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**PROTECTING HUMAN RIGHTS WITHIN REGIONAL  
ECONOMIC INTEGRATION ARRANGEMENTS: A  
CASE STUDY OF THE SADC TRIBUNAL**

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for a Masters of Laws Degree in approved courses and a minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I do hereby declare that I have read and understood the regulations governing submission of a Masters of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

February 2010

**DECLARATION**

I, **Sambwa Simbyakula**, do hereby declare that this minor dissertation submitted for the degree of Masters at the University of Cape Town has not been previously submitted by me at this University or any other University, that it is my own work and that all referenced material in it have been duly acknowledged.

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**Sambwa Simbyakula**

University of Cape Town

**DEDICATION**

To my parents, **Dr Ngosa and Mrs Margaret Simbyakula**

I will forever be indebted to you for the huge sacrifice you made to see me acquire my Masters of Laws (LLM) degree. You went out of your way for me, stood by me every step of the way during the program and always reminded me that God's grace is sufficient.

Thank you very much for everything and for always being there for me.

God bless you.

University of Cape Town

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Introduction

Colonialism left many African states both politically and economically fragile as a consequence of the partitioning of Africa by colonialists.<sup>1</sup> The African states experienced difficulty surviving against Western economies so in response to this legacy, the new African leaders at independence called for political and economic integration.<sup>2</sup> A huge ideological divide ensued in the early 1960s because not every nationalist was enthusiastic about political and economic integration.<sup>3</sup> Therefore, at the continental level, a weak political integration process began with the Organisation of African Unity (OAU) being formed in 1963.<sup>4</sup>

Years of colonialism had weakened most African states socially, politically and economically so when the OAU was formed, one of its primary aims was to promote unity and solidarity of the African states and to act as a collective voice for the African continent.<sup>5</sup> This was seen as an important aim for security of long-term economic and political future. The other primary aim of the OAU was its dedication to the eradication of all forms of colonialism.<sup>6</sup> This would be done by defending the interests of independent countries and help pursue those of still-colonised ones and would remain neutral in terms of the world affairs, preventing members from being controlled by the Western economies.<sup>7</sup> Other aims included, ensuring that all Africans enjoyed human rights; raising the standards of living of all Africans and finally yet importantly, settling arguments and disputes between members by peaceful and diplomatic negotiation.<sup>8</sup>

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<sup>1</sup> Solomon Eborah 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges' (2009) 17 *African Journal of International and Comparative Law* 79 at 79.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> The Organisation of African Unity (OAU) or Organisation de l'Unité Africaine (OUA) was established on 25 May 1963. However, in 2000 the OAU underwent transformation to become the African Union (AU). The AU was formally inaugurated in Durban, South Africa on 9 July 2002 by its last chairperson, former South Africa President Thabo Mbeki, and replaced by the African Union (AU). See <http://www.africa-union.org> [Accessed 8 January 2010]. See Decision on the Establishment of the African Union, OAU Doc AHG/Dec 143 (XXXVI). See also generally Max du Plessis and Lee Stone 'A court not found' (2007) 7 *African Human Rights Law Journal* 522.

<sup>5</sup> See <http://www.africa-union.org> [Accessed 8 January 2010].

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

On the other hand, at the sub-regional level, economic integration began and institutions known as regional economic communities (hereinafter ‘RECs’) were established.<sup>9</sup> They were formed as intergovernmental organisations set up by groups of countries to foster economic ties and cooperation. At the seventh ordinary session of the AU’s Assembly of Heads of State and Government in Banjul, The Gambia, in July 2006, the AU officially recognised eight RECs in Africa<sup>10</sup>, namely: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).<sup>11</sup> These RECs have been set pursuant to the Treaty establishing the African Economic Community.<sup>12</sup> In pursuit of regional economic integration, sub-regional courts were established in some RECs to enhance the smooth operation of the various groupings.<sup>13</sup> These bodies were set up to resolve disputes within the communities established either as a tribunal or community court of justice and primarily set up to interpret and apply the treaty of the relevant REC.<sup>14</sup>

RECs focussed only on economic integration, leaving various important issues to other *fora*, and among these were human rights. African leaders felt that the international fora would appropriately deal with treatment of human rights. Thus, in June 1981, the African Charter on

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<sup>9</sup> Eborah (note 1) at 79.

<sup>10</sup> There are actually even more regional economic cooperation frameworks but only these eight have been recognised by the decision of the AU’s Assembly and Heads of State and Government. Not all RECs are fully functional and only three consist of systems to promote and protect human rights namely; ECOWAS, EAC, and SADC. See [http://www.claiminghumanrights.org/african\\_recs.html](http://www.claiminghumanrights.org/african_recs.html) [Accessed 15 January 2010].

<sup>11</sup> AU Doc Assembly/AU/Dec.112 (VII) July 2006).

<sup>12</sup> Adopted in Abuja, Nigeria on 3 June 1991, entered into force on 12 May 1994. This Treaty is also known as the Abuja Treaty. Available at [www.dfa.gov.za](http://www.dfa.gov.za) [Accessed 6 January 2010]. Article 3(g) of the Treaty establishes the recognition, promotion, and protection of human and peoples’ rights in accordance with the African Charter as a fundamental principle of the economic system it establishes. See also, 30 International Legal Materials 1241 (1991); Gino J Naldi (ed) Documents of the Organization of African Unity (1992) 203; and 1 *African Yearbook of International Law* (1993) 227.

<sup>13</sup> Muna Ndulo ‘African integration schemes: A case study of the Southern African Development Community (SADC)’ (1999) *African Yearbook of International Law* 3 at 3. See also generally Bernard Hoekman et al ‘Benefiting from regional integration’ (2002); regional economic integration refers to an agreement among countries in a geographic region to reduce and ultimately remove tariff and non-tariff barriers to the free flow of goods or services and factors of production among each other’s. It can also be referred to as any type of arrangement in which countries agree to coordinate their trade, fiscal, and/or to coordinate their trade, fiscal and monetary policies. There are many different levels of integration, *inter alia*, free trade area, common market, economic union.

<sup>14</sup> Eborah (note 1) at 80.

Human and Peoples' Rights<sup>15</sup> (African Charter) was adopted and entered into force in 1986. In order to ensure the protection of human and peoples' rights under the conditions laid down by the African Charter, the African Commission was established to carry out this mandate.<sup>16</sup> It is with the introduction of this international human rights instrument that human rights became a common feature in the inter-state relations in the African continent. The Charter emerged under the aegis of the OAU.

Out of the eight officially recognised RECs, three consist of systems that promote and protect human rights namely; ECOWAS, EAC and SADC.<sup>17</sup> They have sub-regional courts that are expressly or impliedly vested with jurisdiction to pronounce on human rights violations.<sup>18</sup> Within SADC, the SADC Tribunal is said to have competence<sup>19</sup> to deal with human rights but its mandate is unclear. This is the same for the East African Court of Justice (EACJ). Nevertheless, during the recent years, the SADC Tribunal and the EACJ have entertained applications for the protection of human rights.<sup>20</sup> On the contrary, in West Africa, ECOWAS in 2005 amended its Protocol establishing the Court, ECOWAS Community Court of Justice (ECCJ) and giving it express competence to hear human rights cases from individuals.<sup>21</sup> Considering that several African countries are members of several RECs at the same time, this raises the possibility of overlap and conflict of competences.

With the growing importance of human rights in Africa and the consequent acknowledgment of respect for human rights contained in the African Charter as a principle in the Treaties of

<sup>15</sup> OAU Doc CAB/LEG/67/3 Rev 5 was adopted in June 1981 and entered into force in October 1986. Reprinted in (1982) 21 *International Legal Materials* 59.

<sup>16</sup> The African Commission, established under Article 30 of the African Charter was inaugurated on 2 November 1987 in Addis Abba, Ethiopia. See African Commission Information Sheet 1 [http://www.achpr.org/english/information\\_sheets/AHCPR%20inf.%20sheet%20no1.doc](http://www.achpr.org/english/information_sheets/AHCPR%20inf.%20sheet%20no1.doc) [Accessed 18 January 2010].

<sup>17</sup> See [http://www.claiminghumanrights.org/african\\_recs.html](http://www.claiminghumanrights.org/african_recs.html) [Accessed 15 January 2010].

<sup>18</sup> *Ibid.*

<sup>19</sup> Article 18 of the SADC Protocol on the Tribunal and the Rules of Procedure (SADC Protocol) provides that 'subject to the provisions of the Protocol, the Tribunal shall have exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal either by the natural or legal person concerned or by the competent institution or organ of the Community'.

<sup>20</sup> In 2008, the EACJ delivered judgment in the *East African Law Society and 3 Others v Attorney General of Kenya and 3 Others EACJ with implications for human rights in the administration of the community*. As for the SADC Tribunal which does not have a clear human rights mandate, in 2008, the Tribunal heard cases with implications for human rights namely; *Ernest Mtingwi v SADC Secretariat Case 1/2007:13* and *Mike Campbell and 78 Others v Zimbabwe Case 2/07* ruling of 13 December 2007. The *Mtingwi* case was an action against the SADC Secretariat alleging unlawful and unfair termination of a contract of employment. The main thrust of the case is that a decision to revoke or terminate the appointment violated the principles of natural justice, as the aggrieved party was not given an opportunity to be heard. The *Campbell* case involved an application challenging the acquisition of applicants' farmland by the Zimbabwean authorities under section 16B of the Constitution of Zimbabwe as introduced by Amendment 17 of 2005.

<sup>21</sup> See Article 9(1) of the ECOWAS Protocol A/P.1/7/91.

most of the RECs, for instance ECOWAS and EAC Treaties, human rights have been seen to play an integral part of RECs besides their original goals, activities and objectives, which had an economic focus.<sup>22</sup> As for SADC, its Treaty and Protocol on the SADC Tribunal do not explicitly make reference to the African Charter allowing the Tribunal to ‘develop its own community jurisprudence having regard to applicable relevant treaties, principles and rules of general international law and any rules and principles of the law of states’.<sup>23</sup>

This study will focus on SADC. This particular REC was chosen because the emerging human rights trend in the region in relation to the SADC Tribunal still raises doubts as to whether it will be a capable protector of human rights. As a creation of SADC, the Tribunal was established to adjudicate matters within the southern African region. This thesis will examine the Tribunal’s human rights jurisdiction and its relationship with other continental human rights bodies.

## 1.2. Brief history of SADC and its Tribunal

In 1980, a body known as the Southern African Development Coordination Conference (SADCC) was founded mainly as a bulwark against the then minority South African governments’ stated policy of establishing a ‘constellation’ of Southern African states.<sup>24</sup> In 1992 the Treaty of SADC<sup>25</sup>, transformed the pre-existing SADCC into a new institution, namely, SADC. This new body aimed at regional peace and security, cooperation in a number of sectors, and integrating regional economies. SADC’s ideals were much more ambitious than those of SADCC.<sup>26</sup> The current membership of SADC include; Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The headquarters are in Gaborone, Botswana.<sup>27</sup>

Within SADC, as an organisation, and in the development of SADC law and jurisprudence, a major event that occurred is the establishment of the SADC Tribunal. The Tribunal was

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<sup>22</sup> Oliver Ruppel ‘Regional economic communities and human rights in East and Southern Africa’ in Anton Bösl and Joseph Diescho J (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009), available at [http://www.kas.de/upload/auslandshomepages/namibia/Human\\_Rights\\_Africa/9\\_Ruppel.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_Africa/9_Ruppel.pdf) 275-317 [Accessed 3 August 2009].

<sup>23</sup> Article 22(b) of the SADC Tribunal Protocol.

<sup>24</sup> Ndulo (note 13) at 8.

<sup>25</sup> Hereinafter referred to as ‘SADC Treaty’. See Article 2(1) of the SADC Treaty.

<sup>26</sup> Ndulo (note 13) at 8.

<sup>27</sup> Article 2(2) of the SADC treaty.

established in 1992 under Article 9 of the SADC Treaty as one of the institutions created by SADC.<sup>28</sup> It however became operational in 2005 when it received its very first case.<sup>29</sup> Pursuant to Article 4(4) of the Protocol on Tribunal, the Summit of Heads of State, which is the supreme policy institution of SADC appointed the members of the Tribunal during its Summit of Heads of State or Government held on 18 August 2005 in Gaborone, Botswana.<sup>30</sup> The inauguration of the Tribunal and the swearing in of the Members took place on 18 November 2005 in Windhoek, Namibia<sup>31</sup>. The Registrar of the Tribunal was appointed by the Tribunal pursuant to Article 12 of the Protocol on Tribunal.<sup>32</sup> The independence of the Tribunal is guaranteed in Article 17 (2) of the SADC Treaty.<sup>33</sup>

The Tribunal as a regional judicial institution within the SADC was constituted to ensure the adherence to and the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.<sup>34</sup> The primary aim of the Tribunal was to resolve disputes arising from closer economic and political union, rather than human rights, but a recent judgment by the Tribunal, namely, *Mike Campbell and Another v Republic of Zimbabwe*<sup>35</sup> and some of the pending cases demonstrate that the Tribunal can also be called upon to consider human rights implications of economic policies and programmes.<sup>36</sup>

Ruppel argues that one of the essential elements for economic development is human rights in that he states that they have been considered to have an impact on the investment climate,

<sup>28</sup> See Article 9 of the SADC Treaty.

<sup>29</sup> See <http://www.sadc.int/tribunal/organisation.php> [Accessed 19 August 2009].

<sup>30</sup> The Tribunal consists of not less than ten (10) members including the President of the Tribunal appointed from nationals of States of which five (5) of the members are designated as regular members. The following are the members of the Tribunal: Hon. Dr Rigoberto Kambovo (Angola), Hon. Dr Onkemetse B. Tshosa (Botswana), Hon. Justice Isaac Jamu Mtambo, SC (Malawi), Hon. Justice Ariranga Govindasamy (Mauritius), Hon. Justice Dr Luis Antonio Mondlane (Mozambique), Hon. Justice Petrus T. Damaseb (Namibia), Hon. Justice Stanley B. Maphalala (Swaziland), Hon. Justice Frederick B. Werema (Tanzania), Hon. Justice Frederic Mwela Chomba (Zambia) and Hon. Justice Antonia Guvava (Zimbabwe). Retrieved from <http://www.sadc.int/tribunal/organisation.php> [Accessed on 19 August 2009].

<sup>31</sup> See <http://www.sadc.int/tribunal/organisation.php> [Accessed 19 August 2009].

<sup>32</sup> The Tribunal appointed Hon. Justice Chinganyi Mkandawire from Malawi as the Registrar.

<sup>33</sup> Article 17(2) provides that 'In performance of their duties, the Members of the Tribunal shall be committed to the international character of SADC and shall not seek or receive instructions from any Member States, or from any authority external to SADC and further, they shall refrain from any action incompatible with their positions as international staff responsible only to SADC'.

<sup>34</sup> Article 16 of the SADC Treaty.

<sup>35</sup> *Mike Campbell and Another v the Republic of Zimbabwe* SADC (T) Case 2/07 ruling of 13 December 2007.

<sup>36</sup> Pending case *Zimbabwe Human Rights NGO Forum v The Government of Zimbabwe* SADC Tribunal case No. 5/2008. In this case, the Zimbabwe Human Rights NGO Forum brought an application against the Government of Zimbabwe before the Tribunal on behalf of twelve of its clients in May 2008. The application was brought in terms of Articles 4(c) and 6 of the SADC Treaty. The Government of Zimbabwe is alleged to have breached its obligations under the Treaty.

which in turn contributes to growth, productivity and employment creation, all being essential for sustainable reductions in poverty.<sup>37</sup> It will also be seen that within SADC, a wide range of provisions and objectives within the SADC Treaty<sup>38</sup> legal system offer human rights protection, *inter alia*, in the various SADC legal instruments.<sup>39</sup> The SADC Treaty identifies the promotion of human rights as one of the core principles of the integration mechanism<sup>40</sup> and proclaims the observance of human rights as critical in ensuring people's participation in the initiative.<sup>41</sup>

### 1.3 Statement of the research problem

RECs have been clothed with the competence of hearing human rights cases. There are separate human rights conventions and institutions created which may undermine efforts of RECs because of already existing bodies such as the African Court on Human and Peoples' Rights, the AU's African Court of Justice, and the African Commission.<sup>42</sup> Viljoen argues that such separate institutions tend to develop a life of their own, and may become obstacles in the process of greater regional integration in the field of human rights.<sup>43</sup> However, Viljoen states that the fact that all member states of SADC, ECOWAS, and EAC are parties of the African Charter implies that the judicial institutions of each of these institutions could draw inspiration from a common constitutional tradition on human rights.<sup>44</sup>

In the SADC Tribunal, judicial interpretation and application of treaty provisions have been used as the basis for the exercise of human rights jurisdiction in the sub-regional court. There is no doubt that the Tribunal has competence to exercise jurisdiction on all matters that come before it in general as earlier noted, but there is an unclear mandate of settling human rights disputes. Despite the lack of an express mandate, a recent judgment by the Tribunal was delivered, namely, *Mike Campbell and Another v Republic of Zimbabwe* demonstrated that

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<sup>37</sup> See Ruppel (note 22) at 279.

<sup>38</sup> See Article 4(c) and 5 of the SADC Treaty.

<sup>39</sup> See, for instance the *Declaration on Gender and Development: A Declaration by the Heads of State or Government of the Southern African Development Community and the prevention and eradication of violence against women*. An Addendum to the 1997 Declaration on Gender Development by the SADC Heads of States or Government.

<sup>40</sup> Article 4 (1)(c) SADC Treaty.

<sup>41</sup> Preamble of SADC Treaty, Para 7.

<sup>42</sup> Frans Viljoen 'The realisation of human rights in Africa through sub-regional institutions' (1999) *African Yearbook of International Law* 185-214 at 213.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

human rights matters can be brought before it. The extent of the human rights jurisdiction of the Tribunal was not adequately addressed of which this thesis aims to investigate.

This thesis therefore seeks to answer the following pertinent question: What should be the extent of the human rights jurisdiction of the SADC Tribunal considering that SADC is an economic integration body?

This paper will critically examine the SADC legal instruments and the current debates surrounding the Tribunal's human rights mandate. It will also be necessary to critically examine the justification for sub-regional courts to deal with human rights and how these courts may co-exist with continental and more specialised human rights courts or tribunals.

#### **1.4 Significance of the study**

This study will provide an in-depth analysis of the human rights mandate of the SADC Tribunal. It will do this by examining the extent of the Tribunal's human rights jurisdiction considering that SADC is an economic integration body. As earlier indicated RECs were in the first place aimed at increased trade and improved economic links, not at good governance and sustaining or improving human rights with states or across state borders.<sup>45</sup> The study is a contribution to the broader understanding of the role of RECs at regional level regarding human rights protection. It is a case study of the SADC Tribunal but lessons will be drawn from other selected RECs, namely ECOWAS and EAC to evaluate how the realisation of human rights has become integral to the goals of RECs besides their basic principles and activities. Ruppel argues that there is a link between one of the main objectives of regional integration, which is, improving the welfare of the people in participating countries, and the realisation of socio-economic rights.<sup>46</sup> This thesis will look into the advantages of incorporating human rights in RECs.

During 2008, very significant developments in the budding human rights activities of RECs in Africa were prominent in the area of supranational judicial protection of human rights by sub-regional courts.<sup>47</sup> These courts concluded cases, which have considerable implications for the protection of rights in Africa. Eborah argues that as human rights litigation before sub-

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<sup>45</sup> Frans Viljoen *International human rights law in Africa* (2007) at 496.

<sup>46</sup> *Ibid* at 496.

<sup>47</sup> Solomon Eborah, 'Human rights developments in sub-regional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 312-335 at 312.

regional courts provides opportunities for improving peoples understanding of the processes of the courts, it also permits reflections on the real value of these developments.<sup>48</sup>

From the foregoing, it can be seen that RECs do play a significant role in protecting human rights within regional economic arrangements in Africa.

### **1.5 Research methodology**

The research will adopt a non-empirical methodology and will embark on a review of the existing literature on the subject. The research will draw from all regional human rights instruments, international human rights instruments pertaining to the subject and to some extent, national legislation. Primary and secondary sources of data will be extensively consulted. The primary sources will include, *inter alia*, the various RECs treaties, the African Charter and the Optional protocol establishing the African Court on Human and Peoples' Rights,<sup>49</sup> to name a few.

Books, journal articles, relevant online reports and decided cases will be used to form the analysis of the secondary sources. The study will draw some lessons from the experiences of other regional and sub-regional bodies in Africa. In addition, it should be noted that in Europe, there is growing evidence that the European Union (EU) is becoming more involved in human rights protection and has the capacity to turn into an unprecedented post-national human rights protection institution.<sup>50</sup> The SADC Tribunal, in exercise of its human rights competence can thus learn from other institutions.

### **1.6 Literature review**

There is a significant body of literature on SADC and regional economic integration. In the recent years, literature on the human rights protection in sub-regional institutions in Africa has emerged although the information is limited to a few books, journal articles, and few

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<sup>48</sup> Ibid at 312.

<sup>49</sup> OAU Doc OAU/LEG/AFCHPR/PROT (III), entered into force Jan 25, 2004.

<sup>50</sup> The European institutional framework presents advantages that fit the general criteria of institutional design in the human rights context. See, Oliver Ruppel and Francois Bangamwabo 'The mandate of the SADC Tribunal and its role in regional integration: In *2008 Yearbook of Regional Integration*, Eds. Bösl. A/Breyden bach K/Hartzenberg F/McCarthy C/Schade K (Stellenbosch: TRALAC. Available at [http://www.tralac.org/cause\\_data/images/1694/MRI2008withcover20090415.pdf](http://www.tralac.org/cause_data/images/1694/MRI2008withcover20090415.pdf) [Accessed 3 August 2009].

chapters in books. Some of the authors include, *inter alia*, Frans Viljoen,<sup>51</sup> Oliver Ruppel,<sup>52</sup> Solomon Eborah<sup>53</sup> Gabriel Oosthuizen<sup>54</sup> and Muna Ndulo.<sup>55</sup>

The proposed study is limited by the scarcity of materials on the human rights competence, which the SADC Tribunal has, arguably, following the Tribunals' reasoning in the *Mike Campbell*<sup>56</sup> case, the only case so far in which the Tribunal has attempted to explain its human rights mandate. This study is a contribution towards the ongoing debate about the realisation of human rights within RECs against the background that they were established to foster economic ties and cooperation.

*Gabriël Oosthuizen* looks into matters concerning the jurisdiction, applicable law, decisions and human rights within SADC.<sup>57</sup> He states that some SADC treaties concern human rights issues. Examples include article 6 (2) of the SADC Treaty, concerning the obligation of the organisation and the members not to discriminate against any person; parts of the Gender Declaration and the addendum to it; the Social Rights Charter; and the Organ on Politics, Defence and Security Protocol.<sup>58</sup> For the SADC Tribunal to deal with human rights issues, whether labelled as such or not, all the jurisdictional and certain conditions have to be met. The author argues that no member state or other judicial forum has the authority to determine for the Tribunal whether those conditions have been met and suggests that whether member states would be eager for the Tribunal to deal with human rights issues is open to question. In practice, the Tribunal would probably seek to avoid clashes with other *fora*, such as the African Commission and the African Court, over which institutions has jurisdictions over a particular matter.

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<sup>51</sup> See Viljoen above (notes 42 and 45).

<sup>52</sup> Oliver Ruppel 'The Southern African Development Community (SADC) and its Tribunal: Reflections on a regional economic communities' potential impact on human rights protection?' (2009) 42 *Verfassung und Recht Ubersee VRU* 173-186. Ruppel Oliver 'The SADC Tribunal, regional integration and human rights: Major challenges, legal dimensions and some comparative aspects from the European legal order', (2009) *Recht in Afrika* 203- 228.

<sup>53</sup> See Eborah (note 47 above).

<sup>54</sup> Gabriel Oosthuizen *The Southern African Development Community: The organisation, its policies and prospects*, (2006).

<sup>55</sup> Ndulo (note 13).

<sup>56</sup> SADC (T) Case 2/07 ruling of 13 December 2007.

<sup>57</sup> Oosthuizen (note 54) at 212.

<sup>58</sup> Hereinafter, the 'OPDS Protocol'. The mandate of the OPDS Protocol extends to the promotion and enhancement of 'the development of democratic institutions and practices within member states, and to encourage the observance of universal human rights as provided for in the Charters and Conventions of the OAU and the United Nations'.

*Frans Viljoen* investigates the extent to which sub-regional arrangements have been and may in future be vehicles for the improvement of human rights on the African continent.<sup>59</sup> He states that many of these arrangements provide for an institution in the form of a court or tribunal to resolve conflicts arising from the application and interpretation of the founding treaty. The judicial institutions are the central focus of his study, and introduces more general observations on these courts in a supranational, but sub-regional setting.<sup>60</sup> The author also considers RECs as building blocks for future integration in the future but argues that the overlapping membership of countries in more than one regional grouping; for instance, DRC belongs to four different RECs may cause potential conflicts and problems.

*Oliver Ruppel* discusses the potential impact of human rights within the sub-region of SADC in its Tribunal. He reflects the major challenges for the SADC regional integration process at large and the SADC Tribunal in particular. He draws some lessons from the European legal order, that is to say, the European Court of Justice and the European Court of Human Rights. The author argues that the EU institutional framework presents comparative advantages that may fit the general criteria of institutional design in the human rights context for SADC.

*Solomon Eborah*, in his study focused on the procedural and substantive issues in the cases brought before sub-regional courts in East Africa, West Africa and Southern Africa.<sup>61</sup> He sought to contribute to the understanding of the human rights processes of sub-regional courts by engaging in a critical analysis of the recent judgments of the EACJ, ECCJ and the SADC Tribunal. He argues that sub-regional courts are only contributing to the consolidation of economic integration and that they have not deviated from their original purpose.<sup>62</sup> The author notes that there have been difficulties that have trailed the functioning of the African Commission and the consequent effect on the human rights protection in Africa that have long demonstrated the need for alternative *fora* for supranational human rights litigation.

*Muna Ndulo* analyses regional integration in the context of a case study of SADC in his article, *African integration schemes: A case study of the Southern African Development Community (SADC)*,<sup>63</sup> and looks at the benefits of and obstacles of integration into Africa before examining the SADC approach to Southern African economic integration. The author

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<sup>59</sup> Viljoen (note 45) at 484.

<sup>60</sup> Ibid at 484.

<sup>61</sup> See Eborah (note 47 above).

<sup>62</sup> Ibid at 334.

<sup>63</sup> Ndulo (note 13) 3-30.

also looks at the European experience and clearly shows that, at the institutional level, a movement towards regional cooperation and integration must give regional institutions real power. He, however, raises a concern of the dominance of South Africa in the southern African region, which can undermine regional integration and make harmonious regional integration more complex.

The authors listed above provide good understanding on the human rights protection of RECs in Africa. There is however, no consensus as to whether the sub-regional courts can legitimately exercise jurisdiction based on an implied mandate sufficient to serve the purpose of protecting human rights. SADC is well known as an economic integration institution but with the human rights trend that has emerged within the institution; the extent of the human rights jurisdiction has not been adequately addressed.

### **1.7 Summary of chapters**

This chapter has introduced the central aim of the thesis, which is to find out the extent of the SADC Tribunal's human rights jurisdiction considering that it is an economic integration body. It has also highlighted the significance of the study and mapped the outline of this study.

Chapter two examines the role of RECs in the protection of human rights. RECs have inevitably been evolved into forms of human rights promotion and protection in order to prevent and address conflicts directly or indirectly linked to human rights violations in addition to their economic focus. As it stands, several cases with human rights implications have been brought before RECs judicial bodies. In this chapter, the ECCJ, EACJ and the SADC Tribunal will be discussed.

Chapter three specifically deals with the SADC Tribunal. It will *inter alia* cover aspects of its general jurisdiction, applicable law, decisions, enforcement, and composition of judges that will provide as a backdrop for chapter four. In essence, the reader will be familiarised with the Tribunal, a regional judicial institution created within SADC.

Chapter four builds up on the other chapters and will finally examine the extent of the human rights jurisdiction of the SADC Tribunal. The promotion and protection of human rights were not the priority of SADC but it will be shown that human rights can be brought before the

Tribunal despite the fact that SADC's primary aim is to further socio-economic co-operation, integration, political, and security co-operation among its member states as was demonstrated in the *Campbell* case. It is important to recognise that already in existence are other regional bodies specifically created to deal with human rights. This study examines whether it is indeed necessary for sub-regional courts to deal with human rights cases, as this may seem as overlap of function. In the absence of properly coordinated judicial integration in the continent, it is argued that multiplicity of courts poses a threat to the unity of international human rights law in the region.

The fifth chapter will draw a conclusion from the whole study and make some recommendations.

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## CHAPTER TWO

### THE ROLE OF REGIONAL ECONOMIC COMMUNITIES IN THE PROTECTION OF HUMAN RIGHTS

#### 2.1 Introduction

This chapter begins by tracing the origin of RECs in Africa. The relevance of RECs is demonstrated by the AU's concession that African integration will use RECs as building blocks.<sup>64</sup> The pre-eminence of the OAU did not prevent RECs from being established as was seen in the previous chapter. It was the failure of the OAU to address the various issues faced by member states that prompted states to form sub-regional blocks. RECs were primarily established to promote trade and economic links among member states but in recent years, these communities have engaged in the promotion and protection of human rights. Ruppel traces the development of human rights into the agenda of RECs to the Abuja Treaty and argues that RECs moved to the protection and promotion of human rights in response to the obligations arising under the Treaty. This chapter will examine the role of RECs in the protection of human rights, generally and specifically within the sub-regional courts of the EAC, ECOWAS and SADC.

#### 2.2 Origin and concept of RECs in Africa

The origin of RECs in Africa dates back to the 1960s, when the United Nations Economic Commission for Africa (UNECA)<sup>65</sup> encouraged African states to incorporate single economies into sub-regional systems with the ultimate objective of creating a single economic union on the African continent.<sup>66</sup> In order to realise this aim, the OAU identified the need to enhance regional integration within the organisation, recognising that each country on its own would have little chance of, *inter alia*, attracting adequate financial transfers and the technology needed for increased economic development.<sup>67</sup> Regional economic integration was, therefore generally seen as a vehicle for enhancing the economic

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<sup>64</sup> See the AU Doc Assembly/AU/Dec.112 (Vii) (July 2006).

<sup>65</sup> UNECA was established by the Economic and Social Council (ECOSOC) of the United Nations (UN) in 1958 following a recommendation by the General Assembly; see A/RES-1155 (XII). It is one of the UN's five regional commissions with a mandate to promote the economic and social development of its member states, foster intra-regional integration, and promote international cooperation for Africa's development. Further, UNECA works towards strengthening and supporting the RECs. for more information see <http://www.uneca.org> [Accessed 6 January 2010].

<sup>66</sup> Ruppel (note 22) at 275.

<sup>67</sup> *Ibid.*

and social development of African states. As economic integration began, RECs were established at sub-regional level and they primarily had an economic focus.<sup>68</sup> They were founded as rallying points for progressive economic integration aimed at improving the living standards of their citizens.<sup>69</sup> They also inevitably evolved to involve varying degrees of political integration,<sup>70</sup> thus, in pursuit of enhancing the process of economic and political integration on the continent, African leaders took various steps by implementing several decisions and declarations relating to regional and political integration, especially the Abuja Treaty<sup>71</sup> discussed below.

### 2.2.1 The Abuja Treaty - Umbrella institution for RECs

The Abuja Treaty provides for the African Economic Community (AEC) to be set up through a gradual process, which would be achieved by the coordination, harmonisation and progressive integration of the activities of the sub-regional institutions in Africa.<sup>72</sup> RECs are in turn regarded as the building blocks of the AEC with a common goal of economic transformation and development.<sup>73</sup> The Abuja Treaty bases the pursuit of African economic integration on *inter alia* the principle of recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter.<sup>74</sup>

The human rights protection aspect is specifically dealt with in chapter two of the Abuja Treaty, which covers *inter alia*, its principles<sup>75</sup>, objectives, general undertaking, and modalities. The objectives stated in Article 4 are to-

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<sup>68</sup> Eborah (note 1) at 79.

<sup>69</sup> Eborah (note 47) at 312.

<sup>70</sup> Ibid.

<sup>71</sup> Adopted in Abuja, Nigeria on 3 June 1999, entered into force on 12 May 1994. Also known as the 'AEC Treaty'. It establishes the recognition, promotion and protection of human and peoples' rights in accordance with the African Charter as a fundamental principle of the economic system it establishes. See Article 3(g). The Treaty is available at [www.dfa.gov.za](http://www.dfa.gov.za); [Accessed 6 January 2010]. See also 30 International Legal Materials 1241 (1991); Gino J Naldi (ed) *Documents of the Organization of African Unity* (1992) 203; and 1 *African Yearbook of International Law* (1993) 227.

<sup>72</sup> Article 2 establishes the AEC. The implementation process of the Abuja Treaty is a process that will be done in six stages over 34 years (by 2028). See <http://www.dfa.gov.za/foreign/Multilateral/africa/aec.htm> [Accessed 8 January 2010].

<sup>73</sup> Ibid.

<sup>74</sup> Article 4(2) of the Abuja Treaty.

<sup>75</sup> The principles stated in Article 3 of the Abuja Treaty are to promote equality and interdependence of member states; solidarity and collective self-reliance; inter-states co-operation, harmonisation of policies and integration of programmes; observance of legal system of the Community; peaceful settlement of disputes among member states, active co-operation between neighboring countries and promotion of a peaceful environment as a pre-requisite for economic development; recognition, promotion and protection of human and people's rights in

Promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development; to establish, on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa in order to achieve a self-reliant development; to promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among member states and contribute to the progress, development and the economic integration of the continent; and; to coordinate and harmonise policies among existing and future economic communities in order to foster the gradual establishment of the Community'.<sup>76</sup>

In order to promote the attainment of the objectives of the community and in accordance of the relevant provisions of the Treaty, the AEC, by stages adheres to the provisions stated in Article 4(2).<sup>77</sup> The member states undertake to<sup>78</sup>-

...create favourable conditions for the development of the community and the attainment of its objectives, particularly by harmonising their strategies and policies. They also have to refrain from any unilateral action that may hinder the attainment of the objectives. Each member state shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislation as may be necessary for the implementation of the provisions of this Treaty. Any member state, which persistently fails to honour its general undertakings under this Treaty or fails to abide by the decisions or regulations of the Community, may be subjected to sanctions by the Assembly upon the recommendation of the Council. Such sanctions may include the suspension of the rights and privileges of membership and may be lifted by the Assembly upon the recommendation of the Council.

In this regard, member states are bound to respect the principles and objectives of the AEC and to desist from conduct that would defeat this purpose. In essence, apart from the promotion of economic, social and cultural development and the integration of African economies as provided for in the Treaty, AEC has an objective of promoting co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among member states and contribute to the progress, development and the economic integration of the continent.<sup>79</sup> Member states are expected to promote the coordination and harmonisation of the integration activities of those RECs to which they belong, within the gambit of their activities on the community.<sup>80</sup> As regards the influence on the place of human rights in RECs, it is evident from the framing of their documents, which in some cases almost replicate the provisions of the Abuja Treaty.<sup>81</sup>

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accordance with the provisions of the African Charter on Human and People's rights; and accountability, economic justice and popular participation in development.

<sup>76</sup> Article 4 of the Abuja Treaty.

<sup>77</sup> See Article 4(2) of the Abuja Treaty.

<sup>78</sup> Ibid, Article 5.

<sup>79</sup> Ibid, Article 4(d).

<sup>80</sup> See Ruppel (note 22 above).

<sup>81</sup> See Article 3(g) of the Abuja Treaty.

## 2.3 Regional integration and RECs in Africa

Having stated that the AU recognises eight RECs in the previous chapter, it is important to note that although membership defies neat categorisation into sub-regional compartments, it mostly centres on a particular sub-region.<sup>82</sup> In the discussion that follows, a brief overall picture of RECs in Africa is provided in selected sub-regions. The potential of human rights protection and promotion through the courts or tribunals established within them, specifically within ECOWAS, EAC and SADC<sup>83</sup> is examined. In essence, RECs have a duty to respect and promote human rights in their jurisdictions.

### 2.3.1 North Africa

In North Africa, it was until the community of Sahel- Saharan States (CEN-SAD) emerged that the region hosted only the Arab Maghreb Union (UMA). However, CEN-SAD and a third REC functioning in this sub-region, the Euro-Mediterranean Free Trade Area (EU-MEFTA), straddle other economic communities and sub-regions.<sup>84</sup> As it stands, CEN-SAD, UMA and EU-MEFTA are RECs found in Northern Africa.

### 2.3.2 East and Southern Africa

In the Eastern Africa and Southern Africa regions, six RECs are in existence namely the Southern African Customs Union (SACU), EAC, IGAD, COMESA, SADC and the Indian Ocean Commission (IOC).

In the Eastern Africa region, attempts at regional co-operation date back to the colonial era under the management of British colonial authorities.<sup>85</sup> Formal regional integration in the sub-region first occurred in 1967 with the founding of the original EAC by Kenya, Tanzania and Uganda. In 1977, the original EAC was dissolved following disagreements among the then member states over several issues. Efforts to revive the EAC began in 1991 and culminated in the signing of a new EAC Treaty in 1999.<sup>86</sup> Under the new treaty, the member

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<sup>82</sup> Viljoen (note 45) at 488.

<sup>83</sup> EAC, ECOWAS and the SADC Tribunal form the basis of this discussion.

<sup>84</sup> Viljoen (note 45) at 488.

<sup>85</sup> Ibid at 490.

<sup>86</sup> The 1999 Treaty of the EAC, which was adopted and ratified by Kenya, Tanzania and Uganda, entered into force on 7 July 2000. Burundi and Rwanda acceded to the EAC Treaty on 18 June 2007. The EAC Treaty is available at <http://www.eac.int> [Accessed 11 December 2009]. By Article 5(2) of the EAC Treaty, the objectives of the Community 'shall be to develop policies and programmes aimed at widening and deepening co-

states undertook to pursue integration guided by the principles of good governance, democracy, the rule of law, social justice and human rights.<sup>87</sup>

Currently, the East African Court of Justice (EACJ) is in operation. It was established by Article 9(1)(e) of the EAC Treaty as one of the organs of the Community. The organs of EAC have exercised restraint in the pursuit of human rights within the framework of the organisation.<sup>88</sup> Although the EAC Treaty indicates an attention by the Community to grant jurisdiction to the EACJ, it has had opportunities to decide on cases dealing wholly or partly with human rights.<sup>89</sup> For instance, in 2008, the EACJ delivered judgment in the *East African Law Society and 3 others v Attorney-General of Kenya and 3 others (EACJ)*<sup>90</sup>, which had implications for human rights in the administration of EAC. In this case, the East African Law Society, the Tanganyika Law Society, the Uganda Law Society and the Zanzibar Law Society brought an action against the Attorney General of Kenya, Tanzania, and Uganda and the Secretary General of the EAC, claiming that amendments made to the EAC Treaty by partner states were unlawful. The issues that emerged in this case were on the right to participation and the independence of the judiciary. It was argued that failure by the partners to consult their citizens on the amendments deprived the citizens of their right to participate in the integration. In the face of limited evidence with respect to a finding of bad faith on this issue has to be appreciated, yet it is obvious that the issue raises questions on the propriety of the response of political organs of the EAC to the Court's engagement with cases involving human rights issues.

The provisions of the EAC Treaty relating to human rights competence of the EACJ are ambiguous but despite this the Court went ahead and seized the opportunity provided by another case of *James Katabazi and 21 others v Secretary General of the East African*

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operation...in political, economic, social and cultural fields, research, defence, security and legal and judicial affairs...' The EAC aims to ultimately result in the establishment of a political federation in East Africa.

<sup>87</sup> Article 7(2) of the 1999 EAC Treaty.

<sup>88</sup> The organs of the EAC are the Summit, the Council of Ministers, the Co-ordinating Committee, the Sectoral Committee, the East African Court of Justice, the East African Legislative Assembly and the Secretariat. Cited in Eborah (note 47) at 315.

<sup>89</sup> In 2007 case of *Katabazi & 21 others v Secretary-General of the EAC & Another*, Ref 1 of 2007, the EACJ had to deal with allegations of human rights violations contrary to the EAC Treaty. See also *Prof. Nyoung'o & 10 others v the Attorney-General of Kenya & others*, Ref 1 of 2006 (*Nyoung'o* case). In *Nyoung'o* case, the application was for invalidation of the process of selecting Kenyan representatives to the East African Legislative Assembly (EALA). The application was brought on the grounds that there had been a violation of Article 50 of the EAC Treaty, which requires the election of persons to the EALA by national assemblies. The EACJ found that there had been a violation of Article 50 of the EAC Treaty.

<sup>90</sup> Ref 3 of 2007 [2008] EACJ 1 (1 September 2008).

*Community and the Attorney General of the Republic of Uganda*,<sup>91</sup> in which it asserted a ‘derivative human rights competence’ under the EAC Treaty. Upon the facts of the case, the court conceded that Article 27 of the EAC Treaty did not give it a human rights competence but the Court held that even it would not assume jurisdiction of interpretation on human rights disputes, it also would not abdicate from exercising its jurisdiction of interpretation merely because the reference includes allegations of human rights violation.

The court interpreted and applied Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty in the *Katabazi* case and went on to arrive at a finding that there was a violation of the principle of the rule of law and consequently a contravention of the EAC Treaty.<sup>92</sup> Eborah argues that the positivist approach would lead to the argument that the decision amounts to excessive judicial re-writing of the EAC Treaty as this decision provides the platform for future litigation of human rights before the court, subject to proper wording of the claim and innovative advocacy on the part of the lawyers.<sup>93</sup> As it currently stands, human rights can be litigated before the EACJ despite the ambiguities present in the Treaty so long as it can be shown that the conduct violating the rights in question also amount to a violation of the EAC Treaty.

In the Southern African region, the concept of regional economic co-operation was first discussed at a meeting of the frontline states foreign ministers in May 1979 in Gaborone.<sup>94</sup> The meeting led to an international conference in Arusha, Tanzania two months later, which brought together all independent countries, with the exception of the then Rhodesia, South West Africa, and international donor agencies.<sup>95</sup> The Arusha conference in turn led to the Lusaka Summit held in the Zambian capital Lusaka in April 1980 after which the adoption of the declaration took place, which was to become known as ‘Southern Africa: *Towards Economic Liberation*’, Sir Seretse Khama was elected the first chairperson of the SADCC.<sup>96</sup>

By 1992, it became apparent that apartheid would soon end in South Africa and so the member states reviewed the future of SADCC in order to position it for a new role in Southern Africa with a non-racial democratic South Africa.<sup>97</sup> Thus, in 1992, the SADCC states adopted a declaration entitled ‘*Towards a Southern African Development Community*’

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<sup>91</sup> EACJ 3 Ref 1 of 2007.

<sup>92</sup> Ibid.

<sup>93</sup> Eborah (note 1) at 82.

<sup>94</sup> Retrieved from <http://www.dfa.gov.za/au.nepad/recs.htm> [Accessed 12 August 2009].

<sup>95</sup> Ibid.

<sup>96</sup> See note 92 above.

<sup>97</sup> Ndulo (note 13) at 11.

in which they agreed to form an economic community of Southern African states. The members also agreed to change the name of the organisation from SADCC to SADC, a development community. Thus, SADC was established as a successor of SADCC. By a signature of its constitutive legal instrument, the SADC Treaty established SADC. The Treaty transformed the pre-existing SADCC into a new institution, SADC. The organisation was aimed at regional peace and security at cooperation in a number of sectors, and at integrating regional economies and its ideals were much more ambitious than those of SADCC.

Following the amendment of the SADC Treaty in 2001, the Community increased its objectives to include the promotion of ‘sustainable and equitable economic growth...that will enhance poverty alleviation...enhance the standard of living and quality of life of the people of Southern Africa and support of the socially disadvantaged through regional integration’.<sup>98</sup> SADC also aimed to ‘consolidate, defend and maintain democracy, peace, security and stability,’ combat HIV and AIDS or other deadly and communicable diseases’ and ‘mainstream gender in the process of community building.’<sup>99</sup> In its present character, SADC is arguably not restricted to economic integration.<sup>100</sup> Human rights have been seen to play a vital role. SADC recognises human rights, democracy and the rule of law as principles in accordance with which it will act in pursuit of integration.<sup>101</sup> Unlike the other RECs, however, SADC adopted its own human rights catalogue in the form of a Charter of Fundamental Social Rights.<sup>102</sup> Implementation of the Charter lies with national institutions and the regional structures. While not much seems to have been achieved under the Charter, the SADC Summit of Heads of State and the Government (Summit) adopted a Regional Protocol on Gender and Development in 2008.<sup>103</sup> This legal instrument was adopted because member states were convinced that gender equality and equity is a fundamental human right and were committed to gender equality and equity as they signed and ratified or acceded to

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<sup>98</sup> See Article 5(1) (a) of the Consolidated SADC Treaty. The Treaty is available at <http://www.sadc.int/index> [accessed 11 December 2009].

<sup>99</sup> Ibid, article 5 of the Consolidated SADC Treaty.

<sup>100</sup> See Article 4(c) of SADC Treaty.

<sup>101</sup> Ibid.

<sup>102</sup> SADC Charter of Fundamental and Social Rights, available at [http://www.givengain.com/unique/tralac/pdf/20060629\\_charter\\_fundamental\\_social\\_rights.pdf](http://www.givengain.com/unique/tralac/pdf/20060629_charter_fundamental_social_rights.pdf) [Accessed 22 January 2010].

<sup>103</sup> Adopted in August 2008, available at [http://www.cladem.org/english/news/Protocol%20on%20Gender%20August%202008%20-%20English0001\(4\).pdf](http://www.cladem.org/english/news/Protocol%20on%20Gender%20August%202008%20-%20English0001(4).pdf) [Accessed 22 January 2010]. The Protocol encompasses commitments made in all regional, global and continental instruments for achieving gender equality.

the United Nations Convention on the Elimination of All Forms of Discrimination against Women.<sup>104</sup>

Thus, although a clear human rights mandate does not exist within the SADC legal regime, it has gone ahead and decided cases with human rights implications and so far the only cases brought before the Tribunal have implications for human rights. For instance, the SADC Tribunal, in 2008, heard the following cases; *Ernest Francis Mtingwi v SADC Secretariat (SADC Tribunal)*<sup>105</sup> and *Campbell and 78 others v Zimbabwe (SADC Tribunal)*.<sup>106</sup> The jurisdictional scope of human rights will be dealt further in chapter four.

The *Mtingwi* case was an action brought against the SADC Secretariat alleging unlawful and unfair termination of a contract of employment. The decision to revoke the appointment was the main thrust of the case as the applicant alleged that the revocation violated the principles of natural justice as he was given an opportunity to be heard in the matter. The aggrieved party also argued that the decision amounted to unfair industrial or labour practices under the International Labour Organisation (ILO) Termination Employment Convention. In defence, the Secretariat argued that the appointment only took effect from the date the employee arrives in the country where the duty station is located. It was further argued that the contract of employment had not become effective. In its judgment, the SADC Tribunal concluded that the rights in the ILO Termination of Employment Convention could only be enjoyed by persons who are employees and as such could not apply in favour of the applicant. In essence, even though this case bordered on labour law and contract law, than human rights, the court went ahead and heard this case, which observed that the rights contained in the ILO Convention can be enjoyed by employees of SADC despite SADC not being a party to the ILO Conventions.

In the *Campbell* case, the applicant challenged the acquisition of his farm by the Zimbabwean authorities under section 16B of the Constitution of the Republic of Zimbabwe as introduced by the Amendment 17 of 2005. This case will be dealt with in further detail in Chapter 4. Along with the main application, the original applicants filed an application for interim

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<sup>104</sup> GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force Sept. 3, 1981.

<sup>105</sup> The *Mtingwi* case was an action against the SADC Secretariat alleging unlawful and unfair termination of a contract of employment. The main thrust of the case is that a decision to revoke or terminate the appointment violated the principles of natural justice, as the aggrieved party was not given an opportunity to be heard.

<sup>106</sup> The case involved an application challenging the acquisition of applicants' farmland by the Zimbabwean authorities under section 16B of the Constitution of Zimbabwe as introduced by Amendment 17 of 2005.

measure to maintain the status quo in respect of land, the subject of the application. The rulings in this case, however, contain matters of great importance to clarifying human rights litigation before the SADC Tribunal. The granting of interim measures before the Tribunal was properly seized of the main matter demonstrates a preparedness not to make orders that would turn out to be academic. The Tribunal took the position that in the decision to entertain an application for interim measures in urgent situations, the requirement to exhaust local remedies does not apply.

At the hearing of the substantive action, the applicants argued that the enactment and implementation of constitutional Amendment 17 by Zimbabwe were in breach of the state's obligation under the SADC Treaty. The applicants argued further that Amendment 17 also denied them access to court in relation to acquisition of their lands, subjected them to racial discrimination and denied them compensation in respect of the acquisition. It is important that in formulation of their claims, the applicants relied essentially on the SADC Treaty as the source of the rights. From a human rights perspective, the most important challenge raised by the respondent was that the Tribunal lacked jurisdiction to entertain the action under the SADC Treaty. In response to the claims, the state's approach was to deny that it violated the rights of the applicants by enacting and implementing Amendment 17. Eborah argues that recognition that compulsory acquisition of land on racially- discriminative grounds, without granting access to court for determination of the validity of the acquisition and payment of compensation, is a violation of rights.

The most important question in the Campbell case was whether the Tribunal had jurisdiction to entertain an application claiming the violation of human rights by the SADC member state. It was held that the Tribunal had competence by virtue of Article 4 (c) of the SADC Treaty but the the extent of the human rights jurisdiction of the SADC Tribunal is what remains to be established.

### **2.3.3 West Africa**

In West Africa, the West African Economic and Monetary Union (UEMOA), the Mano River Union (MRU), the Liptako- Gourma Authority, and the West African Monetary Zone co-exist with ECOWAS.<sup>107</sup>

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<sup>107</sup> Viljoen (note 45) at 492.

The idea for a West African community dates back to President William Tubman of Liberia, who made the call in 1964.<sup>108</sup> An agreement was signed between Côte d'Ivoire, Guinea, Liberia and Sierra Leone in February 1965, but this came to nothing until April 1972 when General Gowon of Nigeria and General Eyadema of Togo re-launched the idea. Finally, 15 West African countries signed a treaty for an Economic Community of West African States (Treaty of Lagos) on 28 May 1975, which is the largest REC in the West African region comprising of 14 countries.<sup>109</sup> The protocols launching ECOWAS were signed in Lomé, Togo on 5 November 1976. In July 1993, a revised ECOWAS Treaty designed to accelerate economic integration and to increase political co-operation was signed. The revised Treaty designed to accelerate economic integration and to increase political co-operation was signed in 1993. While there was almost no reference to human rights in the 1975 ECOWAS Treaty, the 1993 revised ECOWAS Treaty has arguably mainstreamed human rights in the agenda of ECOWAS.<sup>110</sup> Building on the inclusion of the promotion and protection of human rights as fundamental principles of ECOWAS integration, political, administrative and judicial organs of ECOWAS have severally been involved in the field of human rights.<sup>111</sup>

The ECOWAS authority of Heads of State and Government (Authority) has adopted instruments with human rights implications, one of the most prominent of which is supplementary protocol that empowers the ECCJ to receive and determine human rights cases.<sup>112</sup> The ECOWAS Commission has been involved in aspects of human rights work, especially in the areas of conflict resolution, election monitoring and trafficking in persons. It was on the exercise of its expanded mandate that the ECCJ heard the following cases namely; *Ebrimah Manneh v The Gambia (EECJ)*<sup>113</sup> and *Hadijatou Koraou v Niger (ECCJ)*<sup>114</sup>. In this case, officials in Banjul arrested Ebrimah Manneh, a Gambian citizen. He alleged that he was falsely arrested because the arrest was effected without any warrant of arrest and no reasons were brought forward as cause for the arrest. Further, the victim was denied access to his

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<sup>108</sup> Retrieved from <http://www.dfa.gov.za/au.nepad/recs.htm> [Accessed 12 August 2009].

<sup>109</sup> Ibid.

<sup>110</sup> Eborah (note 47) at 318.

<sup>111</sup> Ibid.

<sup>112</sup> Supplementary Protocol A/SP 1/01/05 Amending Protocol A/P 1/7/91 relating to the Community Court of Justice adopted in 2005.

<sup>113</sup> Unreported Suit ECW/CCJ/APP/04/07, Judgment ECW/CCJ/JUD/03, judgment delivered on 5 June 2008. Also known as the *Manneh* case.

<sup>114</sup> ECW/CCJ/JUD/06/08, Economic Community of West African States (ECOWAS): Community Court of Justice, 27 October 2008, available at: <http://www.unhcr.org/refworld/docid/496b41fa2.html> [accessed 5 February 2010].

anyone, he was allegedly detained under conditions that were dehumanising, and he was held in solitary confinement and denied access to adequate medical care.

Ebrimah brought an action before the ECCJ seeking, *inter alia*, a declaration that the arrest and detention by the Gambia National Intelligence Agency violated Articles 4, 5, 6 and 7 of the African Charter. The victim also asked for an order from the court to be immediately released. Relying on jurisprudence from other international and municipal courts, the ECCJ concluded that the essence of human rights litigation was to terminate human rights abuses and restore rights where abuse has ended. Thus, reasoning that compensation under the African Charter was aimed at ensuring just satisfaction rather than to punish violators. The case was demonstrated a new era for human rights litigation.

## **2.4 Conceptual linkages between economic integration, trade and human rights**

Trade within RECs is critical to the achievement of sustainable development within their regions, as regional integration is considered a path towards gradually liberalising the trade of developing countries and integrating them into the world economy.<sup>115</sup> It is a strategy for achieving greater economic development and growth. In essence, calls that have also been made to bridge the schism between the trade and human rights regime and to emphasise the ethics of economic integration.<sup>116</sup> Even if RECs were in the first place aimed at increased trade and improved economic links and not at good governance and sustaining or improving human rights within states or across borders, there is a connection between improving the welfare of the people in the participating countries, and the realisation of socio-economic rights, which is inherent in economic integration.<sup>117</sup>

### **2.4.1 RECs movement towards human rights**

The growing importance of human rights in Africa resulted into a gradual movement towards judicial organs of RECs having competence to settle human rights disputes as highlighted above. It is for this reason that there are many instances where the African regional and sub-regional economic treaties make reference to human rights. Most of the instruments establishing the various economic groupings in Africa, particularly those created after the

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<sup>115</sup> Henning Andresen et al *Promoting regional integration in SADC*, reports and working papers No 5/2001 German Development Institute (GDI), Bonn. See also Ruppel (note 22) at 277.

<sup>116</sup> See Philip Alston and Mary Robinson (eds) *Human rights and development: Towards a mutual reinforcement* (2005) 65- 86.

<sup>117</sup> See Viljoen (note 45) at 495.

African Charter was adopted, explicitly refer to the promotion of human rights under the Charter either as an objective or as a fundamental principle of the economic grouping.<sup>118</sup> Within the legal framework of RECs, human rights related matters indeed play an important role in their daily practice, as many have implemented certain provisions in their mandate that have an impact on human rights and good governance.<sup>119</sup> Most RECs have now incorporated human rights into their treaties and, in most cases, a general tribute to recognising and protecting human rights can be found in the basic legal concepts underpinning RECs.<sup>120</sup> Specific human rights issues such as HIV and AIDS, equality and gender issues, humanitarian assistance and refugees, and children's rights are also covered.<sup>121</sup>

The African economic groupings tacitly recognise human and peoples' rights as conceptualised under the African Charter as fundamental principles of trade regimes.<sup>122</sup> This makes it clear that there is a conceptual link between the regional and sub-regional economic rules and human rights. The reference to the African Charter entails that they recognise, protect and promote all three generations of human rights.<sup>123</sup>

One of the reasons for integrating human rights into the structure of RECs is that states have committed themselves to respecting human rights by acceding to specific human rights treaties, conventions or declarations on the international, regional and sub-regional level.<sup>124</sup>

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<sup>118</sup> See Sisule Fredrick Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 88 - 96 at 92.

<sup>119</sup> The EAC Treaty under Article 6 establishes good governance, democracy, rule of law, equality and the recognition, promotion, and protection of human and peoples' rights in accordance with the African Charter as a fundamental principle. Similarly, the COMESA Treaty under Article 6 establishes the recognition, promotion and protection of human rights as a fundamental principle of the system in addition to liberty, fundamental freedoms and the rule of law. The ECOWAS Treaty under Article 4(g) ordains the recognition, promotion and protection of human and peoples' rights in accordance with the African Charter as a fundamental principle of the economic system. The SADC Treaty, however, does not make direct reference to the African Charter but commits members under Article 4(c) to the fundamental principle of human rights, democracy and the rule of law.

<sup>120</sup> Ruppel (note 22) at 277.

<sup>121</sup> Ibid.

<sup>122</sup> Musungu (note 118) at 93.

<sup>123</sup> The first generation human rights deal with liberty and participation in political life. They are fundamentally civil and political in nature, and serve to protect the individual from excesses of the state. They are enshrined in the ICCPR. See also, Articles 3-21 of the UDHR. The second-generation rights are related to equality and began to be recognised by governments after the world war I. they are fundamentally social, economic and cultural in nature. They are enshrined in the ICESCR. See also Articles 22- 27 of the UDHR. Third generation rights are those that go beyond the mere civil and social, as expressed in many progressive documents of international law, including the Stockholm Declaration of the UN Conference on the Human Environment, the 1992 Rio Declaration on Environment and Development and other pieces of generally aspirational 'soft law'. These rights have been hard to enact in legally binding documents.

<sup>124</sup> Thoko Kaime 'SADC and human security: Fitting human rights into the trade matrix' (2004) 13(1) *African Security Review* 109-117 at 111.

These include, *inter alia*, the Universal Declaration of Human Rights (UDHR),<sup>125</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>126</sup> the International Covenant of Economic, Social and Cultural Rights (ICESCR),<sup>127</sup> the International Convention on the Elimination and All Forms of Racial Discrimination (CEDAW)<sup>128</sup> as well as the African Charter. The obligations and commitments are reflected in the conceptualisation of RECs.

Good governance is another principle incorporated into the legal regimes of RECs. It is an effective democratic form of government relying on broad public participation, control of power and rationality, which play an essential role in economic development.<sup>129</sup> Good governance can be measured by the degree to which civil, cultural, economic, political and social rights is realised.<sup>130</sup> Ruppel gives a practical example in which he argues that human rights and good governance have an impact on the investment climate, which also contributes to growth, productivity and the creation of jobs, essential for economic growth and sustainable reductions in poverty.<sup>131</sup> Thus, good governance is a factor in eradicating and promoting development.

Therefore, the furtherance of economic development and the promotion of human rights are inter-related. An analysis of the legal structure of RECs with regard to human rights shows that a peaceful environment, which recognises and promotes human rights is regarded as a fundamental prerequisite for economic development.<sup>132</sup> The interconnection between human rights and economic development where economic development is concerned is obliged to respect human rights in a democratic society.<sup>133</sup> Conversely, human rights can be given more effect through economic growth, as one outcome of economic growth is the increasing availability of resources, resulting in the reduction of poverty and a higher standard of living.<sup>134</sup>

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<sup>125</sup> GA Res 217 A (III), UN Doc A/810 at 71 (1948).

<sup>126</sup> GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316), 999 UNTS 171, entered into force Mar 23, 1976.

<sup>127</sup> GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1996) 993 UNTS 3, entered into force Jan 3, 1976.

<sup>128</sup> 660 UNTS 195, entered into force Jan 4, 1969.

<sup>129</sup> Ruppel (note 22) at 279.

<sup>130</sup> See note 128 above.

<sup>131</sup> *Ibid.*

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

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

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

In as much as the promotion of human rights is vital in the process of regional integration the integration process however faces many challenges and obstacles that border on human rights of which, some of the obstacles that present themselves when it comes to regional integration which are fear of losing state autonomy, the fear of losing identity, socio-economic disparity among members, historical disagreement, lack of vision, and unwillingness to share resources.<sup>135</sup> One other specific challenge is the heterogeneity of AEC or REC member states, which is reflected by the variety of legal systems applied, and the extent to which human rights are respected by the different member states.<sup>136</sup> This raises a challenge for the promotion of human rights within RECs.

Despite the challenges faced by human rights protection within RECs, several functional benefits have been ascribed to the adoption of human rights approach in the implementation of the regional process. Kaime argues that a human rights approach allows for the explicit recognition of the linkage between trade and human rights.<sup>137</sup> This, in turn, results in the better understanding of the interaction between regional integration, trade and human rights. Further, it also allows for the establishment of constructive dialogue between human rights, environmental, finance and trade practitioners and the designing of balanced and coherent policy making within the integration arrangements.

In addition, a human rights approach to regional integration examines integration law and policy comprehensively, focusing not only on how these processes impact on human security and welfare.<sup>138</sup> It examines the effect of integration on individuals and seeks rules and policies that take into account and benefit the rights of all individuals. While regional integration offers opportunities for increased growth and development, the integration process, in particular where it leads to unregulated private sector activities, may threaten human security by diminishing access for the poor to essential services.<sup>139</sup> Elevating the role of human rights within the integration process thus helps RECs reconcile their obligations under human rights law and trade law.<sup>140</sup> In this manner, the approach seeks the means by

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<sup>135</sup> Ruppel (note 22) at 279

<sup>136</sup> The heterogeneity of states is further explained in Ruppel and Bangamwabo (2009), see (note 51).

<sup>137</sup> Kaime (note 124) at 113.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

which integration of economies, for instance SADC, can take place in a way that advances the objective of promoting and protecting human rights.<sup>141</sup>

## **2.5 Conclusion**

It is evident that in recent years human rights have become a fundamental component of the principles and objectives of RECs in Africa. This Chapter has shown the significant role of RECs through their sub-regional courts in the protection of human rights. In this regard, their role contributes to the consolidation of regional economic integration by moving to the field of judicial protection of human rights. This development can be regarded as a response to the regional agenda as set out in the Abuja Treaty and as conceptualised in the African Charter as a fundamental principle of continental trade relations. However, concerns are still raised in relation to their suitability as forums for promotion and protection of human rights in view of establishing their credibility. The subsequent chapter focuses on the SADC Tribunal even though it has not amassed enough jurisprudence to assess its abilities. The chapter strictly focuses on the Tribunal's general jurisdiction to adjudicate matters, the composition of judges, its operation, applicable law and decisions, enforcement of decisions and will establish whether the new human rights mandate can fall within the scope of the jurisdiction of the Tribunal. It is pertinent that all the jurisdictional and other conditions must be met.

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<sup>141</sup> Kaime (note 124) at 113.

## CHAPTER THREE

### THE SADC TRIBUNAL

#### 3.1 Introduction

In the previous chapter, it was established that the founding treaties of RECs did not provide for the protection and promotion of human rights whether as a goal or principle thereof. The competence of their courts has now expanded to cover human rights issues but their exercise of jurisdiction is much more recent. Currently, promotion and protection of human rights is part of the fundamental principles of most RECs. Within SADC, there exists an unclear human rights mandate. The Tribunal was established to resolve disputes arising from closer economic and political union, rather than human rights, but the judgment by the Tribunal, namely, *Mike Campbell and Another v Republic of Zimbabwe* and some of the pending cases demonstrate that the Tribunal can also be called upon to consider human rights implications of economic policies and programmes. The jurisdictional scope of the human rights protection of the Tribunal was not addressed in this case, of which this chapter forms as a backdrop to the more detailed determination of the extent of the human rights jurisdiction in the subsequent chapter. This chapter is largely descriptive and concerned with the general jurisdiction of the Tribunal, its operation and activities in terms of the composition of judges, applicable law, independence, and the enforcement of decisions.

#### 3.2 The SADC Tribunal: Establishment

Occupying pride of place among SADC treaties is the organisations founding treaty of 1992, which sets out the organisations general objectives and principles; creates its principal institutions, and describes their functions and powers; deals with some financial matters; and provides for the adoption of other SADC treaties in various areas of cooperation, among other things.<sup>142</sup> In order to ensure the effectiveness of the mandate of SADC, there was need for an instrument whose primary objective was to adjudicate over disputes that might arise among the member states or in relation to the provisions of the SADC Treaty. In this regard, the Tribunal was created as one of the institutions of SADC in 1992.<sup>143</sup> The Tribunal only

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<sup>142</sup> See generally the SADC Treaty; Articles 2,3,4,5,9,21 and 22.

<sup>143</sup> Article 9(g) of the SADC Treaty.

became operational in 2005 and its jurisprudence remains meagre in that only few cases have been brought before the Tribunal. The judges were only appointed in August 2005.<sup>144</sup>

### 3.2.1 Jurisdiction of the Tribunal

In terms of the SADC Treaty, the Tribunal is meant to ‘ensure adherence to and the proper interpretation of the Treaty and subsidiary instruments, and to adjudicate upon such disputes as may be referred to it’.<sup>145</sup> The Tribunal is also empowered to provide advisory opinions to the Summit of Heads of State and Government on such matters as the Summit may refer to it.<sup>146</sup> Significantly, it has the power to deal with disputes and applications that relate to kinds of issues, set out in Article 14 of the SADC Protocol on Tribunal. According to the SADC Protocol on Tribunal in Article 14, the Tribunal has jurisdiction over all applications referred to it in accordance with the Treaty and Protocol, which relate to—

- (a) The interpretation and application of the Treaty;
- (b) The interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;
- (c) All matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.

A literal reading of the provision implies sufficiently to direct the Tribunal on what law to apply. The scope of the Jurisdiction of the Tribunal extends to disputes between states, and between natural or legal persons and states.<sup>147</sup> This extension of Jurisdiction is also a commendable position the Tribunal has taken as it entertains claims from natural persons and hence adapting to a modern legal practice of recognizing individuals as participants and subjects international law. This entails that the protection of individual rights such as human rights and human rights law will be protected particularly by the Tribunal as it can entertain claims of the violations thereof.<sup>148</sup> In the *Campbell* case, the Tribunal raised the issue of jurisdiction since the dispute involved a member state and a natural person. The Tribunal made it clear that it is not competent to adjudicate matters involving only natural persons. As for the *Mtingwi* case, Article 18 and 19 state that the Tribunal has exclusive jurisdiction between organs of the community or between community personnel and the community.

<sup>144</sup> See note 30 above.

<sup>145</sup> Article 16 (1) of the SADC Treaty.

<sup>146</sup> Article 16 (4) of the SADC Treaty and Article 20 of the SADC Tribunal Protocol.

<sup>147</sup> Article 15 (1) of the SADC Tribunal Protocol

<sup>148</sup> *Ibid*, Article 15(1).

However, no natural or legal person is entitled to bring an action against a state unless he or she has exhausted all legal remedies or is unable to proceed under the domestic jurisdiction.<sup>149</sup> The requirement of exhaustion of legal remedies is relevant to the relationship between an international court and a state and is founded on the principle that the national authorities should have an opportunity to remedy the breach within their own jurisdiction.<sup>150</sup> In this regard, local remedies refer to the ordinary remedies of common law existing in jurisdictions accessible to persons seeking justice as opposed to an international court.

In relation to disputes between SADC and member states, the Tribunal has exclusive jurisdiction. The competent SADC institution or state involved may refer such disputes to it. Its authority is expressly made subject to Article 14 highlighted above. It has jurisdiction over disputes among member states, referred to them. While not expressly stating that the Tribunal has exclusive jurisdiction over such disputes, SADC Treaties usually state that if members fail to amicably resolve disputes over the interpretation or application of the Treaty in question, the Tribunal would be the final arbiter. The Tribunal's authority to deal with disputes among member states is, however, not expressly made subject to Article 14. This could signify that members agree that it could also deal with matters not covered by the Article. Suffice to note is that consent of the other party is not required when bringing a dispute. This means that the Tribunal has compulsory jurisdiction over all matters referred to it. By virtue of ratifying the SADC Treaty and the Protocol on Tribunal, a member state binds itself to the Tribunal's jurisdiction over all disputes referred to the Tribunal that involve each state.

### **3.2.2 Composition of judges**

Under Article 16(2) of the SADC Treaty, the Summit was empowered to adopt a Protocol detailing out the composition, powers, procedures and functions of the Tribunal. The Protocol was adopted in 2000, which also contains the Tribunal's rules of procedure. Article 3 of the Protocol directs the Tribunal to have not less than 10 members and these members are to be appointed from nationals of member states who possess qualifications required for the appointment to the highest judicial offices in their countries and who are jurists of recognised competence.<sup>151</sup> There is no specific mention of competence in trade related matters

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<sup>149</sup> Ibid, Article 15(2)

<sup>150</sup> Viljoen (note 45) at 336.

<sup>151</sup> Article 3 (1) of the SADC Tribunal Protocol.

considering that the SADC is a regional economic integration body or in respect of the new human rights mandate, there is no corresponding emphasis on a human rights competence for the judges. In the nomination, selection and appointment of members of the Tribunal, member states are merely advised to give due consideration to fair gender representation.<sup>152</sup> Out of the ten members, five are supposed to sit regularly while the other five form a pool from where the President may invite one to sit if a regular member is absent or otherwise unable to sit.<sup>153</sup> The Tribunal is ordinarily quorate when three of its members are sitting even though the Tribunal may some times decide to sit a full bench composed of five members.<sup>154</sup> The judges of the Tribunal are appointed by the Summit on the recommendation of the Council and are selected from a list of nominees prepared by the member states.<sup>155</sup>

### 3.2.3 Operation of the Tribunal

Although the Tribunal was established in 1992 and its structures were outlined in 2000, the Tribunal was inaugurated in 2001 and only became operational in 2005 when the first judges were appointed. The day-to-day running of the Tribunal is entrusted to a Registrar who works under the supervision of the Tribunal's President. The Tribunal's registry was established in 2006 and started functioning in 2007. The scope of the Tribunal's jurisdiction extends to disputes between states and also those between states and natural or legal persons. Disputes between member states and SADC are within the Tribunal's range of interest but disputes between natural or legal persons are not within the Tribunal's jurisdiction.<sup>156</sup> Also within the Tribunal's competence are disputes between individuals and the SADC and just like most supranational tribunals, the Tribunal cannot be seised of a matter unless the applicant establishes that he/she has exhausted local remedies.<sup>157</sup>

### 3.2.4 Applicable law

Article 21 of the SADC Tribunal Protocol prescribes the law that the Tribunal must apply. The Tribunal is directed to apply the SADC Treaty, Protocols that form part of the Treaty, subsidiary instruments adopted by the Summit, the Council or any other institution or organ of SADC. All Protocols approved by the Summit form an integral part of the original SADC

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<sup>152</sup> Article 4 (2) of the SADC Tribunal Protocol.

<sup>153</sup> Article 3 (2) of the SADC Tribunal Protocol.

<sup>154</sup> Article 3 (3) of the SADC Tribunal Protocol.

<sup>155</sup> Article 4 of the SADC Tribunal Protocol.

<sup>156</sup> Article 15(2) of the SADC Tribunal Protocol.

<sup>157</sup> Article 15(2) of the SADC Tribunal protocol.

Treaty. The Tribunal is empowered under Article 21(b) of the SADC Tribunal Protocol to develop its own jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law applicable in a member state.<sup>158</sup> Ruppel argues that this exhortation indicates a clear desire for the Tribunal to influence the direction and speed of the integration process for the community.<sup>159</sup> Further, it is a reflection of a desire to reflect a truly supranational law applicable to the community member states.<sup>160</sup>

### 3.2.5 Decisions of the Tribunal

The Tribunal Protocol directs that all decisions of the Tribunal must contain reasons for the findings made and must be delivered in open court.<sup>161</sup> The Tribunal's decisions and rulings, which are taken by majority vote, are final and binding on the parties.<sup>162</sup> In spite of the fact that the Tribunal's decisions are final, a party may apply for a review of an earlier decision by the Tribunal.<sup>163</sup> Such an application, however, must be based on the discovery of some fact which would have some decisive influence on the decision had it been known at the time the Tribunal made its decision. Under Article 25 of the SADC Tribunal Protocol, the Tribunal is empowered to give decisions in default. An example is where the Tribunal decides to take a decision against a party in spite of the party's non-attendance where it is clear that the party concerned is wilfully ignoring the court process. The Tribunal or the President of the Tribunal may, in appropriate cases, order the suspension of an act challenged before the Tribunal or order such interim relief as may be necessary.<sup>164</sup> The Tribunal's seat is in Windhoek, Namibia, but the Tribunal may 'sit and exercise its functions anywhere within the community'.<sup>165</sup>

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<sup>158</sup> See Article 21(b) of the SADC Tribunal Protocol. See also, Anselm Chidi *Complementarity, competition or contradiction; The relationship of the African Court on Human and Peoples' Rights and the regional courts in Eastern and Southern Africa* (2003).

<sup>159</sup> Ruppel (note 22) at 17.

<sup>160</sup> Ibid at 18.

<sup>161</sup> Article 24 (1) of the SADC Tribunal Protocol.

<sup>162</sup> Article 24 (2) of the SADC Tribunal Protocol.

<sup>163</sup> Article 26 of the SADC Tribunal Protocol.

<sup>164</sup> Article 28 of the SADC Tribunal Protocol.

<sup>165</sup> Article 13 of the SADC Tribunal Protocol.

### **3.2.6 Enforcement of the Tribunal's decisions**

Article 32 of the Protocol addresses the enforcement of Tribunal decisions and this is unfortunately, where the weakness of the Tribunal lies. Article 32(1) provides that the law for the enforcement of foreign judgments in member states shall govern the enforcement of Tribunal decisions. Article 32(2) of the Protocol goes further and obliges member states to immediately take all measures to ensure the enforcement of decisions of the Tribunal. Article 32(4) of the Protocol provides that any failure by a state to comply with a decision of the Tribunal may be referred to the Tribunal and in terms of Articles 32(5) of the Protocol; the Tribunal is obliged to refer such failure to the Summit of SADC for appropriate action. This arrangement is not adequate and the ambiguity is an area that needs to be addressed. This is because international legal arrangements can never be effective if states, party to international agreements, can escape their international obligations by merely invoking rulings of domestic courts in their favour.

### **3.2.7 Independence of the Tribunal**

The independence of the Tribunal is guaranteed in Article 17(2) of the SADC Treaty, which states that in the performance of their duties, the Members of the Tribunal shall be committed to the international character of SADC. Further, they shall not seek or receive instructions from any Member States, or from any authority external to SADC and they shall also refrain from any action incompatible with their positions as international staff responsible only to SADC. This is important for the handling of matters by the Tribunal.

### **3.2.8 SADC jurisprudence and *Campbell* case**

From the time the Tribunal became operational in 2005, it has not amassed enough jurisprudence to assess its abilities. Thus far, it has only tried cases having human rights implications. One of the landmark cases tried by the Tribunal sought to test the extent to which SADC, as a regional economic organization, can foster the rule of law in the region. This is the case in which a Zimbabwean registered company Mike Campbell (Pvt) limited instituted a claim against the Republic of Zimbabwe in which it challenged the acquisition of agriculture land in Zimbabwe by the Government of Zimbabwe. The Claimant argued, *inter alia*, that Zimbabwe's expropriation of land process infringed their property rights and further

that the decision was racist (racially motivated by government decision) and thus illegal by virtue of Article 6 of the SADC Treaty.<sup>166</sup> As a result, an application was brought in terms of Article 28 of the Protocol for an interim measure to interdict the Government of Zimbabwe from evicting Mike Campbell (Pvt) Limited *et al* from the land in question in the mean time. This is referred to as interlocutory relief in municipal law parlance.

The Tribunal granted the relief on 13 December 2007<sup>167</sup> and as the first ruling of the Tribunal, this is significant. The Tribunal held that Article 15 of the Protocol gives it the required jurisdiction.<sup>168</sup> The Tribunal went further and ruled that Article 14 of the Protocol, which gives it jurisdiction over all disputes relating to the interpretation and application of the SADC Treaty, is also applicable. It places particular reliance on Article 4 of this Treaty, which obliges Member states to act in accordance with human rights, democracy and the rule of law.

In response to the interlocutory application the Government of Zimbabwe raised the issue of failure to exhaust local remedies and based their argument on Article 15(2) of the Protocol which requires natural or legal persons to first exhaust all available remedies before they bring an action against a state before the Tribunal, or they may approach the Tribunal if they are unable to proceed under the domestic jurisdiction. The Tribunal rejected the local remedies argument on the grounds that it was not relevant at the *interlocutory* juncture. It could have been relevant at the main hearing. Significantly, the Tribunal applied the principles applicable in municipal law for interim relief, *viz*, a *prima facie* right, the absence of an alternative remedy and the fact that the balance of convenience favours the applicant. It made no order of costs.

In the mean time, the Supreme Court of Zimbabwe ruled in favour of the Government of Zimbabwe and the Government had apparently indicated that it intended to proceed with the seizure of land in question.<sup>169</sup> This flew in the face of an undertaking given on behalf of the Government before the Tribunal and Zimbabwe's international obligations. It raises the issue

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<sup>166</sup> Article 6 of the SADC Treaty provides that SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.

<sup>167</sup> Per the Honorable Justice Dr Luis Antonio Mondlane, the President of the Tribunal.

<sup>168</sup> Article 15 of the Protocol provides that the Tribunal shall have jurisdiction over disputes between natural or legal persons and states.

<sup>169</sup> See the *Campbell* case.

of the effectiveness and enforcement of Tribunal decisions and the relationship between municipal and international law.

It is unfortunate that the first test case for the SADC Tribunal involved a complicated political issue. The negative response of the Zimbabwean government came as no surprise, the human rights dimension is particularly not an easy task for a Tribunal with jurisdiction over the SADC Treaty and Protocols, and this makes the mandate unclear. SADC is not a human rights organisation with great expertise but the question of whether the establishment of the SADC Tribunal marks the beginning of a new era is important to understand complicated issues regarding jurisdiction.

### **3.3 Conclusion**

The Tribunal was constituted primarily to ensure adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it. In this regard, for the Tribunal to engage in any dispute as may be referred to it, all the jurisdictional and other conditions described above must be met as was also seen in the *Campbell* case. Interestingly, other than states, individuals can refer matters to the Tribunal provided that they exhaust all local remedies.

It was seen that the provision establishing the jurisdiction of the Tribunal in Article 14 of the SADC Tribunal on Protocol omits an express mention of the jurisdiction over human rights. For this reason, it has been argued that the Tribunal lacks a clear human rights mandate. Various approaches have been adopted in defining the jurisdiction of sub-regional courts with respect to human rights. Thus, a clarification of the courts jurisdiction as regards human rights is important as the Tribunal has potential to contribute significantly to deeper harmonisation of law and jurisprudence and to better protection of human rights in SADC. The subsequent chapter will determine the scope of human rights protection of the SADC Tribunal.

## CHAPTER FOUR

### THE HUMAN RIGHTS JURISDICTION OF THE SADC TRIBUNAL

#### 4.1 Introduction

It has been established in the previous chapters that RECs have introduced a new layer of supranational protection and promotion of human rights in Africa. Their courts now play an important role in the protection of human rights through the determination of human rights cases. One must be constantly mindful of the fact that SADC, is at its core, a regional economic community. Its principal focus was entirely on promoting economic and trade ties among its members. Thus, in view of the foregoing, this chapter will clarify the extent of human rights jurisdiction of the SADC Tribunal considering that Article 14 of the SADC Tribunal Protocol also omits an express mention of the jurisdiction over human rights.<sup>170</sup> Perhaps as a reflection of the preceding is the appointment of judges for the Tribunal where there is no express requirement that the persons appointed must have special human rights skills.<sup>171</sup>

#### 4.2 Inclusion of human rights in the SADC legal regime

As argued by Viljoen, the inclusion of human rights is explained by reference to the fact that the countries in southern Africa suffered a denial of human rights for a longer period than other African countries.<sup>172</sup> Although all SADC Countries are now democracies, many of them recently emerged from long periods of war and internal strife.<sup>173</sup> Almost all the countries have long legacies of poverty, colonialism and a lack of development. Some countries like South Africa and Namibia have histories of extensive human rights abuses under apartheid regime. In this context, there are many competing human rights matters. HIV/AIDS is also an emerging human rights issue, given the devastating impact of the epidemic on the SADC

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<sup>170</sup> See discussion 3.2.1 above. Jurisdiction is a legal term referring to either a power or competence to exercise authority over a legally defined relationship between the subjects. It creates a capacity to generate legal norms and to alter the position of those subject to such norms. It also refers to the power of a court to determine a case before it in terms of an instrument either creating it or defining the jurisdiction. A court is generally precluded from adjudicating the merits of a cause over which it does not have jurisdiction. The terms competence and jurisdiction are deeply intertwined that they are often used interchangeably but a distinction can be made between the two. While jurisdiction relates to a court's capacity to decide a case with final and binding force, competence regards the propriety of the exercise of such jurisdiction.

<sup>171</sup> Article 3(1) of the SADC Tribunal Protocol.

<sup>172</sup> Viljoen (note 45) 498.

<sup>173</sup> HIV/AIDS and human rights report 2006: An evaluation of the steps taken by countries within the Southern African Development Community (SADC) region to implement the International Guidelines on HIV/AIDS and human rights.

region and it is increasingly becoming a key human rights issue with civil, political and socio-economic rights implications.<sup>174</sup>

The legal protection of human rights is a current, emerging issue in the SADC region.<sup>175</sup> A wide range of provisions and objectives within the SADC Treaty<sup>176</sup> legal system offer human rights protection, *inter alia*, in the various SADC Protocols.<sup>177</sup> In fact, an increased concern for human rights was reflected in the amendment of the admission criteria for admission to SADC. In 2003, the Summit amended the admission criteria adopted in 1995 by adding the requirement that there should be a commonality of observance of the principles of democracy, human rights and the rule of law in accordance with the African Charter.<sup>178</sup> In 1994, a ministerial workshop called for the adoption of a SADC Human Rights Commission as well as for a SADC Bill of Rights.<sup>179</sup> In 1996, a SADC Human Rights Charter was drafted by NGOs of several SADC member states and in the course of establishing the SADC Tribunal in 1997, a panel of experts considered the possibility of separate human rights instrument such as a Protocol of Human Rights or a separate Southern African Convention on Human Rights.<sup>180</sup> None of these came to fruition, which would have been the biggest step towards defining a clearer basis for human rights within SADC or in essence, the extent of the human rights protection.

Clearly, from the SADC founding document the organisations focus lies in the realm of promoting regional peace and security and the integration of national economies of member states.<sup>181</sup> However, the *Campbell* case revealed that the Tribunal declared itself competent to hear and determine human rights disputes or rather, matters alleging violations of human rights within member states. The Tribunal thus identified Article 4(c) of the SADC Treaty as being primarily relevant for the resolution of the matter in the *Campbell* case and from its analysis, SADC, collectively and as individual member states, are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law in the region.

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<sup>174</sup> Frans Viljoen and Susan Precious (eds) *Human rights under threat: Four Perspectives on HIV, AIDS and the Law in Southern Africa* (2007) at 7.

<sup>175</sup> See note 167 above.

<sup>176</sup> See Articles 4(c), 5(1), 6(2) SADC Treaty.

<sup>177</sup> See for instance the Protocol on Gender and development.

<sup>178</sup> This is reflected in Article 4(c) of the SADC Treaty.

<sup>179</sup> See Ruppel (note 52) at 178.

<sup>180</sup> *Ibid.*

<sup>181</sup> Viljoen (note 45) at 492.

Through its decision in the *Campbell's* case, the Tribunal indicated the path that it intends to follow in relation to human rights claims that will come before it. It is important for one to determine whether the position adopted by the Tribunal is proper, irrespective of the Tribunal's findings in the case. The question that was determined by the court was whether the SADC Tribunal was endowed with the jurisdictional competence to rule over the case before it. The court held that the SADC Tribunal did have jurisdictional competence to adjudicate over the case and further, recognised the legitimacy of the SADC Tribunal. In deciding this issue, the Tribunal first referred to Article 21 (b) of the SADC Tribunal Protocol, which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so having regard to applicable treaties, general principles and rules of public international law, which are sources of law for the Tribunal. The Tribunal's reference to international law is largely for the purposes of ascertaining commonly applicable standards in international law. For instance with the issue of non-discrimination brought out in the *Campbell* case, reference was made to the international law norms in order to establish the existence of common standards.<sup>182</sup>

Following this decision, it is apparent that there is still uncertainty with regards the SADC Tribunal's human rights competence that relates to the group or class of rights that the Tribunal will be applying pursuant to its human rights mandate that needs to be addressed. Unlike the SADC Treaty or any of its Protocols, the African Charter,<sup>183</sup> is a human rights treaty that recognises both civil and political rights, and economic, social and cultural rights in one document, and the rights are subject to a complaints procedure. Eborah thus argues that the association of human rights supervisory institutions with specific catalogues of rights facilitates the identification of the specific rights that can be protected by such institutions.<sup>184</sup> Otherwise, in the event of such judicial bodies with borrowed human rights jurisdictions, there is certainly lack of clarity as regards the categories of rights over which jurisdiction can be exercised.<sup>185</sup>

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<sup>182</sup> The Tribunal referred to the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition, the Tribunal referred to the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission.

<sup>183</sup> Article 30 established the African Commission to promote and protect human and peoples' rights.

<sup>184</sup> Solomon Eborah 'A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice' Research Partnership 1/2008. Danish Institute for Human Rights at 52.

<sup>185</sup> Ibid.

The absence of a clear catalogue of rights, however, was not found to be a big hindrance in Tribunal's exercise of its human rights related competence. This is because, it appears that the human rights obligations of SADC member states are clear when the SADC Treaty together with its Protocols and other instruments adopted within SADC are comprehensively analysed.<sup>186</sup> This is also true in that some SADC Protocols have by way of incorporation adopted standards in other major international human rights treaties. Notably, among the SADC Protocols is the SADC Protocol on Gender and Development, which covers human rights issues.<sup>187</sup> Among the instruments expressly referred to in the Protocol on Gender are the Convention on the Rights of the Child,<sup>188</sup> the Protocol to the African Charter, Convention on the Rights of Women in Africa<sup>189</sup> and the United Nations Convention on the Rights of People with Disabilities.<sup>190</sup> The Preamble<sup>191</sup> clearly indicates that the adoption was motivated by member states conviction that the integration and mainstreaming of gender issues within the SADC Plan of Action was key to sustainable development. Other SADC Protocols with human rights implications include the Protocol on Education and Training and the Protocol on Health. In determining the importance of these human rights issues covered in the SADC legal instruments, the significant role and legal basis is discussed below.

#### **4.2.1 The significant role of human rights in SADC**

The SADC Treaty identifies the promotion of human rights as one of the core principles of the integration mechanism and proclaims the observance of human rights as critical in ensuring people's participation in the initiative, but this unequivocal commitment to human rights is not translated with equal force into the normative framework established by the Treaty or into the programmatic activities. It is important to note that the Treaty does not create any institution with the specific mandate to deal with human rights issues, neither are

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<sup>186</sup> See for instance Part II of the SADC Protocol on Gender and Development Articles 4-11.

<sup>187</sup> Recognising that integration and mainstreaming of gender issues into the SADC legal framework is key to the sustainable development of the SADC region, and taking into account globalisation, human trafficking of women and children, the feminism of poverty, and violence against women.

<sup>188</sup> GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force September 2, 1990.

<sup>189</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 September 13, 2000 entered into force November 25, 2005.

<sup>190</sup> GA Res 61/106, Annex I, UN GAOR, 61st Sess, Supp No 49, at 65, UN Doc A/61/49 (2006), entered into force May 3, 2008.

<sup>191</sup> See Preamble of the SADC Protocol on Gender and Development.

there any protocols or sectors especially entrusted with human rights protection.<sup>192</sup> The Tribunal held in the *Campbell* case that Article 15 of the SADC Protocol on Tribunal gave it the required jurisdiction. The Tribunal also ruled that Article 14 of the Protocol was applicable that gives it jurisdiction over all disputes relating to the interpretation and application of the SADC Treaty and placed particular reliance on Article 4 of the SADC Treaty which obliges member states to act in accordance with human rights, democracy and the rule of law. Article 21 (b) of the SADC Tribunal Protocol entitled the Tribunal to look elsewhere in case of a gap within the SADC law.

Considering the people centred nature of the integration mechanism, the inadequate attention accorded to human rights promotion and protection is neither conducive to the achievement of the aims and objectives of SADC, nor is in harmony with well established principles of international law regarding the purpose of trade and development arrangements.<sup>193</sup> This is because deep integration as envisaged by the SADC Treaty is inevitably accompanied by high levels of economic, political and social interaction. This increased interaction calls for the establishment of a coherent framework of rules for governing the relations that arise from there because guaranteeing respect for human rights satisfies this need. In a society governed by law, human rights can be a means for people to protect themselves from bureaucratic abuse, commercial exploitation, and official lawlessness.<sup>194</sup>

Kaime argues that the adoption of strong human rights values and institutions serves not only to give confidence to investors and trading partners but also ensures the effective participation of individuals in the scheme and assures protection from the negative consequences of trade.<sup>195</sup> Apart from positive aspects such as the generation of income, employment and foreign exchange, trade may also manifest negative consequences such as environmental damage, destruction and loss of livelihoods or unacceptable levels of exploitation.<sup>196</sup> Consequently, adherence to human rights values and norms serves to protect vulnerable groups such as women and children whose social protection is liable to be diminished by trade dynamics.<sup>197</sup>

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<sup>192</sup> The Tribunal held in the *Campbell* case that the Tribunal was capable of handling all disputes brought before it.

<sup>193</sup> Kaime (note 124) at 111.

<sup>194</sup> Ibid at 112.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid at 113.

<sup>197</sup> Ibid.

Further, international human rights law and practice has emphasised the centrality and primacy of human rights obligations in all areas of governance in development, including international and regional trade, investment and financial policies, agreements and practices, and requires all governments and economic policy forums to take human rights principles and obligations into account when formulating national, regional or international economic policies.<sup>198</sup> This position is borne out of the recognition that trade arrangements such as the SADC integration mechanism are but processes that enable human individuals to fully enjoy all economic, social, cultural, civil and political rights. It is being accepted that it is unrealistic to measure development ‘purely on the basis of economic indicia’ while ignoring the human dimension of development.<sup>199</sup> Economic growth must therefore translate into a qualitative improvement in the lives of people. Explicit recognition of the primacy and centrality of human rights in the economic integration mechanism is one way of guaranteeing that economic growth results in an improvement in the quality of people’s lives.

Consequently, it is critical that the SADC integration mechanism does more than engage in the promotion and protection of human rights if its goal of human development is to be reached. The promotion and protection of human rights must not be viewed as mere condiment to the integration initiative, but must rather be elevated as one of its central purposes. This entails that the protection and promotion of human rights with the SADC legal framework must pertain only to regional integration matters.

#### **4.2.3 Adoption of a human rights centred approach in the SADC legal framework**

The legal basis for adopting a human rights centred approach to regional integration is clear in that all SADC members have undertaken obligations under human rights law through the ratification of various international treaties or the application of customary international law.<sup>200</sup> Consequently, every policy or activity that is formulated or pursued in order to achieve the aims and objectives of the regional integration initiative must conform to the human rights obligations of the member states. Such an approach not only finds support in international law and within the SADC trade framework but also augurs well with the aims and objectives of the regional integration initiative.<sup>201</sup> The UN Charter<sup>202</sup> establishes general

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<sup>198</sup> Kaime (note 124) at 113

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid at 114

<sup>202</sup> June 26, 1945, 59 Stat 1031, TS 993, 3 Bevans 1153, entered into force October 24, 1945.

human rights obligations, which affirm the need to respect human rights in the quest for economic development.<sup>203</sup>

Under the Charter, all members of SADC have undertaken to promote ‘higher standards of living, full employment, and conditions of economic and social progress and development’ as well as ‘universal respect for and observance of, human rights and fundamental freedoms for all’.<sup>204</sup> Thus, under the UN Charter, economic development and the protection and promotion of human rights go hand in hand and one may not be sacrificed for the other. Similarly, the UDHR, which is viewed as the authoritative elaboration of the UN Charter obligations relating to human rights, establishes the civil, cultural, economic, political and social needs necessary to human dignity and transforms these needs into legal entitlements or rights to be protected by member states of the UN. In other words, under the UN Charter and the UDHR, civil, cultural, economic, political and social rights may not be rationed in the quest for economic development.

Thus, the approach in this case is to ensure that the provisions of the SADC Treaty as well as the protocols under it are not construed in isolation of the human rights objective, but rather are interpreted and implemented in a manner that furthers the promotion and protection of human rights. Indeed, Article 31(3) (c) of the Vienna Convention on the Law of Treaties<sup>205</sup> confirms the appropriateness of such an approach by providing that every international treaty must be interpreted by taking into account ‘any relevant rules of international law applicable in the relations between the parties’. Unfortunately, the SADC Treaty and the protocols under it do not accept this rule. Consequently, in their interpretation and implementation, SADC member states must adopt a human rights approach and ensure that primacy is given to their obligations to protect and promote human rights.

#### **4.3 The African Charter *versus* Sub-regional human rights Charter**

Following the importance of the legal basis for adopting human rights within SADC, it is important to evaluate what standard the Tribunal will be using in order to exercise its human rights mandate. Since SADC has competence to settle human rights cases, it is apparent that in construing state parties’ human rights obligations, the Tribunal is free to consult the other

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<sup>203</sup> Kaime (note 124) at 114.

<sup>204</sup> Ibid.

<sup>205</sup> 1155 UNTS 331, 8 ILM, 679, entered into force January 27, 1980.

treaties that member states have signed, acceded, ratified under other frameworks.<sup>206</sup> Viljoen argues that the African Charter could be the basis of a common sub-regional human rights standard.<sup>207</sup> In my view, the African Charter makes provision for all three-generation rights and would be appropriate for regional economic arrangements to adhere to or invoke such a legal instrument even though the option of creating a sub-regional human rights charter for regional economic institutions would serve as a better standard within which RECs would effectively exercise their human rights competence. As Viljoen points out, ‘once is it accepted that human rights play an important role in the RECs, the question arises whether, and on what basis, a common standard could be derived from common international law standards at the global or regional level’.<sup>208</sup>

One challenge that needs to be addressed is that although, UN human rights instruments enjoy wide acceptance across sub-regions in Africa, none of them has been ratified by all states.<sup>209</sup> However, all AU member states are party to the African Charter and as such, in agreement with Viljoen, the Charter would be preferable to be used to serve as a common standard.<sup>210</sup> The development of distinct sub-regional human rights standards, such as the SADC Charter of Fundamental Social Rights,<sup>211</sup> as further argued is however likely to enhance and accentuate differences, undermining the movement towards African unity and legal integration.<sup>212</sup> While it may be contended that sub-regional courts will be able to raise the human rights standard set out in the African Charter, the same will be attained if the African Charter is interpreted and applied creatively by activist REC courts.<sup>213</sup> The envisaged merger of the RECs with the AEC/AU strengthens this argument.

The African Charter is the most representative and legitimate source of reference to ensue sub-regional judicial harmonisation and this explains why most of the sub-regional treaties<sup>214</sup> make reference to the recognition, promotion and protection of human and peoples’ rights in

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<sup>206</sup> Viljoen (note 45) at 500.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> The SADC Charter of Fundamental Social Rights, available at [http://www.givengain.com/unique/tralac/pdf/20060629\\_charter\\_fundamental\\_social\\_rights.pdf](http://www.givengain.com/unique/tralac/pdf/20060629_charter_fundamental_social_rights.pdf) [Accessed 22 January 2010]. See Nkwanzi, Zolomphi ‘When Elephants Dance, The SADC Charter of Fundamental Social Rights, a Beacon of Hope or Confusion Compounded?’ (2007) 33 (1) *Commonwealth Law Bulletin* 41 — 54.

<sup>212</sup> Viljoen (note 45) at 500.

<sup>213</sup> Ibid.

<sup>214</sup> For instance the ECOWAS Treaty, the EAC Treaty and COMESA Treaty.

accordance with the African Charter as a fundamental principle guiding the accomplishment of their objectives.<sup>215</sup> The reason for the omission of explicit reference to the African Charter from the SADC Treaty and the Protocol on the SADC Tribunal, allowing the Tribunal to develop its own Community jurisprudence having regard to applicable relevant treaties, principles and rules of general international law and any rules and principles of law of states raises a challenge for the Tribunal. However, the option of creating sub-regional human rights charters will take time and effort, which will require states to agree on a common standard.<sup>216</sup>

#### **4.4 Issues arising out of the scope of the Tribunal's human rights jurisdiction**

Having stated the extent of the human rights jurisdiction of the Tribunal, it is important to note that critics and supporters alike have argued that it makes little sense in having an institution that will duplicate the weaknesses present in the African human rights system. Across the continent, other specialised continental bodies exist such as the African Commission, African Court and the AU's African Court of Justice. In relation to the human rights competence of the Tribunal, it is without doubt that the SADC Tribunal will co-exist with other judicial bodies, which raises issues of overlapping jurisdictions, forum shopping, and conflicting interpretations. The selection of judges is also contentious because unlike the members of the African Commission,<sup>217</sup> the judges of the SADC Tribunal do not bring any specialised human rights competence<sup>218</sup> although their subject matter so far has been human rights issues, including the interpretation and application of the African Charter. It is thus important that some of the judges at the very least have specific human rights competence to enable the Tribunal continue on the human rights mission it has started.

##### **4.4.1 Co-existence of human rights institutions**

In the absence of a judicially integrated Africa, the problem of divergent interpretations of one normative source by different judicial bodies is undeniable. The numerous sub-regional courts will co-exist with each other and with the African Court or the AU's African Court of

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<sup>215</sup> Viljoen (note 45) at 500.

<sup>216</sup> Ibid.

<sup>217</sup> Article 31 of the African Charter requires members of the African Commission to be chosen from amongst personalities of the highest reputation known for their high morality, integrity, impartiality and competence in matters of human and peoples rights.

<sup>218</sup> Article 3(1) of the SADC Tribunal Protocol provides that the 'Tribunal shall consist of not less than ten members, appointed from nationals of States who possess the qualifications required for appointment to the highest judicial offices in their respective states or who are jurists of recognized competence.

Justice. If all these bodies adjudicate based on the African Charter, a cohesive jurisprudence could also develop.<sup>219</sup> While these overlapping jurisdictions may lead to cross-fertilization and could strengthen both institutions, the inverse may also be true, leading to a cacophony of divergent interpretations.<sup>220</sup> This eventually could be curbed if sub-regional courts follow the African Court's interpretation, when such an interpretation exists, by working out a system of referral to the African Court, for interpretive guidance in other cases.<sup>221</sup>

#### 4.4.2 Forum shopping

Another disadvantage of a multiplicity of courts is the possibility of forum shopping.<sup>222</sup> A consequence of duplication of REC membership is the possibility that a litigant may choose the institution to which he or she addresses a complaint or application. However, despite the reservation raised against forum shopping, the capacity of a litigant to choose a forum for redress empowers the litigant to access optimum protection of their rights. One way of curbing the possibility of forum shopping is that each of the sub-regional tribunals may apply the principle of *res judicata*<sup>223</sup> in relation to other sub-regional tribunals. It seems that, in respect of the ECCJ, this is the case, as that Court's Protocol, in Articles 19(2) and 22(1), provides for the finality of judgments by the ECCJ. The ECCJ has taken some tentative steps towards judicial acceptance of the African Charter as such a common standard of which the SADC Tribunal could draw this valuable lesson. The SADC Tribunal's admissibility requires litigants to have exhausted local remedies unless they are ineffective or unavailable. RECs may use the African Charter as a basis for standards of rights of ultimate unification at regional level.

#### 4.5 Conclusion

Therefore, it has been established that the extent of the jurisdiction of the Tribunal is expressed subject to the SADC Treaty read together with its Protocols, which in one way or the other recognise the rights stated in the African Charter and other relevant instruments relating to human rights. SADC does not have a single human rights instrument on the basis

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<sup>219</sup> Viljoen (note 45) at 501.

<sup>220</sup> Ibid.

<sup>221</sup> See Article 4(1) of the Protocol of the African Charter on the establishment of an African Court, allowing African organisations' recognised by the AU to submit such requests.

<sup>222</sup> Viljoen (note 45) at 502.

<sup>223</sup> *Res judicata* refers to a rule that a final judgment on the merits of a court having jurisdiction is conclusive between the parties to a suit as to all matters that are litigated or that could have been litigated. Retrieved from <http://legal-dictionary.thefreedictionary.com/res+judicata> [Accessed 22 January 2010].

on which the Tribunal should adjudicate. The Tribunal may well be positioned to adjudicate on that pertain to regional economic integration. However, just like the post-modern judicial landscape that the African Court enters into a landscape of apparent institutional proliferation, imitation, and duplication, so is the issue relating to sub-regional courts. As long as the SADC legal regime is clear on the rights it protects, states would be committed to respecting and promoting human rights. Thus, amending Article 14 of the SADC Tribunal Protocol would be a starting point, as it does not expressly state the jurisdictional scope specifically relating to the human rights competence for the Tribunal.

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## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

It has been established in the previous chapters that, strictly speaking, sub-regional economic communities traditionally did not have competence to deal with human rights issues. Increasingly, in recent years, this position has changed and most RECs have altered their founding instruments to either expressly put human rights among their objectives or at least include them as part of their their founding principles. This is what raised the concern over their capacity to effectively exercise the new competence in light of the economic focus of their founding treaties. The inclusion of human rights within the competence of RECS is not without its own problems and this is largely attributable to the fact that the institutional structures of most RECS were originally poised to promote trade, economic integration and matters incidental to the foregoing. It is thus principally within the judicial institutions of the RECs, that most work pertaining to human rights has occurred. This has often been complemented by the adoption of protocols and other instruments that expressly deal with topical human rights issues.

Africa's human rights regime is still relatively weak, despite the growing body of RECs, declarations, conventions and protocols. It is against this background that this dissertation sought to investigate the extent of the human rights jurisdiction of the SADC Tribunal and examine possible ways of improving the present system of human rights protection in sub-regional institutions. The fact that RECs have traditionally concentrated on regional economic integration matters, leaving other important issues such as human rights to other international *fora*, does not deter them from litigating human rights. The wellbeing of Africans is still inextricably linked to the protection of human rights, which an ongoing struggle.<sup>224</sup> Thus, in moving to the fields of the judicial protection of human rights, sub-regional courts play an important role in consolidating economic integration. In essence, they have not moved away from their original purpose. The benefits of the involvement of sub-regional courts in human rights litigation bring for most vulnerable in the context of easy access to justice, speed in the conclusion of cases, rendering of binding decisions and relative progress in implementation are attractive incentives for support of these emerging systems.<sup>225</sup>

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<sup>224</sup> Eborah (note 47) at 334.

<sup>225</sup> Ibid.

In light of the continuing struggles of the African Court, the potential for sub-regional mechanisms cannot be overemphasised.<sup>226</sup>

It appears that with the position taken by the SADC Tribunal in the *Campbell* case, the Tribunal will continue to exercise jurisdiction on human rights matters that come before it but emphasis should be placed on matters pertaining to regional economic integration and not all human rights matters. With regards the extent of the human rights jurisdiction of the SADC Tribunal, the *Campbell* case has conclusively established that the Tribunal has jurisdiction of deal with human rights. One has to look at SADC instruments to determine the extent of this jurisdiction. Other specialised human rights bodies are endowed with such a mandate and so matters that should be brought before the Tribunal must be in relation to the objectives of SADC. This suggests that the human rights jurisdiction of the Tribunal covers human rights issues that are expressly referred to in the SADC Treaty in addition to all other obligations that emerge from the Protocols adopted within the SADC framework, for instance the SADC Protocol on Gender and Development. The extent of the obligations that each Protocol confers has to be deciphered from the terms of the instrument itself. The SADC Gender Protocol offers the clearest example here because it expressly binds SADC members to comply with standards in treaties that were not adopted within the SADC framework. In my view, the Tribunal's human rights mandate is substantial especially considering the powers that the Tribunal has to consult comparative international law in resolving disputes between parties before it.

It is proposed that a human rights approach to regional integration would require the formal elevation of human rights protection and promotion on to the SADC agenda. This prioritisation of human rights would require the adoption of a protocol specifically on human rights, the establishment of a coordinating unit for the implementation of the protocol and projects relating to human rights protection by the SADC Secretariat. As regards enforcement of the human rights protocol, it is proposed that a SADC human rights commission be established which could be mandated with the duty to examine SADC integration laws and policies in order to ensure that they are compatible with the human rights obligations of member states. In the execution of this mandate, the commission could, *inter alia*, carry out studies, which would encourage dialogue on human rights, undertake human rights

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<sup>226</sup> Ibid.

assessments of economic integration law and policy, and devise strategies, which are compatible with human rights.

Since the role of the SADC Tribunal in the area of human rights protection cannot be denied, the concern that arises is to define the way in which the competence of the Tribunal may be reconciled with that of the African Court. It is clear from reading the SADC Treaty, the protocols and other standards adopted within SADC that the organisation has human rights competence, which it has ceded to the Tribunal. The Tribunal, however, did not articulate this clearly thus leaving doubts on the part of member states in this regard to further complicate compliance with decisions of the Tribunal. The Tribunal therefore needs to clarify its jurisdiction based on human rights related matters so that dispute brought before do not overlap with other institutions. The pursuit of the goals of economic integration on the continent would be meaningless if conflicts prompted by human rights violations at all levels are allowed to continue unabated.

For a clear human rights jurisdiction of the Tribunal to be well founded, amendment of the SADC Treaty to include the catalogue of rights or a separate document should be drafted and entered into force to provide for human rights that will form the proper jurisdictional scope for the Tribunal. The Protocol on the African Court has outlined the extent of the Courts jurisdiction and it serves as good practice for the Tribunal to follow and adjudicate matters instead of having many instruments, which may create confusion when interpreting provisions. In relation to sub-regional institutions, the Tribunal can draw lessons from the ECCJ jurisprudence of its competence of adjudicating human rights violations.

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