kinds of tools that will be use to achieve the comparison and to show up how original the ACPRH is, to what extend the African system differs from other regional systems.

The African system is unique in that it basically rest on the ACHPR and its protocol. The Universal system is grounded on more than one instrument, namely the UDHR, the ICCPR and the ICECSR⁹¹. The European system combines the ECHR⁹² and the European social Charter while the Inter-American one rest on the AMCHR, the OAS Charter, the American Declaration⁹³.

The African Charter includes civil and political rights as well as specific economic and social rights⁹⁴. It has not separated socio-economic rights into a different instrument like in the European and American system⁹⁵. As to the Universal Declaration of Human Rights it contains a comparable catalogue of rights. For instance, both texts recognize the right to satisfactory working conditions and to equal pay for equal (Article 15 of the ACHPR and Articles 23 & 24 of

90 Churc, J . (2007) et al. Human Rights from a Comparative and International Law Perspective 259.

91 The Universal Declaration of Human Rights(1948), The International Covenant on Civil and Political Rights (1966), The International Covenant on Economic, Social and Cultural Rights (1966).

92 The European Convention on Human Rights(1950).

93 The American Convention on Human Rights, the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man.

94 Umozurike OU op.cit, pp.902, 910.

95 These rights were subsequently enshrined in the European Social Charter, adopted on 18 October 1996, and later completed by the Additional Protocol amending the European Social Charter of 21 October 1999;

the UNDHR)⁹⁶. Nevertheless, the African Charter is the only one to incorporate the right of equal access to public property and services.⁹⁷

The entrenchment of the second generation rights in the ACHPR should be regarded like a statement by African states that these rights as well as civil and political rights are indivisible and independent. In the *Preamble*, States parties have stated their conviction that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of these latter rights is a guarantee for the enjoyment of the formers.⁹⁸ In such respect, this integrative African approach must be regarded as a serious argument against the objection to the justiciability of socio-economic rights grounded on their alleged difference with civil and political right⁹⁹. This is what makes Chidi asserting that the African Charter represents a significantly new and challenging normative framework for the implementation of economic, social and cultural rights advocates working in a position to pioneer imaginative approaches to the realization¹⁰⁰.

In light of preceding developments, it appears that the African system of human rights promotion and protection has, like all others, its own values and weakness. Unlike the pessimistic views expressed by many authors, the African system disposes of a large range of tools that make possible the effective promotion and protection of Human rights in the region. Of significant relevance is the establishment of the African Court on Human Rights which really is a step forward to this end¹⁰¹. Nevertheless, it cannot be said strongly that the African system, as it looks today is an achieved one. There still is too much to do in order to improve the system and to remedy some of its

96 Ouguergouz . (2003) 'The African Charter on Human and Peoples' Rights' p 56.

97 Article 13(3) of the ACHPR.

98 Preamble of the ACHPR, para 5.

99 the situation of socio-economic rights in the South Africa Constitution

100 Ondinkalu C.A. (2002) in: Evans & Murray The African Charter on Human and Peoples' Rights', p 178, 186.

101 Mangu, A.M.B, op.cit, pp 379, 404.

shortcomings. The ACHPR should be reviewed in order to include more rights and to provide them with a clear definition. Individuals and NGOs should be granted direct access to the African Court without any dependence on the will of states parties. Definitely, it results from this comparative perspective that the European system is the most advanced one. This is, *inter alia*, because individuals, who are the main beneficiary of Human rights protection, are granted direct application to the European Court. In the meanwhile, the African Commission and the African Court should take advantage of what is available to them and do their best to efficiently protect human rights in the region.

Article 20(1) of the ACHPR reaffirms the right of all people to the self-determination. As known, this principle originates from the United Nations¹⁰². However, the relevant question that has never found the unanimity of all remains the exact meaning of the concept “people”. While some are of the opinion that “people” relates only to sovereign state, others support that it cannot be limited to this category only and should extend to different communities inside a state.¹⁰³ The African Commission has already dealt with cases brought on the basis of Article 20 (1) and has mixed the both approaches of it¹⁰⁴. For instance in the *Katangese Peoples’ Congress v Zaïre*, where the president of this congress tried to rely on the right to self determination to achieve the independency that region, the Commission held that “ in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government (...), Katanga is obliged to exercise variant of self determination that is compatible with sovereignty and territorial integrity of Zaïre”.¹⁰⁵ As pointed out by Dresso, the finding of the

102 G.A Res. 1514(XX) and G.A Res. 2625(XXV).

103 21 U.N. GAOR Supp (No.16) at 49, U.N.Doc. A/6316 (1966).

105 *Katangese People’ Congress v Zaire*, 8th Annual Report of the Commission-1994/1995.

Commission suggests that as long as, there is a constitutional and statutory framework that guaranteed participation of all zaireois equally, the self-determination of Katangese found expression through exercise of the self determination of all zaireoise.¹⁰⁶ According to Ouguergouz, this was a measure of extreme prudence of the African commission, which preferred to link the exercise of the right to self-determination to that of the right of the individual to participate in the government of this country.¹⁰⁷ The Commission held the same position in *Constitutional Rights and Civil Liberties Organization v. Nigeria*¹⁰⁸. It is clear from the *Katangese* and others cases that the Commission considered the peoples' right to self determination like applying to the population of a state as a whole as well as like applying to a particular people within a state. The African Commission has not limited the concept "people" to sovereign states but it has usually combined its application with other principles in order to reach a fair and balanced decision. In the case involving the *Ogoni* community against the state of Nigeria, the African Commission applied peoples' rights to that community.¹⁰⁹ The case provides evidence that the African Commission regards peoples' rights as also providing protection to subgroup against their states. In this connection, it is to be pointed out that the people right to self-determination has also an economic dimension. It implies that every people shall exercise permanent sovereignty over their natural resources.¹¹⁰ Although the African Charter does not expressly mention the phrase "permanent sovereignty over natural resources", it provides for this right in the terms of Article 21. It is in this context that in the *Ogoni* case, the African Commission founds that the state of Nigeria had violated the rights to free disposal of ones wealth and natural resources. The wider application of the concept

106 Dresso, S.A "The Jurisprudence of the African Commission on Peoples' rights of the African Charter" available at <http://www.chr.up.ac.za/about/introduction.html> [Accessed on 22/9/2008].

107 Ouguergouz F op cit, p 255.

108 *Constitutional Rights and Civil Liberties Organization vs. Nigeria*, 12th Annual Report of the Commission-1998/1999 Para.51.

109 The *Ogoni* case op cit

110 G.A Res. 3202, 6 Special Sess. U.N. GAOR Supp (No.1) at 5, U.N Doc. A/9559 (1974).

“people” is somewhat in line with the original context in which this right arose in the region. At the beginning this right was invoked in connection with peoples under colonial and alien domination who naturally did not enjoy sovereignty. Nevertheless, despite the possibility to broadly apply the concept, the practice of the African Commission has reflected the will of this institution to remain in accordance with the practice of African states and the OUA¹¹¹. In this respect, the people right to self-determination can be asserted in any case, provided it is consistent with the African Union notions of sovereignty¹¹².

International non-governmental human rights organizations such as Amnesty International, Human Rights Watch, International Service for Human Rights and FIDH monitor what they see as human rights issues around the world and promote their views on the subject. Human rights organizations have been said to “translate complex international issues into activities to be undertaken by concerned citizens in their own community”. Human rights organizations frequently engage in lobbying and advocacy in an effort to convince the United Nations, supranational bodies and national governments to adopt their policies on human rights. Many human-rights organizations have observer status at the various UN bodies tasked with protecting human rights. A new (in 2009) nongovernmental human-rights conference is the Oslo Freedom Forum, a gathering described by The Economist as “on its way to becoming a human-rights equivalent of the Davos economic forum.” The same article noted that human-rights advocates are more and more divided amongst themselves over how violations of human rights are to be defined, notably as regards the Middle East.

There is criticism of human-rights organizations that use their status but allegedly move away from their stated goals. For example, Gerald M. Steinberg, an Israel-based academic,

111 Ougergouz F op cit, p 253.

112 Gittelman R. opat p 680.

maintains that NGOs take advantage of a "halo effect" and are "given the status of impartial moral watchdogs" by governments and the media. Such critics claim that this may be seen at various governmental levels, including when human-rights groups testify before investigation committees.

A human rights defender is someone who, individually or with others, acts to promote or protect human rights. Human rights defenders are those men and women who act peacefully for the promotion and protection of those rights.

Multinational companies play an increasingly large role in the world, and have been responsible for numerous human rights abuses. Although the legal and moral environment surrounding the actions of governments is reasonably well developed, that surrounding multinational companies is both controversial and ill-defined. Multinational companies' primary responsibility is to their shareholders, not to those affected by their actions. Such companies may be larger than the economies of some of the states within which they operate, and can wield significant economic and political power. No international treaties exist to specifically cover the behavior of companies with regard to human rights, and national legislation is very variable. Jean Ziegler, Special Rapporteur of the UN Commission on Human Rights on the right to food stated in a report in 2003: The growing power of transnational corporations and their extension of power through privatization, deregulation and the rolling back of the State also mean that it is now time to develop binding legal norms that hold corporations to human rights standards and circumscribe potential abuses of their position of power.

Therefore, the researcher looks into the way Regional Economic Community Courts (REC) in Economic Community Court of Justice (ECCJ) and Southern African Development Community Tribunal (SADC) play this crucial role.

The primary objective of the court is administration of justice, and to render justice according to law. Protocol A/P1/7/91 relation to the community court of Justice sets out the status, composition powers, procedure and other issues concerning the court. The court was enjoined in Article 9.1 of its 1991 protocol to ensure the observance of law and the principles of equity in the interpretation and application of the provisions of the treaty. Although, the court was established pursuant to Article 6 and 15 of the Revised Treaty, it was only set up in 2011 following the swearing in of the Honorable Judges of the court.

On the other hand, Article 14 of the Southern African community Tribunal (SADCT) Protocol provides that the SADC Treaty shall constitute the basis of the Tribunal's jurisdiction. The Tribunal is competent to exercise jurisdiction over matters relating to the interpretation and application of the Treaty as well as interpretation, application or validity of Protocols and other legal instruments of SADC and of acts of the Community's institutions¹¹³. Like the East African Court of Justice (EACJ), the Southern African Development Community Tribunal (SADCT) does not have a clear human rights jurisdiction.

A proposal to include human rights in the mandate of the Tribunal was considered and rejected¹¹⁴. However, the Tribunal is authorized¹¹⁴ to 'develop its own jurisprudence', giving due consideration to 'applicable treaties, general principles and rules of public international law and any rules and principles of the law of States'. Such 'developed Community jurisprudence' constitutes 'applicable law' along with the Treaty, Protocols and other instruments of southern African development community (SADC)¹¹⁵. Article 4 (c) of the SADC Treaty identifies human rights, democracy and the rule of law as fundamental principles of southern African

113 Article 14 of the SADC Tribunal Protocol.

114 Eborah, S.T Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges, African Journal of International and Comparative Law. p.84

115 Article 21 of the SADC Tribunal Protocol.

Development Community (SADC). The Tribunal concluded that it had jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in that particular application. The issue of jurisdiction resolved, the Tribunal considered the alleged human rights violations which included the denial of access to justice and racial discrimination, and found the Government of Zimbabwe in contravention with the rule of law and consequently held it in breach of Article 4(c) of the southern African Development Community (SADC) Treaty. In arriving to this conclusion, the Tribunal applied various international human rights instruments including the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and political Rights, the International Covenant of Social Economic and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the African charter on Human and People's Rights.

CHAPTER THREE

THE ROLE OF ECOWAS COURT IN PROTECTION OF HUMAN RIGHTS

3.1 Establishment, Mandate, Jurisdiction and Powers of ECOWAS Court of Justice

The role of the courts in protecting human rights and in developing human rights jurisprudence, being at the regional levels is undisputable. Courts are established as forums to defend the people against the oppressive and unjust laws and practices, against laws and practices that are inconsistent with or in violation of the basic human rights. Furthermore, Regional courts are established with a general mandate to ensure adherence to the rule of law by the states parties to the respective treaties establishing those courts¹. Wondering whether or not regional courts play any role in the protection of human rights is nothing more than asking whether human rights are justifiable before those courts and whether the courts are sensitive to them.

In the course of the last decade, Africa has witnessed the establishment of various supranational courts, including the African Court on Human and Peoples' Rights and, at the sub-regional level, the Economic Community of West African States (ECOWAS) Court of Justice, among others. The creation of the court was initially hailed as an important contribution to the strengthening of the rule of law and the protection of human rights. Yet, only a few years later, the initial optimism seems to have disappeared and been replaced with skepticism, as the court does not have an impressive track record and, more worrisome, it cannot fulfill its functions independently.

The Community Court of Justice is established by Article 25 of the Revised Treaty. Article 15(4) declares that the judgments of the Court are binding on all member states,

1 Kouassi (2007) op cit

Community institutions, and on individuals and corporate bodies. In 1991, a Protocol on the status, composition, powers, procedure and other issues concerning the Community Court of Justice was established in accordance with Article 15(2) of the Revised Treaty. This Protocol was amended by a Supplementary Protocol in 2005. It can be asserted that the Court has both a Community and a national jurisdiction over human rights issues.

The jurisdiction of the Court is to be found in Article 9 of the 1991 Protocol (as amended). The Court is competent to adjudicate on any dispute relating to the following:

- i. The interpretation and application of the Treaty, Conventions and Protocols of the Community
- ii. The interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS
- iii. The legality of regulations, directives, decisions and other legal instruments adopted by ECOWAS
- iv. The failure by member states to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS
- v. The provisions of the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS member states, the Community and its officials
- vi. Action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions
- vii. Determination of any non-contractual liability of the Community and the power to order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions

- viii. Jurisdiction over any matter provided for in an agreement where the parties provide that the Court is to settle disputes arising from the agreement, and
- xi. Any specific dispute other than those specified above that is referred by the Authority of Heads of State and Government.

The Court is also competent to act as arbitrator for the purpose of Article 16 of the Treaty. Examining these heads of jurisdictions, it may be asserted that the following human rights issues will be cognizable before the Court. Firstly, there are the so-called Community rights endowed on ECOWAS citizens. As correctly identified by Ajulo², ECOWAS Treaties have created rights and obligations for Member States of ECOWAS on the one hand and ECOWAS citizens on the other. For instance, the ECOWAS Protocol relating to the free movement of persons and right of residence and establishment creates obligations for every Member State and rights for every ECOWAS citizen.

Secondly, ECOWAS member states may bring complaints by its citizens of human rights, as protected by the African Charter on Human and Peoples' Rights.³

The amendment of the Protocol to allow individual direct access to the Court is regarded as the major achievement of the Court since its inception about four years ago. Records from the Court show that the number of cases filed at the Court increased tremendously. According to the Registrar of the Court at an address at the opening of the 2007–2008 Legal Year of the ECOWAS Community Court of Justice⁴, Six applications were lodged in 2005, one of which sought for an advisory opinion. The Court held 26 public sittings and examined one request for Advisory Opinion in camera. It is our contention that this was a remarkable improvement,

2 Ajulo, S.B. Sources of law of the Economic Community of West African States (ECOWAS), *Journal of African Law*, 45:73,82, 2001.

3 "Gambia in ECOWAS Court again?"; available at www.africanews.com/site/list_messages/18220; last accessed 6 October 2008.

4 Address available at www.ecowascourt.org/reports1.html; last accessed 9 September 2008.

especially when compared with the fact that only two (2) cases were filed before the Court between 2001 and January 2005. This new trend continued in 2006, when twenty-one (21) cases were filed. So far, eight cases have been filed in 2007. The Court held 64 Court sessions between January 2006 and July 2007. Thirty-two (32) interlocutory applications were lodged in respect of these cases as at 14th September 2007.

This would be in furtherance of the mandate of the Court to ensure observance of the Revised Treaty, the Mechanism, and the Supplementary Protocol on Democracy and Good Governance.

Article 9 of the 1991 Protocol of the Court provides that the latter has the jurisdiction to determine cases of human rights violations that occur in any ECOWAS member state. To complement this jurisdiction, the 2005 Supplementary Protocol grants access to individuals to the Court to apply for relief for violations of their human rights; the submission of application for which should not be anonymous, or be made if the same matter has already been instituted for adjudication before another international court.⁵ The jurisdiction over human rights is with respect to actions or inactions that have occurred in ECOWAS member states.

Since the jurisdiction is with respect to human rights, it is important to examine what is meant by this term: does it mean *human rights* as recognized by member states' legal systems, or does it mean *human rights* as defined in the African Charter on Human and Peoples' Rights? This is not an academic question because the rights recognized in member states' constitutions often differ from those provided for in the African Charter.

For example, in Nigeria, while the African Charter recognizes socio-economic and cultural rights, Chapter 2 of the Nigerian Constitution of 1999 provides for non-justifiable socio-

⁵ Banjo, A. (2007), "The ECOWAS Court and the politics of access to justice in West Africa". Africa Development.

economic human rights. Happily, the Community Court of Justice in *Leo Keita v Mali*⁶ indicated that it was the African Charter on Human and Peoples' Rights that should determine whether or not there had been a human rights violation. The Court referred to Article 4(g) of the Revised Treaty, which declares that one of the principles of ECOWAS is the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. This point was reaffirmed in *Moses Essien v The Gambia*,⁷ where the Court stated that it had the jurisdiction to entertain a case brought on the grounds of a violation of Article 5 of the African Charter and Article 23(2) of the Universal Declaration of Human Rights.

It is significant, therefore, that the Court decided to use the African Charter on Human and Peoples' Rights, which is a normative standard and common to all member states. Using a national bill of rights would admit variations that would ultimately weaken the jurisprudence of the Court.

A related question is whether other treaties such as the African Charter on the Rights and Welfare of the Child,⁸ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women; the Convention on the Elimination of All Discrimination Against Women; and other international human rights treaties ratified by ECOWAS member states will be applied by the Court. It is submitted that the Court should interpret and apply these treaties.

Another important question is the relationship between the national human rights protection system and the ECOWAS human rights system. In *Leo Kaita*, the Community Court of Justice declared that it was not a Court of Appeal for decisions of national courts like the European Court of Human Rights. From this decision it is possible to assert that there is no

6 Suit No. ECW/CCJ/APP/05/06; Judgement No. ECW/CCJ/APP/03/07 of 22 March 2007.

7 Suit No. ECW/CCJ/APP/05/05; Judgement No. ECW/APP/05/07 of 29 October 2007.

8 OAU Doc. CAB/LEG/24.9/49 (1990).

requirement of the exhaustion of local remedies before an action can be brought before the Court. Thus, every individual who alleges that his or her human right protected by the African Charter has been violated can approach the Court. Arguably, this means that even when a national court has ruled against it, an ECOWAS citizen can approach the Community Court of Justice. Assuming the decision is different from that of the highest domestic court of the land, it is clear that the decision of the Community Court of Justice may be held to supersede the decision of national court, given the supranational status of the Community Court of Justice and the fact that its decision is declared by Article 15(4) of the Revised Charter to be binding on member states, ECOWAS institutions, individuals and corporate bodies. The Community Court of Justice, therefore, is *sui generis*. Yet another question is whether individuals can bring actions against other individuals before the Community Court of Justice. The answer is in the affirmative. It is to the African Charter that we must look for the answer; and since the Charter in no way restricts its provisions to African states, it may be asserted that there can be horizontal application of the African Charter before the Community Court of Justice. It is acknowledged that this is an issue that will occupy the Court in due course.

The ramifications of the monumental change brought about by the direct access of individuals to the Court needs to be examined closely. Substantive access is greatly affected by the geographical location of the Court and the cost of access to it for Community citizens. At present, it is a fact that the Court is largely inaccessible to ECOWAS citizens. To contain this obstacle, the Court moves its sessions to different parts of the Community to enable easier access for citizens. For example, the *Leo Kaita* case was heard in Mali. Just recently, the Court heard a case on an allegation of slavery against Niger.⁹

9 Hadijatou Mani Koraou vs Niger republic (2008) ecw/ccj/jud/06/08.

An intriguing aspect of the evolving human rights jurisdiction of the ECCJ is the fluidity that surrounds the mandate and its exercise. In a sense, the complexities that come out of the vagueness and consequent fluidity of the jurisdiction can both be constructive and destructive. Thus, an understanding of the unresolved issues that would make or mar the emerging system is vital to guide the response that the ECCJ and all concerned actors would make where these issues turn up for determination. There are at least five of such issues that can be identified. In considering these issues, it has to be borne in mind that the credibility of the system depends, to a large extent, on the ability of the ECCJ to act within the bounds of the powers conferred. This essentially requires a delicate balance between meeting the expectations of the citizenry – touching on the effectiveness of the Court- and respecting the legal and legitimate bounds set by member states. This section of the paper would examine these complexities. Generally, the exercise of supranational legislative powers by international organizations is strictly confined to pre-determined issue-areas voluntarily ceded by the states that converge in such international organisations.⁷⁶ Consequently, the powers of judicial review by the judicial or quasi-judicial bodies of such international organizations are also usually restricted to the areas over which the international organization has been granted legislative competence. This rule may not apply with exactly the same level of rigidity in essentially intergovernmental organizations as the legislating powers in such intergovernmental arrangements effectively remains with the heads of states and governments of converging states. The level of resistance to the ceding of sovereign powers is even higher among African states for reasons beyond the scope of this paper. However, under the platform of ECOWAS, West African heads of states and governments have made moves to

create a supranational organization with powers to exercise direct jurisdiction (legislative and judicial) over the territories, nationals and institutions of the integrating states.¹⁰

Notwithstanding the rhetoric on the transformation of ECOWAS into a supranational organization, it is noteworthy that the Authority of heads of states and governments remains the supreme organ of ECOWAS and thus, control and highest legislative competence resides in the heads of state and government. Another vital observation is that even in the field of economic integration, ECOWAS does not seem to have clearly delineated the subjects that fall within the competence of the Community and those that remain with the states. In this regard, it is easy to point out the clear distribution of competence between the EC/EU. However, while it could be argued that the highest legislative competence in the EC/EU also remains with the European states to the extent that it resides in the EU Council of Ministers, the practice of majority voting in decision-making strengthens the quality of supranationality in the areas that fall within the legislative competence of the EC/EU. The relevance of this distinction to the present discourse is that whereas the ECJ's exercise of human rights jurisdiction revolves around the areas of EC/EU competence, it is not possible to clearly identify the boundaries of the human rights mandate of the ECCJ.

It is evident from the vast literature on the human rights practice of the ECJ that there are clear boundaries beyond which the ECJ would not seek to apply judicial competence. As the EU is a 'multi-layered institution' comprising of Community institutions and member states institutions, the powers of the ECJ spreads over internal acts and legislation (EC/EU) as well as acts and institutions of member state institutions.¹¹ In terms of EC/EU legislations and conduct, the human rights enquiries of the ECJ do not seem to apply to primary legislation of the

11 Ecowas revised treaty

Community/Union although it would apply to secondary legislations.¹² However, the ECJ monitors compliance with human rights when the EC/EU acts on its own competence through Community institutions.¹³ In terms of member states legislations and actions, there are layers of jurisdiction issues. As a general rule, the human rights jurisdiction of the ECJ is ‘essentially limited to matters within the fields of EU law...’¹⁴ so that ‘if member states were bound by EU fundamental rights, it was not in their own fields of competence and the EU had no business telling them how best to protect human rights in their national sphere of competence’.¹⁵ Even within the competence of the EU, ECJ scrutiny of member states human rights compliance was initially restricted to situations where the member state in question acted in the execution of EU legislation, that is, in cases where the state acted as an agent of the EU.¹⁶ Subsequently, ECJ scrutiny extended to cases arising from situations where member states derogate from the application of Community law.¹⁷

Thus, effectively, insofar as member states are concerned, ECJ scrutiny for human rights compliance of legislation and action arises where states act as agents of the EU in making implementation legislation in an area of EC/EU competence or where state institutions execute EU legislation as agents of the EU, or where states legislate or act in derogation of EU law and in permissible exceptions from EU legislation.

12 Besson (2006) p. 353

13 Stever, T.C (1996) ‘Protecting Human Rights in the European Union: An Argument for Treaty Reform’ p. 20 Fordham International Law Journal pp. 919, 941.

14 Lyons, C.(2003) ‘Human Rights Case Law of the European Court of Justice, January 2003 to October 2003’

Human Rights Law Review, Vol. 3 No. 2 pp. 323, 344

15 Besson (2006) p. 344

16 Kingston, J.(2003) ‘Human Rights and the European Union – An Evolving System’ in MC Lucey and C Keville (eds.)

Irish Perspectives on EC Law Dublin: Round Hall p. 275

17 Holmes, J. (2006) ‘Human Rights protection in European Community Law: The Problem of Standards’ in JF Beltran and N Mora (eds.) Politics and Morality: European perspectives II, Utlanssaml p. 160

On the part of the ECCJ, it is not possible to identify the boundaries of the Court's human rights jurisdiction. As previously noted, there are no clear demarcations between Community competence and states competence. The ECOWAS treaties basically refer to member states cooperation in specified field of actions. However, from a human rights perspective, it is possible to identify what can liberally be described as 'community treaty rules' in the areas of immigration, touching on the rights of free movement, residence and establishment. It is around these economic freedoms that ECOWAS has made the most elaborate 'collective legislation' having binding effect on the member states. The Treaty provisions in these areas have been strengthened by protocols drafted in similar rights language. A survey of the cases already decided by the ECCJ however, demonstrates that the ECCJ does not restrict its scrutiny of human rights compliance to the economic freedoms: whether from the perspective of Community institutions or member states' institutions.⁸⁶ Indeed, the provisions of new articles 9(4) and 10 of the 2006 Supplementary Protocol of the Court do not set any boundaries for the court in terms of competence partitioning. Thus, the ECCJ can and does exercise jurisdiction to scrutinize the human rights situation of member states insofar as there is an alleged violation.

From the view-point of a human rights lawyer, the fact that the ECCJ has no limitations whatsoever in its human rights mandate should be cause for celebration. This is especially so seeing that the ECCJ has emerged in a situation where most domestic courts have not lived up to the high expectations of human rights lawyers and activists alike. The supervisory institutions of the continent-wide African human rights system themselves have left so much to be desired. The African Commission comes under constant (though decreasing) attacks while the African Court of Human and Peoples' Rights is only just emerging.⁸⁷ In these circumstances, the emergence of a court with powers to make binding decisions at the transnational plane becomes an exciting

prospect. In fact, the ECCJ has in a way even begun to justify the confidence and hopes of its admirers with recent decisions finding violation of human rights for detention without trial of a Gambian journalist, 88 and for failure of a state to prevent the practice of slavery. However, these positive aspects need not becloud constructive assessment of the possible consequences of the fluid jurisdiction of the ECCJ. The first point to note is that there is the likelihood of conflict between national courts of member states and the ECCJ on the one hand and between the ECCJ and continent-wide supervisory institutions on the other hand. Considering that the ECCJ can exercise jurisdiction on the same competence areas as the national courts, forum shopping is a present danger. With respect to the continent-wide institutions, the ECCJ now shares jurisdiction with the African Commission and the African Court, over the same instrument (the African Charter), the same territories, peoples and institutions, albeit, in a given part of the African continent. With the potential of conflicting decisions, fragmentation of the African international human rights is a risk that is unavoidable. Further, the realities of the manner in which African states jealously guard national sovereignty holds the danger of future state resistance to the unrestricted jurisdiction of the ECCJ to scrutinize their human rights conducts on issues perceived as purely domestic concerns. These are some of the possible challenges that need to be addressed at some stage of the court's evolution. (Legitimacy of international courts vis-à-vis national courts).

3.2 Nature and Scope of Human Rights Mandate of ECOWAS Court

In the relatively short lifespan of ECOWAS, the ECCJ can be described as one of the few institutions that have undergone the most transformation to meet new and emerging challenges. Conceived as a community tribunal under the 1975 ECOWAS Treaty,¹⁸ the judicial organ of the

¹⁸ Art 11 of the 1975 ECOWAS Treaty.

community was born as a Community Court of Justice under its founding 1991 protocol.¹⁹ Since then, the Protocol on the ECCJ has been amended by a supplementary protocol adopted in 2005²⁰ resulting in the expansion of the jurisdiction of the ECCJ. At inception, in relation to its contentious jurisdiction,²¹ the ECCJ was empowered to ‘ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty’.²² The ECCJ could only exercise competence in cases between member states of ECOWAS or between member states and institutions of the Community. Where the interest of nationals of member states were involved in relation to ‘the interpretation and application of the provisions of the Treaty’, a member state was authorized to bring an action on behalf of its national, after amicable settlement has been unsuccessful.²³ In summary, the ECCJ was designed for the purpose of resolving disputes between subjects of international law in the interpretation and application of treaty provisions relating to regional economic integration. This was the old wine which the wineskin was made to accommodate.

Despite not having any opportunity to exercise its original competence in the first few years of its existence,²⁴ the relevance of the ECCJ was abruptly challenged by its very first case which involved an individual complaint not contemplated by the Court’s Protocol. Interestingly, this first case (*Afolabi Olajide v Federal Republic of Nigeria*²⁵) raised issues around the question of individual access to the Court. The question of individual access related to human rights and fundamental freedoms partly founded on the recognition accorded the African Charter in the

19 Protocol A/P.1/7/91 On the Community Court of Justice.

20 52 Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice.

21 The Article 10 of the 1991 Protocol on the Court of Justice.

22 Art 9 (1) of the 1991 Protocol on the Court of Justice

23 Art 9(2)(3) of the 1991 Protocol on the Court of Justice.

24 Ibid

25 Unreported Suit no. 2004/ECW/CCJ/04

1993 revised Treaty.²⁶ While the ECCJ declined jurisdiction in the *Olajide* case, the fallout of the case, linked with the new visibility of human rights in the Community agenda prompted the amendment of the 1991 Protocol on the Community Court of Justice. At the time the *Olajide* case was heard by the ECCJ, there were sufficient human rights content in the constitutional and other legislative instruments of ECOWAS to sustain the exercise of human rights competence by ECOWAS institutions. The case might have been an opportunity for the ECCJ to take a more dynamic role in providing judicial protection of human rights under ECOWAS Community framework.²⁷ However, the ECCJ shied away from such judicial activism and gave room for legislative provision of judicial competence in the field of human rights. The relevance of this observation is that the restraint exercised by the judges of the ECCJ potentially impacts on public perception of their dedication to the cause of human rights protection. This does not however, take away the fact that the approach of the Court in that case is legally defensible on the basis of the doctrine of conferred powers. In any event, the restraint by the ECCJ has resulted in a clear and unambiguous empowerment of the Court by the lawmaking organ of the Community. Thus, the human rights mandate of the ECCJ is ‘a legislature-driven’ mandate.

The jurisdictional change introduced by the 2005 Supplementary Protocol of the ECOWAS Court is rather expansive in the sense that it affects the material, personal, temporal and territorial aspects of the Court’s jurisdiction with respect to human rights.²⁸ In addition to conferring the ECCJ with jurisdiction over cases of ‘violation of human rights that occur in any

26 203 revised ECOWAS Treaty and the right to freedom of movement under the Africa Charter based on the provisions of art 4(g) of the revised ECOWAS treaty. Interestingly, reliance was place on the Nigerian domesticated statute of the Africa Charter.

27 Viljoen, F. (2007) *International Human Rights Law in Africa* (2007) Oxford: Oxford University Press p. 507.

28 Ebobrah, S.T. (2007) ‘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’ 2 *African Human Rights Law Journal* p. 307.

member state',²⁹ the Supplementary Protocol grants access to the Court to individuals and corporations with respect to different cases of human rights violation.³⁰ This new jurisdiction is added to the original jurisdiction of the ECCJ and does not replace the original jurisdiction. Consequently, the 'new wine' is an increased jurisdiction that comprises competence in disputes involving member states and Community institutions, to interpret and apply the ECOWAS Treaty from a regional integration perspective and competence in complaints of human rights violation involving member states, Community institutions, corporations and nationals of member states. With respect to the credibility of the ECCJ, the critical question then, is whether the original design of the Court is able to sustain this additional mandate without amendments to the Court's structure, composition and procedure.

In relation to structure, the ECCJ remains largely fit for the original concept of a judicial forum for settling disputes arising from economic integration rather than human rights. The ECCJ is the single court in the ECOWAS legal system and its decision on a matter is final and immediately enforceable.³¹ The ECCJ has no direct relationship with the courts on member states and does not consider itself a court of appeal or a court of cassation over decisions of national courts.³² This is in spite of provisions in the 2005 Supplementary Protocol allowing national courts to refer domestic cases involving issues of interpretation of the Treaty, Protocols and Regulations of ECOWAS to the ECCJ.³³ This structure of the Court, when combined with the interpretation that the ECCJ cannot sit in appeal over decisions of national courts negatively impacts the human rights jurisdiction that the Court now has. The position taken by the ECCJ in

29 New art 9 of the Protocol of the ECOWAS Court as introduced by art 3 of the 2005 Supplementary Protocol

30 New art 10 of the Protocol of the ECOWAS Court as contained in art 4 of the 2005 Supplementary Protocol.

31 Art. 19 (2) of the 1991 Protocol of the Ecowas Court.

32 *Ugokwe vs Federal Republic of Nigeria* (2006): Suit No. ECW/CCJ/APP /02105 .

33 New art 10(f) in art 4 of the 2005 Supplementary Protocol.

at least two cases gives the impression that the Court would hesitate to hear a case or if it does, to make a finding where the case had previously been heard and decided by a national court as it does not want to overrule the decisions of national courts.³⁴ If this is indeed the intention of the Court, then the first effect is that a right of appeal is extinguished in cases heard by the Court as such a case would not have previously been heard by a national court. In other words, once a litigant decides to bring his case before the ECCJ, the litigant abandons his right of appeal as no other court would have previously heard the case and there is no appeal from the decision of the ECCJ.

Secondly, the operation of the principle of subsidiary in the form of requirements to exhaust local remedies before bringing human rights complaint before international courts does not apply in the ECCJ.³⁵ This has a double barrel effect. The one is that the ECCJ is forced to become a court of first instance, depriving the national courts of the first opportunity to remedy alleged violations. The Court thereby opens the gate for every single case of injustice from the 15 member states. The other related effect is that the majority of cases alleging human rights violation first go to national courts and such cases become barred from getting to the ECCJ.

Thus, by emphasizing that it is not an appellate court, the ECCJ, for example, potentially avoids all the cases alleging a violation of the right to fair trial. Either way, the ECCJ's credibility as an international court is thrown open to challenge as a result of adapting the original structure to cover the new jurisdiction.

The difficulty that the ECCJ faces in insisting on holding on to its original conception as a judicial institution in non-hierarchical relation to the national courts can best be appreciated in the observation that that the ECTHR and the ECJ have different hierarchical relation to national

34 *Ugokwe vs Federal Republic of Nigeria* Supra

35 Ebobrah (2007) on the inapplicability of exhaustion of local remedies. Vol 1. No. 1, pp. 22 – 27

courts of European states. As a result of the clear delineation of competences between the EU and its member states, the ECJ, for as long as it restricts itself to the area of EU competence and maintains the procedure of receiving cases essentially by reference from national courts need not ‘sit on appeal’ over decisions of national courts. In contrast, since the ECtHR receives human rights cases directly from individual, on every conceivable area of human rights, that court cannot avoid the toga of a ‘court of appeal’. Herein lies one of the contradictions of placing an expanded and radically different jurisdiction on the original structure of the ECCJ.

By article 3 of the 1991 Protocol on the Community Court of Justice, the qualification for appointment as a judge of the ECCJ is ‘high moral character and ... the qualification required in their respective countries for appointment to the highest judicial offices’ or by being a ‘jurisconsult of recognized competence in international law. This provision has been amended by a 2006 Supplementary Protocol which substitutes the original article 3 with a new article 3. The only addition in terms of qualification for the office of a judge of the ECCJ is that ‘jurisconsults of recognized competence in international law’ should be versed ‘particularly in areas of Community law or Regional Integration’. Clearly, experience or qualification in international human rights is not a consideration for appointment as a judge of the ECCJ. It can be argued that judges in national courts do not need any special human rights qualification to be appointed, yet are expected to provide the first layer of protection in the event of alleged human rights violation.

However, as Besson notes, an entity claiming the status of a post-national human rights institution needs some ‘global-know how’ in the field of human rights. The practicality of this requirement lies in the need for international courts involved in human rights protection to provide leadership and guidance for national courts in the application of human rights

instruments. Such leadership becomes even more relevant for legitimacy of the system considering the gap between international judges and direct domestic mandates. It is the 'global know how' that would prompt the sort of indebt analysis of human rights issues that international courts need if their decisions are to be taken seriously. In this respect, the original composition of the ECCJ poses challenges for the credible exercise of its human rights mandate in terms of not requiring any specific human rights qualification for appointment.

The rules of procedure of the ECCJ were adopted in August 2003 by the Court on the basis of authority granted in article 32 of the 1991 Protocol of the Community Court of Justice. At the time those rules were adopted, the ECCJ did not have jurisdiction over human rights and the Court was not competent to receive cases from individuals. However, the current rules of procedure are generally adequate even for the purpose of the human rights competence. The only visible concern is in the fact that there is no provision for legal assistance to indigent litigants. Considering that some of the people most commonly at the receiving end of human rights violations are those at the lower end of the economic spectrum, omitting to create room for legal assistance may easily result in disempowerment of people with genuine cases.

The issues of structure, composition and procedure rose in relation to the addition of a human rights mandate to the jurisdiction and competence of the ECCJ arise as a result of the origin and scope of the mandate. The ECJ provides an excellent comparator to the ECCJ with regard to the acquisition and exercise of a human rights mandate in the context of regional economic integration. It is generally agreed that the founding treaties of the EC/EU did not make any reference to the protection of human rights but the ECJ was forced to engage human rights in its working as a result of national challenges to its principle of supremacy of EC law. Hence, since the 1960s, the ECJ has exercised some form of human rights jurisdiction even in the

absence of a mandate in that regard. As a consequence of the ECJ's pioneering and proactive efforts in bringing human rights protection within its sphere of authority, the ECJ forced the EC/EU to introduce references to human rights in later treaties. In effect, the EC/EU human rights mandate is driven by the judiciary. However, in decades of its adaptive exercise of human rights jurisdiction, the ECJ has maintained its structure, composition and procedure without any visible negative impact on the protection of human rights. Even though, there are some who doubt the suitability of the ECJ to play the role of a human rights court, the ECJ has continued to exert its influence in the field of human rights in Europe. Perhaps the difference between the ECJ and the ECCJ in this regard lies in the fact that the ECJ exercises limited competence in the field of human rights. Without the unambiguous special legal basis in human rights, the ECJ has restricted itself to human rights as it relates to the 'interpretation and application of European Community law'. Thus, the view has been expressed that the ECJ is a 'tardy convert to human rights'. To the extent that individual access to the ECJ is limited and the ECJ addresses only human rights in relation to application of or derogation from European Community law, its human rights mandate is different from that of the ECCJ. These are some of the reasons why challenge to its existing structure does not arise.

Putting new wine in old wineskin does not always result in the disaster of a burst skin and spilled wine but the disaster looms until the old wineskin shows its durability and worth by stretching to accommodate the new wine. To date, the ECCJ has done fairly well in adapting to its growing role as an economic integration cum human rights court. But the quality of protection it offers can improve significantly if concerns identified are addressed. This paper would offer some advice at a later section. Having demonstrated that the ECCJ has a clear human rights mandate, the following section of the paper examines the nature of the mandate.

Article 7 of the Revised Treaty provides that the Authority is the supreme organ of ECOWAS, and is responsible for the general direction and control of Community, and will take all measures necessary to ensure its progressive development and the realization of its objectives.

Specifically, the Authority will-

- i. Determine the general policy and major guidelines of the Community • give directives
- ii. Harmonize and coordinate the economic, scientific, technical, cultural and social policies of member states
- iii. Oversee the functioning of Community institutions
- iv. Follow up the implementation of Community objectives
- v. Refer, where it deems it necessary, any matter to the Community Court of Justice over the interpretation and application of the Revised Treaty, and
- vi. Request the Community Court of Justice to give an advisory opinion on any legal question.

Its decisions are binding on all community institutions except the Community Court of Justice. The Authority is, therefore, a critical pivot in the protection and promotion of human rights in ECOWAS. If its decisions are guided by the African Charter on Human and Peoples' Rights, it can be said that its role is important and decisive.

Citizens of ECOWAS member states can file complaints against human rights violations of state-actors at the regional Court of Justice. ECOWAS member states have decided to give the court, which exists formally since 1991 and was in practice only set up in 2001, a specific mandate in that respect. The court that is seated in Abuja, Nigeria, rules according to the

provisions of the African Charter on Human and Peoples' Rights. The decisions are legally binding to the ECOWAS member states.

The Court has competence to rule on human rights violations through an individual complaint procedure since 2005. Particularly noteworthy is that local remedies do not need to have been exhausted, before cases are brought to the ECOWAS Court of Justice. So every victim of a human rights violation can directly appeal to the court even while the case is subject to national proceedings. In a dramatic and ground-breaking decision, the ECOWAS Community Court of Justice in Abuja has declared that all Nigerians are entitled to education as a legal and human right.

The Court said that the right to education can be enforced before the Court and dismissed all objections brought by the Federal Government, through the Universal Basic Education Commission (UBEC), that education is “a mere directive policy of the government and not a legal entitlement of the citizens.”

3.3 Analysis of Case Law on Human Rights Protection in ECOWAS Region

i. Hissein Habre v. Republic of Senegal³⁶

In this case, the Applicant, the Former President of Chad, obtained asylum in Senegal after being overthrown in a military coup d'état mounted by Idris Deby Itno. But contrary to the expectations of the Applicant, and in contrast with judicial decisions which had become final, the Defendant have the Applicant tried in one of its Courts, for acts committed while he was Head of State in Chad. The Applicant therefore considers that the Defendant does not guarantee him any condition whatsoever of a fair and just trial. He is asking the Court to determine the violation of the principle of non-

36 (2013) ECW/CCJ/JUD/03/03

retroactivity of Criminal Law, the Principle of equality before the law and the right to an equitable trial.

And also for an order directing the Republic of Senegal to stop all prosecutions and actions against him.

ii. Petrostar Nigeria Limited v. Blackberry Nigeria Limited & 2 Ors³⁷

The Application, a legally incorporated Company, delivered on request 5 Million Litres of Automotive Gas Oil (AGO) to shell at a total sum of 485 Million Naira. The Applicant filed an application against the Defendants for breach of the terms of contract of sale, and for attempting to bribe influence the Counsel to the Plaintiff, in order to prevent him from proceeding with the recovery of the remaining 255 Million Naira.

iii. Dauda Garba v. Republic of Benin³⁸

The Applicant, a citizen of the Community and a Programme Officer at the Centre for Democracy and Development, situated in Abuja, was questioned and beaten up by officers of the Immigration Services of Benin. He filed an application before the Court for the alleged violation of his fundamental human rights and the right to free movement, as guaranteed by Articles 1, 5 and 12 of the African Charter on Human and People's Rights.

iv. Nuhu Ribadu v. Federal Republic of Nigeria³⁹

Mr. Nuhu Ribadu, a Nigerian citizen and senior officer of the Nigerian Police, who was promoted to the rank of Assistant Inspector-General of Police and later demoted, filed an action for the violation of his human dignity.

37 (2011) ECW/CCJ/APP/08/08

38 (2008) ECW/CCJ/APP/09/08

39 (2009) ECW/CCJ/APP/01/07

v. Mahamat Seid Abazene Seid v. Republic of Mali & 2 Ors⁴⁰

Mr. Mahamat Seid Abazene filed an application for the violation of his fundamental human rights by the Defendants, who dismissed him from his office without regard to the provisions of the Staff Rules and Regulations.

vi. Amouzou Henri & 5 Ors v. Republic of Cote d’ivoire⁴¹

The Applicants jointly filed an action alleging the violation of their rights to fair hearing, presumption of innocence, unlawful detention, defamation and violation of the rights of pregnant women and breast-feeding babies. Consequently, the Applicants are demanding for their immediate release from unlawful detention and compensation for damages suffered.

vii. The National Co-ordination of the Departmental Delegates of the Coffee and Cocoa Sector v. Republic of Cote D’Ivoire⁴²

The Applicants jointly filed an action for alleged violation of their human right to equal re-numeration and the violation of the principle of equality before the law by all citizens. Furthermore, the Applicants are seeking from the Defendants compensation for violation of their human right.

viii. Private Aliyu Akeem v. Federal Republic of Nigeria⁴³

The Plaintiff, a Community citizen, was arrested and detained in military custody without trial for two years on the allegation that a riffle was missing from General Malu’s house. He filed an action before this Court for alleged violation of his fundamental human right

40 (2010) ECW/CCJ/APP/09/07
41 (2009) ECW/CCJ/APP/01/09
42 (2008) ECW/CCJ/APP/08/09:

to dignity and personal liberty and for 10,000,000 (Ten Million Naira) compensation for injuries suffered.

The ECOWAS Court's decision was also made public on 19 November, followed a suit instituted by the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) against the Federal Government and UBEC, alleging the violation of the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and to economic and social development guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights.

Reacting to the ruling, SERAP's Solicitor Femi Falana, who filed and argued the case before the Court with the assistance of Adetokunbo Mumuni, said, "This is the first time an international court has recognized citizens' legal right to education, and sends a clear message to ECOWAS member states, including Nigeria and indeed all African governments, that the denial of this human right to millions of African citizens will not be tolerated."

SERAP's suit⁴⁴ followed a petition sent by SERAP to the Independent Corrupt Practices and Other Related Offences Commission (ICPC), which led to the discovery by the ICPC of massive corruption and mismanagement of the UBEC funds. The investigation also resulted in the recovery of stolen N3.4 billion, meant to improve the quality of education and access to education of every Nigerian child. The organization used the findings of the ICPC as the basis for its suit before the ECOWAS Court. The Federal Government had alleged, through the UBEC, that "the Court lacks jurisdiction to entertain the action filed by SERAP on the grounds that the Compulsory and Basic Education Act 2004 and the Child's Rights Act 2004 are Municipal Laws of Nigeria and not subject to the jurisdiction of the Court because it is not a

44 [No ECW/CCJ/APP/0808]

treaty of ECOWAS; that the educational objective of Nigeria under the 1999 Constitution is non-justiciable or enforceable; and that SERAP has no locus standi to institute or maintain the action.”

Dismissing all the objections by the government, the ECOWAS Court said: “It is important to assess the basis of SERAP’s claims in determining the justiciability or otherwise of its claims with respect to the right to education and whether it can be litigated before this Court.

Though SERAP factually based its claim on the Compulsory and Basic Education Act and the Child’s Right Act of Nigeria, it alleged a breach of the right to education contrary to Article 17 of the African Charter on Human and Peoples’ Rights and not a breach of the right to education contained under Section II of the 1999 Federal Constitution of Nigeria. It is trite law that this Court is empowered to apply the provisions of the African Charter on Human and Peoples’ Rights and Article 17 thereof guarantees the right to education.”

“It is well established that the rights guaranteed by the African Charter are justiciable before this Court. Therefore, since SERAP’s application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of the government that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold”, the Court further ruled.

On the objection that the court lacks jurisdiction, the Court said: “It is a well established principle of law that jurisdiction is a creature of stature. Under Article 9(4) of the Supplementary Protocol, the Court clearly has jurisdiction to adjudicate on applications concerning the violation of human rights that occur in Member States of ECOWAS.

The thrust of SERAP’s suit is the denial of the right to education for the people of Nigeria, denial of the right of people to their wealth and natural resources and the right of people

to economic and social developments guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights of which Nigeria is a signatory. The Court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of Nigeria cannot oust the jurisdiction of the Court.”

The Court also said that “As SERAP’s claim is premised on Articles 1, 2, 17, 21 and 22 of the African Charter, the Court does have subject matter jurisdiction of the suit filed by SERAP.”

Dismissing the government’s argument on locus standi, the Court stated: “The authorities cited by both the government and SERAP support the viewpoints canvassed by them. However, we think that the arguments presented by SERAP are more persuasive for the following reasons: first, the doctrine of ‘Actio Popularis’ developed under Roman law to allow any citizen to challenge a breach of public right in Court was a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in Court.

Second, SERAP cited authorities from around the globe which all concur in the view that in a human rights violation the plaintiff need not be personally affected or have any special interest worthy of protection.”

The Court also said: “Public international law in general is in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing.

Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy

development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime.”

Also in the case of *Hadijatou Mani Koroua v Niger* the Court, which has authority across most of West Africa, found Niger in breach of its own laws and international obligations in protecting its citizens from slavery. The Court has made clear that Niger is obliged to take positive measures to protect its citizens from slavery. Ms Mani is to be compensated 10 million CFA, the equivalent of £12,300/\$19,000 in damages.

The Court in its judgment stated that: 'There is no doubt that Hadijatou Mani was held in slavery for almost 9 years in violation of the legal prohibition on this practice.' Niger criminalized slavery in 2003, but five years on at least 43,000 people remain enslaved across the country. Hadijatou was born into an established slave class and like all slaves in Niger, was inherited, sold and made to work without pay. She was also used as a sexual slave by her master. Ms Mani brought the case to the regional ECOWAS court after failing to receive any redress in Niger's domestic legal system and state authorities, which had at times been complicit in her master's attempts to deny her freedom. The case also follows Ms Mani serving two months of a six month prison sentence for bigamy. The charge of bigamy was made following her legal attempts to gain freedom and marrying a man of her own choosing. The judgment is recognition of the long standing abuses she has suffered.

Local lawyers were assisted in bringing the case by INTERIGHTS, the International Centre for the Legal Protection of Human Rights, with support from Anti-Slavery International and Niger NGO Timidria.

CHAPTER FOUR
THE ROLE OF SADC COURT TOWARDS PROTECTION OF HUMAN RIGHTS IN
AFRICA

4.1 Introduction

This chapter is the submission of the above stated organization regarding the legal and policy appropriateness and legal objections to limitations on the human rights jurisdiction of the SADC Tribunal which are based on the provisions of the SADC Treaty, other treaty obligations within the African Union framework, and the general principles of international law. Below we deal with these under three broad grounds of objection.

4.2 Establishment, Mandate, Jurisdiction and Powers of SADC Tribunal

Currently the review process is at the stage where the Summit is considering adopting the Proposed Protocol at its annual meeting to be held in Maputo on 09 August 2012. The issues discussed below refer to the latest version of the Proposed Protocol, contained in document. In its current form, as provided for in document SADC/MJ/2/2012/4, the proposed amendment to Article 15 of the SADC Tribunal Protocol provides as follows:

Article 37 provides

- 1. The Tribunal shall have jurisdiction over disputes between natural or legal persons and Member States arising from Protocols concluded by Member States, except that the Tribunal shall exercise jurisdiction in human rights matters as shall be provided for in a protocol on human rights to be concluded by Member States.*
- 2. Subject to paragraph 1, no natural or legal person shall bring an action against a Member State unless he or she has an interest of a legal nature in the subject matter of the dispute and:
(i) has exhausted all available domestic remedies; or
(ii) is unable to proceed under the domestic jurisdiction.*
- 3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.*

Of relevance to this submission is the following effect flowing from the wording of Article 37: The limitation of the jurisdiction of the SADC Tribunal in respect of human rights matters referred to it by natural or legal persons against States to those which shall be provided for in a future human rights protocol yet to be adopted by the Member States;

4.3 Nature and Scope of Human Rights Mandate of the SADC Tribunal

For purposes of this submission we assume that Article 37 will have and is intended to have the following implications:

- (a) The SADC Tribunal is barred from considering disputes concerning human rights matters referred to it by natural or legal persons against States until such time as a human rights protocol has been adopted by the Member States, irrespective of the source of the human rights claimed e.g. SADC Treaty;
- (b) Human rights matters refers to matters in which there is an alleged infringement of a generally recognized fundamental human right or freedom as recognized in international human rights law, particularly as it could be interpreted to be provided for in Article 4(c) of the SADC Treaty; and furthermore refers to matters raised under the Protocols and Resolutions of the Summit which are capable of being construed so as to confer human rights on natural and legal persons.

The Limitation is an Infringement of Article 6 of the SADC Treaty

Here we deal with the argument that the intended limitation is a breach of Article 6 of the SADC Treaty, in that it prohibits the adoption of measures which are likely to jeopardize the sustenance of the principles, attainment of the objectives and the implementation of the provisions of the Treaty of SADC. Article 6(1) of the SADC Treaty provides as follows:

Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from

taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

As appears clearly from the above provision the principle applies explicitly to the principles and objectives of SADC as stated in the SADC Treaty. At the outset it must be emphasized that Member States must adopt “adequate measures” to promote achievement of the objectives of SADC.

Furthermore the threshold for determining infringement is whether the measure at hand is “likely to jeopardize the sustenance of its principles”. Below we maintain that the intended limitation is likely to jeopardize the principles, objectives and implementation of the provisions of the Treaty. Each of them is taken in turn.

The Limitation is Likely to Jeopardize the Sustenance of the Principles of SADC

We argue here that the two principles in jeopardy are human rights and rule of law. It goes without saying that victims of human rights violations in most cases are natural persons. Furthermore it is trite that States are yet to espouse human rights cases on behalf of the nationals of other States before the SADC Tribunal. Moreover, “individual complaints mechanisms” form the core of the international human rights enforcement system.

A SADC without the capacity to entertain direct complaints of human rights violations against its Member States is severely limited in its ability to enforce its principles, which include human rights and the rule of law, and in its supervisory capacity over the domestic policies of Member States in observance of human rights and rule of law principles. Furthermore allowing for a situation where rights conferred by the SADC community law go without remedies leaves doubts as to ability to sustain the rule of law in domestic contexts, and at the supranational level. Furthermore it creates a potential for impunity to reign, as opposed to enforcement.

In the Campell Case (Main Decision)⁴⁵ the Tribunal held that an aspect of the rule of law is the protection of the right to a remedy for human rights infringements. Citing with approval the African Commission on Human and Peoples Rights in the communication of Zimbabwe Human Rights NGO Forum v Zimbabwe⁴⁶ when it said, “To fulfill the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value”, it found that Article 4(c) had been breached, which led to a finding of a violation of Article 6(1). By depriving natural persons access to the Tribunal the Summit is allowing the possibility that Member States can flout the rule of law without any sanction.

The rule of law encompasses legal certainty and stability of the legal system. By withdrawing the pre-existing right of access to the SADC Tribunal of natural and legal persons the Summit is in breach of the rule of law principle. Furthermore this measure undermines and is likely to jeopardize the rule of law within SADC as it creates a precedent for the Member States to reverse earlier rights-promoting undertakings.

The Limitation is Likely to Jeopardize the Achievement of the Objectives of SADC

Below we argue that two categories of objectives are likely to be jeopardized by the limitation on the exercise of human rights jurisdiction by the SADC Tribunal. Firstly, the effectiveness of institutions; and secondly objectives entailing the promotion and protection of human rights.

Article 5(1) (b) envisages that institutions shall be the agent for the transmission of common political values, systems and other shared values. It goes without saying that the prime institutions destined to fulfill this role are the SADC institutions, one of which is the SADC

45 Mike Campbell (Pvt) Ltd & Others v Zimbabwe Case No. SADC (T) 02/2007 available on the website of the SADC Tribunal at address: <http://www.sadctribunal.org/pages/decisions.htm>

46 (2006) Communication 245/2002 African Human Rights Law Reports 128.

Tribunal. In summary we argue that the SADC Tribunal will be rendered ineffective for the following reasons:

- (a) due to the fact that only natural and legal persons have been referring matters to the SADC Tribunal, which have in the most related to human rights matters, the SADC Tribunal will be in limbo should the limitation be implemented;⁴⁷
- (b) the SADC Tribunal will have limited ability to correct deviation from SADC community law, and thus limited effectiveness in fulfilment of its competence as stated in Article 16(1);
- (c) the limitation serves to undermine the principle of judicial independence, serving to underscore the prevalence of political considerations in the SADC Tribunal's landscape.;
- (d) if implemented the limitation is likely to be perceived as a sanction against the SADC Tribunal, and diplomats, lawyers, academics, jurists and civil society groups are unlikely to view the newly constituted Tribunal as a legitimate judicial organ; and
- (e) the limitation cannot be said to in any way enhance the attainment of the objectives nor the effectiveness of the SADC Tribunal.

Article 5(1)(a) contains the following objective:

“Promote sustainable and equitable economic growth and socioeconomic development that will ensure poverty alleviation with the ultimate”

It is beyond question that inherent in this objective of the SADC is the furtherance of the well-being of the individual human being, particularly his enjoyment and exercise of fundamental human rights and freedoms, especially economic and social rights. Leaving the implementation of socioeconomic development policies at the exclusive discretion and whim of

⁴⁷ 225 (2008) SADC Judgement

the political organs, without judicial checks and balances, creates the likelihood that violations and omissions will go without redress.

As the case of Campbell illustrates a broad-based land redistribution program can be abused to enrich only the few, at the price of the rule of law and individual human rights. Furthermore States may neglect or ignore the plight of the socially disadvantaged. The ability to have recourse to the SADC Tribunal in such a case will serve as a useful bulwark against the potential of such neglect.

In Article 5(2)(b) among some of the measures mandated in achievement of the objectives is encouragement of "... the people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC". Participation in implementation of programmes and projects entails that natural and legal persons be afforded an opportunity to take up the question of whether and if States are honouring their treaty obligations and to further engage with whether the measures being adopted are purposefully designed to attain the SADC Common Agenda, at judicial organ. Limitation on access partly limits this right of participation. least by accessing the SADC's It is a well-settled practice in international relations that dispute settlement procedures are established to monitor implementation of treaties, and furthermore that individuals are granted access to specially tailored judicial mechanisms for enforcement of rights conferred on them by treaties. The role of judicial mechanisms is to safeguard the respective rights of the parties to treaties. Whilst individuals are not direct parties to the treaties at hand, they are nonetheless the prime beneficiaries of their provisions, hence indirectly parties with interests in their proper interpretation, application and implementation.

Withdrawal of the SADC Tribunal's human rights mandate until such time as States Parties have concluded a protocol to this end is likely to jeopardize the implementation of the SADC Treaty, central to which is the observance and protection of human rights. **The Limitation is a Breach of the Obligations flowing from the AEC Establishment Process**

As one of the Regional Economic Communities (RECs) involved in the African Economic Community (AEC) establishment process, SADC is under an obligation to incrementally implement processes leading to the establishment of the African Common Market, and then eventually to the African Economic Community. The process leading up to the establishment of the AEC is outlined in the Treaty Establishing the African Economic Community (AEC Treaty). The relationship between individual RECs and the AEC Institutions is governed by two treaties:

- i. the Protocol on Relations Between the African Economic Community and the Regional Economic Communities, 1998 (AEC/RECs Protocol); and the
- ii. Protocol on Relations Between the African Union and the Regional Economic Communities, 2008 (AU/RECs Protocol).

Central to this framework are the common provisions of Articles 21(1) and 22(1) of the AEC/RECs and AU/RECs Protocols respectively. Here we cite the provisions of the latter Protocol:

In compliance with articles 10(2) and 13(2) of the Treaty, the Union shall take measures, through its principal policy organs, against a regional economic community whose policies, measures and programmes are incompatible with the objectives of the Treaty...

Furthermore Article 5(1) of the AEC Treaty provides as follows:

Member States undertake to create favourable conditions for the development of the Community and the attainment of its objectives, particularly by harmonising their strategies and policies. They shall refrain from any unilateral action that may hinder the attainment of the said objectives.

Effectively these provisions hold that the constituent RECs of the AEC are under an obligation similar to the one discussed above in respect of Article 6(1) of the SADC Treaty, i.e. not to adopt measures which impedes attainment of the objectives.

Among the principles of the AEC, in respect of which Member States declare their adherence, is that contained in Article 3(g) of the AEC Treaty, which provides as follows:

Recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; ...

It is submitted that the relationship which the principles bear to the objectives is that in attainment of the objectives the role-players (Member States and RECs) must adhere to the principles⁴⁸. Furthermore the principles are integral to attainment of the objectives. Among some of the objectives in Article 4 in respect of which adherence to the human rights principle is central is that in Article 4(c) which provides as follows:

To promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and the economic integration of the Continent; ...

In extinguishing an existing remedy for the “protection of human and peoples’ rights” the SADC is firstly in breach of Article 3(g) of AEC Treaty. Secondly it is failing to “create

48 Articles 3 and 4 of AEC.

favourable conditions” for attainment of the objectives, by not recognizing the competence of its judicial organ to adjudicate human rights matters referred by natural or legal persons against States. The SADC is thus in breach of the general obligation to further the objectives of the AEC.

Legality as a principle of international law demands that the actions of international organizations, not infringe on the general principles and rules of international law, their constitutions (or constituent instruments) and the international agreements to which they are party.

In the Advisory Opinion Concerning Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt⁴⁹, Judge El-Erian elaborates on this principle in the following manner:

It is imperative for international organizations to base their actions on valid and solid legal grounds and take their decisions in full awareness of their legal implications and guided by an authoritative interpretation of their constitutions. The overriding objective should be the observance of the principles of the organization and the fulfillment of its purposes. The common interest of the Member States of the organization can be adequately assured not through the excessive influence of political considerations which are of a transient character but on the basis of respect for legal safeguards and constraints.⁵⁰

As demonstrated below, the intention to limit the jurisdiction of the SADC Tribunal is a breach of the doctrine of *ultra vires*. The matter at hand cannot be merely characterized as an “amendment” of the SADC Tribunal Protocol. At the core lie far more contentious issues of principle which concern the nature, object and principles of SADC as an international organization, and the competences of the various organs involved in the process. Furthermore the

49 62 ILR .

50 Ibid at p. 549.

proposed amendments go to the heart of institutional separation of powers between the policy and judicial organs of the SADC.

The Doctrine of *Ultra Vires* in the Law of International Institutions

In the law of international organizations the doctrine of *ultra vires* operates to circumscribe the bounds of the acts of international organizations. It is generally accepted that international organizations have explicit, implicit and incidental powers stemming from their nature, objects and purposes. Primarily international law requires that international organizations only perform acts which are within their competence, i.e. perform actions in respect of which they have been specifically authorized by their constituent instruments. This first rule is supplemented and qualified by a second one, which requires that in performing their acts they not exceed the objects and purposes for which they have been established. Furthermore the principle of *detournement de pouvoir* requires that international organizations not exercise their competences for an improper motive.

The competence of international organizations is furthermore constrained by the rule of competence *d'attribution* which means that they only have the competence attributed to them by the Member States.

The doctrine of *ultra vires* as applied to international organizations has been termed: the principle of specialty and the principle of institutional effectiveness. The principle of specialty means that international organizations are created for a special purpose, and this purpose serves to either broaden the scope and nature of the legal acts which they may perform and furthermore to constrain or restrict those acts.⁵¹ The principle of institutional effectiveness demands that the

51 Cassese, A. (2001) Advisory Opinion on the Legality of Use of Nuclear Weapons in Armed Conflict.

actions of the institution be directed toward achieving the purposes of the organization, hence it results in implied and incidental powers.⁵²

The International Court of Justice (hereinafter the “ICJ”) has had occasion to expound upon and apply the doctrine of ultra vires in a significant number of cases. Among these cases are the Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations; Advisory Opinion on Certain Expenses of the United Nations (Article 17, paragraph 2 of the United Nations Charter)⁵³; Advisory Opinion on Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO⁵⁴; Advisory Opinion on the Effects of Awards of Compensation Made by the United Nations Administrative Tribunal⁵⁵; Advisory Opinion Concerning Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt⁵⁶; Advisory Opinion on Membership of the United Nations, Advisory Opinion on the Legality of Use By A State of Nuclear Weapons in Armed Conflict⁵⁷; Advisory Opinion on Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania⁵⁸ and Advisory Opinion on Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal.⁵⁹ In the Advisory Opinion on the Legality of the Use By A State of Nuclear Weapons in Armed Conflict⁶⁰, in holding that the World Health Organization (WHO) had no competence to seek an advisory opinion from the ICJ on the legality of the use of nuclear weapons, the ICJ specifically

52 Brownlie, L. (2001) Principles of Public International Law 688 relying on the Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations”.

53 16 ILR.

54 34 ILR.

55 23 ILR.

56 21 ILR 310-347.

57 110 ILR.

58 17 ILR.

59 54 ILR.

60 Supra fn. 15.

relied on the fact that the WHO had not been granted such power in its Constitution. The Court said the following:

“International organizations are governed by the ‘principle of specialty’ that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”⁶¹

In the Advisory Opinion on Certain Expenses⁶² the court effectively authorized the expenditure the General Assembly incurred for purposes of peacekeeping though same were not specifically authorized by the provisions of the UN Charter by placing reliance on the fact that the UN General Assembly was pursuing one of its objectives viz the maintenance of international peace and security. In the process the ICJ made the following dicta:

“But when an organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organisation.”⁶³

As illustrated below we assert that all four of the principles flowing from the doctrine of ultra vires will be infringed, jointly and/or severally, by the limitation on the SADC Tribunal’s jurisdiction.

It is our submission that the institutional scheme provided for in the SADC Treaty accords the SADC Tribunal an autonomous role, which effectively makes it the judicial organ of the SADC. Article 16(1) of the SADC Treaty stipulates that the purpose of the SADC Tribunal is two-fold: to ensure adherence to and proper interpretation of the Treaty and subsidiary instruments; and to adjudicate upon such disputes as may be referred to it. Furthermore Article 32 accords the SADC Tribunal the role of “final arbiter” in respect of the following matters: any disputes concerning the interpretation and application of the SADC Treaty; and any dispute

61 110 ILR at para. 25.

62 Supra fn. 11.

63 [at para. 168]

concerning the interpretation, application and validity of the Protocols or other subsidiary instruments.

Even without reference to the terms of the SADC Tribunal Protocol, the SADC Tribunal has competence, per the terms of Article 16 and 32, to adjudicate on disputes referred to it by natural and legal persons, and more specifically those which allege breach of human rights obligations. As illustrated above the primary human rights jurisdiction of the SADC Tribunal derives from the SADC Treaty, which it is specifically authorized to apply.

The following factors further serve to buttress the autonomous role of the SADC Tribunal:

- i. The fact that the Tribunal is one of the initial institutions established by Article 9;
- ii. Its competence to adjudicate disputes in which the Community is a respondent;
- iii. The fact that once adopted the SADC Tribunal Protocol became an integral part of the SADC Treaty

Furthermore, the SADC Tribunal's human rights jurisdiction over disputes referred to it by natural and legal persons is part of its "core and inviolable sphere". All judicial tribunals are vested with the so-called "competence de la competence" to judge its own jurisdiction. By this we mean that exercise of human rights competence in respect of disputes involving natural or legal persons and States is intrinsic to fulfillment of its purpose as an institution of the SADC, and as a judicial institution. As elaborated upon below this "core and inviolable sphere" is beyond interference by the political and policy organs of the SADC.

In the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in South West Africa⁶⁴ the ICJ made remarks regarding the independent and

64 49 ILR.

autonomous nature of the ICJ as the principal judicial organ of the UN. The following is a list of passages from that decision:

The Court is wholly independent of the other organs of the UN. ... Its function is to decide in accordance with international law.⁶⁵ The Court retains the elevated dignity deriving from its constitutional status and independence. Its authority may never be compared to that of a legal consultant or advisor – it must remain faithful to its judicial character.⁶⁶

Furthermore it was said that no limitations can be placed on “the logical processes” it employs to answer legal questions. The Court also maintained that the General Assembly and the Security Council cannot declare the Court’s judgments to be invalid.⁶⁷ It is contended here that the position of the ICJ vis-a-vis the Security Council and the General Assembly is analogous to the position of the Summit in relation to the SADC Tribunal. The separation of arms must be strictly maintained.

The Summit’s competences are dealt with in Article 10 of the SADC Treaty. Sub-article (3) thereof grants the Summit the power to adopt legal instruments. Furthermore in respect of the SADC Tribunal Article 16(2) accorded the Summit the role of adopting the SADC Tribunal Protocol. Article 16(2) provides as follows: “The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit”.

Generally the dissolution of the institutions of the SADC is provided for in Article 35 of the SADC Treaty. Whilst conceivable that the Summit may dissolve the SADC Tribunal, it is a

65 Ibid at p. 133.

66 Ibid at p. 170.

67 Ibid at p. 163.

possibility which would render redundant the institutional scheme of the SADC for the reason that it undermines its purposes, and furthermore weakens its effectiveness.⁶⁸

Prime among the international legal instruments recognizing the principle of rule of law is the SADC Treaty, which as indicated above states that the rule of law is one of the fundamental principles of the SADC. A similar provision is found in the African Union's Constitutive Act, Article 4(m). Furthermore the following United Nations General Assembly Resolutions have dealt with the rule of law at national and international levels. All these resolutions confirm that the rule of law is a core and indivisible principle of the United Nations.

Primarily the obligation to provide a remedy in the event of human rights violations is established in the major international human rights treaties. Admittedly the majority of these instruments confine this right to domestic remedies. However an important exception is Article 2(3)(a) of the International Covenant on Civil and Political Rights which provides as follows:

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*⁶⁹

Article 25 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter "African Women's Protocol") provides for a right to judicial remedies which is not qualified by being confined to the domestic jurisdiction. Principle 14 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter "Victims Basic Principles") provides as follows:

68 SADC Treaty.

69 African Charter on Human and Peoples' Rights CAP A9 Laws of the Federal Republic of Nigeria 2004.

An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

The human rights at issue are those conferred on natural and legal persons by the various protocols and subsidiary instruments adopted by SADC. Generally in international law breach of treaties is not actionable by individuals within their domestic legal systems.⁷⁰ It is for this reason that enforcement of those treaty rights in favour of individuals should remain vested with the SADC Tribunal.

4.4 Analysis of Case Laws on Human Rights Protection in the SADC Region

4.4.1 Kanyama v SADC Secretariat⁷¹

The important issue to be decided by us in this application is whether the Applicant was entitled to a renewal of his contract of employment as Principal Finance Officer which was entered into by him with the Respondent in November 2004. The Applicant assumed office in January 2005 and the period of employment was initially for four years. The contract of employment referred to the SADC Administration Rules and Procedures Handbook issued by the Respondent. In accordance with clause 15.3.5 of the Handbook: “An employee in a Regional Post shall inform the Head of the Institution, in writing, whether he/she wishes to be considered for a further term of office, not less than six months before the expiration of his/her contract of secondment. In the event that he/she wishes to be considered for a further term, the Head of Institution shall inform the officer, in writing not less than four months before the expiration of his/her contract, whether it is the intention of the Institution to renew his/her contract.”

70 *Corporation vs United States* (2004) of ILR p 1-4.

71 (SADC (T) 05/2009) [2010] SADCT 1 (29 January 2010).

In July 2008, the Applicant applied for a renewal of his contract. It was sent six months before 4 January 2009 which was the date of expiry of his contract. The reply of the Executive Secretary of the Respondent (the Executive Secretary) was just over 2 months before the date of expiry of the contract and was to the effect that the Applicant's request for an extension of his contract will depend on the outcome of the skills audit being undertaken on all existing staff of the Respondent.

On 13 December 2008, the Applicant was granted an extension of his contract as Principal Finance Officer (Director of Budget and Finance) for one year effective 5 January 2009 to 4 January 2010, without any reason being given. The Applicant accepted the term of twelve months under protest and explained during his testimony before us that he accepted the offer since he did not have an alternative employment in Malawi, his home country, and he had school-going children to provide for.

It is noteworthy that the Applicant is still occupying his present position of Director of Budget and Finance, having succeeded in August, 2009 in persuading this Tribunal to maintain the *status quo* and grant an order restraining and prohibiting the Respondent from advertising, recruiting for, and filling, the position of Director of Budget and Finance, pending the determination of his present application on the merits-**vide Clement Kanyama vs SADC Secretariat**⁷².

It is significant that during the course of 2006-2008 a Job Evaluation exercise was carried out within the Respondent, the purpose of which included, among other matters, the determination of a new organizational structure for the Respondent, job specifications, descriptions and grading. In the course of this exercise, a skills audit of the Respondent's

72 2009 SADCT 05.

existing staff was also undertaken, the purpose of which was to facilitate the migration of the existing staff members into the new organizational structure. New posts were created and there was also a change in the nomenclature of some of the existing posts within the Respondent.

Whereas in the old structure the Applicant held the post of Principal Finance Officer, in the new one he occupied that of Director of Budget and Finance. Doc. CK 7 confirms this as well as Doc. CK 10 of January 14, 2009 which in its heading specifies that the Applicant's post was just a migration into the New SADC Secretariat Structure and that, following the outcome of the skills audit undertaken by the Applicant who had obtained a 100% proficiency evaluation score, the Applicant was then re-appointed Director (Budget and Finance) – Personal to Holder, with all other benefits and conditions of his original contract of November 2004 remaining unchanged.

The Applicant in essence claims that, by not renewing his contract, the Respondent, through its Executive Secretary, has acted in breach of its contractual obligations towards him and that his reasonable and legitimate expectation of having his contract renewed for a second and final four-year period has been dashed, the more so as he had been expressly told in December 2008, that, if his performance in the skills audit were satisfactory and that he were to perform his duties diligently pending the review, he would obtain a renewal of his contract.

The essential arguments on which the Respondent's case was based, as we understood them from the evidence of the sole witness of the Respondent and indeed from the statement of defence as pleaded, were mainly the following:

The Applicant did not apply for a renewal of contract *per se*, but he also wanted to be appointed to the newly created post of Director (Budget and Finance).

2. The posts of Director (Budget and Finance) and Principal Finance Officer were not at par. The functions of the former had more in content than those of the latter. Secondly, the qualifications for the post of Director (Budget and Finance) were higher than those for Principal Finance Officer as, for example, the pre-appointment professional experience was 10 years, including 8 years in a similar position for the post of Director (Budget and Finance) whereas for the post of Principal Finance Officer, it was 10 years with three years in a similar position.
3. It was argued that, by a policy decision made at Grand Baie in the Republic of Mauritius by the Council of SADC Ministers (Council) on 24-25 February 2005, there was to be a “Fair and Equitable Member States Representation at the SADC Secretariat” i.e. the quota system would apply to new appointments made.

That meant that no one State was allowed to have more than one officer holding senior positions at the Respondent between the ranks of Director and Executive Secretary at the expense of other member states. In the case of the Applicant, a Malawian national, if he acceded to the position of Director (Budget and Finance), he would be the second Malawian to fall in those ranks, the other being a Mrs. Margaret Nyirenda who was Director of Food, Agriculture and Natural Resources.

The Tribunal should declare that the decision made by Council on 26 February 2009 in Cape Town, South Africa, whereby the Applicant was appointed as Acting Director (Budget and Finance) and to hold such post until 31 December 2009, was fair and just. Moreover, there could not be any breach of the Respondent’s contractual obligations towards the Applicant, given that, in any event, the Respondent, through its Executive Secretary, was bound not to renew the

Applicant's contract, in the light of Council's decision above. At this stage it is significant to note the following points:

At the meeting of Council in Lusaka, Zambia in November 2007, Council, in reviewing the Job Evaluation exercise, decided that the functions of the Strategic Advisor should be fused in a Unit under one of the Deputy Executive Secretaries and that two new additional posts were to be created, a second position of Deputy Executive Secretary and the creation of a position of Director Human Resources.

2. The Report of the Executive Secretary on the Implementation of the Job Evaluation (the Report) subsequently sets out the three new posts, with their functions, skills and experience profile, namely Deputy Executive Secretary (Regional Integration), Deputy Executive Secretary (Finance and Administration) and Director (Human Resources and Administration). The Report also highlights the fact that the respondent will adhere to the quota system and gender representation "before any recruitment of personnel in the new structure" is made.

As for "the skills audit of the existing staff members to determine the suitability of translating to new ranks and positions in the proposed structure", the Report in paragraph 2.1.25 states as follows:

"In the event that some positions within the organization are no longer required, rendering current incumbents redundant, or the individual does not have the requisite skills needed for the job the following alternatives are proposed: Apply the Personal to Holder principle in the event that the staff member occupies a position whose grade is lower than the grade the staff member currently occupies. The court have deliberately mentioned this paragraph of the Report just to show that it is not in any respect applicable to the Applicant, least of all the

Personal to Holder principle, so that we are at a loss to understand why it was mentioned in Doc. CK10.

The SADC Troika considered the Report at its meeting of February 2008 in Pretoria, South Africa and approved, *inter alia*, the three new posts and the skills audit of the existing staff members.

4. Council, at its meeting, in February 2008 in Lusaka, Zambia approved the decisions of the Troika. In the Management Structure, there were only three new posts, namely, Deputy Executive Secretary (Regional Integration), Deputy Executive Secretary (Finance and Administration) and Director (Human Resources and Administration).
5. Council, at its meeting, in August 2008 in Sandton, South Africa noted that the SADC Treaty must be amended to accommodate the recruitment of a second Deputy Executive Secretary and that, if that position were approved by Summit, “this post would be advertised immediately, in line with the quota system and ensuring gender balance”. Council also mentioned that the Job Evaluation exercise had resulted in the creation of new positions as well as the downgrading, upgrading and standardization of nomenclature of other positions. All staff should be assessed through the skills audit to determine their suitability or non-suitability *vis-à-vis* those positions on the new structure.
6. Council at its meeting, in closed session, in February 2009 in Cape Town, South Africa, in the presence of the Executive Secretary but not that of the Applicant, noted that the Director of Human Resources and Administration was appointed and assumed duty in December 2008 and took the following decisions:

It approved the Report and the outcome of the skills audit;

- b. The two acting Directors for “the newly created positions of Directors”, among them the applicant in respect of the position of Director (Budget and Finance), were appointed until 31 December 2009. After that date, those new posts would be advertised and filled, in line with the recruitment procedures, the quota system and gender representation, just as in the case of the two new positions of Deputy Executive Secretary;
- c. The current Deputy Executive Secretary will be able, however, to apply for one of the new positions of Deputy Executive Secretary.

It is quite clear, therefore, that it is only in February 2009 that, for the first time, the position of Director (Budget and Finance) is referred to as a “newly created position of Director” by Council. No reason has been advanced by Council for its decision so that it is not possible for us to gauge the reasoning behind such a decision.

The court consider, however, that the position of Director (Budget and Finance) is not a new post, but is a new rank or position in the new organizational structure of the respondent, as is made clear by the documents mentioned above. Indeed, the Executive Secretary, himself, made it clear in Doc. CK10 that the applicant only migrated from the old structure into the new one and that his job content, profile and responsibilities as former Principal Finance Officer remain the same as Director (Budget and Finance), following the skills audit conducted to determine his suitability for the new rank or position in the new organizational structure. That is why the post was filled by the Applicant and not advertised, as in the case of the two new posts of Deputy Executive Secretary and the new post of Director of Human Resources and Administration. The clinching argument which demonstrates beyond doubt that there has only been at most only a change of nomenclature is that the applicant was

offered by the Executive Secretary the post of Director (Budget and Finance), following the results of the skills audit. If the Executive Secretary had some qualms about the job content and responsibilities of the new rank or position of Director (Budget and Finance) not being similar to those of Principal Finance Officer, he would surely not have appointed the applicant. After all, the Executive Secretary was in a better position than us, with his array of consultants, to come to the conclusion that there were no marked differences in the functions, responsibilities and job profiles of the two positions. It is common ground between the parties that the quota system only applies to the creation of new jobs, since it would be unlawful to apply the quota system retrospectively to existing staff, as rightly pointed out by Counsel on both sides. Since we consider that the post of Director (Budget and Finance) is not a newly-created position, the quota system, as indicated already, is not applicable to the present case.

The court consequently hold that the appointment of the Applicant by the Executive Secretary was legally in order, the more so as the Report had been approved by Council, as mentioned already. No doubt the Executive Secretary can only appoint the Applicant under terms and conditions of service determined by Council under Article 15(1)(f) of the SADC Treaty, but that is precisely what he did. Since the Applicant has been appointed on the same terms and conditions of his original contract, the court consider that he is not only entitled to a renewal of his contract of employment but also has a reasonable and legitimate expectation that his contract would be renewed, for a second and final four-year period, in the light of his track record and outstanding performance. The court accordingly declare that –

There has been a breach of the contract of employment of the Applicant by the Respondent;

- b. In terms of the contract of employment of the Applicant, as well as the Respondent's policies and practices, the Applicant is not only entitled to a renewal of his contract of employment but also has a reasonable and legitimate expectation that his contract would be renewed, for a second and final four-year period, in the light of this track record and outstanding performance.

With regard to the issue of costs, the court first refer to Rule 78 of the Rules of Procedures of SADC Tribunal (The Rules). Rule 78 provides as follows:

1. Each party to the proceedings shall pay its own legal costs.
2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party.”

In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party. the court takes the view that there are exceptional circumstances, on the particular facts of the present case, justifying the award of costs in favour of the applicant in the interests of justice. In this regard, the court have taken into account the fact that the applicant who is a high-ranking official of the Respondent has had to suffer intolerable prejudice, trouble and annoyance when he was first offered employment as Director (Budget and Finance) for only one year and then subsequently told, for no valid reason whatsoever, that he was in fact appointed as acting Director and that his acting would lapse on 31 December 2009, without a hearing and without being able to make any representations, so that in effect he was demoted and he would not be eligible, as he is entitled, to obtain a second and final four-year contract of employment with the Respondent, in spite of having a reasonable and legitimate expectation for such a renewal of his contract, in the light of his track record and outstanding performance. For the reasons given, the

court consequently make a costs order against the Respondent under Rule 78 (2) of the Rules. The costs are to be determined by the Registrar in the case of disagreement between the parties.

4.4.2 Kethusegile-Juru vs Southern African Development Community Parliamentary Forum⁷³

The dispute between the parties is about the termination of the contract of employment. The allegation is that the contract was unlawfully and unprocedurally terminated by the Respondent.

There are three preliminary objections to the application. Firstly, that the same matter is pending before the District Labour Court (DLC) for the District of Windhoek, a municipal court of the Republic of Namibia with competent jurisdiction to adjudicate on employment matters. Secondly, that the application to this Tribunal is premature in that the Applicant has failed to lodge an appeal in accordance with her conditions of employment and has thus failed to exhaust her internal remedies. Thirdly, that the Tribunal does not have jurisdiction in that it only has power to interpret the Southern African Development Community Treaty, Protocols, Subsidiary Instruments and acts of the Institutions of the Community and such other matters as may specifically be provided for in any other agreements that Member States may conclude among themselves or within the Community, and which confer jurisdiction on the Tribunal - *vide* Article 14 of the Protocol on Tribunal.

The court first considers the third objection. For easy comprehension of the case, it replicate Article 14 of the Protocol as follows: “The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: the interpretation and application of the Treaty; the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the

73 (2010) SADCT.

Community, and acts of the institutions of the Community; all matters specifically provided for in any other agreements that Member States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.”

Of relevance, for the present purpose, is paragraph (b) above which provides that the Tribunal shall have jurisdiction over all disputes which relate to “. . . acts of the institutions of the Community”. The crucial question then becomes whether the Respondent is an institution of the Community, and, if so, whether it has done an act which has given rise to the dispute now before the Tribunal.

Article 9 (1) of the SADC Treaty stipulates six institutions as having been established. Under paragraph (2) the Community may establish other institutions “. . . as necessary.” On or about September 8, 1997, the Summit, held in Blantyre in the Republic of Malawi, established the Respondent as follows: “7.8. The Summit approved the establishment of the SADC Parliamentary Forum as an autonomous institution of SADC, in accordance with Article 9 (2) of the Treaty.” The question whether the Respondent is an institution of the SADC must therefore be answered in the affirmative. There can be no doubt that it is such an institution. Regarding the question whether the Respondent has done an act which has given rise to the dispute now before us, must also be resolved in the affirmative.

The allegation is that the Respondent has unlawfully and unprocedurally terminated the Applicant’s employment with it, and Article 19 of the Protocol confers on the Tribunal exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment. The Article provides as follows: “Subject to the provisions of Article 14 of this Protocol the Tribunal shall have exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment.”

Surely, contrary to what the Applicant's Agent contended – an allegation of unlawful or unprocedural termination of a contract of employment would, in the court's opinion, have to do with, or relate to, the conditions of employment; in the Protocol the term "the Community" which is significantly not defined in the Protocol must, in our view, be given a broad and purposive meaning according to its context and accordingly include all the institutions of the Community such as the Respondent, under Article 19 of the Protocol. The context is, however, different in the SADC Treaty since the Community is expressly defined in Article 2 thereof as the Southern African Development Community or SADC.

The court now refer to the first objection which is that the same matter is pending before the DLC for the District of Windhoek which is a court of competent jurisdiction on employment matters, as indicated already. The court agree that persons should be prevented from abuse of remedies through concurrent proceedings, a generally recognized rule of international law. But we consider that this is a matter, in terms of the Protocol, over which the Tribunal is better placed to exercise jurisdiction than any other court or tribunal by reason that it has exclusive jurisdiction to do so.

Finally, with regard to the second objection, namely, that the Applicant has not exhausted internal remedies in that she has not lodged an appeal in accordance with her conditions of employment, and that this application is premature, the court take the view that the objection is certainly not about the jurisdiction of the Tribunal. It is a matter which would be decided on the evidence and, therefore, it cannot be raised at this stage of the proceedings.

In the result, the court dismiss all the preliminary objections. The Applicant is properly before us and we have jurisdiction to consider her application. It is so ordered.

4.4.3 **Mondlane vs SADC Secretariat**⁷⁴

The Applicant was employed by the Respondent in the position of Head of Policy and Strategic Planning. The dispute between the parties is about the terms and conditions of the contract of employment. The Applicant alleges that the Respondent is in breach of the contract by, among other things, its unlawful, improper and unjustifiable refusal to extend the Applicant's contract of employment, its discriminatory and unfair treatment of the Applicant and by its unilateral imposition of unfair contractual terms.

The court thought it pertinent to point out at the outset that on October 21, 2009 the Tribunal made an order restraining the Respondent from taking any steps to the detriment of the Applicant as follows:

1. Respondent is restrained and prohibited from advertising for possible recruitment the position of Director: Policy, Planning and Resource Mobilization;
2. Respondent is restrained and prohibited from recruiting and filling the position of Director: Policy, Planning and Resource Mobilization within the SADC Secretariat and which is currently held by the Applicant;
3. Orders 1 and 2 shall prevail pending the hearing and determination of the main application.
4. Respondent is compelled and directed to retain Applicant in its employ after 31 December 2009 should the main application not be determined by that date.
5. The Tribunal awards no costs to the Applicant as there are no exceptional circumstances shown.” – vide **Angelo Mondlane vs SADC Secretariat**⁷⁵

On or about November 11, 2005 the parties entered into a contract of employment. The contract was contained in the letter of offer dated November 09, 2005 (Doc. AM1). The

74 (2010) SADCT 07/2009.

75 (2009) SADCT 42.

Applicant accepted the offer by appending his signature thereto on November 11, 2005; he commenced work on January 01, 2006. The letter of offer, among other things, stipulated thus:

“This letter, together with the SADC Administration Rules and Procedures Handbook, constitute your contract of employment.”

Clause 15.3.5 of the Handbook concerns Regional Posts; there is no dispute that the position occupied by the Applicant is one such post. The clause provides:

“An employee in a Regional Post shall inform the Head of the Institution, in writing, whether he/she wishes to be considered for a further term of office, not less than six months before the expiration of his/her contract or secondment. In the event that he/she wishes to be considered for a further term, the Head of Institution shall inform the officer, in writing not less than four months before the expiration of his/her contract, whether it is the intention of the Institution to renew his/her contract.”

It seems it is an established practice that an employee of the Respondent who desires to renew his contract of employment is entitled to do so for a second and final term of four years, if his performance has been satisfactory.

In terms of the organizational structure the Applicant, at the time of his appointment, was immediately below the Executive Secretary of the Respondent (the Executive Secretary); in other words, he reported directly to the Executive Secretary.

During the period between 2006 and 2008, a Job Evaluation exercise was carried out within the Respondent. The purpose of the exercise was, among other things, to determine a new organizational structure of the Respondent, and job specifications, descriptions and grading. The position held by the applicant, following the exercise became or changed to that of Director: Policy, Planning and Resource Mobilization.

During the course of the exercise, a skills audit of the Respondent's staff was also carried out with a view to assessing the suitability of the existing staff for the new organizational structure.

By a letter dated December 12, 2008, the Executive Secretary informed the Applicant as follows:

“Dear Dr. Mondlane

Migration into new SADC Secretariat Structure

Following the result of the Skills Audit, I am pleased to inform you that you have been appointed as Director: Policy and Planning – Personal to Holder (the underlining is ours).

Your new job grade will be 3 (46,145 x 910 – 51,605) and your Salary will be All other benefits and conditions of your contract remain unchanged. This change is with effect from October 1st, 2008.”

In or about February 2009, the SADC Council of Ministers (Council) resolved to appoint the Applicant, to the position of acting Director of Policy, Planning and Resource Mobilization, which it regarded as newly created, following the Job Evaluation exercise above mentioned, up to December 31, 2009. We shall elaborate on this issue later. It is observed at this stage that this is the post to which the Applicant had already been appointed in a substantive capacity through the letter dated December 12, 2008. It is noteworthy that this is the first time that this position is being described as a newly created post. It is further observed that the effect of the resolution was to have ended the Applicant's contract of employment on December 31, 2009, without the Applicant having been accorded the right of renewal of his contract for a second and final period of four years.

It is in these circumstances that the court considered whether:

- a. The appointment of the Applicant by the Executive Secretary in December 2008 (Doc. AM 3) was valid or was *ultra vires* the powers of Council to determine the terms and conditions of the Respondent's staff, as contended by the Agent of the Respondent, and the resolution of Council in February 2009 appointing the Applicant as acting Director of Policy, Planning and Resource Mobilization until 31 December 2009 for that "newly created position" was valid or constitutes, as submitted by learned Counsel for the Applicant, an unlawful and unjustified demotion; the position of Director (Policy, Planning and Resource Mobilization) is a newly created post or is it the same as that previously held by the Applicant; the contract of employment between the parties is that concluded on November 11, 2005 or not; the Applicant was ever appointed in an acting position; and the Respondent is in breach of its contractual obligations towards the Applicant.

During the course of 2006-2008 a Job Evaluation exercise, as indicated already, was carried out within the Respondent, the purpose of which, among other matters, was the determination of a new organizational structure for the Respondent, job specifications, descriptions and grading. In the course of this exercise, a skills audit of the Respondent's existing staff was also undertaken, the purpose of which was to facilitate the migration of the existing staff members into the new organizational structure. New posts were created and there was also a change in the nomenclature of some of the existing posts within the Respondent.

Whereas in the old structure the Applicant held the post of Head of Policy and Strategic Planning, in the new one he occupied that of Director of Policy, Planning and Resource Mobilization. Doc. AM3 confirmed in its heading that the Applicant's post was a migration into the New SADC Secretariat Structure and that, following the results of the skills audit, the

Applicant, who had achieved a 80% proficiency evaluation score had been appointed as “Director of Policy and Planning, Personal to Holder”, as from 1 October 2008, with all other benefits and conditions of his original contract of November 2005, remaining unchanged.

In terms of the original contract of November 2005, the SADC Administration Rules and Procedures Handbook forms part of the contract of employment concluded by the Applicant with the Respondent, as mentioned already. At this stage reference may be usefully made to the following facts:

At the meeting of Council in Lusaka, Zambia in November 2007, Council reviewed the Job Evaluation exercise and decided that the functions of the Strategic Advisor should be fused in a Unit under one of the Deputy Executive Secretaries and that two new additional posts were to be created, a second position of Deputy Executive Secretary and the creation of a position of Director Human Resources.

The Report of the Executive Secretary on the Implementation of the Job Evaluation subsequently sets out the three new posts, with their functions, skills and experience profile, namely Deputy Executive Secretary (Regional Integration), Deputy Executive Secretary (Finance and Administration) and Director (Human Resources and Administration). The report also highlights the fact that the respondent will adhere to the quota system and gender representation “before any recruitment of personnel in the new structure” is made.

As for “the skills audit of the existing staff members to determine the suitability of translating to new ranks and positions in the proposed structure”, the Report in paragraph 2.1.25 states as follows:

“In the event that some positions within the organization are no longer required, rendering current incumbents redundant, or the individual does not have the requisite skills needed for the job the following alternatives are proposed: Apply the Personal to Holder

principle in the event that the staff member occupies a position whose grade is lower than the grade the staff member currently occupies”.

The court deliberately mentioned this paragraph of the Report just to show that it is not in any respect applicable to the Applicant, least of all the Personal to Holder principle, so that the court is at a loss to understand why it was mentioned in Doc. AM3.

The SADC Troika considered Doc. AM11 at its meeting of February 2008 in Pretoria, South Africa and approved, *inter alia*, the three new posts and the skills audit of the existing staff members.

Council, at its meeting, in February 2008 in Lusaka, Zambia approved the decisions of the Troika. In the Management Structure, there were only three new posts, namely, Deputy Executive Secretary (Regional Integration), Deputy Executive Secretary (Finance and Administration) and Director (Human Resources and Administration).

Council at its meeting in August 2008, in Sandton, South Africa noted that the SADC Treaty must be amended to accommodate the recruitment of a second Deputy Executive Secretary and that, if that position were approved by Summit, “this post would be advertised immediately, in line with the quota system and ensuring gender balance”.

Council also mentioned that the Job Evaluation exercise had resulted in the creation of new positions as well as the downgrading, upgrading and standardization of nomenclature of other positions. “All staff would be assessed through the skills audit to determine their suitability or non-suitability *vis-à-vis* those positions on the new structure” as provided for in the Implementations Plan approved by Council in February 2008 – *vide* Doc. AM14.

Council at its meeting, in closed session in February 2009 in Cape Town, South Africa noted that the Director of Human Resources and Administration was appointed and assumed duty in December 2008 and took the following decisions:

It approved Doc. AM11 on the Implementation of the Job Evaluation exercise and the outcome of the skills audit; the two acting Directors for “the newly created positions of Directors”, among them the Applicant in respect of the position of Director (Policy, Planning and Resource Mobilization) were appointed until 31 December 2009. After that date, those new posts would be advertised and filled, in line with the recruitment procedures, the quota system and gender representation, just as the two new positions of Deputy Executive Secretary; the current Deputy Executive Secretary would be able, however, to apply for one of the new positions of Deputy Executive Secretary.

It is quite clear that it is only in February 2009 that, for the first time, the position of Director (Policy, Planning and Resource Mobilization) is referred to as a “newly created position of Director” by Council. No reason has been given for such a decision so that it is not possible for us to understand and test the reasoning behind such a decision – *vide* also **Clement Kanyama vs SADC Secretariat**⁷⁶

The court consider, however, that the position of Director (Policy, Planning and Resource Mobilization) is not a new post but that it is a new rank or position in the new organizational structure of the Respondent, as is made clear by Doc. AM9 to 13, referred to above. Indeed, the Executive Secretary himself expressly stated in Doc. AM3 that the Applicant only migrated from the old structure into the new one and that his job content, profile and responsibilities as former Head (Policy, and Strategic Planning Unit) remain the same as Director (Policy, Planning and

76 05/2009 SADCT.

Resource Mobilization) following the skills audit conducted to determine his suitability for the new rank or position in the new organizational structure. That is why the post was filled by the Applicant and not advertised as in the case of the two new posts of Deputy Executive Secretary and the new post of Director of Human Resources and Administration – *vide* also **Clement Kanyama**, cited above.

The clinching argument to show beyond reasonable doubt that there has only been at most only a change of nomenclature is that the Applicant was offered by the Executive Secretary the post of Director (Policy, Planning and Resource Mobilization) following the outcome of the skills audit at which he had obtained an 80% proficiency evaluation score.

If the Executive Secretary had certain reservations about the job content and responsibilities of the new rank or position of Director (Policy, Planning and Resource Mobilization) not being identical to those of Head (Policy and Strategic Planning), he would surely not have appointed the Applicant. After all, the Executive Secretary, with an array of consultants at his disposal, was in a better position than us to compare Documents AM2 and AM9 and come to the conclusion, as he did, that there were no marked differences in the functions, responsibilities and job profile, of the two positions.

It is common ground between the parties that the quota system only applies to newly-created jobs, since it would be unlawful to apply the quota system retrospectively to existing staff, as rightly pointed out by Counsel on both sides. Since we consider that the post of Director (Policy, Planning and Resource Mobilization) is not a newly-created position, the quota system, as indicated already, is not applicable to the present case.

The court consequently hold that the appointment of the Applicant by the Executive Secretary was legally in order, the more so as his Report on the Implementation of the Job

Evaluation had been approved by the Council, as indicated already. No doubt the Executive Secretary could only appoint the Applicant under terms and conditions of service determined by the Council, and that is precisely what he did, as demonstrated by the chronology of events highlighted by the court above.

Since the Applicant has been appointed on the same terms and conditions as his original contract, the court was of the considered opinion that he is not only entitled to a renewal of his contract of employment but also has a reasonable and legitimate expectation that his contract would be renewed for a second and final four-year period beginning from 1 January 2010, in the light of his track record and his more than satisfactory performance.

The court consequently hold that the Applicant had never been appointed as acting Director (Policy, Planning and Resource Mobilization) and that Council's purported resolution to appoint the Applicant as acting Director until 31 December 2009 was not legally in order in the circumstances. The court consequently declared that –

the contract of employment (Doc. AM1) between the Applicant and the Respondent is the one entered into on 11 November 2005, as amended by the letter dated 12 December 2008 there has been a breach of contract of employment of the Applicant by the Respondent; in terms of his contract of employment as well as the Respondent's policy and practice, the Applicant is not only entitled to a renewal of his contract of employment for a further period of four years but also has a reasonable and legitimate expectation that his contract would be renewed with effect from 1 January 2010, in the light of his track record and his more than satisfactory performance.

With regard to the issue of costs, the court first refer to Rule 78 of the Rules of Procedures of SADC Tribunal. Rule 78 provides as follows:

1. Each party to the proceedings shall pay its own legal costs.

2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party.”

In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

The court consider that there are exceptional circumstances on the particular facts of the present case justifying the award of costs in favour of the Applicant in the interests of justice. the court have taken into account, in this respect, especially the fact that the Applicant who is a top official of the Respondent has had to suffer intolerable prejudice, trouble and annoyance when he was first offered employment as Director in December 2008 and then subsequently told in 2009, for no valid reason whatsoever, that he was in fact appointed as acting Director and that his actingship would lapse on 31 December 2009, so that in effect he was demoted and he would not be eligible, as he is entitled, to obtain a final four-year contract of employment with the Respondent, in spite of having a reasonable and legitimate expectation for such a renewal of his contract, in the light of his track record and his more than satisfactory performance – as also **Clement Kanyama**, quoted above.

For the reasons given, the court consequently award costs to the Applicant under Rule 78 (2) of the Rules. The costs are to be determined by the Registrar in the case of disagreement between the parties.

4.4.4 Swissbourgh Diamond Mines (Pty) Ltd and Others vs Kingdom of Lesotho⁷⁷

The application initiating proceedings was issued on June 15, 2009. It was served on the Respondent on June 22, 2009. In terms of Rule 36(1) of the Rules of Procedure of the Southern African Development Community (SADC) Tribunal, hereinafter referred to as the Rules, the

77 (2009) ZIR 215.

period within which the Respondent was required to have filed a defence is thirty (30) days, which expired on or about July 22, 2009. On July 13, 2009, the Respondent applied for an extension of the period. The application was granted. The Respondent was allowed a further period of sixty (60) days within which to file a defence. This period was to expire on or about September 21, 2009, in terms of Rule 84 of the Rules. On September 7, 2009 the Respondent brought an application for a further extension of the period. On the basis that the circumstances had not changed warranting further extension, the application was, on September 30, 2009, refused. Despite this, the Respondent still filed the first part of a purported defence; this was October 16, and the second part thereof on November 24, 2009. The Respondent also, on November 24, filed the present application for condonation of the late filing of the defence.

The court thought this is a convenient stage at which to refer to the applicable principles in an application for condonation. In the case of **Kodzwa vs Secretary for Health and Another**⁷⁸, the Supreme Court of Zimbabwe quoted, with approval, from a textbook on practice and procedure: Herbstein and Van Winsen's *The Civil Practice of the Supreme Court of South Africa*, the following passage:

“Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance.

The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The facts usually weighed by the court in considering applications for condonation include the degree of non-compliance, the explanation for it, the importance of the case,

78 1991 (1) ZLR 313

the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

It is, therefore, well established that the court has discretion to grant condonation when the principles of justice and fair play demand it, and when the reasons for non-compliance with the rules have been explained by the applicant/appellant to the satisfaction of the court.”

This passage was also quoted, with approval, in the case of **Willowcreek Farm (PVT) Limited vs Devon Engineering**⁷⁹, among others.

The court found this passage very instructive. It contains the correct principles governing the requirement for the grant or refusal of condonation. A court has a discretion which it has to exercise judicially and according to established principles of law, not the caprice of an individual judge; a court has to take into account all the facts which are before it. It has to consider: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or non-compliance with time frame; (c) the prospects of success or *bona fide* defence in the main case; (d) the importance of the case; (e) the Respondent's interest in the finality of the judgment; (f) the convenience of the court, and (g) the avoidance of unnecessary delay in the administration of justice – see **Forster vs Stewart Scott Inc**⁸⁰.

In deciding this application, the court bears in mind that these factors are not individually decisive; they are interrelated and must be weighed against each other. the court also takes into account that a good explanation for lateness or failure to comply with the time frame is shown by giving a reasonable explanation that shows how and why the default occurred, and that if it appears to the court that the default was willful or was due to gross negligence on the part of the Respondent, the court should decline the granting of condonation. Regarding the prospects of

79 (2004) HCR p289.

80 (1997) 18 ILJ 367 (LAC).

success or *bona fide* defence, the court bears in mind that all that needs to be shown is the likelihood or chance of success when the main case is heard – as was decided in **Sareiva Construction (Pty) Ltd vs Zulu Electrical Engineering Wholesalers (Pty) Ltd**⁸¹ and **Chetty vs Law Society**⁸² the court applies the above principles to the circumstances of the present application regarding the length or any negligence attached to the delay, and the public importance of the case. The Respondent has informed us that a period of nearly nine years had elapsed, after the matter was concluded in the Court of Appeal (the highest court) of the Respondent, before the filing of the application in the main case; that the trial itself, in the High Court, lasted some sixty-four court days spreading over nearly three years, i.e. from May 1996 to April 1999; that the Respondent is faced with a very lengthy application in the main case with prayers taking some 12 pages, the statement of claim stretching over 541 pages (based on 2030 pages of evidentiary material annexed thereto), and referring also to approximately 35,000 pages of additional documents, with an indication that copies of the entire record of proceedings in the municipal courts as well as the bundle of documents exceeding 20 000 pages would be placed before the Tribunal, if it should become necessary. The Respondent, therefore, submitted that the briefest consideration of only those papers filed makes it clear that an adequate defence could not be formulated within the 30 days prescribed by the Rules of the Tribunal. Faced with such a time limit, the Respondent approached the Tribunal for an extension of the time in which to file its defence; sixty days were granted, as we have mentioned above.

When, towards the expiry of the extended period, it became apparent to the Respondent that it was impossible to file an adequate defence within the time allowed, an application for a further extension was immediately made. The application was refused, as we have said above,

81 (1975) (1) SA 612 (D)

82 (1985) (2) SA p765 A-C.

whereupon the Respondent filed the part of the defence which had already been formulated, albeit outside the period allowed. The remaining part of the defence was filed on November 24, as we have already indicated.

The Respondent has also submitted that the matter is of considerable public importance in that the amount of money involved is very substantial in relation to the size of the economy of the Respondent; the claim amounts to more than ZAR 1324 million. The Respondent has, therefore, argued that it would be wrong not to allow it to be heard, having shown the desire to be heard, notwithstanding that it has not acted within the time limits.

The Applicants oppose the application. They contend mainly that the Respondent's failure to meet the extended deadline was caused by the same circumstances that had already been earlier considered, namely, the length and nature of the applicant's case, and that the events spanned many years the court bears in mind that the standard for considering an application for condonation is the interest of justice and that whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. The circumstances that are relevant in this application are the extent and cause of the delay, the nature of the relief sought and the importance of the matters raised in the main case. In this connection, the court had to consider the length of the interval (nine years) between the time of the conclusion of the matter in the municipal court and its resuscitation in the Tribunal, which meant that the Respondent was faced with having to answer factual allegations stretching back that long period in some ninety days. The court also had to consider the size of the record. the court had to consider the manner in which the Respondent has approached the whole matter; it has shown the desire to be heard and the wish to comply with the prescribed time limits, it has promptly taken steps whenever it appeared that it would not be possible to do so. In the circumstances, we are of the view that the

Respondent's explanation for late filing of the defence is reasonable and excusable, and that it is without any negligence on its part. The court also examined the Respondent's defence and has considered the public importance of the matter from the point of view of the large amounts of money involved. The court was of the opinion that it would only be fair and proper that the Respondent be accorded the opportunity to be heard on the allegations upon which the Applicants rely in the main case. In the result, the court held that the Respondent has shown sufficient cause to be excused from compliance and that it is, in the circumstances, in the best interest of justice that the application to condone the late filing of the defence be allowed, and it is, therefore, hereby granted.

4.4.5 Bach's Transport (Pty) Ltd vs Democratic Republic of Congo⁸³

This is an application for a decision in default brought in terms of Article 25 of the Protocol on Tribunal (the Protocol) read with Rule 68 of the Rules of Procedure of SADC Tribunal (the Rules). The Applicant seeks an order in the following terms:

“That the Government of the Democratic Republic of Congo (DRC) be ordered to pay:

Damages to the Applicant in the sum of US\$1,988 079.49 per annexure BT19

2. *Costs of the suit at Attorney Client scale*

10% interest from October 2006 to May 2007 Further and/ or any alternative relief.”

The application was filed with the Office of the Registrar on 29 August 2008. It was served on the Respondent through its Embassy in Lusaka, Zambia on 2 November 2008. However, the Respondent failed to file a defence to the application as required by Rule 36(1) of the Rules, which provides as follows:

83 (2008) SADCT 14.

“The respondent shall file a defence within thirty (30) days of service of the application or notification stating:

- The name and address of the Respondent;
- b. the name and address of the Respondent’s agent;
- c. arguments of facts relied upon;
- d. the form of Order sought by the Respondent;

The nature of any evidence offered by him or her or it in defence.”

As a result of the Respondent’s failure to file a defence, the Applicant made an application for a default decision. The hearing of the application was set down for 17 July 2009. On 17 July 2009 when the application was about to be heard, the Respondent’s agent appeared and raised a preliminary objection to the application. He argued that the Respondent had never received the application initiating proceedings. The record, however, shows that the application had been served on the Respondent through its Embassy in Zambia on 2 November 2008. The Tribunal then ordered that the Respondent should be served with the application through its Embassy in Windhoek, Namibia on the same day, that is, 17 July 2009. Service of the application was effected in accordance with Rule 83(1) (a) of the Rules, which states as follows: “Any notice or other document which is required to be served by these Rules shall be served by registered post with a form for acknowledgment of receipt or by personal delivery of the copy against a receipt.”

Moreover, the application was also served personally on the Respondent’s Agent at the Tribunal who promised to give a response thereto. However, again, the Respondent failed to respond or file any defence to the application.

The application for a default decision was again set down for hearing on 25 March 2010. Agents for both parties were present at the hearing. Before the Agents made their submissions,

the Respondent's Agents raised three preliminary points. Firstly, they argued that the Applicant is not a legal person capable of bringing an application before the Tribunal as provided for in the Protocol. Secondly, the Agents argued that the Applicant had not exhausted local remedies either in the DRC or Botswana. Thirdly, the Respondent's Agents challenged the amount of US\$1, 988 079.49 claimed by the Applicant. They argued that the amount is exaggerated and is not commensurate with damages caused to the Applicant.

The court noted at this stage that it was clear that the application had been filed and served on the Respondent by the Applicant in accordance with the Rules. However, the Respondent did not file its defence to the application. The power of the Tribunal to grant default decisions are provided for under the Protocol and the Rules. In terms of Article 25 of the Protocol:

1. The Tribunal may give a decision in default.

Before giving such a decision the Tribunal shall satisfy itself that it has jurisdiction over the dispute and that the claim is well-founded in fact and law.

2. A party against whom a default decision is made may apply to the Tribunal for the rescission of such decision. The Applicant shall set out the ground for such application.”

Further, Rule 68 of the Rules provides as follows:

“1. Where a respondent on whom an application initiating Proceedings has been duly served fails to file a defence to the application in the proper form within the time prescribed in the Rules, the applicant may apply for a decision in default.

2. The application shall be served on the respondent and the President shall fix the date for the hearing of the application.

3. (a) Before granting the application, the Tribunal must be satisfied that the application initiating proceedings is properly before it, discloses a cause of action and that appropriate formalities have been complied with.

(b) It is clear from both Article 25 of the Protocol and Rule 68 of the Rules that the Tribunal has the power to grant default decisions. Before granting a default decision, however, the Tribunal must satisfy itself of the following: firstly, that it has the jurisdiction over the dispute or that the application is properly before it; secondly, that the claim is well-founded in fact and law or that it discloses a cause of action; thirdly, that the application for a decision in default is in the proper form within the time prescribed in the Rules, and fourthly, that the appropriate formalities have been complied with.

The first issue that the Tribunal should decide is whether it has jurisdiction over the dispute. The issue of jurisdiction is regulated by Article 15 (1) of the Protocol, which provides as follows:

“The Tribunal shall have jurisdiction over disputes between Member States, and between natural and legal persons and Member States.”

The Applicant is not a natural person. It is a legal person incorporated under the Laws of Botswana (Doc.BT3) and has brought an action against the Respondent, which is a Member State of SADC. This application, therefore, concerns a legal person and a Member State and as such falls within the ambit of Article 15(1) of the Protocol.

Furthermore, Article 15(2) of the Protocol provides as follows:

“No natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.”

It should be noted that, although the court raised the issue of exhaustion of local remedies in so far as it is germane as to whether the Tribunal has jurisdiction to hear the application, the Respondent has also raised it in its preliminary objection.

The Applicant's representative had stated in paragraph 13 of his Founding Affidavit as follows:

"I aver that all available avenues within DRC legal systems were exhausted and nothing fruitful was achieved even diplomatic channels also failed."

The Applicant's representative also went on to state that after the Applicant's truck and trailer were impounded by the Congolese Control Officers, he lodged a complaint with the Attorney General at the High Court in DRC. The Attorney General advised him to contact a lawyer for assistance. The Attorney General even called a lawyer for the Applicant by the name of Eric Mumwena Kasongo of Muyabo & Associates. The services of one Mr. Eric Kasongo were hired by the Applicant to get its truck and trailer released from the Congolese Control Officers. However, the truck and trailer were not released but sold at a public auction. Thereafter, the Applicant tried in vain to contact Mr. Eric Kasongo for legal assistance and instructed another lawyer by the name of one Mr. Vital Mbuyo Kinanzula who did nothing.

The Applicant's representative further averred that the problem was compounded by the fact that the legal system of the Respondent uses French as its official language, which he does not speak and every time he needed documents to be translated into English he had to pay, which proved a costly affair.

Further, the Applicant's representative stated in paragraph 12 of his Founding Affidavit that:

"I aver that at one stage I was informed by my lawyer, Eric to pay him some money so that he can in turn pay judges and other

judicial officers. I refused to do that and I believe that my case failed to go through the system because of my refusal to pay the authorities.”

Finally, the Applicant’s representative stated in his Founding Affidavit that he contacted the Ministry of Foreign Affairs in Botswana which in its turn contacted the Embassy of the Respondent in Lusaka and the South African Consulate in the DRC but to no avail. Clearly, there is evidence supported by documents that the Applicant tried to utilize the legal system of the Respondent to have its truck and trailer released but was unsuccessful. It even tried to use the diplomatic channels available but was equally unsuccessful. It was clearly unable to proceed under the domestic legal system of the Respondent. In **Mike Campbell (PVT) Ltd vs The Republic of Zimbabwe**⁸⁴, the Tribunal observed at p. 21:

“However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. . . . These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal.”

Consequently, the Tribunal considers that the Applicant has tried unsuccessfully to obtain redress under the municipal legal system of the Respondent. The Tribunal, therefore, holds that it has the jurisdiction to entertain the application.

Article 25 of the Protocol and Rule 68 of the Rules also require that the Tribunal should satisfy itself that the claim is well-founded in fact and in law. This means that the application should have both a factual and legal basis.

The application brought against the Respondent is a claim for damages in the sum of US\$1, 988 079.49. The damages arose from the unlawful seizure and sale by public auction of

84 (2007) ZACC 14.

the Applicant's truck and trailer by the Respondent's Control Officers in Lubumbashi in the DRC. The circumstances relating to the unlawful seizure and sale of the truck and trailer and the costs incurred by the Applicant relating to such seizure and sale are spelt out in the Founding Affidavit of the Applicant's Representative. The Respondent did not file any defence challenging the unlawful seizure and sale of the Applicant's truck and trailer and the costs incurred by the Applicant relating to such seizure and sale. the court consider that the Applicant's claim is well-founded in law and fact, as envisaged by Article 25 of the Protocol as read with Rule 68 of the Rules.

With regard to the issue of formalities for initiating an application as laid down in Rule 32 of the Rules, the court was satisfied on the record before it that they have been complied with by the Applicant. Rule 35 deals with service of applications and notifications. It provides in paragraph 1 that the Registrar shall transmit a certified copy of the application to the Respondent. Rule 35 (1) is complemented by Rule 83(1) (a) which provides that service of notice or document required to be served under the Rules shall be served by registered post with a form or acknowledgement of receipt.

It is abundantly clear, from the record before the court that the application was initially served on the Respondent through its Embassy in Zambia on 2 November 2008, as indicated already. The application was also served on the Respondent's Agent at the Tribunal when he appeared to argue the case, on 17 July 2009. The application was subsequently served on the Respondent through its Embassy in Namibia on the same day.

The last issue that remains to be decided is whether the Applicant is entitled to the amount of damages it has claimed. It was argued on behalf of the Respondent that the Applicant's claim was exaggerated and that the true value of the truck and trailer of the

Applicant was estimated by an insurance company in April 2007 at US\$25,000. It was further contended that the truck and trailer had been in operation since 1996 and there was no basis for the Applicant's claim.

The court noted, however, that the Respondent did not adduce any evidence to substantiate the argument of its Counsel that the Applicant's claim was exaggerated or to indicate the value of the truck and trailer at the time they were impounded by the agents of the Respondent. The court also noted that the Applicant had later recovered its truck, which was damaged due to constant use but that its trailer had never been found.

In the circumstances, the Tribunal holds that the Applicant is entitled to a default decision in terms of Article 25 of the Protocol and Rule 68 of the Rules.

The court therefore make the following orders: The Respondent shall pay damages to the Applicant in respect of its truck and trailer and such damages are to be assessed by the Registrar. The Respondent shall pay legal interest on such damages.

With regard to costs, the court refers to Rule 78 of the Rules. Rule 78 provides as follows:

1. *Each party to the proceedings shall pay its own legal costs.*
2. *The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party."*

In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

The court consider that there are exceptional circumstances on the particular facts of the present case justifying the award of costs to the Applicant in the interests of justice. We have taken into account, in this respect, especially the fact that the Applicant has had to suffer prejudice and material damages when its truck and trailer were unlawfully impounded in October 2006 by the agents of the Respondent and that the Respondent tried all means of delaying tactics

to prevent the Applicant from getting a decision from the Tribunal. We accordingly award costs to the Applicant under Rule 78(2) of the Rules. The costs are to be determined by the Registrar in case of disagreement between the parties.

4.4.6 Fick and Another vs Republic of Zimbabwe⁸⁵

This application is brought under Article 32 (4) of the Protocol on Tribunal (the Protocol) in order that the Tribunal may report the failure by the Republic of Zimbabwe (the Respondent) to the Summit for its appropriate action, pursuant to paragraph 5 of that Article. It is made on the basis of two earlier decisions of the Tribunal in respect of the case of **Mike Campbell (Pvt) Limited and others vs The Republic of Zimbabwe⁸⁶**, and the case of **William Campbell and Another vs The Republic of Zimbabwe⁸⁷**. In the former case, the Tribunal held that the Respondent was in breach of Articles 4 (c) and 6 (2) of the Southern African Development Community Treaty and made the necessary order which we will refer to later in this ruling. In the latter case, the Tribunal found that the Respondent had failed to comply with the decision in the former case and reported such failure to the Summit to take appropriate action in terms of Article 32 (5) of the Protocol which provides:

“If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.”

Despite this, the Respondent has continued to violate the decision of the Tribunal. Three instances of the violation may be highlighted, amongst others. Firstly, there is abundant evidence before us to the effect that the lives, liberty and property of all those whom the decision meant to protect have been endangered.

85 (2010) ZACC 22.

86 (2007) ZACC 14.

87 (2009) ZACC 16.

Secondly, in a letter dated 12 August, 2009 the Minister of Justice and Legal Affairs of the Respondent informed the Tribunal as follows:-

“We hereby advise that, henceforth, we will not appear before the Tribunal and neither will we respond to any action or suit that may be instituted or be pending against the Republic of Zimbabwe before the Tribunal. For the same reasons, any decisions that the Tribunal may have made or may make in the future against the Republic of Zimbabwe, are null and void.”

Indeed, it is no surprise that the Respondent was not represented during the hearing of this application. Thirdly, an attempt to register and enforce the decision of the Tribunal, pursuant to Article 32 (1) of the Protocol, has been refused by the High Court of Zimbabwe –*vide* the case of **Gramara (Private) Limited and Another vs The Government of the Republic of Zimbabwe**. . (HC33/09) in which the Court stated as follows:

“In the result, having regard to overwhelmingly negative impact of the Tribunal’s decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international obligations of the Government, I am amply satisfied that the registration and consequent enforcement of the judgment would be fundamentally contrary to the public policy of this country.”

Article 32 (1) provides as follows:

“The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the Member State in which the judgment is to be enforced shall govern enforcement.”

And under paragraph 3 of that Article, the decision of the Tribunal is binding upon the parties to the dispute in respect of a given case and is enforceable within the territory of the Member State concerned.

It will be recalled that in the **Campbell** case, the Tribunal directed the Respondent to take all necessary measures, through its agents, to protect the possession, occupation and ownership

of the land of the applicants and to take all appropriate measures to ensure that no action is taken directly or indirectly, whether by its agents or others, to evict the applicants from, or interfere with their peaceful residence on, the land.

In light of the foregoing, it is evident that the Respondent has not complied with the decision of the Tribunal. The court, therefore, holds that the existence of further acts of non-compliance with the decision of the Tribunal has been established, after the Tribunal's decision of June 5, 2009 under which the earlier acts of non-compliance have already been reported to the Summit. Accordingly, the Tribunal will again report this finding to the Summit for its appropriate action.

The court notes also that the fourth and fifth Applicants were not parties to either of the two earlier applications. Their application is, therefore, dismissed.

Finally, we consider that there is ample justification for a costs order to be made against the Respondent, pursuant to Rule 78(2) of the Rules of Procedure of the SADC Tribunal, since the Respondent has continued to violate the decision of the Tribunal. The costs are to be agreed by the parties. In case of disagreement, the Registrar should determine the costs to be awarded.

4.5 Challenges and Prospects in Human Rights Protection in SADC Region

It is beyond doubt that the various protocols and resolutions adopted by the SADC contain provisions which uphold human rights norms. Should the current human rights jurisdiction of the SADC Tribunal in respect of natural and legal persons be withdrawn, even if temporarily, it will leave a protection/remedy vacuum in respect of those human rights. As illustrated above (II-2.1) the existence of remedies is fundamental to effective protection of human rights, such a vacuum renders the treaty obligations ineffective. We must presume that the intention was not to create ineffective treaties or treaty obligations.

Furthermore it is our submission that in respect of African women the SADC Member States have an obligation in terms of Article 25 of the African Women's Protocol to ensure the establishment of effective judicial remedies. Particularly, they have an obligation not to limit or extinguish an existing remedy. This obligation must be further considered in light of the SADC Protocol on Gender and Development which is applicable inter alia through Article 21 of the SADC Treaty.

The obligation to observe obligations in good faith is codified in Article 26 of the Vienna Convention on the Law of Treaties, 1969 as part of the principle of *pacta sunt servanda*. Furthermore Principle 7 of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations enshrines the principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter. In elaboration it is also stated that "Every State has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law".

In the Case Concerning the Territorial Dispute⁸⁸ Judge Ajibola quotes with approval the following statement made by Rosenne:

"It is a cardinal principle of interpretation that a treaty should be interpreted in good faith and not lead to a result that would be manifestly absurd or unreasonable".⁸⁹

In the La Bretagne Arbitration⁹⁰ the arbitrator stated that the principle of good faith is a principal factor in performance of treaties, affording a sufficient guarantee against any risk of the

88 Libya v Chad (ICJ) 100 ILR 1-114.

89 Ibid.

90 Canada vs France 82 ILR 814.

parties exercising their rights abusively. Furthermore the parties must show restraint, moderation and reasonableness in the exercise of treaty rights.⁹¹

Breach of the good faith obligation engages international responsibility.⁹² Applying the principle of good faith to the human rights context, the Inter-American Court of Human Rights stated the following in the Advisory Opinion on Habeas Corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6) of the American Convention on Human Rights⁹³:

It is our submission that this obligation places the following demands on States: i. obligations and rights flowing from treaties are to be interpreted reasonably; and rights accruing from a treaty are not to be exercised abusively, implying that there is an obligation not to adopt mala fide and frivolous amendments to treaties; the objects and purposes of the treaty should be kept in mind in its application.

To interpret the SADC Treaty as permitting sudden and multiple changes to a fundamental aspect of the framework, such as the competence of its judicial organs is absurd and unreasonable. (b) The SADC Tribunal Review Process is Mala Fide and Frivolous. The parties to treaties are under an obligation not to exercise their treaty rights abusively. We maintain that the right of the Member States to amend the treaty is being abused through the current review process. The process is being used as a sanction for the SADC Tribunal.

Whilst we accept that natural and legal persons are not parties to the SADC Treaty nor Protocols, they are nonetheless the beneficiaries of the SADC integration process, and to that extent their concerns should not go unheeded in exercise by States of their sovereign rights.

91 Ibid. at p. 614.

92 Ibid. at p. 670.

93 96 ILR 392-404.

The allegations of mala fides are made without prejudice and respectfully. The action of the Summit, in suspending the SADC Tribunal for a period of over two years, is evidence of breach of the principle of *pacta sunt servanda* and mala fides. Objectively, whilst the

Summit has a qualified power to dissolve the Tribunal, the power to suspend the SADC Tribunal falls patently outside the Summit's competence. The restoration followed by curtailment of the human rights jurisdiction suggests that both actions are an attempt to avoid human rights accountability by the Member States.

The following provisions of international human rights instruments deal with the general implementation obligation: Article 2(2) ICCPR, Article 2(1) ICESCR, Article 2 CEDAW, Article 4 CRC. The following African Union instruments contain general implementation obligations: Article 3(h) of the Constitutive Act of the African Union, Article 1 of the African Charter on Human and Peoples' Rights, Article 2(1) of the African Charter on the Rights and Welfare of the Child, Article 2(1) of the African Women's Protocol. In substance the implementation obligations obligate the States Parties to adopt appropriate and effective measures to implement the rights recognized in the respective instruments. Whilst States enjoy a measure of discretion as to the processes they adopt in implementing treaties, this discretion is not absolute, and the measures which States adopt should be "reasonably considered appropriate".⁹⁴ Furthermore the State's measures should be "appropriate and adapted to the end object (of the treaty)".⁹⁵ It is our submission that this obligation entails inter alia the undertaking by States to recognize international and regional mechanisms granting individuals access thereto, and at a minimum the obligation not to limit the right of individuals to access human rights protection mechanisms with a human rights competence.

94 Pty vs AOTC Ltd (Australian Federal Court) 100 ILR 487.

95 Richardson vs Forestry Commission (Australian High Court) 77 ILR

This obligation is derived from the provisions of Article 55 of the UN Charter read together with Article 56 thereof. In essence the Member States to the UN Charter undertake to take joint and separate action for the achievement of the purposes specified in Article 55, which include “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

It is our contention that one of the fundamental purposes of international cooperation is the collective protection by States of fundamental human rights and freedoms. The obligation under consideration is capable of interpretation to the extent that it mandates adoption of human rights protection mechanism at this sub-regional level of cooperation.

Generally in terms of international human rights law States have the duty to protect human rights. This obligation entails States affording a remedy in case of human rights violations. It is our contention that the withdrawal of an existing effective remedy for violations of human rights is a breach of the obligation to protect.

The concern raised by the limitation of individual access to the SADC Tribunal in human rights matters is that it is divestiture of existing jurisdiction of the SADC Tribunal and of the right to a judicial remedy for natural and legal persons. It is our submission that in implementing human rights States should desist from taking retrogressive steps.

CHAPTER FIVE

SUMMARY FINDINGS AND RECOMMENDATIONS

5.1 Summary

This dissertation deals with role of Economic Community of West African State (ECOWAS), ECOWAS Community Court of Justice (ECCJ), the Southern African Development Community (SADC) and its Community Court of Justice towards protection of human rights in Africa. It was examined in the like manner and was aimed at making an analysis on the basis, nature and scope of the conflict of laws, particularly with respect to torts situations.

The research work deals with the Historical Development and impact of Human Right, Scope of Human Rights, Instruments of Human Right, Universal Declaration of Human Rights and The Historical Development of the Community Courts in the protection of Human Rights in Members States. This was aimed at showing the role ECOWAS Community Court of Justice (ECCJ), the Southern African Development Community (SADC) and its Community Court of Justice towards protection of human rights in Africa.

5.2 Findings

Against the general backdrop, the following observations were made:

- i. It has been observed that While Article 15(4) of the ECOWAS Treaty makes the Judgment of the Court binding on Member States, institutions of the Community and individuals and corporate bodies, Article 76 (2) provides for the finality of the decision of the Court. Also Article 19(2) of the 1991 Protocol provides that the decisions of the Court shall be final and immediately enforceable, strictly speaking the Court has no direct means of doing this but will rely mainly on the respect by member states of the commitments made by them under the Treaty and other legal instruments.

- ii. Another problem, it has been found, is the one which is commonly available or often faced in cases of implementation of the courts' decisions. While Article 15 (3) of the Treaty of ECOWAS provides for the independence of the Court from the Member States while Article 3 (i) of the Protocol provides for the independence of the Judges. However, Member States under the council of minister exercise control over the budgetary allocation to the Court. A situation may arise where the Court gives a judgment against some Member States who at the same time may be required to decide on the budget of the Court. This may pose a problem but then how should the Court be funded so as to shield it from this situation while at the same time limiting its spending. The location of the Court and the attendant problems of transportation across the Member States also pose problems which militate against the people's utilization of the Court.
- iii. It has further been observed that the member states of the two sub-regions do not cooperate with one another in terms of implementation of their instruments as well as the enforcement of the decisions of each other's courts. This is a great obstacle to the promotion and protection of human rights in those sub-regions that needs to be addressed.
- iv. Lastly, there is the issue of high cost of litigation in a sub region the majority of whose citizens are poor. There is need to explore the possibility of providing free legal services for indigent citizens by the Community.

5.3 Recommendations

Based on the findings made above, the following recommendations were made;

- i. It is recommended that the Commission should open a window that will enable the Court provide an annual report of the status of implementation of its decisions to the Council of Ministers, which comprises ministers responsible for providing strategic direction to the Community as a peer review mechanism.
- ii. It is recommended that the Courts should engage in massive sensitization of judicial authorities of Member States on the mandate of the court and their role in the implementation of its decisions, as Justice without enforcement is impotent and the use of force without justice is tyrannical. Justice and enforcement must, therefore, go together and thus, ensure that whatever is just is made to become powerful and whatever is powerful is just.
- iii. It has further been recommended that member states of the two organizations should evolve an effective mutual co-operation to enhance a global standard of the promotion and protection of human rights in the sub-region and establish a strong enforcement mechanism of enforcement of the judgments of their respective courts, as judgments without power of enforcement is as good as bad.
- iv. Lastly, it is recommended that the Courts should explore the possibility of adopting measures to improve on compliance with its decisions, including the establishment of a properly equipped unit in the Court's Registry responsible for compliance and implementation of judgments; the Court should consider the possibility of invoking sanctions as an instrument for guaranteeing compliance as provided for in the relevant Community texts.

BIBLIOGRAPHY

BOOKS

- Anatole, A. (2002) Co-Operating For Peace In West Africa. Geneva, Switzerland
- Ladan, M.T (2009) Introduction to ECOWAS Community Law and Practice: Intergration Migration, Human Rights, Access to Justice and Security, ABU University Press Ltd Zaria, Kaduna State Nigeria P. 253
- Okolo .J.E (1990) The Development and Structure of ECOWAS, Boulder West View P. 46
- Onwubiko, KBC (1973) History of West Africa, Africana Educational Publishers .Co. Nig Aba P.40
- Perter R. (1983) Integration, Development and Equity: Economic Integration in Africa, George Allen Bpsten P.56
- Rupnel O.C (2009) Regional Economic Communities in East and South Africa, Macmillan Education Press, Namibia P. 319 – 350
- Snuth RKM (2015) Textbook International Human Rights

JOURNALS

- Eborah S.T (2009) Litigating Human Rights before Sub-Regional Courts in Africa Prospects and Challenges, African Journal of Interrogational and Corporative Law P.84
- Gutlement, R. (1982) Return Des Experts Pour L'easoratin D'in Avant Project De Charte Africana Des Drouts De 'Aonane Et Ds Peoples 1-2, Virginia Journal of International Law P.667
- Mangu AMB (2005) Netherlands Quarterly of Human Right P.379, 381, 383.

ARTICLES

- Churc, J (2007) Human Rights from a Comparative Perspective
- Gambari, I.A (1991) Peutical and Comparative Dimensions of Regional Integrating New Jersey P. 27

INTERNET MATERIAL

- Dnesso, S.a (2008) The Jurisprudence of the African Commission on Human and Peoples Right Available Online at <http://www.chr.up.ac.za/about/introduction.html>