



**Balancing state sovereignty and the protection of human rights: a case study on the impact of the requirements of state consent and the exercise of political will on the functioning of the human rights systems of the African Union and the Southern African Development Community**

**Sheryl Kunaka (KNKSHE002)**

**Submitted in partial fulfilment of the requirements of the Degree of Master of Laws (LLM) specialising in Human Rights Law.**

**Supervisor: Associate Professor Hannah Woolaver**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws (LLM) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## Plagiarism Declaration

1. I know that plagiarism is wrong. Plagiarism is to use another's work and to pretend that it is one's own.
2. I have used the footnote convention for citation and referencing. Each contribution to, and quotation in, this dissertation from the work(s) of other people has been attributed and has been cited and referenced.
3. This is my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.
5. I acknowledge that copying someone else's assignment or essay, or part of it, is wrong, and declare that this is my own work.
6. This dissertation has been submitted to the Turnitin module and I confirm that my supervisor has seen my report and any concerns revealed by such have been resolved with my supervisor.

Name: Sheryl Kunaka

Student number: KNKSHE002

Signature: 

Signed by candidate
---------------------

Date: 04.03.2021

## **Abstract**

In recent decades, achieving the goal of the global protection of human rights has been approached most commonly through multilateralism. States have since abandoned notions of self-reliance in favour of interdependency and collaboration, leading to a proliferation of international, regional, and sub-regional multilateral organizations. However, the definition of ‘multilateralism’ restricts the application of the legal frameworks of these organizations to sovereign states that have voluntarily consented to be bound by the obligations contained therein. State consent and political will drive multilateralism, and the requirement of voluntariness in these forms has been utilised as a means of respecting the internationally recognized legal principle of state sovereignty. Consequently, voluntariness has impacted the effective functioning of organizations such as the African Union (‘AU’) and the Southern African Development Community (‘SADC’). This thesis proposes that the less significant the impact of voluntariness is on a regional or sub-regional human rights system, the more effective it will be in its role of protecting human rights. This thesis provides practical ways of lessening the impact of voluntariness, in order to strengthen the human rights legal frameworks of the AU and the SADC; and to improve the functioning of their respective compliance mechanisms. This thesis achieves the aforementioned by drawing from the systems’ European and African regional and sub-regional counterparts.

## Acknowledgements

I would like to express my most sincere gratitude and appreciation to the UCT Faculty of Law for providing me with a portion of the financial support that I required to pursue this degree.

To my supervisor, Hannah Woolaver, thank you for your helpful feedback during the drafting process, and for your willingness to guide me.

To my family, Mom, Dad, Sharon, Kelly, and Iris- your unceasing support, both emotionally and financially, has been invaluable. I would not have been able to undertake this journey without each of you. You are all immensely valued.

To Sonia Mataramvura, Sapna Mesthrie, and Mathabo Baase- I am eternally indebted to each of you for graciously offering to read various versions of my thesis, even whilst juggling your own professional commitments.

To Sonia, thank you for being by my side from the moment I first realised that I was passionate about human rights, and even before then. Thank you for your encouragement, support and for engaging with me on human rights and related topics literally all the time.

To Kelsey Amy Pailman and Candysse Amy Louise Vrancken, the most effective sentiments to express my gratitude for your selfless love and support elude me. I guess I will have to settle with this: the both of you are an undeserved blessing and a testament to God's abundant grace in my life. Thank you for remaining by my side and for being my biggest supporters.

Finally, but most significantly, to our Heavenly Father. I thank You for placing Your love for justice in my heart, for willing the pursuit of this degree and for making provision for its completion. I pray that I may continue to serve as Your humble servant, in anticipation of the day that Lord Jesus may present me blameless before the presence of Your glory. In your Son, Jesus Christ's name, Amen.

*'God is not man, that He should lie, or a son of man, that He should change His mind. Has he said, and will He not do it? Or has He spoken, and will He not fulfil*

*it?' - Numbers 23:19*



## Table of Contents

1.1 Introduction .....	1
1.2 Methodology .....	2
1.3 Scope .....	3
1.3.1 A legal framework conducive to the protection of human rights.....	4
1.3.1.1 The AU.....	4
1.3.1.2 The SADC.....	5
1.3.2 Effective compliance and enforcement mechanisms .....	6
1.3.2.1 The AU.....	7
1.3.2.2 The SADC.....	8
1.4 Proposals for minimizing the impact of voluntariness on the functioning of the AU and the SADC.....	8
1.4.1 The European System .....	8
1.4.2 The EAC and the ECOWAS.....	9
1.4.3 The SADC.....	10
1.5 The rationale for the study of the human rights systems .....	11
1.5.1 Regional and sub-regional systems.....	11
1.5.1.1 The AU.....	12
1.5.1.2 The SADC.....	12
1.6 Research Question and Motivation .....	12
1.7 Thesis Structure.....	13
2.1 Introduction .....	14
2.2 The origins of the AU .....	14
2.3 The AU legal framework for the protection of human rights .....	16
2.3.1 The African Charter and Protocols thereto .....	16
2.3.2 The African Commission .....	18
2.3.2.1 Inter-state communications .....	19

2.3.2.2 Individual communications .....	20
2.3.2.2.1 Access to the African Commission .....	20
2.3.2.2.2 Legal force of the decisions of the African Commission .....	21
2.3.3 The African Court .....	21
2.3.3.1 Inter-state complaints .....	22
2.3.3.2 Individual complaints .....	22
2.3.3.3 Access to the African Court .....	23
2.3.3.4 Legal force of the decisions of the African Court .....	23
2.3.4 Concluding remarks on the legal framework of the AU .....	24
2.4 The compliance and enforcement mechanisms of the AU .....	24
2.4.1 The African Commission .....	24
2.4.2 The African Court .....	26
2.4.3 Concluding remarks on the compliance and enforcement mechanisms of the AU .....	28
2.5 Conclusion .....	29
3.1 Introduction .....	31
3.2 The origins of the SADC .....	31
3.3 The SADC legal framework for the protection of human rights .....	32
3.3.1 The SADC Treaty and Protocols .....	32
3.3.2 The SADC Tribunal .....	35
3.3.2.1 Access to the SADC Tribunal .....	36
3.3.2.2 Legal force of the decisions of the SADC Tribunal .....	37
3.3.3 Concluding remarks on the legal framework of the SADC .....	37
3.4 The compliance and enforcement mechanisms of the SADC .....	38
3.4.1 Political will and the SADC Tribunal .....	39
3.4.1.1 The Republic of Zimbabwe .....	41
3.4.1.2 The SADC Summit .....	41

3.4.1.3 South Africa .....	43
3.4.1.4 Tanzania .....	45
3.4.2 Concluding remarks on the compliance and enforcement mechanisms of the SADC .....	45
4.5 Conclusion .....	46
4.1 Introduction .....	47
4.2 Legal framework conducive to the protection of human rights .....	47
4.2.1 Legal instruments evidencing a clear human rights mandate .....	47
4.2.1.1 The AU .....	47
4.2.1.1.1 Restricting membership of the regional organization by requiring a ratification of the primary legal instrument ....	48
4.2.1.2 The SADC .....	50
4.2.1.2.1 Expanding on references to human rights protection in the constitutive instrument of the sub-regional organization.	50
4.2.1.2.2 Restricting membership of the sub-regional organization by requiring the ratification of the primary regional human rights legal instrument.....	52
4.2.1.2.3 Conferral of human rights jurisdiction on the judicial body.....	52
4.2.2 A judicial institution authorised to adjudicate matters relating to the interpretation and application of the human rights legal instruments; whose decisions are legally binding on the parties to a matter; and to which all persons and states have access .....	54
4.2.2.1 The AU .....	54
4.2.2.1.1 Integrating the protocol governing the functioning of the judicial body into the founding legal instrument of the regional organization.....	54
4.2.2.1.2 Restricting access to the judicial body for individuals and civil society organizations that have exhausted local remedies .....	55

4.2.2.2 The SADC.....	56
4.3. Effective compliance and enforcement mechanisms .....	57
4.3.1 Institutions for the supervision of the execution of judicial decisions..	57
4.3.1.1 The AU.....	57
4.3.1.1.1 Supervision of the execution of judgments made by regional judicial bodies .....	58
4.3.1.1.1.1 The Committee of Ministers .....	58
4.3.1.1.1.2 Enhanced Supervision.....	58
4.3.1.1.1.3 Standard Supervision .....	59
4.3.1.1.1.4 The effectiveness of the work of the Committee of Ministers .....	60
4.3.1.1.1.4.1 Rationale for analyzing performance from the year 1998 .....	60
4.3.1.1.1.4.2 Rationale for the comparison of the periods 1998 to 2010 and 2011 to 2018.....	61
4.3.1.1.1.4.3 Results of the analysis.....	62
4.3.1.1.2 Decision-making body tasked with taking ‘appropriate action’ against non-compliant states .....	63
4.3.1.2 The SADC.....	64
4.4 Conclusion .....	65
5.1 Purposes of the thesis .....	66
5.2 Closing remarks .....	66
5.2.1 Legal framework conducive to the protection of human rights .....	66
5.2.1.1 The AU.....	66
5.2.1.2 The SADC.....	67
5.2.2 Effective compliance and enforcement mechanisms .....	67
6. Bibliography.....	69



## Chapter One: Introduction

### 1.1 Introduction

During the past three decades, the goal of the global protection of human rights has been approached primarily through the use of multilateralism. This is due to the fact that the end of the Cold War marked a shift in the manner in which sovereign states interact with each other and the manner in which they approach common global problems. Self-reliance has since ceased to be a viable principle of governance and this realisation has given rise to the acceptance and adoption of principles such as interdependency and collaboration. More and more sovereign states continue to favour an approach to ‘common global problems’ that calls for ‘common global action’.<sup>1</sup> As a consequence, there has been a proliferation of multilateral organisations established for the object of the protection of human rights and fundamental freedoms.

The definition of multilateralism, however, continues to pose a difficulty with which organizations utilising such a means of global governance have to contend. Multilateralism is commonly defined as the ‘management of transnational problems by three or more parties operating on the basis of *mutually agreed* generalized principles of conduct’<sup>2</sup> (own emphasis). Multilateralism is therefore driven by state consent, without which there can be no agreement as to principles of conduct or to any legal obligations with which states must comply.

Additionally, and most significantly, agreement between states cannot be coerced because of the internationally recognised principle of state sovereignty and its corollary, the principle of non-interference. State sovereignty describes a state’s ‘supreme authority’ over its territory<sup>3</sup> and is a principle directly or indirectly relied upon by all other ‘institutions and principles of international law.’<sup>4</sup> The principle is understood as a state’s power to make decisions that will affect its territories and the people residing within those territories, and an immunity against interference from

---

<sup>1</sup> Juha Jokela ‘Global governance and effective multilateralism’ in Juha Jokela’s *The G-20: A Pathway to Effective Multilateralism?* Report. (2011) *European Union Institute for Security Studies* at 51

<sup>2</sup> *Ibid.*, at 55.

<sup>3</sup> Samantha Besson ‘Sovereignty’ in Max Planck Encyclopaedias of Public International Law, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?prd=MPIL>, accessed on 10 January 2021.

<sup>4</sup> *Ibid.*

other states and organizations.<sup>5</sup> As autonomous subjects of international law, therefore, sovereign states can choose whether or not to bind themselves to international or regional arrangements and, for the most part, it is only in respect of this consent that a state may be bound thusly. Accordingly, creating a human rights system that requires the co-operation of multiple sovereign states will always entail a balancing of the needs of an effectively functioning human rights system and the desire for the preservation of state sovereignty.

As this thesis will demonstrate, the requirement of voluntariness in the form of state consent is not the only factor that has the potential to adversely impact the effective functioning of multilateral human rights organizations. Notwithstanding a state's voluntary act of binding itself to certain obligations, whether a state will indeed comply with its obligations is often dependent on its (voluntary) exercise of political will (it is for the purposes of this thesis that the concept of 'political will' will be used to describe a state's action or inaction with regards to its obligations, based on a lack of state interest and commitment to the protection of human rights). A number of factors can influence the exercise of a state's political will and as will be demonstrated in the discussion on the Southern African Development Community Tribunal ('SADC Tribunal'), one such factor is the desire to strengthen regional unity and solidarity at the expense of accountability.

Thus, this thesis seeks to analyse and highlight the impact of voluntariness in the form of state consent and the exercise of political will on the effective functioning of the African regional and sub-regional systems of the African Union ('AU') and the Southern African Development Community ('SADC').

## 1.2 Methodology

This thesis highlights the impact of voluntariness on the effective functioning of the AU and the SADC with particular focus on the systems' respective roles of human rights protection. This is done through analyzing the impact of voluntariness on two factors which are proposed as being among the most significant factors that contribute to an effective human rights system. These factors are: (i) a legal framework conducive to the protection of human rights; and (ii) effective compliance and enforcement

---

<sup>5</sup>Besson op cit note 3.

mechanisms. These factors are henceforth known as the Criteria for an Effective Human Rights System, or the ‘CEHRS.’

This thesis proposes practical ways in which to diminish the impact of voluntariness on the functioning of human rights systems within a regional and sub-regional context, and it does this by drawing from the enforcement mechanisms and the legal frameworks of the European Human Rights System (which operates with the support of the Council of Europe) (‘European System’), the East African Community (‘EAC’) and the Economic Community of West African States (‘ECOWAS’).

### 1.3 Scope

The scope of this thesis is limited to a detailed analysis of the regional and sub-regional systems abovementioned. However, it should be noted that the impact of voluntariness is evident in many other human rights systems.

The most notable of these systems is that of the United Nations (‘UN’), with particular reference to the UN Treaty Based system (‘UN Treaty System’). The UN Treaty System functions in respect of states that have voluntarily consented to be bound by treaty-specific obligations,<sup>6</sup> and this requirement of state consent is consistent with the firmly established principles of ‘sovereign equality’ for all members of the UN<sup>7</sup> and the inherent respect for the sovereignty of each UN member.

Accordingly, although the UN is an exemplar of a system the functioning of whose legal framework and compliance mechanisms is primarily dependent on state consent, the proposals discussed within this thesis would fail to find application within the context of an international human rights system such as the UN. As is discussed in this thesis, the proposals are specific to regional and sub-regional constructions of human rights systems which function in respect of smaller portions of sovereign states. Hence, the status of the UN as the leading *international*, multilateral human rights organization disqualifies it from the scope of this thesis.

This thesis proposes that among the most significant elements of an effective human rights system are the existence of a legal framework conducive to the protection

---

<sup>6</sup> The United Nations Human Rights Office of the High Commissioner ‘The United Nations Human Rights Treaty System Factsheet: 30 Revision 1’ (‘UN Factsheet 30’) at 1, available at <https://www.ohchr.org/documents/publications/factsheet30rev1.pdf>, accessed on 9 January 2020.

<sup>7</sup> Article 2(1), United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at <https://www.refworld.org/docid/3ae6b3930.html>, accessed 9 July 2020.

of human rights, and effective compliance and enforcement mechanisms. The sections to follow briefly set out the significance of this criteria as well as what each of the criteria entails in the context of regional and sub-regional systems.

It should be noted that the existence of institutions tasked with promoting and educating people about their human rights is equally significant to the effective functioning of a human rights system. However, the focus of this thesis is limited to the role of the *protection* of human rights achieved through the means discussed herein.

### 1.3.1 A legal framework conducive to the protection of human rights

The existence of a legal framework conducive to the protection of human rights is an integral part of multilateralism. The protection of human rights necessitates a legal basis upon which such rights and entitlements may be claimed, so as to ensure the provision of rights and entitlements capable of being realised. Accordingly, this thesis proposes the existence of such a legal framework as one of the significant criteria for an effective human rights system.

This thesis proposes that such a legal framework should encompass the following: (i) legal instruments evidencing a clear mandate for the protection of human rights which includes the existence of a body of codified human rights, or an express commitment to such a body existing within a regional framework; and (ii) a judicial institution authorised to adjudicate matters relating to the interpretation and application of the human rights legal instruments; whose decisions are legally binding on the parties to a matter; and to which all persons and states have access.

#### 1.3.1.1 The AU

The primary human rights legal framework of the AU consists of the African Charter on Human and Peoples' Rights ('African Charter') and protocols thereto;<sup>8</sup> a quasi-judicial body (the African Commission on Human and Peoples' Rights ('African Commission')); and a judicial body (the African Court on Human and Peoples' Rights ('African Court')). The African Commission and the African Court ensure compliance with the provisions of the African Charter and its protocols primarily through their

---

<sup>8</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ('African Charter'), available at: <https://www.refworld.org/docid/3ae6b3630.html>, accessed 1 February 2021.

consideration of communications received from individuals and states, in respect of violations of the provisions of the African Charter and its protocols.

The African Charter is the primary human rights legal instrument of the AU and it is a codification of specific human and peoples' rights. Together with the provisions of the Constitutive Act of the AU,<sup>9</sup> the African Charter provides the AU with a strong human rights mandate. However, a state can only be bound by the provisions contained therein where the state has ratified the African Charter. It is in this requirement of ratification that the impact of voluntariness, in the form of state consent, is evident.

The impact of voluntariness on the functioning of the African Commission and the African Court is evident in the extent to which litigants have access to the bodies as well as in the extent to which the decisions are binding on states. As is discussed in Chapter two, the analysis of these two factors in the context of the African Commission yields results that support the argument that the existence of a quasi-judicial body like the African Commission is not an element that would significantly contribute to the effective functioning of a human rights system. Accordingly, the existence of a quasi-judicial body that functions as a protection mechanism has not been included as a criterion in the CEHRS.

In the context of the African Court, the analysis of the two factors abovementioned indicates that although the decisions of the African Court are binding on states, individuals cannot access the African Court without state consent in the form of a declaration. Accordingly, this thesis argues that the legal framework of the AU is not conducive to the protection of human rights.

#### 1.3.1.2 The SADC

The SADC legal framework does not place adequate emphasis on the protection of human rights and as a consequence, the system lacks an adequately strong, formal human rights mandate. Although the SADC system does not have a body of codified human rights like the African Charter, this thesis argues that it need not adopt such an instrument of its own because the African Charter is applicable to the entire African region. In this regard, although the primary SADC legal instrument, being the SADC

---

<sup>9</sup> Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000 ('Constitutive Act of the AU'), available at <https://www.refworld.org/docid/4937e0142.html>, accessed 22 February 2021.

Treaty,<sup>10</sup> *does* empower the SADC Tribunal to interpret human rights encompassed in other regional and international legal instruments, this thesis argues that an express commitment to the protection of human rights in accordance with the African Charter must be established.

The SADC Tribunal ensures the justiciability of the provisions of the SADC Treaty and its protocols. An analysis on the extent to which litigants may access the SADC Tribunal and whether or not the decisions of the SADC Tribunal are binding yields positive results. This notwithstanding, the lack of an adequate human rights mandate within the legal framework of the SADC makes such a framework not conducive to the protection of human rights.

### 1.3.2 Effective compliance and enforcement mechanisms

When sovereign states *do* consent to be bound by certain prescribed obligations contained in legal instruments, the important question then becomes the extent to which such obligations may be enforced. This is significant as the protection of human rights can only be achieved through the effective functioning of the compliance and enforcement mechanisms put in place to provide such protection. As such, it is imperative to understand what mechanisms exist and to further analyse the extent to which voluntariness has impacted their effective functioning. Thus, this thesis proposes, as the second criterion for an effective human rights system, the existence of effective compliance and enforcement mechanisms.

This thesis proposes that in order to ensure the effective enforcement of the obligations contained within a legal framework conducive to the protection of human rights, the following elements are to be present: (i) an institution specifically tasked with supervising the execution of the decisions of the judicial body that operates within that system; and (ii) a supreme decision-making body whose powers are legally prescribed and which is legally bound to take appropriate action in instances of state non-compliance.

---

<sup>10</sup> Declaration and Treaty of the Southern African Development Community (1992) ('SADC Treaty').

### 1.3.2.1 The AU

The African Commission is obliged to report its activities, including the recommendations that it makes in respect of state and individual communications, to the Assembly of the AU.<sup>11</sup> The Assembly of the AU comprises the Heads of States and Government or ‘their duly accredited representatives.’<sup>12</sup> The Assembly of the AU is empowered to take decisions on the reports of the African Commission<sup>13</sup> but the adoption of the decisions of the latter by the former do not make such decisions binding. The Assembly of the AU does not serve as a supervisory institution either. Accordingly, the AU does not have an institution for the supervision of the execution of the decisions of the African Commission.

In respect of the decisions of the African Court, these are to be communicated to the Executive Council ‘composed of Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States’,<sup>14</sup> so that it may monitor the execution of the judgments of the African Court. States are obligated to submit reports detailing the steps which they have taken to comply with the decisions of the African Court.<sup>15</sup> Apart from the aforementioned, the AU does not employ any effective mechanisms to ensure adequate supervision of the execution of the judgments of the African Court. As is discussed in this thesis, state non-compliance is an issue that has been identified by the African Court as a factor that is adversely affecting its effectiveness, and this is largely due to the absence of effective compliance and enforcement mechanisms and the impact of voluntariness on the methods of enforcement that are currently being utilised.

Further, the Assembly of the AU is empowered to impose sanctions on non-compliant states<sup>16</sup> but this power is discretionary and given the composition of the Assembly of the AU, the exercise of such power is likely to become influenced by political factors.

---

<sup>11</sup> Article 54 of the African Charter.

<sup>12</sup> Article 6(1) of the Constitutive Act of the AU.

<sup>13</sup> *Ibid*, article 9(1) (b).

<sup>14</sup> *Ibid*, article 10(1).

<sup>15</sup> Rule 81(1) of the African Court on Human and Peoples’ Rights Rules of Court (2020) (‘Rules of Court of the African Court’).

<sup>16</sup> Article 23(2) of the Constitutive Act of the AU.

### 1.3.2.2 The SADC

Member States and institutions of the SADC are expected to undertake all ‘necessary’ measures for the execution of a judgment by the SADC Tribunal.<sup>17</sup> The laws of civil procedure within a Member State which govern the ‘registration and enforcement of foreign judgments’ apply for purposes of the execution of a judgment of the SADC Tribunal.<sup>18</sup>

Where a state does not abide by the decisions of the SADC Tribunal, such a failure must be established by the SADC Tribunal and communicated to the SADC Summit of the Heads of State or Government of the SADC (‘Summit’) so that the latter may take ‘appropriate action’.<sup>19</sup> The SADC system does not have a supervisory institution for the execution of the decisions of the SADC Tribunal, and the powers of the Summit are too wide. As is discussed in this thesis, given the primarily political role of the Summit, which is policymaking, the impact of the exercise of political will on the decisions of the Summit affects the extent to which the Summit may be considered an effective enforcement institution.

## 1.4 Proposals for minimizing the impact of voluntariness on the functioning of the AU and the SADC

This thesis provides proposals for practical ways in which the AU and the SADC may minimize the impact of state consent and political will on the functioning of their respective systems. This thesis draws from their European and African regional and sub-regional counterparts in order to provide proposals which would minimize the impact of voluntariness and improve state compliance.

### 1.4.1 The European System

The European System operates with the support of the Council of Europe, an intergovernmental organization established in 1949 by 10 European States.<sup>20</sup> The primary human rights legal instrument of the European System is the European Convention for the Protection of Human Rights and Fundamental Freedoms

---

<sup>17</sup> Article 32(2) of the Protocol on the Tribunal in the Southern African Development Community (2000) (‘SADC Tribunal Protocol (2000)’).

<sup>18</sup> *Ibid*, article 32(1).

<sup>19</sup> *Ibid*, article 32(5).

<sup>20</sup> Frans Viljoen ‘International protection of human rights’ in Strydom (ed), Viljoen & Ruppel (et al) *International Law* (2016) at 337.

(‘European Convention’, ‘Convention’)<sup>21</sup> and the primary means with which the European System ensures compliance with the European Convention is the European Court of Human Rights (‘European Court’).

The European System places restrictions on membership to the Council of Europe and one of the requisites of membership is the ratification of the European Convention. Accordingly, although the act of ratification is a voluntary one, it is a necessary means to an end: the means being ratification, and the ends being membership of the regional organization. This thesis therefore argues that by restricting membership to a regional organization by requiring states to ratify the primary human rights legal instrument of that organization, the requirement of state consent is minimized. Accordingly, this thesis draws from the European System to propose a way in which there may be greater commitment to the African Charter by the Member States of the AU and the SADC, as the African Charter can be relied upon by the SADC system as the latter’s primary human rights legal instrument.

Further, the execution of the decisions of the European Court is supervised by a body referred to as the Committee of Ministers. The Committee of Ministers is comprised of the Ministers of Foreign Affairs of each of the Member States of the Council of Europe<sup>22</sup> and it supervises the execution of the judgments of the European Court through the use of a system that provides levels of supervision that are appropriate with the levels of complexity of a matter. The work of the Committee of Ministers has minimized voluntariness and improved state compliance. Accordingly, this thesis proposes the establishment of supervisory institutions for the AU and the SADC which are modelled on the Committee of Ministers.

#### 1.4.2 The EAC and the ECOWAS

The EAC was established in terms of the Treaty for the Establishment of the East African Community, 1999 (‘EAC Treaty’), which came into effect in 2000.<sup>23</sup> The creation of the EAC, much like the SADC, was also brought about to foster economic

---

<sup>21</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (‘European Convention’), available at: <https://www.refworld.org/docid/3ae6b3b04.html>, accessed 10 January 2021.

<sup>22</sup> Article 14 of the Council of Europe. (1949). *Statute of the Council of Europe: London, 5th May, 1949*. London, H.M.S.O (‘Statute of the Council of Europe’).

<sup>23</sup> Tasco R. Luambano ‘Litigating Human Rights Through the East African Court of Justice: Overview and Challenges’ (2018) 71 *Journal of Law, Policy and Globalization* 76.

development but within the region of East Africa.<sup>24</sup> However, even prior to its amendment, the EAC Treaty had a stronger focus on the protection of human rights compared to the SADC Treaty, as is apparent from some of the provisions contained within the EAC Treaty. Accordingly, this thesis proposes legislative amendments to the legal instruments of the SADC in order to establish a strong, formal human rights mandate within the SADC and it does this by drawing from some of the relevant wording of the EAC Treaty.

ECOWAS was formally established through the signing of the Economic Community of West African States Treaty of 1975 ('Treaty of 1975').<sup>25</sup> Similar to the SADC and the EAC, the ECOWAS is a Regional Economic Community and its primary purposes include economic integration,<sup>26</sup> the protection of political independence, economic development, and 'territorial integrity.'<sup>27</sup> This notwithstanding, the ECOWAS Community Court of Justice ('ECCJ') has the jurisdiction to adjudicate human rights matters.<sup>28</sup> Accordingly, this thesis draws from the relevant wording of the Supplementary Protocol to the Protocol of the ECOWAS Community Court of Justice ('Supplementary Protocol to the ECCJ')<sup>29</sup> to propose legislative amendments to the SADC Tribunal Protocol (2000) for purposes of conferring express human rights jurisdiction on the SADC Tribunal.

### 1.4.3 The SADC

Prior to the amendments to the SADC Tribunal Protocol (2000) discussed in this thesis, states and individuals were granted access to the SADC Tribunal without the need for state consent. This was the case because the SADC Tribunal Protocol (2000) expressly stated that the consideration of communications brought to the SADC Tribunal was not dependent on state consent, and because the SADC Tribunal Protocol (2000) had been incorporated into the SADC Treaty.<sup>30</sup> Such incorporation meant that the SADC Tribunal Protocol (2000) came into force once the amendment agreement which

---

<sup>24</sup> Luambano op cit note 23.

<sup>25</sup> John- Mark Iyi 'Introduction' in John Mark Iyi (ed) *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties under International Law* (2016) 4.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid, at 5.

<sup>28</sup> Article 3(4) of the Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1,2,9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol ('Supplementary Protocol to the ECCJ').

<sup>29</sup> Ibid.

<sup>30</sup> Article 16(2) of the SADC Treaty.

provided for the SADC Tribunal's integration into the SADC Treaty came into force<sup>31</sup> (and this was upon 'its adoption by three quarters of all of the members of the Summit').<sup>32</sup> Corresponding amendments were also made to the SADC Tribunal Protocol (2000) such that states would not need to ratify the SADC Tribunal Protocol (2000) for purposes of conferring upon the SADC Tribunal the jurisdiction to consider communications.<sup>33</sup> Accordingly, this thesis proposes a similar integration process for the AU system, so that the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('Protocol to the African Charter')<sup>34</sup> would become integrated into the African Charter, thereby making it necessary to ratify only the African Charter. Further, this thesis proposes amendments to the Protocol to the African Charter to ensure that individuals have access to the African Court without the need for separate state consent in the form of a declaration.<sup>35</sup>

## 1.5 The rationale for the study of the human rights systems

### 1.5.1 Regional and sub-regional systems

Regional and sub-regional human rights systems have been established in different parts of the world, with some of the most prominent of these systems functioning within Africa. Regionalism refers to the construction of policies 'based on shared regional identities and objectives' and which results in the establishment of regional institutions required for the implementation of these policies.<sup>36</sup> Regionalism presents an alternative to the universal, treaty-based human rights system of the UN; that is, an alternative construction of a human rights system which functions in respect of a smaller portion of sovereign states and which utilises the commonalities in political character and ideologies of states within the same region to establish a human rights system. Determining the extent to which such a construction can function effectively

---

<sup>31</sup> Laurie Nathan 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35 *Human Rights Quarterly* at 877.

<sup>32</sup> Article 32 of the SADC, Agreement Amending the Treaty of the Southern African Development Community (2001) ('SADC Treaty Amendment Agreement (2001)').

<sup>33</sup> Articles 16 and 17 of the SADC, Agreement Amending the Protocol on Tribunal (2002).

<sup>34</sup> Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998 ('Protocol to the African Charter'), available at <https://www.refworld.org/docid/3f4b19c14.html>, accessed 10 January 2021.

<sup>35</sup> *Ibid*, article 34(6).

<sup>36</sup> Shahrbanou Tadjbakhsh 'Interdependency trends in a multipolar world' (2009) 18 *International Issues and Foreign Policy Affairs*, at 13.

in respect of the mandate of human rights protection would arguably be of great interest.

#### 1.5.1.1 The AU

As mentioned in the preceding paragraphs, the AU possesses a strong human rights mandate realized through a comprehensive human rights legal framework. Due to this, the AU is an exemplar system within the African region, notwithstanding the inadequacies of its enforcement mechanisms. The rights contained in the legal instruments of the AU legal framework find application within other sub-regional systems including that of the SADC system, and this further makes the effectiveness of the AU system something which ought to be studied further.

#### 1.5.1.2 The SADC

As is discussed in this thesis, the SADC system is an appropriate example of a system that has been adversely affected by politics and the voluntary exercise of the political will of its Member States, to the detriment of the ability of the SADC system to protect human rights. No other sub-regional system within Africa has been impacted in a comparably similar manner by the aforementioned, and it is for this reason that its consideration in terms of the scope of this thesis is important.

### 1.6 Research Question and Motivation

Voluntariness plays a significant role in the functioning of the AU and the SADC. This is the case because of the importance that is placed on the preservation of the international law principle of state sovereignty. Accordingly, this thesis considers the impact of voluntariness on the functioning of these systems and concludes that the greater the impact of voluntariness on the legal framework and/or the system's compliance and enforcement mechanisms, the less effective such a system will be. This thesis aims to provide answers to the question which enquires about whether there are any ways in which the impact of voluntariness on the effective functioning of regional and sub-regional systems may be minimized.

The motivation for this thesis is to explore one of the significant hindrances to the effective functioning of regional and sub-regional human rights systems and to provide practical ways in which to alleviate the consequent impact.

## 1.7 Thesis Structure

**Chapter one** of this thesis provides an introduction to the topic of the thesis, a discussion on the scope of the thesis and the rationale for the analysis of the human rights systems under study. Chapter one also provides the motivation for the study of the thesis topic.

**Chapter two** of this thesis provides an analysis of the primary regional human rights system in Africa, being the AU. First, the discussion considers the origins of the system. Thereafter, the impact of voluntariness on the CEHRS is analyzed.

**Chapter three** of this thesis considers the sub-regional system of the SADC. The discussion analyses the origins of the system for purposes of drawing comparisons between the strong human rights mandate of the AU and the weak human rights mandate of the SADC.

Chapter three thereafter considers the impact of voluntariness on the CEHRS.

**Chapter four** of this thesis provides proposals regarding practical ways in which the impact of voluntariness on the functioning of the AU and the SADC may be minimized.

**Chapter five** of this thesis provides concluding remarks.

## Chapter Two: The African Union

### 2.1 Introduction

The African Union ('AU') is a regional organization which aims to 'promote and protect human and peoples' rights...' on the African continent.<sup>37</sup> The AU is committed to achieving these aims through, among other ways, the promotion of the principles of democracy and the rule of law.<sup>38</sup>

The discussion below first considers the motivations behind the establishment of the AU as a means of juxtaposing its inherent focus on human rights with that of the SADC discussed in Chapter three. Thereafter, the discussion analyses the impact of voluntariness on the CEHRS, namely: (i) the AU's legal framework for the protection of human rights; and (ii) the AU's compliance and enforcement mechanisms.

### 2.2 The origins of the AU

The AU was established in 1963 as the Organisation of African Unity ('OAU'). Thereafter, the OAU was replaced by the AU in 2002.<sup>39</sup>

The establishment of the OAU was preceded by conflict between African States and colonial rulers, motivated by the former's desire to gain independence.<sup>40</sup> Thus, some of the primary purposes of the OAU were to foster unity among its Member States, eradicate colonialism, and to protect the 'sovereignty, territorial integrity and independence' of its members.<sup>41</sup> In order to hold on to their newly gained independence, the Member States of the OAU adopted the OAU Charter<sup>42</sup> in 1963 which placed significance on the principles of 'sovereign equality'<sup>43</sup> and of 'non-interference' in the domestic affairs of other Member States.<sup>44</sup>

---

<sup>37</sup> Ninth preambular paragraph to the Constitutive Act of the AU op cit note 9.

<sup>38</sup> Ibid, article 4(m).

<sup>39</sup> Henri J. Steiner, Phillip Alston & Ryan Goodman 'Regional Arrangements' in Steiner (ed), Alston & Goodman *International Human Rights in Context* 3 ed (2008) 1063.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Organization of African Unity (OAU), *Charter of the Organization of African Unity*, 25 May 1963 ('OAU Charter'), available at <https://www.refworld.org/docid/3ae6b36024.html>, accessed 10 January 2021.

<sup>43</sup> Ibid, article 3(1).

<sup>44</sup> Ibid, article 3(2).

However, the inaction of the OAU when faced with human rights violations perpetrated by African dictators in, among other places, Uganda and Equatorial Guinea led to the decision to adopt the African Charter on Human and Peoples' Rights ('African Charter', 'Charter')<sup>45</sup> in 1981.<sup>46</sup> The Charter codifies cultural, socio-economic, civil and political, and third-generation rights.

In 1999, Members of the OAU adopted a declaration providing for the establishment of the AU.<sup>47</sup> The AU was subsequently established through the adoption of the Constitutive Act of the African Union ('Constitutive Act of the AU')<sup>48</sup> in 2000. The AU was created to facilitate a shift in focus from efforts towards decolonization, to the hastening of the process of integrating Africa into the global economy whilst enabling African states to continue addressing common issues of a social and political nature.<sup>49</sup>

The Constitutive Act of the AU, in comparison to its predecessor, places greater emphasis on human rights, democratic governance and the rule of law. This is evident from some of its provisions which state, inter alia, that the objectives of the AU include the 'promot[ion] and protect[ion] of human and peoples' rights',<sup>50</sup> and that the principles of the AU include the respect for 'democratic principles, human rights, the rule of law and good governance.'<sup>51</sup>

The origins of a multilateral organization are important in identifying the context in which the organization's legal framework and compliance mechanisms function. As is clear from the preceding discussion, the OAU initially placed great focus on the protection of human rights even before the establishment of the AU, and this contributed to the latter's strong human rights mandate and its human rights legal framework (discussed below). In contrast, and as will be discussed in Chapter three, the motivations for the establishment of the SADC were centred on economic development and this resulted in a weaker human rights mandate compared to that of the AU.

---

<sup>45</sup> African Charter op cit note 8.

<sup>46</sup> Steiner, Alston & Goodman op cit note 39, at 1064.

<sup>47</sup> African Union 'About the African Union' available at <https://au.int/en/overview>, accessed on 28 September 2020.

<sup>48</sup> Constitutive Act of the AU op cit note 9.

<sup>49</sup> Supra note 47.

<sup>50</sup> Article 3(h) of the Constitutive Act of the AU.

<sup>51</sup> Ibid, article 4(m).

Notwithstanding the strong human rights mandate of the AU, voluntariness has primarily affected the effective functioning of its compliance and enforcement mechanisms, as is indicated in the following discussion on the impact of voluntariness on the CEHRS.

### 2.3 The AU legal framework for the protection of human rights

The discussion to follow analyses the impact of voluntariness on the legal framework of the AU. The primary human rights legal framework of the AU consists of the African Charter and its human rights Protocols; the African Commission on Human and Peoples' Rights ('African Commission', 'Commission'); and the African Court on Human and Peoples' Rights ('African Court', 'Court').

As discussed in Chapter one, the elements of a legal framework conducive to the protection of human rights within the context of a regional or sub-regional system are the following: (i) legal instruments evidencing a clear mandate for the protection of human rights which includes the existence of a body of codified human rights, or an express commitment to such a body existing within a regional framework; and (ii) a judicial institution authorised to adjudicate matters relating to the interpretation and application of the human rights legal instruments; whose decisions are legally binding on the parties to a matter; and to which all persons and states have access.

#### 2.3.1 The African Charter and Protocols thereto

Chapter one of the African Charter sets out the human rights to which every person is entitled, without any distinction.<sup>52</sup> The Charter also provides for concomitant duties which are to be fulfilled by all persons.<sup>53</sup>

The African Charter further obliges Member States of the AU to, *inter alia*, 'recognize the rights, duties and freedoms'<sup>54</sup> contained within the Charter and to undertake the adoption of legislative or other kinds of measures in order to give effect to the rights, duties and freedoms.<sup>55</sup> Accordingly, there exists a clear human rights

---

<sup>52</sup> Article 2 of the African Charter provides that no distinction is to be made in respect of the provision of the rights and freedoms contained in the African Charter on such grounds as 'race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

<sup>53</sup> Articles 27-29 of the African Charter.

<sup>54</sup> *Ibid*, article 1.

<sup>55</sup> *Ibid*.

mandate within the AU system as evidenced by the provisions contained within the Charter.

Voluntariness plays a decisive role in whether the African Charter is applicable to an African state. States intending to be bound by the provisions contained within the Charter are required either to submit instruments of ratification or adherence.<sup>56</sup> The Constitutive Act of the AU does not make ratification of the Charter a requirement for membership of the AU,<sup>57</sup> with the consequence of this being that an African State may be a Member State of the AU but not a States Party to the Charter. The Kingdom of Morocco ('Morocco') is an example of the aforementioned and it is the only Member State of the AU that is not a States Party to the Charter. This state of affairs impacts the extent to which Morocco complies with its obligations in terms of the Constitutive Act of the AU and the extent to which it is able to demonstrate a commitment to the human rights objectives of the AU, as encompassed in the Constitutive Act of the AU. An example of an obligation contained within the Constitutive Act of the AU and with which Morocco may not be able to comply is found in article 3(h) of the Constitutive Act of the AU, which provides that one of the objectives which all Member States of the AU must strive to achieve is the promotion and protection of human and peoples' rights 'in accordance with the African Charter...'.<sup>58</sup>

Accordingly, being a States Party to the African Charter is the first step towards being able to evidence a commitment to the human rights protection mandate of the AU, and the act of ratifying the Charter creates legal obligations which states should not be able to voluntarily ignore. Further, given the commonalities between the objectives of the AU as encompassed in the Constitutive Act of the AU and those contained within the Charter, opting not to become a States Party to the Charter is arguably inconsistent with the objectives of the AU to which every Member State of the AU should be committed. This may suggest an absence of state commitment to the

---

<sup>56</sup> Article 63(3) of the African Charter.

<sup>57</sup> Article 29(1) and 29(2) of the Constitutive Act provide that any African State may accede to the Constitutive Act and request to be admitted as a Member State of the AU, and that such admission will be determined by a 'simple majority' vote of the Members of the AU.

<sup>58</sup> Article 3(h) of the Constitutive Act of the AU.

protection of human rights and is perhaps highly irregular in the context of the AU, given that 54 of the 55 Member States of the AU have ratified the Charter.<sup>59</sup>

The AU has a number of other instruments which provide for human and peoples' rights including instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>60</sup> As is the case with the African Charter, states cannot be bound by such instruments where they have not voluntarily consented to be bound.

### 2.3.2 The African Commission

Although the existence of a quasi-judicial body has not been asserted as a significant element for a legal framework conducive to the protection of human rights, it is important to look at the functioning of the African Commission for two main reasons: first, because an analysis on the legal framework and the compliance and enforcement mechanisms of the AU would be incomplete in the absence of a discussion on the Commission; and second, it is important to consider the impact of voluntariness on the functioning of the Commission for purposes of illustrating the reasons that this thesis does not propose the existence of a quasi-judicial body as being an integral element to the effective functioning of a legal framework conducive to the protection of human rights.

Article 30 of the African Charter establishes the African Commission which is a quasi-judicial organ of the AU. The primary purposes of the Commission include the promotion and protection of human and peoples' rights as provided for by the Charter,<sup>61</sup> and the interpretation of the provisions of the Charter upon the request of States Parties to the Charter or institutions of the AU.<sup>62</sup>

In respect of its protection mandate, the African Commission considers communications brought to it by States Parties to the African Charter ('inter-state communications'),<sup>63</sup> and other communications (including those brought by

---

<sup>59</sup> African Union 'List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples' Rights' ('African Charter Signatories and Ratifications') available at <https://au.int/en/treaties/african-charter-human-and-peoples-rights>, accessed on 2 January 2021.

<sup>60</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at <https://www.refworld.org/docid/3f4b139d4.html>, accessed 10 January 2021

<sup>61</sup> Article 45(1) and 45(2) of the African Charter.

<sup>62</sup> Ibid, article 45(3).

<sup>63</sup> Articles 47-54 of the African Charter.

individuals ('individual communications'),<sup>64</sup> which allege violations of the provisions of the African Charter by a States Party. The manner in which the Commission considers such communications is discussed below.

### 2.3.2.1 Inter-state communications

Inter-state communications may be sent directly to the African Commission pursuant to article 49 of the African Charter. Although article 47 of the Charter provides that the States Parties involved in a matter *may* attempt to reach an amicable solution before approaching the Commission, the wording of article 49 indicates that such an attempt is not a prerequisite for the seizing of the Commission.<sup>65</sup>

The provisions of the African Charter do not require States Parties to voluntarily consent to the jurisdiction of the African Commission to hear inter-state communications, by providing declarations to this effect. The act of ratifying the Charter itself enables States Parties to utilise the inter-state communications mechanism. Accordingly, States Parties to the Charter are unencumbered from approaching the Commission.

The African Commission cannot consider a matter unless it is satisfied that there has been an exhaustion of all local remedies by the applicant, unless it is apparent to the Commission that recourse to such remedies would be 'unduly prolonged.'<sup>66</sup>

In addressing inter-state communications, the African Commission endeavours first to facilitate an amicable solution between the states.<sup>67</sup> Where this is not possible, the Commission prepares a report providing for the facts of the matter and its findings<sup>68</sup> and submits this report to the states and to the Assembly of the Heads of States and Government ('AU Assembly').<sup>69</sup> The Commission may make any appropriate recommendations to the AU Assembly which it considers would be useful.<sup>70</sup> The role of the AU Assembly as a compliance and enforcement mechanism is discussed in the sections to follow.

---

<sup>64</sup> Articles 55-59 of the African Charter.

<sup>65</sup> Article 49 of the African Charter states that 'Notwithstanding the provisions of Article 47, if a State party to the [African Charter] considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission...'

<sup>66</sup> Article 50 of the African Charter.

<sup>67</sup> *Ibid*, article 52.

<sup>68</sup> *Ibid*.

<sup>69</sup> Article 2(2) of the Constitutive Act of the AU provides that the Assembly is the 'supreme organ of the Union'.

<sup>70</sup> Article 53 of the African Charter.

### 2.3.2.2 Individual communications

The African Commission may also consider communications brought by individuals and non-governmental organizations ('NGO's'),<sup>71</sup> but only where a 'simple majority' of the members of the Commission decide to do so.<sup>72</sup> Similar to inter-state communications, one of the prerequisites for the consideration of an individual communication is the exhaustion of local remedies where this is possible.<sup>73</sup> Although the African Charter seems to imply that the Commission will only consider the substantive aspects of a matter that involves 'serious or massive' violations of human and peoples' rights, the Commission has always accepted its power to consider matters concerning *any* violations of human rights provided that such matters are admissible.<sup>74</sup>

The process culminates in the dispensing of the African Commission's final decision which takes the form of recommendations.<sup>75</sup> Similar to inter-state communications, the African Charter does not indicate any separate declarations which must be made prior to an individual communication being received by the Commission.

The impact of voluntariness on the functioning of the African Commission can be considered by looking at two factors: namely, the extent to which litigants have access to the Commission and the legal force of the decisions of the Commission.

#### 2.3.2.2.1 Access to the African Commission

As discussed above, the African Charter does not provide that states have to make separate declarations consenting to the African Commission's consideration of inter-state and individual communications. Therefore, the only requirement appears to be that the states involved in a matter are to have voluntarily become States Parties to the Charter. Where a state is not a States Party to the Charter, as is the case with Morocco, the state itself as well as the people residing within the state's territory will not have access to the Commission through the use of these mechanisms. This consequence is,

---

<sup>71</sup> Steiner, Alston & Goodman op cit note 39, at 1067.

<sup>72</sup> Article 55(2) of the African Charter.

<sup>73</sup> Ibid, article 56(5).

<sup>74</sup> Supra note 71.

<sup>75</sup> The Secretariat of the African Commission on Human and Peoples' Rights 'Information Sheet No. 3' ('African Commission Information Sheet 3'), at 8, available at <https://www.achpr.org/communications>, accessed on 27 December 2020.

however, not as severe considering the legal force of the decisions of the Commission discussed directly below.

#### 2.3.2.2.2 Legal force of the decisions of the African Commission

Notwithstanding the almost perfect record of ratification, States Parties to the African Charter have been less than perfect in their compliance with the obligations contained therein.<sup>76</sup> One reason for this lies with the quasi-judicial nature of the African Commission: because the decisions of the Commission cannot be equated with those of a *judicial* institution, recommendations made by the Commission are not legally binding on the states involved in a matter.<sup>77</sup> This results in greater reliance being placed on the exercise of the voluntary will of states to ensure compliance with the recommendations. Such exercises of will, however, have not always been forthcoming<sup>78</sup> and this has had an adverse impact on the Commission's ability to guarantee state compliance with the Charter.<sup>79</sup>

It is for the reasons discussed above that voluntariness continues to significantly impact the functioning of the African Commission. It is also for the same reasons that this thesis does not propose the existence of a quasi-judicial body as being an important element for the effective functioning of a regional human rights system.

#### 2.3.3 The African Court

The African Court was established in 1998 through the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('Protocol to the African Charter').<sup>80</sup> The Court came into force in 2004<sup>81</sup> and was established to 'complement and reinforce the functions' of the African Commission.<sup>82</sup>

The African Court has the jurisdiction to adjudicate disputes that concern the interpretation and the application of the African Charter, the Protocol to the African

---

<sup>76</sup> Chairman Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 28.

<sup>77</sup> The Secretariat of the African Commission on Human and Peoples' Rights *African Commission Information Sheet 3* op cit note 75, at 8.

<sup>78</sup> Supra note 76, at 31

<sup>79</sup> Ibid, at 28.

<sup>80</sup> Protocol to the African Charter op cit note 34.

<sup>81</sup> Steiner, Alston & Goodman op cit note 39, at 1081.

<sup>82</sup> Ibid.

Charter and ‘any other relevant Human Rights instruments’ ratified by the states concerned.<sup>83</sup> One of the primary ways in which the Court does this is by considering inter-state and individual communications, as discussed below.

### 2.3.3.1 Inter-state complaints

Articles 5(1) (b) and (c) of the Protocol to the African Charter provide for the submission of inter-state complaints to the African Court, provided that such complaints have been submitted to the African Commission first.<sup>84</sup> States do not have to consent to the use of this procedure apart from the requirement of having to ratify the Protocol to the African Charter before the inter-state complaints mechanism can be utilised.<sup>85</sup>

### 2.3.3.2 Individual complaints

Article 5 (1) (3) of the Protocol to the African Charter provides for the submission of individual communications to the African Court by NGO’s with ‘observer status’ and individuals.<sup>86</sup> However, the Court cannot consider individual complaints brought to it unless a declaration granting state consent and made pursuant to article 34(6) of the Protocol to the African Charter has been made by the States Party against which the complaint is being brought. Prior to submitting a declaration under article 34(6), states must ratify the Protocol to the African Charter. It should be noted that to date, 30 states have ratified the Protocol to the African Charter.<sup>87</sup>

Accordingly, the ability of individuals and NGOs to utilize this mechanism is entirely dependent on the voluntary grant of consent by the relevant state.

The following discussion further expounds on the extent to which litigants have access to the African Court and the legal force of the decisions of the Court.

---

<sup>83</sup> Article 3(1) of the Protocol to the African Charter.

<sup>84</sup> *Ibid*, article 5(1) (b) and (c).

<sup>85</sup> Steiner, Alston & Goodman *op cit* note 39, at 1082.

<sup>86</sup> Article 5(1) (3) of the Protocol to the African Charter.

<sup>87</sup> African Court on Human and Peoples’ Rights ‘Activity Report of the African Court on Human and Peoples’ Rights’ (‘Activities Report’), para 5, available at <https://www.african-court.org/en/index.php/publications/activity-reports/1327-activity-report-of-the-african-court-on-human-and-peoples-rights-1-january-31-december-2019>, accessed on 30 September 2020.

### 2.3.3.3 Access to the African Court

As discussed above, individuals do not have access to the African Court in the absence of a voluntary declaration made in terms of article 34(6) of the Protocol to the African Charter. As of 5 May 2020, only six states had submitted declarations to this effect, with four states having subsequently withdrawn previously valid declarations.<sup>88</sup> Accordingly, individuals who have exhausted all local remedies,<sup>89</sup> or who are unable to do so due to the absence of such remedies,<sup>90</sup> are still unable to approach the Court for relief where the offending state has chosen not to make the requisite declaration.

Although inter-state communications may be considered by the African Court without the need for the submission of separate declarations by the offending state, this mechanism is scarcely utilized.<sup>91</sup> This is the case because few states are willing to accuse other states of treaty violations where there is a possibility that the former might also find themselves on the receiving end of similar accusations. Accordingly, the effective functioning of the Court in respect of inter-state communications is dependent on the voluntary exercise of the political will of states.

### 2.3.3.4 Legal force of the decisions of the African Court

The Protocol to the African Charter provides that where the African Court determines that a violation of a human or peoples' right has occurred, it shall make an appropriate order.<sup>92</sup> Such orders may include the payment of compensation or reparations.<sup>93</sup>

The legally binding nature of the decisions of the African Court is expressly provided under Rule 72 of the Rules of Court of the African Court,<sup>94</sup> which states that the judgments of the Court 'shall be binding on the parties' to the matter. States Parties to the Protocol to the African Charter are therefore obligated to 'undertake to comply

---

<sup>88</sup> Centre for Human Rights 'Press Statement: Centre for Human Rights expresses concern about the withdrawal of direct individual access to the African Court by Benin and Côte d'Ivoire' available at <https://www.chr.up.ac.za/press-statements/2073-centre-for-human-rights-expresses-concern-about-the-withdrawal-of-direct-individual-access-to-the-african-court-by-benin-and-cote-d-ivoire>, accessed on 28 December 2020.

<sup>89</sup> Article 56(5) of the African Charter.

<sup>90</sup> *Ibid.*

<sup>91</sup> Steiner, Alston & Goodman *op cit* note 39, at 1067.

<sup>92</sup> Article 27(1) of the Protocol to the African Charter.

<sup>93</sup> *Ibid.*

<sup>94</sup> Rules of Court of the African Court *op cit* note 15.

with the judgment in any case to which they are parties'<sup>95</sup> within the prescribed time period and to ensure its execution.

#### 2.3.4 Concluding remarks on the legal framework of the AU

The elements of a legal framework conducive to the protection of human rights within a regional context, and which are articulated in Chapter one are not entirely present within the legal framework of the AU. Specifically, the legal instrument codifying human and peoples' rights is only applicable to states that have voluntarily chosen to be bound by its provisions. Further, the judicial institution that functions in terms of the system of the AU is not accessible to individuals and NGOs without voluntary state consent. Accordingly, it cannot be said that the human rights legal framework of the AU is adequately conducive to the protection of human rights.

The discussion to follow analyses the impact of voluntariness on the extent to which the decisions of the African Court can be enforced.

The existence of a quasi-judicial body has not been included as a significant element in terms of this criterion for reasons which have been discussed in the preceding paragraphs, as well as those which are discussed in Chapter four. This notwithstanding, it remains relevant to analyse the compliance and enforcement mechanisms of the African Commission for purposes of completeness.

### 2.4 The compliance and enforcement mechanisms of the AU

The following discussion considers the impact of voluntariness on the compliance and enforcement mechanisms of the AU. The elements for effective compliance and enforcement measures are the following: (i) an institution specifically tasked with supervising the execution of the decisions of the judicial body that operates within that system; and (ii) a supreme decision-making body whose powers are legally prescribed, and which is legally bound to take appropriate action in instances of state non-compliance.

#### 2.4.1 The African Commission

The African Commission is obligated to provide a report on its activities, which includes the recommendations it makes, to the AU Assembly.<sup>96</sup> The AU Assembly is

---

<sup>95</sup> Article 30 of the Protocol to the African Charter.

<sup>96</sup> Article 54 of the African Charter.

comprised of the Heads of States and Governments of the Member States of the AU and serves as the highest organ of the AU. One of the functions of the AU Assembly is to ‘take decisions’ regarding the reports and recommendations received by it from the other organs of the AU, including the Commission.<sup>97</sup> Accordingly, the AU Assembly can decide, either by ‘consensus’<sup>98</sup> or, failing this, ‘by a two-thirds majority’<sup>99</sup> to adopt the Commission’s recommendations regarding a particular matter. However, it has been proposed that the AU Assembly should do more than just adopt the recommendations but should also attach binding effect to its adoption of the Commission’s reports and recommendations.<sup>100</sup> The consequence of this will be that such recommendations would become legally binding on the states involved.<sup>101</sup> This would be consistent with the AU Assembly’s objectives which include taking decisions on the reports and recommendations of the Commission,<sup>102</sup> and ensuring ‘compliance by all’ of the Member States of the AU.<sup>103</sup>

In addition, it has been argued that the adoption of the recommendations by the AU Assembly would render non-compliant states susceptible to the imposition of sanctions by the AU Assembly, pursuant to article 23(2) of the Constitutive Act of the AU. However, even where this is the case, it is likely that the imposition of sanctions will be limited to non-compliance in respect of *grave* violations of human rights.<sup>104</sup> As a consequence, the possible threat of sanctions would not be sufficient as a deterrent for state non-compliance in *all* cases of human rights violations.

The ‘rubber-stamping’ of the recommendations of the African Commission by the AU Assembly cannot guarantee state compliance either.<sup>105</sup> Absent any effective follow-up and enforcement measures, states can disregard the Commission’s legally binding decisions as easily as they can disregard non-binding decisions. Under the

---

<sup>97</sup> Article 9(1) (b) of the Constitutive Act of the AU.

<sup>98</sup> *Ibid*, article 7(1).

<sup>99</sup> *Ibid*.

<sup>100</sup> Okoloise *op cit* note 76, at 47.

<sup>101</sup> The Secretariat of the African Commission on Human and Peoples’ Rights *African Commission Information Sheet 3* *op cit* note 75 at 9.

<sup>102</sup> Article 9(1) (b) of the Constitutive Act of the AU.

<sup>103</sup> *Ibid*, article 9(1) (e).

<sup>104</sup> Rachel Murray ‘Implementation of the Judgments of the African Court on Human and Peoples’ Rights’ available at <http://www.acthprmonitor.org/implementation-of-the-judgments-of-the-african-court-on-human-and-peoples-rights/#prettyPhoto>, accessed on 30 September 2020.

<sup>105</sup> *Ibid*.

current Rules of Procedure of the African Commission,<sup>106</sup> a state is required to inform the Commission of the measures it has taken to ensure the implementation of a decision of the Commission and to do so within 180 days.<sup>107</sup> Special Rapporteurs are tasked with monitoring the implementation of such measures<sup>108</sup> and where a state fails in its implementation of a decision of the Commission, the Commission may refer the matter to other policy organs of the AU.<sup>109</sup> The Commission will also indicate in its reports to the AU Assembly the fact of the non-compliance of a state.<sup>110</sup>

Further, requiring the approval of a policy-making organ, which plays a primarily political role, before a decision by the Commission can be legally enforced is not advisable. It not only presents the Commission as a body lacking the requisite authority to carry out its own protection mandate, but it also leaves room for the influence of politics in the process of holding states accountable for their human rights violations.

In terms of the enforcement of the decisions of the Commission, there are no other mechanisms employed for this purpose. Therefore, ensuring state compliance with such decisions becomes increasingly difficult as a result of this fact.

#### 2.4.2 The African Court

Once the African Court has made its judgment, the Executive Council must be informed of the judgment in order to monitor its execution.<sup>111</sup> However, the Executive Council does not have any mechanisms that assist it with its role of monitoring the execution of the judgments of the Court.<sup>112</sup>

The Rules of Court of the African Court provide that States Parties must submit reports detailing the steps taken to comply with the decisions of the Court.<sup>113</sup> The Court

---

<sup>106</sup> Rules of Procedure of the African Commission on Human and Peoples' Rights (2020) ('Rules of Procedure of the African Commission').

<sup>107</sup> Ibid, rule 125(1). This rule relates to decisions of the Commission that require a state to take specific measures.

<sup>108</sup> Rule 125(5) of the Rules of Procedure of the African Commission.

<sup>109</sup> Ibid, rule 125(8).

<sup>110</sup> Ibid, rule 125(9).

<sup>111</sup> Judy Oder 'The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?' (2011) 2 *African Human Rights Law Journal* at 505.

<sup>112</sup> African Court on Human and Peoples' Rights *Activities Report* op cit note 87, para 59.

<sup>113</sup> Rule 81(1) of the Rules of Court of the African Court.

is also empowered to obtain information from ‘credible sources’ for purposes of assessing compliance<sup>114</sup> as well as hold hearings where compliance is in dispute.<sup>115</sup>

Failure to comply with a judgment of the African Court will be reported to the AU Assembly through the submission of the Court’s regular reports in which it details the work it has done.<sup>116</sup>

The reporting system described above is not sufficient in ensuring state compliance. This is clear from the information contained in the most recent African Court report to the AU Assembly, in which the former provides details of its activities during the period 1 January 2019 to 31 December 2019 (‘Activities Report’). The Activities Report identifies the issue of non-compliance as one of the main factors adversely impacting the effectiveness of the Court.<sup>117</sup> The Activities Report notes that the Court had received 248 applications since its commencement in 2006.<sup>118</sup> The Court had been able to finalize 78 of these cases, and from these, it found that rights had been violated in 35 cases.<sup>119</sup> At the point at which the Activities Report was prepared, only the state of Burkina Faso had complied fully with the decisions of the Court; the United Republic of Tanzania had partially complied with all judgments against it; and the Republic of Cote d’Ivoire had filed its report regarding the steps it had taken to comply with the judgments of the Court.<sup>120</sup> The remaining States Parties against whom judgments had been made had either failed to comply or had refused to comply at all with the judgments of the Court.<sup>121</sup>

In an attempt to improve compliance with African Court judgments, the Court was requested to conduct a comprehensive study on a framework of implementation for mechanisms which would enable effective monitoring of the execution of judgments.<sup>122</sup> In response, the Court submitted a ‘Draft Framework for Reporting and Monitoring Execution of Judgments and Other Decisions of the African Court on Human and Peoples’ Rights’ (‘Draft Framework’), and such will be considered at the next meeting of the Specialized Technical Committee (‘STC’) of the Justice and Legal

---

<sup>114</sup> Rule 81(2) of the Rules of Court of the African Court.

<sup>115</sup> *Ibid.*, Rule 81(3).

<sup>116</sup> Article 31 of the Protocol to the African Charter.

<sup>117</sup> African Court on Human and Peoples’ Rights *Activities Report* op cit note 87, para 56.

<sup>118</sup> *Ibid.*, para 10.

<sup>119</sup> *Ibid.*, para 56.

<sup>120</sup> *Ibid.*, para 57.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, para 60.

Affairs. The STC is ‘composed of ministers or senior officials’<sup>123</sup> who are ‘responsible for sectors falling within their respective areas of competence.’<sup>124</sup> Inter alia, the STC is tasked with ensuring the supervision, follow-up and evaluation of the implementation of decisions which are taken by the organs of the AU.<sup>125</sup> Some of the proposals provided in the Draft Framework include the establishment of a Monitoring Unit within the Court to which States Parties would submit ‘execution reports’ which the Court would use to determine their level of compliance.<sup>126</sup> As stated above, the Draft Framework is yet to be approved, and it is yet uncertain whether there exists a greater likelihood of states being willing to submit reports to the Monitoring Unit where they have failed or refused to do so under the current reporting system.

Accordingly, the fact that the African Court is a judicial institution whose decisions are legally binding should positively impact the functioning of the Court, as it provides the decisions of the Court with much needed legal force. However, this has not necessarily been the case as is illustrated in the preceding discussion, due to the lack of effective enforcement mechanisms.

#### 2.4.3 Concluding remarks on the compliance and enforcement mechanisms of the AU

The AU primarily relies on the voluntary exercise of the political will of states for the enforcement of decisions by the African Commission and the African Court. This is the case because neither the Commission nor the Court have effective measures of enforcing their decisions. Specifically, neither institution makes use of an effective supervisory body that supervises the execution of its decisions, or a decision-making body that is legally obliged to take measures to ensure state accountability.

The lack of political will to comply with the decisions of the African Court has resulted in the absence of a tangible state commitment to human rights, as is evidenced by increasing cases of non-compliance. In addition to the reasons discussed above, the reluctance of states to comply with, in particular, the decisions of the Court can be attributed, to some extent, to the political context in respect of which the former OAU and the AU were established (as previously discussed). The OAU Charter placed significance on such principles as state sovereignty, political independence and non-

---

<sup>123</sup> Article 14(3) of the Constitutive Act of the AU.

<sup>124</sup> Ibid, article 14(3).

<sup>125</sup> Ibid, article 15(b).

<sup>126</sup> Murray op cit note 104.

interference,<sup>127</sup> as does the Constitutive Act.<sup>128</sup> As such, it might be inconceivable that the Member States of the AU would desire to relinquish some of their sovereignty and be bound by the decisions of legal institutions seeking to rule on human rights issues.<sup>129</sup> Indeed, the establishment of the African Court was advocated for primarily by academics and NGO's<sup>130</sup> because states wished to safeguard their sovereignty and independence.

Accordingly, because the compliance and enforcement mechanisms of the AU are inadequate in ensuring the enforcement of the decisions of, in particular, the African Court, the lack of state political will has enabled states to commit to certain obligations within the legal framework of the AU human rights system but to fail at demonstrating a tangible commitment in respect thereto.

## 2.5 Conclusion

The AU was established to further the goals of its predecessor and to codify a commitment to human rights, democracy, and the rule of law. This is evident from the provisions of the Constitutive Act of the AU. The human rights mandate of the AU is unambiguously provided for in the African Charter as well.

The African Charter, however, is only applicable to states that have consented to be bound by it, and this has practical implications for the enforcement of the provisions contained therein by *all* current and future Member States of the AU.

The AU's commitment to the protection of human and peoples' rights is made manifest in the workings of the African Commission which is empowered to determine cases brought to it by individuals and States Parties. The effective functioning of the Commission is, however, compromised by the impact of voluntariness as a result of the following: (i) the Commission is a quasi-judicial institution and therefore its decisions are not legally binding; and (ii) the Commission lacks the requisite mechanisms to ensure compliance with its decisions, most likely because it cannot enforce non-binding decisions. This chapter has provided that the existence of a quasi-

---

<sup>127</sup> Rowland JV Cole 'The African Court on Human and Peoples' Rights: will political stereotypes form an obstacle to the enforcement of its decision?' (2010) 43 *The Comparative and International Law Journal of Southern Africa*, at 30.

<sup>128</sup> Articles 4(a) and (g) of the Constitutive Act of the AU provide for the principles of sovereign equality and non-interference in the internal affairs of Member States of the AU.

<sup>129</sup> *Supra* note 127, at 31.

<sup>130</sup> *Ibid*, at 26.

judicial body similar to the Commission would not be a crucial element for a regional human rights system that is to function effectively. As discussed above, however, the Commission is mandated to protect *and* promote human rights, and it is in respect of the latter mandate that a quasi-judicial body would be important to the functioning of a human rights system. This thesis, however, is concerned with the *protection* of human rights.

Voluntariness and the respect for state sovereignty also significantly impact the functioning of the African Court. The Court is a judicial institution whose decisions are accepted as binding only on States Parties to the Protocol to the African Charter. It has proven difficult to obtain acceptance from the Member States of the AU for the jurisdiction of the African Court, as is clear from the fact that only 30 Member States of the AU have ratified the Protocol to the African Charter. Even more concerning is the fact that the Court cannot act to bring justice to all private litigants and NGO's as only six Member States of the AU have consented to the jurisdiction of the Court in matters where individuals approach the Court directly.

The African Court, like the African Commission, has difficulty guaranteeing compliance with its decisions because of a lack of enforcement mechanisms. Data provided by the Court in its Activities Report clearly indicates that, among other factors, state non-compliance is severely compromising the effectiveness of the Court. The fact that some states have indicated an intention not to comply further points to the reliance that is placed on the voluntary exercise of the will of states to ensure compliance with judicial decisions.

Due to the adverse impact of voluntariness, the legal framework of the AU is inadequate in the protection of human rights. So too are the compliance and enforcement mechanisms ineffective at achieving the goal of human rights protection.

## **Chapter Three: The Southern African Development Community**

### **3.1 Introduction**

The Southern African Development Community ('SADC') is a sub-regional system which functions within the southern region of Africa. SADC was initially established to promote economic development and integration. As a result, the system places inadequate focus on the protection of human rights and this has translated into a weak human rights mandate, as is discussed below.

The discussion to follow considers the context in which the existing mechanisms for the protection of human rights within the SADC function.

Thereafter, the discussion examines the adverse impact that voluntariness has had on the functioning of the SADC through the lens of the CEHRS. Namely: (i) SADC's legal framework for the protection of human rights; and (ii) SADC's compliance and enforcement mechanisms. In doing so, the discussion highlights the extent to which the elements of each of the criteria are present within the SADC system, and the impact of voluntariness on such elements. These elements have been provided for in Chapter one as being: in terms of criterion (i), legal instruments evidencing a clear mandate for the protection of human rights which includes the existence of a body of codified human rights, or an express commitment to such a body existing within a regional framework; and a judicial institution authorised to adjudicate matters relating to the interpretation and application of the human rights legal instruments; whose decisions are legally binding on the parties to a matter; and to which all persons and states have access.

In terms of criterion (ii), these elements are: an institution specifically tasked with supervising the execution of the decisions of the judicial body that operates within that system; and a supreme decision-making body whose powers are legally prescribed, and which is legally bound to take appropriate action in instances of state non-compliance.

### **3.2 The origins of the SADC**

The SADC emerged from the Southern African Development Co-ordination Conference ('SADCC') established in 1980 as a 'development aid co-operation

mechanism.<sup>131</sup> Some of the aims of the SADCC included the mobilization and co-ordination of development assistance and the facilitation of regional co-operation.<sup>132</sup> The SADCC possessed no legal status.<sup>133</sup>

Towards the end of the 1980's, however, the members of the SADCC (Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe)<sup>134</sup> responded to the need for a more effective organization and one which possessed legal status and power.<sup>135</sup> As a result, the SADCC gained a stronger regional integration agenda through the establishment of the SADC, brought about by the adoption of the Treaty of the Southern African Development Community in 1992<sup>136</sup> ('SADC Treaty', 'Treaty').<sup>137</sup> Some of the objectives of the SADC include promoting the reduction of poverty through economic growth and development and maintaining peace, security and stability within the SADC region.<sup>138</sup> Accordingly, the focus on economic integration and development which was present under the SADCC remained.

It is clear from the context in which the SADC was established that little to no focus was placed on the protection of human rights.

The discussion to follow sets out an examination of the CEHRS and considers the impact of voluntariness on such criteria.

### 3.3 The SADC legal framework for the protection of human rights

The legal framework for the protection of human rights under the SADC system consists of the SADC Treaty ('SADC Treaty; 'Treaty') and Protocols thereto, and the SADC Tribunal of the Community ('SADC Tribunal', 'Tribunal').

#### 3.3.1 The SADC Treaty and Protocols

The SADC Treaty does not codify specific human rights and concomitant state obligations. This fact, however, is not unusual for an economic sub-regional system

---

<sup>131</sup> Garth le Pere & Elling N Tjønneland 'SADC: Which way SADC? Advancing co-operation and integration in southern Africa' (2005) *Institute for Global Dialogue* at 9.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> SADC Treaty op cit note 10.

<sup>137</sup> *Supra* note 131, at 10.

<sup>138</sup> *Ibid.*, at 9.

within Africa. Other economic sub-regional systems on the continent such as the East African Community ('EAC') and the Economic Community of West African States ('ECOWAS') also do not possess legal instruments that comprehensively codify human rights in the same manner as does their regional counterpart, the AU. However, what *is* unusual about the SADC Treaty as compared to the treaties of its sub-regional counterparts is the inadequate emphasis that is placed on human rights, as is evidenced in the relevant provisions of the Treaty: first, article 4(c) of the Treaty provides that States Parties are to act in accordance with the principles of 'human rights, democracy and the rule of law'; and secondly, article 6(2) of the Treaty enjoins States Parties to ensure that they do not discriminate on the grounds listed therein, which include the ground of race.<sup>139</sup> The manner in which the EAC in particular has framed its commitment to the protection of and respect for human rights within its primary legal instrument is relevant to the proposals provided for minimizing the impact of voluntariness on the functioning of the AU and the SADC. This is discussed in Chapter four.

The Protocols to the SADC Treaty and other SADC legal instruments codify procedures and practices regarding various issues that relate to the main objectives of the Treaty: regional integration and poverty eradication.<sup>140</sup> It should be noted, however, that there are a few protocols to the Treaty that address human rights issues such as the SADC Protocol on Gender and Development.<sup>141</sup> However, there is no obligation for Member States of the SADC to bind themselves to these legal instruments.

The primary compliance mechanism of the SADC Treaty is the SADC Tribunal, and it is empowered to adjudicate matters relating to the provisions of, *inter alia*, the Treaty. As discussed above, the lack of a human rights focus inherent in the provisions of the Treaty has resulted in the deprivation of a formal human rights mandate within the SADC. Further, the SADC Tribunal Protocol (2000)<sup>142</sup> which provides for the rules and procedures of the Tribunal does not provide such a mandate either. In contrast, the

---

<sup>139</sup> Article 6(2) of the SADC Treaty provides that Member States 'shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill-health, disability, or such other ground as may be determined by the Summit.'

<sup>140</sup> Southern African Development Community 'SADC Protocols' available at <https://www.sadc.int/about-sadc/overview/sa-protocols/>, accessed on 29 December 2020.

<sup>141</sup> SADC Protocol on Gender and Development (2008).

<sup>142</sup> SADC Tribunal Protocol (2000) *op cit* note 17.

EAC Treaty<sup>143</sup> and the Supplementary Protocol to the Protocol of the ECOWAS Community Court of Justice<sup>144</sup> provide their respective judicial institutions with a human rights mandate through conferring upon them the jurisdiction to adjudicate human rights matters. The manner in which this has been done is discussed in greater detail in Chapter four.

In light of the discussion above, the SADC Tribunal has had to place reliance on the broad framing of the principles of human rights and the rule of law under article 4(c) of the SADC Treaty in order to confer upon itself the jurisdiction to adjudicate matters wherein human rights violations are implicated. In its adjudication, the Tribunal may have regard to any and all other international and regional conventions which the Member States of the SADC have ratified.<sup>145</sup> Further, the Tribunal is expected to ‘develop its own... jurisprudence, having regard to the... general principles and rules of public international law and any rules and principles of the law of the States.’<sup>146</sup>

Although the SADC Tribunal is empowered to consider other regional and international instruments ratified by the Member States of the SADC in the fulfilment of its adjudicatory role, a greater emphasis on human rights within the legal framework of the SADC is necessary in order to establish a formal human rights mandate. This would ensure that all future efforts towards strengthening that mandate would be grounded in the SADC’s own commitment to the protection of human rights, as will be evidenced by the human rights-focused provisions contained within the legal instruments of the SADC. Non-compliance by Member States can be better addressed where there is a focused and explicit state obligation to the protection of human rights. Further, a clear human rights mandate would ensure that the human rights jurisdiction of the Tribunal cannot ever be questioned.

In respect of the impact of voluntariness on the operation of the SADC Treaty and its Protocols, states are required to ratify the Treaty in order to become a member of the SADC (and a States Party to the Treaty),<sup>147</sup> as well as to ratify the Protocols in order to be bound by them. As is discussed further in Chapter four, requiring states to

---

<sup>143</sup> Treaty for the Establishment of the East African Community (as amended) (2008) (‘EAC Treaty’).

<sup>144</sup> Supplementary Protocol to the ECCJ *op cit* note 28.

<sup>145</sup> Article 14(c) of the SADC Tribunal Protocol (2000).

<sup>146</sup> *Ibid*, article 21(b).

<sup>147</sup> Article 8(1) of the SADC Treaty.

ratify the primary human rights instrument of a regional or sub-regional system before becoming a member of that system is helpful in ensuring a prima facie commitment to the human rights objects of the relevant community. In this regard, it is therefore imperative that the legal instrument which states are to ratify evidences a strong human rights protection mandate. As is discussed in the preceding paragraphs, the SADC neither possesses a strong human rights mandate contained within the SADC Treaty nor an express commitment to the human rights contained within the regional human rights instrument, being the African Charter. The consequence of this has been that ratification of the Treaty has contributed little to the protection of human rights within the SADC region. This is confirmed by the fact that although all Member States of the SADC have ratified the Treaty, this has not guaranteed a tangible commitment to the protection of human rights (as discussed below).

### 3.3.2 The SADC Tribunal

The SADC Tribunal was established in 1992 pursuant to article 9 of the SADC Treaty.<sup>148</sup> The Tribunal was inaugurated in 2005 and began adjudicating cases in 2007.<sup>149</sup> The Tribunal is the means through which legal recourse may be sought for, inter alia, state violations of provisions contained in the SADC Treaty and Protocols thereto.<sup>150</sup>

The impact of voluntariness on the functioning of the SADC Tribunal can be determined by considering two factors: namely, the extent to which litigants have access to the Tribunal and the legal force of the decisions of the Tribunal. The discussion below first considers these factors in the context of the functioning of the Tribunal prior to the events that took place in 2008. The impact of such events on the effective functioning of the Tribunal are thereafter discussed in the context of the compliance and enforcement mechanisms of the SADC.

---

<sup>148</sup> Oliver C. Kuppel 'The Southern African Development Community (SADC) and its Tribunal: Reflexions on a Regional Economic Communities' Potential Impact on Human Rights Protection' (2009) 42 *Law and Politics in Africa, Asia and Latin America* 181.

<sup>149</sup> Ibid.

<sup>150</sup> Articles 14(a) and (b) of the SADC Tribunal Protocol (2000) provide that the SADC Tribunal has the jurisdiction over 'all disputes and applications pertaining to' the interpretation and application of the SADC Treaty and its Protocols, including all other instruments which are adopted 'within the framework' of the SADC.

### 3.3.2.1 Access to the SADC Tribunal

Article 15 of the SADC Tribunal Protocol (2000) provides that the SADC Tribunal has jurisdiction to adjudicate ‘disputes between Member States and between natural or legal persons and Member States.’<sup>151</sup> Pursuant to the SADC Agreement Amending the SADC Treaty (‘SADC Treaty Amendment Agreement, 2001’),<sup>152</sup> the SADC Treaty makes it clear that the SADC Tribunal Protocol (2000) is an ‘integral part’ of the Treaty.<sup>153</sup> Accordingly, the SADC Tribunal Protocol (2000) came into effect upon the adoption of the SADC Treaty Amendment Agreement, 2001 by three-quarters of the members of the Summit (that is, the Heads of States or Government of the Member States of the SADC).<sup>154</sup> Corresponding amendments were also made to the SADC Tribunal Protocol (2000) which removed the requirement of its ratification by two-thirds of the Member States for its entry into force.<sup>155</sup> As a consequence, the SADC Tribunal Protocol (2000) came into force when ‘three quarters of the members of the Summit’ signed the SADC Treaty Amendment Agreement, 2001,<sup>156</sup> and the amendments made to the SADC Tribunal Protocol (2000) came into force when ‘three quarters of the members of the Summit’ signed the agreement providing for such amendments.<sup>157</sup> It should be noted that all Member States of the SADC have adopted the aforementioned agreements.

Accordingly, states do not have to ratify the SADC Tribunal Protocol (2000) in order to confer jurisdiction on the SADC Tribunal to adjudicate cases brought to it by states and individuals. This understanding is supported by article 15(3) of the SADC Tribunal Protocol (2000) which provides that state consent is not a prerequisite for the consideration of a case by the Tribunal, and by the fact that the SADC Tribunal Protocol (2000) is an integral part of the Treaty as a result of the abovementioned amendments. Therefore, states need only ratify the SADC Treaty for purposes of the application of the SADC Tribunal Protocol (2000).

Once a Member State has ratified or acceded to the SADC Treaty, it cannot deny state or individual access to the SADC Tribunal by appending reservations to the

---

<sup>151</sup> Article 15(1) of the SADC Tribunal Protocol.

<sup>152</sup> Article 18 of the SADC Treaty Amendment Agreement (2001) op cit not 32.

<sup>153</sup> Article 16(2) of the SADC Treaty.

<sup>154</sup> Article 32 of the SADC Treaty Amendment Agreement (2001).

<sup>155</sup> Articles 16 and 21 of the SADC, Agreement Amending the Protocol on Tribunal (2002) op cit note 33.

<sup>156</sup> Supra note 152.

<sup>157</sup> Supra note 155, article 21.

‘access provisions’ contained in the SADC Tribunal Protocol (2000).<sup>158</sup> Accordingly, the impact of voluntariness, as regards access to the Tribunal, starts and ends at the point of ratification or accession to the SADC Treaty.

### 3.3.2.2 Legal force of the decisions of the SADC Tribunal

Article 16(5) of the SADC Treaty and article 24 of the SADC Tribunal Protocol (2000) state that the decisions of the SADC Tribunal are final and legally binding on the parties to a dispute. The fact of the binding nature of the decisions of the Tribunal is a good first step towards ensuring state compliance with such decisions. This is so because attaching legal force to the decisions of the Tribunal means that non-compliance would be a legal violation, the seriousness of which would be equal to the violation of an order made by a domestic court within the territory of a state. In theory therefore, a state’s ability to voluntarily choose not to comply is arguably diminished by the seriousness that would be attached to its non-compliance.

### 3.3.3 Concluding remarks on the legal framework of the SADC

The discussion above has indicated that the SADC system is lacking a strong, formal human rights mandate within its legal instruments. This is evidenced by the fact that the SADC Treaty places little emphasis on the protection of human rights, and the Treaty does not evidence a specific commitment to the regional body of codified human rights, being the African Charter. A sub-regional system need not adopt its own body of codified human rights and fundamental freedoms, but this thesis argues that it must ensure that its member states are obliged to respect and protect the human rights contained within the region’s body of codified rights. This is not the case with the SADC system.

This notwithstanding, prior to the events which took place in 2008 and which adversely impacted the functioning of the SADC Tribunal, the SADC system did indeed have a judicial institution which was equally accessible to states and individuals. However, the Tribunal made use of the broadly framed principles of human rights and the rule of law, as well as other regional and international human rights legal instruments, to adjudicate human rights matters. This thesis argues that a

---

<sup>158</sup> Article 22(14) of the SADC Treaty.

stronger human rights mandate within the SADC system itself would ensure the conferral of an unambiguous human rights jurisdiction upon the Tribunal.

Prior to the changes to the SADC Tribunal discussed below, the impact of voluntariness on the functioning of the Tribunal was limited to the requirement of the ratification of the SADC Treaty. The changes to the functioning of the Tribunal influenced by the exercise of the political will of the Member States of the SADC have now made it impossible for the Tribunal to serve as an effective human rights protection mechanism.

### 3.4 The compliance and enforcement mechanisms of the SADC

The responsibility of complying with the decisions of the SADC Tribunal lies primarily with the parties to a decision, however both Member States and institutions of the SADC are expected to undertake all ‘necessary’ measures for the execution of a judgment by the SADC Tribunal.<sup>159</sup> The laws of civil procedure within a Member State governing the ‘registration and enforcement of foreign judgments’ are to apply for purposes of the execution of a judgment.<sup>160</sup>

Where a Member State has failed to abide by a decision of the SADC Tribunal, such failure ‘may be referred’ back to the Tribunal for confirmation.<sup>161</sup> Once confirmed, the matter will be referred to the Summit so that it may take appropriate action.<sup>162</sup> The SADC Tribunal Protocol (2000) provides no indication as to the kinds of ‘appropriate action’ that may be taken by the Summit, but articles 33(1) (a) and (b) of the SADC Treaty respectively provide that the Summit can impose sanctions on Member States which ‘persistently fail, without good reason, to fulfil obligations’<sup>163</sup> set out in the Treaty, or which ‘implement policies that undermine the principles and objectives of SADC.’<sup>164</sup>

The Summit comprises of the Heads of States or of Government of all of the Member States of the SADC, and it serves as the highest ‘policy-making institution of SADC.’<sup>165</sup> The work of the Summit includes the adoption of legal instruments that

---

<sup>159</sup> Article 32(2) of the SADC Tribunal Protocol (2000).

<sup>160</sup> *Ibid*, article 32(1).

<sup>161</sup> *Ibid*, article 32(4).

<sup>162</sup> *Ibid*, article 32(5).

<sup>163</sup> Article 33(1) (a) of the SADC Treaty.

<sup>164</sup> *Ibid*, article 33(1) (b).

<sup>165</sup> *Ibid*, article 10(1).

give effect to the provisions of the SADC Treaty<sup>166</sup> and this includes the amendment of existing SADC legal instruments such as the SADC Tribunal Protocol (2000), which amendment is discussed below.

Absent any other mechanisms that provide for the supervision of the enforcement of judgments by the SADC Tribunal, whether a judgment of the Tribunal is executed is influenced by voluntariness in the form of the exercise of political will, either by the state in question or by the Summit. Where a state fails to exercise such political will, it is the duty of the Summit to take ‘appropriate action’<sup>167</sup> against the errant state. As is illustrated in the discussion to follow, the task of ensuring state accountability for the violation of human rights should not be undertaken by a body that plays the primarily political role of policymaking, and which has an absolute discretion regarding the nature of the action that it may take against non-compliant states. This leaves room for undue political influence in the carrying out of the task of holding a state accountable for its actions. Accordingly, and in the context of the SADC, the willingness of the Summit to take the requisite appropriate action greatly impacts whether errant states are held accountable for their non-compliance.

The discussion to follow looks at the impact of the exercise of political will by the Summit on the functioning of the SADC Tribunal.

#### 3.4.1 Political will and the SADC Tribunal

Notwithstanding the inadequacy of the SADC human rights mandate, the SADC Tribunal was still willing and able to protect human rights. This is evident from its first human rights case: *Mike Campbell & Another (PVT) Limited v The Republic of Zimbabwe* (‘*Campbell*’).<sup>168</sup>

The *Campbell* case dealt with the compulsory acquisition, by the government of the Republic of Zimbabwe (‘Respondent’, ‘Republic of Zimbabwe’), of agricultural land belonging to the Applicants,<sup>169</sup> pursuant to section 16(B) of the Constitution of Zimbabwe (Amendment 17).<sup>170</sup> The specific constitutional provisions went as far as

---

<sup>166</sup> Article 10(3) of the SADC Treaty.

<sup>167</sup> Article 32(5) of the SADC Tribunal Protocol (2000).

<sup>168</sup> *Mike Campbell & Another (PVT) Limited v The Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (‘*Campbell*’).

<sup>169</sup> *Ibid.*, at 7.

<sup>170</sup> *Ibid.*, at 8.

to bar individuals affected by the acquisitions from mounting legal challenges in respect thereto.<sup>171</sup>

The SADC Tribunal found the following in its adjudication of the matter: first, that the Respondent had violated the principle of the rule of law enshrined in the SADC Treaty<sup>172</sup> by ousting the jurisdiction of the Zimbabwean courts in any matter regarding the acquisition of agricultural land, pursuant to the relevant constitutional provisions.<sup>173</sup> The Tribunal reasoned that the ousting of the jurisdiction of the Zimbabwean courts was a denial of the Applicant's right to access the courts, and such a denial violated their right to a fair hearing.<sup>174</sup>

Second, that the Respondent had violated article 6(2) of the SADC Treaty which requires that all Member States refrain from discriminating on any of the listed grounds, including the ground of race.<sup>175</sup> The SADC Tribunal reasoned that the particular constitutional provisions had an 'unjustifiable and disproportionate impact upon a group of individuals distinguished by race, such as the Applicants.'<sup>176</sup> And lastly, the Tribunal held that the Applicants were entitled to fair compensation in respect of the acquired land, which was to be paid by the Respondent.<sup>177</sup>

Accordingly, the SADC Tribunal made an order directing the Respondent to pay due compensation to the Applicants by a particular date and to undertake 'all necessary measures... to protect the possession, occupation and ownership of the lands of the Applicants...'<sup>178</sup> and 'to ensure that no action is taken, pursuant to Amendment 17, directly or indirectly,... to evict from, or interfere with, the peaceful residence on, and of [the farms] by the Applicants.'<sup>179</sup>

The Respondent did not do as it was ordered. Instead, the Applicants continued to be intimidated and their lands continued to be invaded.<sup>180</sup> The failure of the Respondent to comply with the order made by the SADC Tribunal was alleged by the

---

<sup>171</sup> *Campbell*, at 12

<sup>172</sup> Article 4(c) of the SADC Treaty.

<sup>173</sup> *Supra* note 171, at 41.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, at 54.

<sup>176</sup> *Ibid.*, at 53.

<sup>177</sup> *Ibid.*, at 57.

<sup>178</sup> *Ibid.*, at 58.

<sup>179</sup> *Ibid.*, at 59.

<sup>180</sup> *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009) ('*Campbell and Another*, 2009), at 3.

Applicants and established by the Tribunal.<sup>181</sup> The Tribunal ruled that it would report such failure to the Summit pursuant to article 32(5) of the SADC Tribunal Protocol (2000).<sup>182</sup>

Further action was thereafter taken in respect of Zimbabwe's non-compliance in the case of *Louis Karel Fick & Others v Republic of Zimbabwe* ('*Louis Karel*'),<sup>183</sup> wherein the SADC Tribunal once again ruled that Zimbabwe had failed to comply with its previous orders,<sup>184</sup> and that it would report such failure to the Summit.<sup>185</sup>

The subsequent voluntary actions of Zimbabwe and the Summit indicated little commitment to the protection of human rights and to the SADC Tribunal's role in human rights protection.

#### 3.4.1.1 The Republic of Zimbabwe

The State of Zimbabwe made it clear that it would not ensure compliance with the decision of the SADC Tribunal in *Campbell*. It did so through its voluntary act of non-compliance and through its expressly stated intention not to ensure the registration and enforcement of the judgment of the Tribunal.<sup>186</sup> Notwithstanding the binding nature of the decisions of the Tribunal, the Minister of Justice and Legal Affairs of Zimbabwe informed the Tribunal that Zimbabwe would thereafter consider any decisions taken against itself by the Tribunal as 'null and void.'<sup>187</sup>

The Republic of Zimbabwe's attitude towards the SADC Tribunal as well as its support for the amendment of the SADC Tribunal Protocol (2000) (discussed below) is evidence of its lack of commitment and interest in exercising its political will towards the protection of the human rights of individuals within the SADC region.

#### 3.4.1.2 The SADC Summit

Following the SADC Tribunal decision in *Louis Karel*, the Summit held a meeting in August 2010. During such meeting, the Summit called on the international community

---

<sup>181</sup> *Campbell and Another*, 2009, at 2.

<sup>182</sup> *Ibid*, at 3.

<sup>183</sup> (SADC (T) O1/2010) [2010] SADCT 8.

<sup>184</sup> *Louis Karel Fick & Others v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8 ('*Louis Karel*'), at 4.

<sup>185</sup> *Ibid*.

<sup>186</sup> *Ibid*, at 3.

<sup>187</sup> *Ibid*.

to ‘lift all forms of sanctions’ which had been imposed on Zimbabwe.<sup>188</sup> Although the Summit was empowered to, and indeed could, impose sanctions on Zimbabwe, it chose not to do so in response to Zimbabwe’s failure to comply with the orders of the Tribunal. Instead, the Summit decided to conduct a review of the ‘role, functions and terms of reference’ of the SADC Tribunal.<sup>189</sup> The independent review was conducted by Dr. Lorand Bartels of Cambridge University (‘Independent Review’).<sup>190</sup> The conclusions of the Independent Review confirmed the validity and binding nature of the decisions of the Tribunal by providing, inter alia, that such decisions are to be enforced within the jurisdictions of the SADC Member States,<sup>191</sup> and that non-compliance with the Tribunal decisions was a violation of the obligation to take all ‘necessary’ measures to execute the judgments of the Tribunal, as provided under article 32(2) of the SADC Tribunal Protocol (2000).<sup>192</sup>

Notwithstanding the findings of the Independent Review and during a subsequent Summit held in May 2011 (‘2011 Summit’),<sup>193</sup> the Summit authorized the initiation of a process to amend SADC legal instruments.<sup>194</sup> As a result, a new SADC Tribunal Protocol (2000) was drafted (‘2014 Protocol to the Tribunal’), and it limits the jurisdiction of the Tribunal to disputes *between Member States* only.<sup>195</sup> The 2014 Protocol to the Tribunal requires ratification by two-thirds of the Member States of the SADC before it may come into force. This requirement has not yet been met.

One of the most significant implications of the changes brought about by the 2014 Protocol to the Tribunal is the preclusion of individuals from accessing the SADC Tribunal in order to hold states accountable for violating treaty obligations. Another is the inability of the SADC Tribunal to utilise communications brought by individuals

---

<sup>188</sup> Communiqué of the 30<sup>th</sup> Jubilee Summit of SADC Heads of State and Government available at <http://www.thepresidency.gov.za/content/communique-30th-jubilee-summit-sadc-heads-state-and-government>, accessed on 1 January 2021, para 18.

<sup>189</sup> Ibid, para 32.

<sup>190</sup> WTI ‘Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal, Final Report’ available at <https://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>, accessed on 1 January 2021, 1-89.

<sup>191</sup> Ibid, at 55.

<sup>192</sup> Ibid, at 43.

<sup>193</sup> Communiqué Extraordinary Summit Heads of State and Government of the Southern African Development Community (SADC) (‘SADC Summit 2011’), available at <http://www.swradioafrica.com/Documents/SADCSummit240511.pdf>, accessed on 1 January 2021.

<sup>194</sup> Ibid, para 7.

<sup>195</sup> Article 33 of the Protocol on the Tribunal in the Southern African Development Community (2014) (‘2014 Protocol to the Tribunal’).

as a means of assessing the situation ‘on the ground’ so to speak, for the purpose of determining the degree to which a state is actually complying with the principles of human rights and the rule of law, among others.

The 2011 Summit further decided that the SADC Tribunal would not continue to conduct hearings in respect of new cases until the 2014 Protocol to the Tribunal had been ‘reviewed and approved.’<sup>196</sup> And lastly, the 2011 Summit decided against the reappointment of the members of the Tribunal whose terms of office had expired during the previous year, and the replacement of those whose terms of office would expire at the end of 2011.<sup>197</sup> This resulted in the Tribunal being inadequately constituted in terms of the SADC Tribunal Protocol (2000)<sup>198</sup> which rendered the Tribunal practically and legally inoperative.

The failure of the Summit to take action against Zimbabwe for the latter’s non-compliance sealed the fate of the SADC Tribunal and illustrated a lack of commitment to the protection of the principles of human rights and the rule of law. The participation of the representatives of the Member States in the 2011 Summit, during which the practical and legal suspension of the Tribunal was confirmed, and the subsequent adoption of the 2014 Protocol to the Tribunal by some of these representatives also illustrates a similar lack of commitment.

It must be noted, however, that the backlash that ensued in response to the acts of the Summit created the impression that the judicial organs of at least some of the Member States of the SADC recognize the jurisdiction of the SADC Tribunal and are willing to uphold the principle of the rule of law, in order to protect the right of individuals to access the SADC Tribunal. In this regard, the brief discussion below provides insight into the actions of the judiciaries of the Republic of South Africa (‘South Africa’) and the United Kingdom of Tanzania (‘Tanzania’).

#### 3.4.1.3 South Africa

The High Court of South Africa decided a matter brought by some of the Applicants in *Campbell* for the attachment of property situated in South Africa and owned by

---

<sup>196</sup> Communique Extraordinary Summit Heads of State and Government of the Southern African Development Community (SADC) *SADC Summit 2011* op cit note 193, para 8.

<sup>197</sup> *Ibid*, para 7.

<sup>198</sup> Article 3 of the SADC Tribunal Protocol (2000).

Zimbabwe.<sup>199</sup> The Applicants (now Respondents) intended to sell the attached property in order to reduce the indebtedness of Zimbabwe in respect of the main judgment in *Campbell*.<sup>200</sup> The Respondents were successful, albeit only in respect of one of the properties owned by Zimbabwe.<sup>201</sup>

Notwithstanding this victory recognizing and affirming the SADC Tribunal judgment in *Campbell*, South Africa participated in the 2011 Summit<sup>202</sup> and thereafter appended its signature to the 2014 Protocol to the Tribunal. Both of these voluntary actions could be construed as an act of solidarity with Zimbabwe and a prioritization of sovereignty over the protection of human rights and the rule of law.

However, the South African Constitutional Court ('Constitutional Court') subsequently addressed a challenge to the abovementioned actions on the grounds that such actions were 'unconstitutional, unlawful and irrational.'<sup>203</sup> The Constitutional Court confirmed the aforementioned<sup>204</sup> by reasoning that the President could not approve of anything that undermines South Africa's international obligations and its own Bill of Rights.<sup>205</sup> The President had been attempting to do so through supporting changes to the SADC legal framework that would deny South Africans their constitutional right to access justice.<sup>206</sup>

Accordingly, the President was directed to withdraw his signature from the 2014 Protocol to the Tribunal,<sup>207</sup> which he subsequently did.<sup>208</sup>

---

<sup>199</sup> *Republic of Zimbabwe v Sheriff Wynberg North and Others* (2009/34015) [2010] ZAGPJHC 118, para 2.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*, para 14.

<sup>202</sup> The Summit which took place on 20 May 2011 was attended by H.E. YLM Myakayaka-Manzini, South African High Commissioner to Namibia and representative of the State of South Africa. Further, article 10(9) of the SADC Treaty provides that decisions of the Summit are taken by consensus.

<sup>203</sup> *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (South African Litigation Centre and Centre for Applied Legal Studies as Amicus Curiae) [2018] ZACC 51, para 7.

<sup>204</sup> *Ibid.*, para 97.

<sup>205</sup> *Ibid.*, para 77.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Supra* note 204.

<sup>208</sup> Communique of the 39<sup>th</sup> SADC Summit of Heads of State and Government, available at [https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/08/Communique\\_of\\_the\\_39th\\_SADC\\_Summit-English.pdf](https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/08/Communique_of_the_39th_SADC_Summit-English.pdf), accessed on 1 January 2021, para 20.

#### 3.4.1.4 Tanzania

Tanzania also participated in the 2011 Summit<sup>209</sup> and subsequently appended its signature to the 2014 Protocol to the Tribunal. In response to these actions, however, the Tanganyika Law Society instituted proceedings against the Ministry of Foreign Affairs and International Cooperation and the Attorney General of Tanzania ('Respondent's') for the judicial determination of the legality of the acts aforementioned.<sup>210</sup> The Tanzania High Court found, *inter alia*, that the suspension of the SADC Tribunal and the Summit's decision not to appoint judges pursuant to the SADC Treaty is 'inimical to the rule of law as a foundational principle inherent to the legitimacy of the SADC';<sup>211</sup> and that in the absence of a duly constituted tribunal with the requisite jurisdiction, the legitimacy of the SADC Community is seriously questionable, and the Respondents are to reconsider their position in respect thereto.<sup>212</sup>

#### 3.4.2 Concluding remarks on the compliance and enforcement mechanisms of the SADC

The SADC does not employ any mechanisms for the supervision of the execution of the judgments of the SADC Tribunal. Accordingly, states are heavily relied upon to voluntarily comply with such judgments and where non-compliance is established by the Tribunal, the Summit is called upon to take appropriate action.

The dangers of expecting a political body with wide, discretionary powers to hold some of its members accountable for their human rights violations have been illustrated in the discussion above, and it is clear that the adverse impact of the exercise of a state's political will can be damaging to the functioning of a human rights system. The refusal by Zimbabwe to abide by the decisions of the SADC Tribunal; the failure of the Summit to take appropriate action in respect thereto; and the voluntary acts of the representatives of the Member States of the SADC in supporting the drafting of the 2014 Protocol to the Tribunal and in the subsequent act of signing such document

---

<sup>209</sup> The Summit which took place on 20 May 2011 was attended by H.E. Jakaya Mrisho Kikwete, representative of Tanzania.

<sup>210</sup> *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania & the Attorney General of the United Republic of Tanzania* (MISC Civil Cause No. 23 of 2014) ('*Tanganyika Law Society*'), available at [https://africanlii.org/sites/default/files/Judgment.%20TLS%20vs%20Ministry%20of%20Foreign%20Affairs%20and%20International%20Cooperation%20%26%20AG%2C%20Misc%20Civil%20Cause%20No.%2023%20of%202014.\\_0.pdf](https://africanlii.org/sites/default/files/Judgment.%20TLS%20vs%20Ministry%20of%20Foreign%20Affairs%20and%20International%20Cooperation%20%26%20AG%2C%20Misc%20Civil%20Cause%20No.%2023%20of%202014._0.pdf), accessed on 1 January 2021, at 2.

<sup>211</sup> *Ibid*, at 50 para 1.

<sup>212</sup> *Ibid*, at 50 para 3.

are clear indicators of a lack of a tangible commitment to the work of the Tribunal. It is fortunate, however, that the judiciaries of some of the SADC States intervened in order to preserve the principles of the rule of law and human rights within their territories. However, this has not been the case in respect of all of the Member States of the SADC who voted in favour of reforming the SADC Tribunal. As a result, the Tribunal itself remains inoperable.

#### 4.5 Conclusion

The SADC is a regional organization which primary purposes include economic integration. This is apparent from its minimal human rights focus and inadequate human rights mandate. This notwithstanding, the SADC Tribunal did all it could to protect the principles of human rights and the rule of law in the determination of its first human rights case. Yet not even such willingness on the part of the Tribunal could counter the negative effects of the voluntary exercise of political will, influenced by a desire to prioritize regional unity and solidarity at the expense of accountability.

The role of the Summit in the downfall of the SADC Tribunal cannot be understated. The Summit failed in its obligation to take appropriate action to ensure compliance with the judgments of the Tribunal and consequently set a dangerous precedent. Further, its actions brought about the suspension of the Tribunal and indicated support for the functioning of a tribunal that would lack the jurisdiction to consider violations of human rights brought to its attention by individuals.

The SADC Tribunal is no longer functional. The lack of compliance with a Tribunal judgment, which ultimately acted as a catalyst to the current state of affairs of the Tribunal, indicates a general disregard for the rule of law and for the authority of the Tribunal.

Accordingly, the legal framework and the compliance and enforcement mechanisms of the SADC require intervention in order to ensure their adequacy for the function which the SADC system is to perform: the protection of human rights within the SADC region.

## **Chapter Four:** Proposals for the minimization of the impact of the requirements of state consent and the exercise of political will

### 4.1 Introduction

Chapter two and Chapter three of this thesis have illustrated the impact of voluntariness in the form of state consent and the exercise of political will on the functioning of the regional and sub-regional systems of the African Union ('AU') and the Southern African Development Community ('SADC'). In particular, the impact of voluntariness on the criteria asserted to be among the most significant factors that contribute to the effective functioning of a human rights system ('CEHRS') has been analysed. This chapter provides practical ways in which the impact of voluntariness on the CERHS can be minimized by considering how this has been done within the regional and sub-regional systems of the European Human Rights System, ('European System'), the East African Community ('EAC') and the Economic Community of West African States ('ECOWAS').

### 4.2 Legal framework conducive to the protection of human rights

Chapter one of this thesis provides the elements that constitute a legal framework, within the context of regional and sub-regional systems, conducive to the protection of human rights. Those elements are: (i) legal instruments evidencing a clear mandate for the protection of human rights which includes the existence of a body of codified human rights, or an express commitment to such a body existing within a regional framework; and (ii) a judicial institution authorised to adjudicate matters relating to the interpretation and application of the human rights legal instruments; whose decisions are legally binding on the parties to a matter; and to which all persons and states have access.

#### 4.2.1 Legal instruments evidencing a clear human rights mandate

##### 4.2.1.1 The AU

The AU possesses a clear human rights mandate evidenced by the provisions of the constitutive document of the AU which places focus on human rights through its stated objectives, some of which include the protection and promotion of human and peoples'

rights<sup>213</sup> and the respect for ‘democratic principles, human rights, the rule of law and good governance.’<sup>214</sup> This is supported by the existence of a body of codified civil and political, socio-economic, cultural and third-generation rights (the African Charter).

The impact of voluntariness on the functioning of the primary human rights legal instrument of the AU, being the African Charter (‘African Charter’, ‘Charter’), is inherent in the requirement of state consent before the Charter may bind a state. This is consistent with the principle of state sovereignty which ensures that states are bound by obligations contained in legal instruments to which they have *consented* to be bound. Although only one Member State of the AU has not ratified the Charter, it is still important to consider how this requirement of state consent can be alleviated in the context of a regional system.

#### 4.2.1.1.1 Restricting membership of the regional organization by requiring a ratification of the primary legal instrument

The European System is an example of a human rights system that restricts membership to the Council of Europe.

The impact of voluntariness is significantly minimized in respect of the application of the European Convention (‘European Convention; ‘Convention’)<sup>215</sup> to Member States of the Council of Europe: States Parties to the Convention are to first become Member States of the Council of Europe<sup>216</sup> and in order to be admitted as such, states must be committed to the realization of the principles of the rule of law;<sup>217</sup> be in acceptance of the right of all persons within its territory to the enjoyment of human rights and fundamental freedoms;<sup>218</sup> and must be a genuine democracy.<sup>219</sup> In practice, the ratification of the Convention has come to be understood as a significant way in which a state evidences its commitment to the aforementioned objects of the Council of Europe because the Convention itself espouses similar objects. Further, the

---

<sup>213</sup> Article 3(h) of the Constitutive Act of the AU op cit note 9.

<sup>214</sup> Ibid, article 4(m).

<sup>215</sup> European Convention op cit note 21.

<sup>216</sup> The Preamble to the European Convention commences with the words ‘The Governments Signatory hereto, *being members of the Council of Europe,...*’ (Own emphasis).

<sup>217</sup> Article 3 of the Statute of the Council of Europe op cit note 22.

<sup>218</sup> Ibid.

<sup>219</sup> Third preambular paragraph to the Statute of the Council of Europe.

ratification of the Convention is a requirement which must be met in order for a state to *continue* as a Member State of the Council of Europe.<sup>220</sup>

Accordingly, states desiring to become and to remain Member States of the Council of Europe must ratify the European Convention. Therefore ratification, though technically a voluntary act, is based on necessity as opposed to any other reason for which a state may voluntarily become a party to a convention.

The ratification process is not a *prerequisite* for admission as a member into the Council of Europe, however, it is required for a state to remain a Member State of the Council of Europe. In the same manner, this thesis proposes that regional organizations like the AU should make ratification of their primary human rights instrument a requisite for retaining membership in the regional organization. States would be more willing to bind themselves in this manner where the objects of the organization itself are consistent with those espoused in the primary human rights instrument, and this is the reason it is imperative for the founding instrument of the regional organization to contain an express human rights protection mandate.

In the context of the AU, the Constitutive Act of the AU and the African Charter provide for a strong human rights protection mandate, such that the ratification of the latter would evidence a state commitment to the objects of the former. However, as mentioned in Chapter two, the ratification of the African Charter is not a requisite for membership of the AU, as evidenced by the fact that Morocco is the only Member State of the AU that has not ratified the African Charter.

In order to implement the proposals put forward in this thesis, amendments would have to be made to articles 29(1) and 29(2) of the Constitutive Act of the AU which provide for the requirements for membership,<sup>221</sup> in order to ensure that ratification of the African Charter becomes a requisite for admission into the AU.

This proposal would result in full support, at least on paper, for the primary human rights legal instrument of a regional organization and this would be achieved through the reduction of the impact of voluntariness.

---

<sup>220</sup> Steiner, Alston & Goodman op cit note 39, at 937.

<sup>221</sup> Article 29(1) of the Constitutive Act of the AU provides that an African State is to 'notify the Chairman of the Commission of its intention to accede to [the Constitutive Act] and to be admitted as a member of the Union.' Article 29(2) states that admission into the AU will be decided by a simple majority of the Member States of the AU.

#### 4.2.1.2 The SADC

Chapter three of this thesis indicates that the SADC does not have an adequately strong human rights mandate. This is evident from the minimal focus that is placed on human rights protection within the SADC Treaty and the fact that, in comparison to its sub-regional African counterparts, the SADC Tribunal does not have an unequivocal human rights mandate either.

The SADC is a sub-regional system primarily concerned with economic integration and development. Accordingly, this thesis draws from the system's sub-regional counterparts, both of which were also established with the same primary objectives in mind, in order to propose ways in which the impact of voluntariness on the functioning of the SADC can be minimized.

In order to create a system that would incentivize Member States of the SADC to commit to the protection of human rights, the SADC system must adopt a stronger human rights mandate. This thesis proposes that such mandate should be inherent within the SADC Treaty and the SADC Tribunal Protocol (2000).

##### 4.2.1.2.1 Expanding on references to human rights protection in the constitutive instrument of the sub-regional organization

The SADC Treaty expressly provides that the principles of the SADC include 'human rights, democracy, and the rule of law'<sup>222</sup> and it obliges Member States of the SADC 'not to discriminate against any person' on the grounds provided for under article 6(2) of the Treaty. This thesis proposes an amendment to the Treaty to provide the Treaty with a greater focus on human rights protection.

Further, because the SADC is a sub-regional organization, it is not proposed that the system should adopt a separate body which codifies human rights because the African Charter *is* such a body, and it is applicable to the entire African region. However, this thesis does propose that an express commitment to the provisions of the Charter be presented as an obligation within the SADC Treaty, in the same manner as it has been done within the systems of the SADC's sub-regional counterparts.

In this regard, this thesis proposes that the provisions of the Treaty for the Establishment of the East African Community (as amended) ('EAC Treaty') relating

---

<sup>222</sup> Article 4(c) of the SADC Treaty op cit note 10.

to human rights and the rule of law be utilized as templates for the manner in which the SADC Treaty is to be amended. Specifically, articles 6(d) and 7(2) of the EAC Treaty should supplant article 4(c) of the SADC Treaty. These articles state the following respectively:

**Article 6(d)**

*“Fundamental Principles of the Community*

*The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:*

...

*(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples Rights;”*

**Article 7(2)**

*“Operational Principles of the Community*

...

*2. The Partner States undertake to abide by the principles of good governance including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”*

The provisions quoted above place greater emphasis on the protection of human rights than is expressly provided for by the SADC Treaty and the provisions also ensure an express commitment to the protection of human rights in accordance with the African Charter. This is important because the Charter must serve as the primary human rights legal instrument of the SADC system, and Member States of the SADC are to respect and protect the provisions encompassed therein.

#### 4.2.1.2.2 Restricting membership of the sub-regional organization by requiring the ratification of the primary regional human rights legal instrument

This thesis proposes that the SADC should restrict its membership to states that ratify the African Charter. It is important that Member States evidence a clear commitment to the protection of not only universally accepted standards of human rights, but also to the specific rights contained in the Charter. The amendments to the SADC Treaty proposed in the preceding paragraph necessitate this restriction in the membership of the SADC. Further, ratification of the Charter by all Member States of the SADC would be easier to achieve after the amendments discussed above have been effected, because the SADC Treaty and the Charter will, going forward, espouse similar objects in respect of human rights protection.

In this regard, amendments must be made to article 8 of the SADC Treaty which provides for the requirements for the admission of new members into the SADC. It is proposed that the provision be amended to reflect the abovementioned restriction on membership. It is also proposed that in the amendment process, regard should be had to the factors which the EAC takes into account when determining whether a foreign state should be admitted as a member of the EAC. These factors include the acceptance of the EAC as set out in the EAC Treaty;<sup>223</sup> and the state's 'adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice,'<sup>224</sup> among others. Although these factors are applicable to foreign states desiring to join the EAC, they can nonetheless be helpful in determining membership for the SADC going forward.

#### 4.2.1.2.3 Conferral of human rights jurisdiction on the judicial body

There were a number of reasons that led to the disbanding of the SADC Tribunal, however, this thesis asserts that the issue of the human rights jurisdiction of the Tribunal was one of the most important reasons. Although the SADC Tribunal concluded that it *did* have the jurisdiction to adjudicate the human rights matter of *Campbell*, the Tribunal may not have been disbanded if there had been greater certainty as to its human rights jurisdiction. Accordingly, this thesis proposes that such

---

<sup>223</sup> Article 3(3) (a) of the EAC Treaty op cit note 143.

<sup>224</sup> Ibid, article 3(3) (b).

jurisdiction be cemented in the protocol that is to govern matters relating to the functioning of the Tribunal.

This thesis proposes that amendments be made to the SADC Tribunal Protocol (2000) to give effect to the human rights jurisdiction of the SADC Tribunal. Although the 2014 Protocol to the Tribunal has been signed by a few Member States of the SADC, it has not come into effect as yet<sup>225</sup> and it therefore has not repealed the SADC Tribunal Protocol (2000) either.<sup>226</sup> Accordingly, the amendments that have been proposed are to be made to the SADC Tribunal Protocol (2000) which is the protocol that is currently in force.

This thesis proposes that article 14 of the SADC Tribunal Protocol (2000) which provides for the basis of the jurisdiction of the SADC Tribunal be amended to include that the Tribunal has the express jurisdiction to adjudicate human rights matters. In this regard, the wording of article 3(4) of the Supplementary Protocol Amending the Protocol Relating to the ECOWAS Community Court of Justice ('Supplementary Protocol to the ECCJ')<sup>227</sup> could be utilized. Article 3(4) of the Supplementary Protocol to the ECCJ states the following:

*“The Court has jurisdiction to determine case[s] of violation[s] of human rights that occur in any Member State.”*

In addition to the provision quoted above, it is proposed that the new provision should specify that the SADC Tribunal has the jurisdiction to adjudicate such human rights matters which are brought to it in accordance with article 15 of the SADC Tribunal Protocol (2000). Article 15 provides that the Tribunal has 'jurisdiction over disputes between Member States, and between natural or legal persons and Member States.'<sup>228</sup> This is to provide specificity to the new provision.

---

<sup>225</sup> Article 53 of the 2014 Protocol to the Tribunal provides that it will enter into effect '30 days after the deposit of the Instruments of Ratification by two-thirds of the Member States....' This requirement has not been met.

<sup>226</sup> Article 48 of the 2014 Protocol to the Tribunal provides that the SADC Tribunal Protocol will be repealed from the date of the coming into effect of the 2014 Protocol to the Tribunal.

<sup>227</sup> Supplementary Protocol to the ECCJ op cit note 28.

<sup>228</sup> Article 15(1) of the SADC Tribunal Protocol (2000).

4.2.2 A judicial institution authorised to adjudicate matters relating to the interpretation and application of the human rights legal instruments; whose decisions are legally binding on the parties to a matter; and to which all persons and states have access

#### 4.2.2.1 The AU

Chapter two of this thesis discusses the impact of voluntariness on the functioning of the African Court. Chapter two also discusses such impact on the African Commission in order to provide an accurate reflection of the protection mechanisms within the AU, and to illustrate the reasons that the existence of a quasi-judicial body like the Commission is not argued to be important for the effective functioning of a human rights system. It is because of these reasons that the following proposals are applicable only to the African Court.

The impact of voluntariness on the functioning of the African Court is evident in the fact that Member States of the AU are to ratify the African Charter and the Protocol to the African Charter in order to consent to the jurisdiction of the Court. The amendments to the Constitutive Act of the AU regarding membership of the AU can assist in ensuring that all Member States of the AU ratify the Charter. However, this thesis proposes additional amendments to the Constitutive Act of the AU to ensure that the impact of the requirement of state consent is further minimized and to ensure that the African Court has the jurisdiction to adjudicate matters brought in respect of any of the Member States of the AU.

The impact of voluntariness was also evident in the fact that individuals cannot access the African Court without state consent in the form of a declaration, pursuant to article 34(6) of the Protocol to the African Charter. This thesis proposes amendments to the Protocol to the African Charter to provide individuals with access to the African Court without the need for the declaration aforementioned.

##### 4.2.2.1.1 Integrating the protocol governing the functioning of the judicial body into the founding legal instrument of the regional organization

This thesis proposes amendments to article 18 of the Constitutive Act of the AU which provides for the establishment of a Court within the AU and for a protocol governing

the ‘statute, composition and functions’<sup>229</sup> of the Court. It is proposed that these provisions be amended in order to incorporate the Protocol to the African Charter into the Constitutive Act of the AU, so as to make the former an integral part of the later. In this way, the Protocol to the African Charter would come into force on the date on which the amendment agreement would come into force, and this would ensure that, in the future, states are only required to ratify one legal instrument.

In this regard, the wording of article 16(2) of the SADC Treaty could be utilised as a guide for purposes of the amendments discussed above. Article 16(2) states the following:

*“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 [which provide that protocols only bind states that have ratified the protocols], form an integral part of this Treaty, adopted by the Summit.”* (Own emphasis).

The implications of this amendment for the AU and for other regional organizations are that states would no longer be required to ratify the legal instrument that governs the functions of the judicial body (in this case, that is the Protocol to the African Charter), and the impact of voluntariness would be minimized by ensuring that states only need to ratify the founding document of the organization (in this case, that is the Constitutive Act of the AU). Further, this would ensure that the judicial body would be able to adjudicate cases which implicate any of the member states of the regional body.

It should be noted that corresponding amendments would also have to be made to the Protocol to the African Charter to remove the requirement of its ratification by 15 Member States.<sup>230</sup>

#### 4.2.2.1.2 Restricting access to the judicial body for individuals and civil society organizations that have exhausted local remedies

This thesis proposes an amendment to article 5(3) of the Protocol to the African Charter which provides for the entities that have access to the African Court. In order

<sup>229</sup> Article 18(2) of the Constitutive Act of the AU.

<sup>230</sup> Article 34 of the Protocol to the African Charter.

to ensure access to the African Court for all persons, this thesis proposes changes to the aforementioned provision that would provide access to individuals and civil society organizations but only where such litigants have exhausted the local remedies (provided that such remedies are available and that their exhaustion will not be unduly prolonged). In this way, the African Court will not be bombarded with innumerable applications from individuals and the judiciaries within the Member States of the AU would be provided with an opportunity to adjudicate the matters first.

Due to the reasons discussed under Chapter two, this thesis proposes that applications (from states and individuals) should not need to be received by the African Commission before being adjudicated upon by the African Court. However, the Commission may continue to carry out its protection mandate by reviewing applications before they are received by the Court, with a view to determining whether such applications are admissible. This would assist the Court in the fulfilment of its own protection mandate.

Accordingly, the amendments made in the preceding paragraph would necessitate amendments to the provisions governing the Commission and the discharge of its role as a protection mechanism. In this regard, this thesis proposes that the Commission cease its quasi-judicial duties of *adjudicating* individual and inter-state communications.

#### 4.2.2.2 The SADC

It has been noted in preceding paragraphs that the SADC Tribunal Protocol (2000) has not been repealed because the 2014 Protocol to the Tribunal has not come into force as yet. Accordingly, this thesis will not provide proposals as to a means to ensure that individuals maintain their right to access the Tribunal because such a right was still intact prior to the suspension of the Tribunal.

It is, however, important that the SADC Tribunal be reinstated so that it may continue its work. It is proposed that this will require pressure from civil society within the Member States of the SADC in order to compel the Summit to ensure that the Tribunal is properly constituted, pursuant to the SADC Tribunal Protocol (2000) currently in force. Further, pressure from civil society can also help in ensuring an increase in legal challenges being brought against the Member States that participated in the 2011 Summit and that voted in favour of the 2014 Protocol to the Tribunal. Such

legal challenges could place pressure on the representatives of the Member States of the SADC to withdraw their signatures from the 2014 Protocol to the Tribunal, which would ensure that the 2014 Protocol to the Tribunal never comes into force.

### 4.3. Effective compliance and enforcement mechanisms

Chapter one of this thesis provides the elements required for the existence of effective compliance and enforcement mechanisms. Those elements are: (i) an institution specifically tasked with supervising the execution of the decisions of the judicial body that operates within that system; and (ii) a supreme decision-making body whose powers are legally prescribed, and which is legally bound to take appropriate action in instances of state non-compliance.

#### 4.3.1 Institutions for the supervision of the execution of judicial decisions

##### 4.3.1.1 The AU

As discussed under Chapter two, the AU does not possess any effective means of enforcing the decisions of the African Court apart from the Executive Council, which has failed to effectively monitor the implementation of the judgments of the African Court. This thesis proposes the establishment of a supervisory body that will supervise the execution of the decisions of the Court by working with the Member States in order to achieve compliance. In the alternative, this thesis proposes that the mandate of the Executive Council be reconsidered to specifically task the body with the *supervision* of the judgments of the African Court. Effective methods to effect such supervision are to be established as well.

Further, because the AU Assembly is empowered to make decisions regarding the recommendations and reports received from other AU organs<sup>231</sup> and to impose sanctions on Member States,<sup>232</sup> it is further proposed that amendments be made to the relevant provisions of the Constitutive Act of the AU to (i) expressly attach binding legal status to the decisions of the AU Assembly; and (ii) oblige the AU Assembly to impose sanctions on non-compliant Member States.

---

<sup>231</sup> Article 9(1) (b) of the Constitutive Act of the AU.

<sup>232</sup> Ibid, article 23(2).

#### 4.3.1.1.1 Supervision of the execution of judgments made by regional judicial bodies

This thesis proposes the restructuring of the Executive Council or the establishment of a supervisory institution modelled on the Committee of Ministers, a body which supervises the execution of the judgments of the European Court. The discussion to follow considers the manner in which the Committee of Ministers discharges its duty as a supervisory committee and the extent to which it has been successful in effectively fulfilling such duty.

##### 4.3.1.1.1.1 The Committee of Ministers

The final judgments of the European Court are handed over to the Committee of Ministers which oversees the continuous supervision of the execution of the judgments.<sup>233</sup>

In instances where the European Court has made an order for ‘just satisfaction’, the offending state generally has three months to make payment of that just satisfaction.<sup>234</sup> In every other case, the offending state must submit an Action Plan within a period of six months from receipt of the final judgment of the Court.<sup>235</sup> The standard of supervision which the Committee of Ministers undertakes is contingent on the classification of the case:

##### 4.3.1.1.1.2 Enhanced Supervision

Where the case presents complex problems identified by the European Court or the Committee of Ministers, or where the case involves an inter-state complaint, *inter alia*, an ‘Enhanced Supervision’ procedure will be employed.<sup>236</sup>

This procedure enables the Committee of Ministers to monitor the execution of the judgment more closely and to assist with communication between national authorities for purposes of ensuring such execution.<sup>237</sup>

---

<sup>233</sup> Article 46(2) of the European Convention.

<sup>234</sup> Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights ‘The supervision process’(‘Committee of Ministers Supervision Process’), available at [https://www.coe.int/en/web/execution/the-supervision-process#%2259551776%22:\[\]](https://www.coe.int/en/web/execution/the-supervision-process#%2259551776%22:[]), accessed on 16 September 2020.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

#### 4.3.1.1.1.3 Standard Supervision

The Standard Supervision procedure enables, for the most part, the state to handle the execution of a final judgment,<sup>238</sup> and is employed in respect of all other cases that are not supervised in terms of the Enhanced Supervision procedure.

Accordingly, involvement by the Committee of Ministers is limited to ensuring that sufficient Action Plans and Action Reports have been submitted; and that the measures which are to be taken, or which have been taken are adequate.<sup>239</sup> The Department for the Execution of Judgements, which assists the Committee of Ministers with the fulfilment of its supervisory role, tracks the progress of matters under the Standard Supervision and communicates relevant information in respect thereto to the Committee of Ministers.<sup>240</sup>

Once an Action Plan has been submitted to the Committee of Ministers, the on-going process of supervising the implementation of the Action Plan begins. The process culminates in (i) the submission of an Action Report by the State once all of the compliance measures have been taken;<sup>241</sup> and (ii) the drafting of a Final Resolution by the Committee of Ministers, which is the written decision to close the supervision process. The Final Resolution can only be made when the Committee of Ministers is satisfied that all measures to be taken by the state have been taken.<sup>242</sup>

The work of the Committee of Ministers is significant in minimizing the impact of voluntariness on the functioning of the European Court as it ensures that compliance is adequately monitored and that states do not easily escape the fulfilment of their obligations.

The supervision of the execution of judgments also ensures that the binding nature of the judgments of the European Court finds practical application as opposed to having no significance, either because of the practical difficulties of complying with a judgment or because states are able to choose not to comply without any repercussions.

---

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights *Committee of Ministers Supervision Process* op cit note 234.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

Accordingly, the impact of voluntariness is greatly diminished in the context of the European System as a result of the work of the Committee of Ministers.

#### 4.3.1.1.1.4 The effectiveness of the work of the Committee of Ministers

The goal of compliance and enforcement mechanisms within a human rights system is improved state compliance. Therefore, in considering the Committee of Ministers as a supervisory institution after which regional and sub-regional supervisory bodies can be modelled, we must necessarily consider the extent to which its work has contributed towards the achievement of the aforementioned goal. Accordingly, the analysis below considers the effectiveness of the work of the Committee of Ministers in improving state compliance by considering its performance in terms of two stages:

**Stage 1** analyses the performance of the Committee of Ministers during the period of 1998 to 2010 ('Period X') and the period 2011 to 2018 ('Period Y'), by comparing the number of 'Pending Cases' to 'Closed Cases' during these two periods.

**Stage 2** considers the performance of the Committee of Ministers only during Period Y, by comparing the number of Pending Cases to Closed Cases during this period.

The reasons for the selection of the above stated periods of time and the parameters chosen for comparison are discussed below.

##### 4.3.1.1.1.4.1 Rationale for analyzing performance from the year 1998

Prior to the adoption of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby ('Protocol 11') in 1998,<sup>243</sup> all state and individual communications had to first be heard by a quasi-judicial body known as the European Commission.<sup>244</sup> Thereafter, and only where States Parties to the European Convention had accepted the jurisdiction of the European Court (because acceptance was, at the time, completely optional) could a matter be heard by the Court, provided that the matter was admissible.

---

<sup>243</sup> Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, ETS 155, available at <https://www.refworld.org/docid/42ef8c812.html>, accessed 24 February 2021.

<sup>244</sup> Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights *Committee of Ministers Supervision Process* op cit note 234.

Protocol 11 dissolved the European Commission and made the approval of the jurisdiction of the European Court dependent only on the ratification of the European Convention. Accordingly, when considering the effectiveness of the Committee of Ministers, the analysis commences with the year from which all admissible cases were heard only by the Court, and where the execution of such matters came under the supervision of the Committee of Ministers. Thus, this analysis begins from the year 1998.

The analysis measures effectiveness by comparing the proportion of Pending Cases to Closed Cases during the stated periods. Pending Cases are cases the execution of which were under the supervision of the Committee of Ministers at the time.<sup>245</sup> Closed Cases are cases in respect of which the Committee of Ministers has adopted a Final Resolution. A number of factors may influence the quantity of Pending Cases and Closed Cases, and some of these factors are discussed below. At this stage, it suffices to state that these two indicators arguably provide the greatest insight into the work of the Committee of Ministers, and that is the reason for their analysis in respect of Period X and Period Y.

#### 4.3.1.1.4.2 Rationale for the comparison of the periods 1998 to 2010 and 2011 to 2018

The issue of improving the execution and the supervision of the execution of judgments made by the European Court has been extensively discussed by the Committee of Ministers.

The 12<sup>th</sup> Annual Report of the Committee of Ministers published for the period ending December 2018, which considers the ‘supervision of the execution of judgments and decisions by the European Court’ (‘Annual Report’),<sup>246</sup> provides insight into the responses of the Committee of Ministers to the issues of execution and supervision. The Committee of Ministers proposed and subsequently introduced two

---

<sup>245</sup> Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights ‘Glossary’, available at <https://www.coe.int/en/web/execution/glossary>, accessed on 16 September 2020.

<sup>246</sup> Council of Europe Committee of Ministers ‘12<sup>th</sup> Annual Report of the Committee of Ministers: Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2018’ (‘Supervision and Execution of Judgments Report’), at 1, available at <https://edoc.coe.int/en/european-convention-on-human-rights/7976-supervision-of-the-execution-of-judgments-of-the-european-court-of-human-rights-2018-12th-annual-report-of-the-committee-of-ministers.html>, accessed on 17 September 2020.

new working methods which would improve efficiency and provide for better prioritization of the cases under its supervision:<sup>247</sup> namely (i) a system that required States Parties to submit an Action Plan within six months, and an Action Report once all requisite measures in respect of the execution of the judgment had been adopted; and (ii) a system whereby cases would be supervised either according to the Enhanced Supervision process or the Standard Supervision process,<sup>248</sup> as discussed above.

The introduction of these working methods was intended to improve the efficiency of the work of the Committee of Ministers and to improve state compliance with the European Court judgments, in comparison to the years prior to 2011. Accordingly, the analysis considers the effectiveness of the work of the Committee of Ministers during a time before and after these reforms had been introduced (during Period X and Period Y respectively).

#### 4.3.1.1.1.4.3 Results of the analysis

The Annual Report illustrated the following in terms of the factors which have been analyzed:

**Stage 1:** Statistics presented in the Annual Report indicate a steady increase in Pending Cases during Period X.<sup>249</sup> In comparison, the data indicates an initial increase in Pending Cases (between the years 2011 and 2012), followed by a decrease in Pending Cases during the remainder of Period Y.<sup>250</sup> A comparison of the proportion of Closed Cases between these two periods shows a predictable trend considering the results relating to the number of Pending Cases. Specifically, there were 3,464 and 14,742 Closed Cases during Period X and Period Y, respectively.

The differences in the results mentioned above are likely due to the implementation of the new working methods. This is supported by the significant number of Closed Cases during Period Y in comparison to Period X. Even when one considers the number of New Cases, that is cases that had been given to the Committee of Ministers during Period X and Period Y (12,772 and 11,003 respectively), this

---

<sup>247</sup> Ibid, at 12.

<sup>248</sup> Ibid, at 21.

<sup>249</sup> Council of Europe Committee of Ministers *Supervision and Execution of Judgments Report* op cit note 246, at 51.

<sup>250</sup> Ibid.

would still not be able to account for the significant difference in the proportion of Closed Cases during the two periods.

**Stage 2:** The Annual Report indicated a greater proportion of Pending Cases in comparison to Closed Cases (78,039 and 14,742 respectively) during Period Y.<sup>251</sup> However, the majority of the Pending Cases were cases being supervised in terms of the Enhanced Supervision procedure (approximately 58.43 per cent of the Pending Cases) and, accordingly, cases under Enhanced Supervision made up a smaller proportion of the Closed Cases (about 39 per cent).

The results above may be due to the fact that cases under Enhanced Supervision require a greater standard of supervision from the Committee of Ministers, as discussed in the preceding paragraphs.

Accordingly, the analysis above indicates that there has, indeed, been improved state compliance with the decisions of the European Court as a result of the work of the Committee of Ministers. Therefore, an institution like the Committee of Ministers which is dedicated to supervising the execution of the judgments of a regional or sub-regional judicial body and which is equipped to do so effectively can ensure the minimization of voluntariness and can improve state compliance within a system like the AU.

#### 4.3.1.1.2 Decision-making body tasked with taking ‘appropriate action’ against non-compliant states

As briefly mentioned in the preceding paragraphs, the AU Assembly is empowered to take decisions on the recommendations and reports of the organs of the AU, pursuant to article 9 of the Constitutive Act of the AU.<sup>252</sup> Due to the fact that the African Court is an organ of the AU, this aforementioned power would extend to the decisions and reports of the Court. This view is consistent with article 31 of the Protocol to the African Charter which provides that the Court is to provide the AU Assembly with reports detailing the work of the Court, including information relating to state non-compliance. Further, the AU Assembly is empowered to impose sanctions on Member

---

<sup>251</sup> Supra note 249, at 51 and 52.

<sup>252</sup> Article 9(1) (b) of the Constitutive Act of the AU.

States that ‘fail to comply with the decisions and policies’ of the AU, pursuant to article 23(2) of the Constitutive Act of the AU.<sup>253</sup>

This thesis proposes amendments to the Constitutive Act of the AU to effect the following proposed changes: (i) article 9 should be amended to provide that the decisions of the AU Assembly taken pursuant to this provision are binding; and (ii) article 23(2) should be amended to *oblige* the AU Assembly to impose sanctions on persistently non-compliant states. This provision should not be framed in such a manner as to give the AU Assembly a discretion in the act of imposing sanctions, and that is the reason for its amendment.

The changes discussed above have the potential to create effective compliance and enforcement mechanisms that work to diminish the role of voluntariness in the issue of state compliance.

#### 4.3.1.2 The SADC

Chapter three of this thesis provides that Member States and the Summit are responsible for state compliance with the decisions of the SADC Tribunal. Chapter three also indicates that where states do not voluntarily comply with the binding decisions of the Tribunal and where the Summit does not take ‘appropriate action’ to hold non-compliant states accountable, there are no other means of ensuring that the decisions of the Tribunal are enforced. Concerns regarding a primarily political body such as the Summit being granted wide, discretionary powers to determine how to hold non-compliant states accountable were also expressed in Chapter three.

This thesis proposes the establishment of a supervisory institution that is tasked with supervising the execution of the binding decisions of the SADC Tribunal. Similar to the proposals provided in respect of the enforcement mechanisms of the AU, this institution can be modelled on the Committee of Ministers, as discussed above.

In respect of the fact that the Summit has too discretionary a power to determine what ‘appropriate action’ it may take against non-compliant states, this thesis proposes an amendment to the SADC Treaty and to the SADC Tribunal Protocol (2000) in order to limit such power. In this regard, this thesis proposes the following changes to the legal framework of the SADC system: (i) article 33 of the SADC Treaty which

---

<sup>253</sup> Ibid, article 23(2).

provides the Summit with the discretion of imposing sanctions in prescribed circumstances is to be amended to *oblige* the Summit to impose sanctions against states, under the prescribed circumstances; and (ii) article 32(5) of the SADC Tribunal Protocol (2000) which provides that the Summit is to take appropriate action in response to state non-compliance with the decisions of the Tribunal is to be amended to state that such action must include, but should not be limited to, the imposition of sanctions.

#### 4.4 Conclusion

The preceding discussion has outlined some of the legislative and other changes that can be made in order to limit the role of voluntariness within the functioning of the AU and the SADC.

In respect of the AU, the changes that have been proposed have been focused primarily on improving the means of enforcing the decisions of the African Court. These changes included the establishment of a supervisory institution tasked with supervising the execution of the decisions of the Court, and which mirrors the structure of the Committee of Ministers under the European System. Further, legislative changes have been proposed to ensure that the AU Assembly is legally obligated to impose sanctions on non-compliant Member States.

In respect of the SADC, the changes that have been proposed are extensive. First, it has been proposed that legislative amendments are to be made to the legal framework of the SADC to strengthen the SADC human rights mandate. Changes have also been proposed to ensure that the SADC Tribunal has the express jurisdiction to adjudicate human rights matters. Thereafter, the establishment of an institution that supervises the execution of the decisions of the Tribunal has been proposed, and legislative changes that limit the discretionary power of the Summit have also been proposed. This is to ensure that the Summit is legally obligated to impose sanctions against non-compliant Member States.

The changes that have been discussed are merely proposals on how the impact of voluntariness can be minimized. These proposals can be further improved upon to ensure their successful implementation within the regions of the Member States of the AU and the SADC.

## Chapter Five: Concluding remarks

### 5.1 Purposes of the thesis

This thesis set out to analyse the impact of voluntariness on the effective functioning of the human rights systems of the AU and the SADC. In particular, it sought to analyse such impact on two factors which it has been asserted are significant to the effective functioning of a human rights system: namely (i) a legal framework conducive to the protection of human rights; and (ii) effective compliance and enforcement mechanisms. The purpose of this analysis was to provide an understanding of the extent to which the principle of sovereignty is being preserved through the requirement of voluntariness, and to provide ways in which the impact of voluntariness could be minimized whilst ensuring due respect for sovereignty.

### 5.2 Closing remarks

#### 5.2.1 Legal framework conducive to the protection of human rights

##### 5.2.1.1 The AU

In terms of this criterion, the areas identified as being impacted by the requirement of voluntariness were the following: (i) only states that have ratified the African Charter are bound by its provisions; (ii) the decisions of the African Commission are not legally binding on Member States of the AU; (iii) the African Court may only consider communications from states and individuals where the relevant state has consented to be bound by the Protocol to the African Charter; and (iv) states are further required to submit a declaration consenting to the jurisdiction of the African Court in matters brought to it by individuals.

This thesis provided the following proposals in respect thereto: (i) membership of the AU should be restricted by making the ratification of the African Charter a requisite for such membership; (ii) the African Commission should cease its role as a protection mechanism in so far as that role includes its adjudication of inter-state and individual communications, but it may continue to assist the African Court with determining the admissibility of applications to be adjudicated upon by the African Court; (iii) the Protocol to the African Charter should be incorporated into the Constitutive Act of the AU, so as to ensure that states are only required to ratify the African Charter but will

be bound by the Protocol to the African Charter as well; and (iv) the Protocol to the African Charter must be amended to provide individuals and civil society organizations with access to the African Court without the need for state consent in the form of a declaration, provided that they have exhausted all domestic remedies (where this is possible).

#### 5.2.1.2 The SADC

In the context of the SADC, the following areas were implicated as areas that require intervention: (i) the SADC Treaty does not provide the system with a formal, express human rights mandate; (ii) only states that have ratified the SADC Treaty are bound by its provisions; (iii) the SADC Tribunal does not have explicit human rights jurisdiction; and (iv) the SADC Tribunal is currently inoperative.

The following proposals were made to diminish the impact of voluntariness and to improve the human rights mandate of the SADC: (i) legislative amendments are to be made to the SADC Treaty so as to expand the references to human rights protection contained therein and to make express reference to the African Charter; (ii) membership of the SADC should be restricted by making ratification of the African Charter a requisite for such membership; (iii) legislative amendments should be made to the SADC Tribunal Protocol (2000) in order to provide the SADC Tribunal with express human rights jurisdiction; and (iv) members of civil society should place pressure on Member States of the SADC to reinstate the SADC Tribunal. Further, legal challenges within the domestic courts of the Member States should continue to be brought against those states that participated in the dissolving of the SADC Tribunal and in the adoption of the 2014 Protocol to the Tribunal, in order to pressure such states into withdrawing their signatures from the 2014 Protocol to the Tribunal.

#### 5.2.2 Effective compliance and enforcement mechanisms

In terms of this criterion, it was identified that neither the AU nor the SADC had effective measures of supervising the execution of or enforcing the decisions of their respective judicial bodies. Accordingly, the following proposal was made in respect thereto: it has been proposed that a supervisory institution modelled on the Committee of Ministers of the European System should be established within the AU and the SADC systems.

In respect of the AU, legislative amendments to the Constitutive Act of the AU have been proposed to give effect to the following changes: (i) the decisions of the AU Assembly which are taken in respect of the reports received by it from the African Court are to be legally binding; and (ii) the AU Assembly is to be obliged to impose sanctions on non-compliant states.

In respect of the SADC, legislative amendments to the SADC Treaty and the SADC Tribunal Protocol (2000) have been proposed to give effect to the following changes: (i) the Summit is to be obliged to impose sanctions on non-compliant states; and (ii) the nature of the appropriate measures that can be taken by the Summit in respect of non-compliant states should be expressly stated to include the imposition of sanctions.

As mentioned in Chapter four, the proposals made within this thesis can be improved upon and broadly applied to other regional and sub-regional systems functioning in other parts of the world. However, any such improvements and changes must ensure a minimization of voluntariness and a prioritisation of the protection of human rights and state accountability.

## 7. Bibliography

### Primary Sources

#### Case Law:

##### South African case law

*Law Society of South Africa and Others v President of the Republic of South Africa and Others* (South African Litigation Centre and Centre for Applied Legal Studies as Amicus Curiae) [2018] ZACC 51

*Republic of Zimbabwe v Sheriff Wynberg North and Others* (2009/34015) [2010] ZAGPJHC 118

##### Foreign case law

*Mike Campbell & Another (PVT) Limited v The Republic of Zimbabwe* (2/2007) [2008] SADCT 2

*Louis Karel Fick & Others v Republic of Zimbabwe* (SADC (T) O1/2010) [2010] SADCT 8.

*Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania & the Attorney General of the United Republic of Tanzania* (MISC Civil Cause No. 23 of 2014)

*Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009)

### Legislation

African Court on Human and Peoples' Rights Rules of Court (2020)

African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*,

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

Council of Europe, Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, 11 May 1994, ETS 155

Council of Europe. (1949). Statute of the Council of Europe: London, 5th May 1949. London, H.M.S.O

Declaration and Treaty of the Southern African Development Community (1992)

Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Organization of African Unity (OAU), Charter of the Organization of African Unity, 25 May 1963

Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000

Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998

Protocol on the Tribunal in the Southern African Development Community (2014)

Rules of Procedure of the African Commission on Human and Peoples' Rights (2020)

SADC Protocol on Gender and Development (2008)

SADC, Agreement Amending the Protocol on Tribunal (2002).

SADC, Agreement Amending the Treaty of the Southern African Development Community (2001)

Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol

The Protocol on Tribunal in the Southern African Development Community (2000)

Treaty for the Establishment of the East African Community (2008)

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

## Secondary sources

### Books

Iyi, John- Mark ‘Introduction’ in John Mark Iyi (ed) *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties under International Law* (2016), 1-40

Steiner, Henri.J., Alston, Phillip & Goodman, Ryan ‘Regional Arrangements’ in Steiner (ed), Alston & Goodman *International Human Rights in Context* 3 ed (2008), 925-1063

Viljoen, Frans ‘International protection of human rights’ in Strydom (ed), Viljoen & Ruppel (et al) *International Law* (2016).

### Journals

Chairman Okoloise ‘Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples’ Rights’ (2018) 18 *African Human Rights Law Journal* 27-57.

Cole, Rowland JV ‘The African Court on Human and Peoples’ Rights: will political stereotypes form an obstacle to the enforcement of its decision?’ (2010) 43 *The Comparative and International Law Journal of Southern Africa*, 23-45.

Kuppel, Oliver C. ‘The Southern African Development Community (SADC) and its Tribunal: Reflexions on a Regional Economic Communities’ Potential Impact on Human Rights Protection’ (2009) 42 *Law and Politics in Africa, Asia and Latin America*, 173-186.

Luambano, Tasco R. ‘Litigating Human Rights Through the East African Court of Justice: Overview and Challenges’ (2018) 71 *Journal of Law, Policy and Globalization*, 76-90.

Nathan, Laurie ‘The Disbanding of the SADC Tribunal: A Cautionary Tale’ (2013) 35 *Human Rights Quarterly*, 870-892.

Oder, Judy ‘The African Court on Human and Peoples’ Rights’ order in respect of the situation in Libya: A watershed in the regional protection of human rights?’ (2011) 2 *African Human Rights Law Journal*, 495-510.

## Internet sources

African Court on Human and Peoples' Rights 'Activity Report of the African Court on Human and Peoples' Rights', available at <https://www.african-court.org/en/index.php/publications/activity-reports/1327-activity-report-of-the-african-court-on-human-and-peoples-rights-1-january-31-december-2019>, accessed on 30 September 2020.

African Union 'About the African Union' available at <https://au.int/en/overview>, accessed on 28 September 2020.

African Union 'List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples' Rights', available at <https://au.int/en/treaties/african-charter-human-and-peoples-rights>, accessed on 2 January 2021.

Besson, Samantha 'Sovereignty' in Max Planck Encyclopaedias of Public International

Law, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?prd=MPIL>, accessed on 10 January 2021.

Centre for Human Rights 'Press Statement: Centre for Human Rights expresses concern about the withdrawal of direct individual access to the African Court by Benin and Côte d'Ivoire' available at <https://www.chr.up.ac.za/press-statements/2073-centre-for-human-rights-expresses-concern-about-the-withdrawal-of-direct-individual-access-to-the-african-court-by-benin-and-cote-d-ivoire>, accessed on 28 December 2020.

Communique Extraordinary Summit Heads of State and Government of the Southern African Development Community (SADC), available at <http://www.swradioafrica.com/Documents/SADCSummit240511.pdf>, accessed on 1 January 2021.

Communique of the 30<sup>th</sup> Jubilee Summit of SADC Heads of State and Government available at <http://www.thepresidency.gov.za/content/communique-30th-jubilee-summit-sadc-heads-state-and-government>, accessed on 1 January 2021.

Communique of the 39<sup>th</sup> SADC Summit of Heads of State and Government, available at [https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/08/Communique\\_of\\_the\\_39th\\_SADC\\_Summit-English.pdf](https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/08/Communique_of_the_39th_SADC_Summit-English.pdf), accessed on 1 January 2021.

Council of Europe Committee of Ministers ‘12<sup>th</sup> Annual Report of the Committee of Ministers: Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2018’, available at <https://edoc.coe.int/en/european-convention-on-human-rights/7976-supervision-of-the-execution-of-judgments-of-the-european-court-of-human-rights-2018-12th-annual-report-of-the-committee-of-ministers.html>, accessed on 17 September 2020.

Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights ‘The supervision process’, available at [https://www.coe.int/en/web/execution/the-supervision-process#%2259551776%22:\[\]](https://www.coe.int/en/web/execution/the-supervision-process#%2259551776%22:[]), accessed on 16 September 2020.

Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights ‘Glossary’, available at <https://www.coe.int/en/web/execution/glossary>, accessed on 16 September 2020.

Murray, Rachel ‘Implementation of the Judgments of the African Court on Human and Peoples’ Rights’ available at <http://www.acthprmonitor.org/implementation-of-the-judgments-of-the-african-court-on-human-and-peoples-rights/#prettyPhoto>, accessed on 30 September 2020.

Southern African Development Community ‘SADC Protocols’ available at <https://www.sadc.int/about-sadc/overview/sa-protocols/>, accessed on 29 December 2020.

The Secretariat of the African Commission on Human and Peoples’ Rights ‘Information Sheet No. 3’, at 8, available at <https://www.achpr.org/communications>, accessed on 27 December 2020.

The United Nations Human Rights Office of the High Commissioner ‘The United Nations Human Rights Treaty System Factsheet: 30 Revision 1’, available at <https://www.ohchr.org/documents/publications/factsheet30rev1.pdf>, accessed on 9 January 2020.

WTI ‘Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal, Final Report’ available at <https://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>, accessed on 1 January 2021, 1-89.

**Other sources**

Jokela, Juha 'Global governance and effective multilateralism' in Juha Jokela's *The G-20: A Pathway to Effective Multilateralism?* Report. (2011) *European Union Institute for Security Studies*, 51-60.

Pere, Garth le & Tjønneland, Elling N 'SADC: Which way SADC? Advancing co-operation and integration in southern Africa' (2005) *Institute for Global Dialogue*, 9-16.

Tadjbakhsh, Shahrbanou 'Interdependency trends in a multipolar world' (2009) 18 *International Issues and Foreign Policy Affairs*, 3-20.