FROM TRADE COURTS TO HUMAN RIGHTS TRIBUNALS: CONTRIBUTIONS OF SUB-REGIONAL COURTS TO THE PROTECTION OF HUMAN RIGHTS IN AFRICA

Abstract
This article examines the extent of involvement of sub-regional courts in the adjudication of human rights cases in Africa, and whether their involvement in human rights adjudication contributes, or poses a grave danger, to the overall goal of human rights protection on the African continent. Some of the questions asked and answered in the paper include whether sub-regional trade courts, now acting as ‘human rights tribunals’, are best suited for their new duty and to what extent does their new role complement the mandates of the three regional human rights bodies, namely the African Commission on Human and Peoples’ Rights, African Court on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child, that have primary responsibility for the protection and adjudication of human rights matters at the continental level in Africa? The paper concludes that even though the jurisdiction of sub-regional courts to adjudicate on human rights definitely raise some unresolved issues, sub-regional courts will nonetheless make notable contributions to the development of human rights jurisprudence in Africa.

Keywords: Sub-regional Courts, Human Rights Tribunals, Africa

1. Introduction
At the end of colonial rule in the 1960s, African states were largely unstable and fragile.¹ Due to political instability and economic fragility, states in Africa were advised mainly by Western democracies and development partners to integrate economically and politically in order to achieve prosperity.² Political leaders on the continent clearly had no choice but to integrate if they were to ‘undo’ the balkanization of Africa brought about as a result of colonialism.³ While regional integration at the continental level could not be realised rapidly due to several reasons including sovereignty concerns, uneven distribution of integration benefits, and lack of political will, geographically proximate states had started coming together to create larger markets and economic consolidation through regional economic communities.⁴ Regionalism is a form of cooperation among states that are

---

* Victor Oluwasina AYENI, PhD, Lecturer, Adekunle Ajasin University, Akungba-Akoko, Ondo State. Email: victorayeni7@gmail.com/ Phone: +2347066711568


² As above.


⁴ LN Murungi and J Gallinetti (n. 1) p. 119.
geographically proximate for the pursuit of mutual benefits.⁵ The process of regional integration may take various forms but usually starts with preferential trading arrangements, custom union, common market, economic union and then gradual political integration.⁶ It must be noted however that no particular sequence is applicable to all RECs in Africa. While RECs usually do not at first consider regional protection of human rights as a goal, states generally agree across RECs in Africa that one of the fundamental principles for achieving the set goals of RECs is observance of the rule of law, good governance and respect for human rights.⁷ As states seek to promote their trade interests, certain principles of human rights become imperative. Even a REC comprising the most authoritarian states will require a minimum guarantee of political stability, free movement of people and goods, freedom of association and freedom of residence.

At the end 2018, Africa comprised at least 14 regional economic communities (RECs), eight of which are recognized by the AU as building blocks of economic integration in Africa.⁸ The eight recognised bodies usually referred to as RECs in Africa are: the Arab Maghreb Union (AMU), Community of Sahel-Saharan States (CENSAD), Economic Community of West African States (ECOWAS), Economic Community of Central African States (ECCAS), East African Community (EAC), Intergovernmental Authority on Development (IGAD), Common Market for Eastern and Southern Africa (COMESA), and the Southern African Development Community (SADC).⁹ The legal instruments establishing the various RECs usually provide for a permanent judicial body (also referred to in this paper as ‘sub-regional court’) responsible for adjudication of disputes; and in most cases the adjudicatory procedure is limited to disputes between states.

This paper takes a look at three of such adjudicatory mechanisms, namely the ECOWAS Community Court of Justice (ECCJ), East African Court of Justice (EACJ) and the Tribunal of the Southern African Development Commission (SADC Tribunal). The three sub-regional courts are similar in some ways. Each of them was created by a regional economic community that has the primary mandate of facilitating trade and political integration amongst member states.

---

⁷ See F Viljoen (n. 6) p. 482.
⁹ Viljoen (n.12) pp. 474 - 480.
2. Main Sub-Regional Courts in Africa
Traditionally, the three bodies that have primary responsibility for the protection of human rights at the regional level in Africa are: the African Commission, the African Court and the African Children’s Rights Committee. However due to issues of accessibility and proximity, sub-regional courts traditional set up for settling trade disputes are gradually becoming platforms for the protection of human rights. Below is an overview of the three main sub-regional courts that have adjudicated on significant human rights or human rights related cases and their contributions to the development of human rights jurisprudence in Africa.

ECOWAS Community Court of Justice (ECCJ)
The Economic Community of West African States (ECOWAS) was formed in 1975. The objective of the Community is to promote regional cooperation and economic development ‘for the purpose of raising the standard of living of its people’. The treaty established a number of institutions including a judicial body referred to simply as ‘the Tribunal of the Community’. The Tribunal was charged with the responsibility of settling disputes and for ensuring just and lawful application of the provisions of the founding treaty. The 1975 ECOWAS Treaty transferred to the Authority of Heads of State and Government of ECOWAS the responsibility of adopting a protocol to prescribe the composition and competence of the Tribunal. The Protocol was adopted in 1991. The 1991 Protocol established the Community Court of Justice as a principal organ of ECOWAS, thus changing the name of the court from ‘Tribunal of the Community’.

**Jurisdiction**
The jurisdiction of the Court under the 1991 Protocol was two-fold. Firstly, the Court had jurisdiction over interpretation and application of the ECOWAS Treaty and other legal instruments

---

15 See 1975 ECOWAS Treaty, art 4(1).
16 See 1975 ECOWAS Treaty, art 11(1).
17 1975 ECOWAS Treaty, art 11(2).
18 See Protocol (A/P.I/7/91) on the Community Court of Justice.
adopted by ECOWAS including the Protocol establishing the Court. Secondly, the Court had jurisdiction over proceedings commenced by member states on behalf of their nationals against other member states or an ECOWAS institution. In order to activate the second leg of the Court’s jurisdiction, it must be shown that attempts at amicable settlement have been made and failed. The Court may also issue advisory opinion on any matter relating to the ECOWAS Treaty. However, the 1991 Protocol did not grant private individuals access to the Court. In response to developments which have taken place at the international scene, the Authority of Heads of State and Government of ECOWAS on 30 May 1990 constituted a Committee of Eminent Persons to come up with a proposal for the review of the 1975 ECOWAS Treaty. In its report, the Committee underscored the importance of access to the Court for private litigants. The report of the Committee formed the basis of the 1993 Revised ECOWAS Treaty. Under the revised Treaty, the ECOWAS acquired more responsibilities for security, good governance and human rights. The Revised Treaty rededicated the Community to economic integration, introduced far reaching structural changes, created new organs such as the ECOWAS Community Parliament and strengthened existing organs. One of the most significant additions following the 1993 revised Treaty is the proposal which increased the participation of civil society in the activities of the Community. The 1993 revised ECOWAS Treaty however jettisoned the proposal for individual access to the ECOWAS Court.

Ultimately, the Protocol expanding the jurisdiction of the Court was adopted by the ECOWAS Authority in 2005 with little or no opposition from government representatives. The Protocol contains provisions that limits the powers of states on many grounds. Why did state officials not raise their voice in opposition even if they would fail eventually? Following series of interviews with stakeholders in ECOWAS member states, Alter, Helfer and McAllister, argued that the involvement of the ECOWAS Secretariat was critical. States trusted the ECOWAS Secretariat, and the NGO lobby

---

21 1991 ECOWAS Court Protocol, art 9(1).
22 1991 ECOWAS Court Protocol, art 9(2).
23 As above.
26 The 1993 Revised ECOWAS Treaty was adopted on 24 July 1993, and entered into force on 23 August 1995.
27 KJ Alter, LR Helfer and JR McAllister (n. 20) p. 744.
28 See KJ Alter, LR Helfer and JR McAllister (n. 20) p. 743. ECOWAS Member states had in 1978 and 1981 respectively adopted the Protocol on Non-Aggression and the Protocol relating to Mutual Defence Assistance. The Liberian crisis led to the formation of the Economic Community of West African States Monitoring Group (ECOMOG). Although a monitoring outfit, ECOMOG contributed significantly in quashing unrests and civil wars in Sierra Leone, Guinea Bissau, and Côte d’Ivoire.
29 KJ Alter, LR Helfer and JR McAllister (n. 20) p.745.
group partnered with the Secretariat, activist judges of the ECOWAS Court and the West African Bar Association to build an influential civil society coalition in support of the campaign to grant explicit human rights jurisdiction to the ECOWAS Court. The group also met with heads of state and top-level officials in several countries to get their ‘buy in’ into the campaign. Under article 3 of the 2005 Supplementary Protocol, the Court is competent to receive and determine cases involving the interpretation and application of the ECOWAS Treaty and other ECOWAS instruments including non-binding soft law standards. The jurisdiction of the Court may also be invoked where a member state fails to honour its obligation under the ECOWAS Treaty or other Community laws. This implies the possibility of inter-state human rights complaints. Any matter involving the Community, or its staff is also within the Court’s competence. In addition to these, the Court has jurisdiction over sundry matters such as action for damages against officials or institutions of the Community for actions taken in official capacity. Article 9(4) of the 1991 Protocol, as amended by article 3 of the 2005 Supplementary Protocol, provides: ‘the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.’ While article 3 is the most fundamental and transformative provision of the 2005 Supplementary Protocol, the provision arguably retains the wider jurisdiction on non-human rights cases. Section 4 of the Supplementary Protocol lists the categories of persons that have access to the Court to include: member states, specified ECOWAS organs, individuals and corporate bodies, staff of the Community or the courts of member states. Some distinctive features of the Court’s jurisdiction under the 2005 Supplementary Protocol include: direct access for human rights litigants, an open-ended catalogue of human rights and human rights instruments, as well as the absence of a requirement for exhaustion of domestic remedies.

**States’ obligation to comply with judgments of the ECCJ**

Judgments of the ECCJ are binding on states. The process of execution of ECCJ judgments begins when the Registrar of the Court submits a writ of execution to a relevant state. In terms of the 2005 Supplementary Protocol, states have an obligation to receive the writ of execution and give effect to them according to the rules of procedure for enforcement of judgments in place in their respective countries. Adjolohoun has argued that the reference to domestic rules of procedure entails no more than for state officials to verify that the writ of execution is from the registry of the ECCJ. It is also

---

30 KJ Alter, LR Helfer and JR McAllister (n. 20) p. 752.
34 KJ Alter, LR Helfer and JR McAllister (n. 20) p.755.
not clear whether only states that are parties to the case have the obligation to receive and register the writ of execution from the ECCJ or if states that are non-parties to the case should also do so. A purposive interpretation of article 6 of the 2005 Supplementary Protocol supports the latter view. States are required to appoint competent national authorities responsible for receiving and enforcing a writ of execution from the Court. As at July 2017, only four countries – Nigeria, Guinea Bissau, Mali and Burkina Faso – had designated the relevant national authority. The other 11 countries are at various levels of compliance; the national process of designation is ongoing. In 2012, the Authority of Heads of State and Government adopted the Supplementary Act A/SP.13/02/12 on sanctions against member states that fail to honour their obligations to ECOWAS. Article 2 of the 2012 Supplementary Act defined member states’ obligations to ECOWAS to include the obligation to “respect and protect human rights”. The Act further states that the judgments of the ECOWAS Community Court of Justice are binding on member states, ECOWAS institutions as well as individuals and corporate bodies within ECOWAS. In terms of the 2012 Supplementary Act, non-compliance with decisions of the ECCJ constitutes failure to adhere to obligations states owe the Community. The Act enumerates detailed sanctions, political and judicial, which may be imposed on a non-complying state. Whenever a state fails to honour its obligations under any of law of the Community, the ECCJ may impose financial and other sanctions against the defaulting member state. Political sanction which may be imposed on states that fail to comply with the judgments of the ECCJ include: suspension from participation in Community activities, freezing of financial assets of the state, arms embargo, travel ban, and suspension of the member state concerned from all ECOWAS decision-making organs. The sanctions are to be imposed in increasing order of severity. Sanctions imposed on a member state as a result of non-compliance with Community obligations are not appealable to the ECCJ or any other court or tribunal. The records of the ECCJ indicate that 21 of the total cases finalised by the Court have been fully complied with while 34 other cases are at various stages of implementation.

---

40 See Supplementary Act A/SP.13/02/12 on Sanctions against Member States that Fail to Honour their obligations to ECOWAS, fortieth ordinary session of the Authority of Heads of State and Government, Abuja, 16 to 17 February 2012.
41 ECOWAS Supplementary Act A/SP.13/02/12, art 2.
42 ECOWAS Supplementary Act A/SP.13/02/12, art 3.
43 ECOWAS Supplementary Act A/SP.13/02/12, art 5.
44 ECOWAS Supplementary Act A/SP.13/02/12, art 13.
45 ECOWAS Supplementary Act A/SP.13/02/12, art 16(4).
46 ‘ECOWAS Court holds 89 sessions, delivers 34 judgements in 2015/2016 legal year’ Premium Times 28 September 2016 <http://www.premiumtimesng.com/foreign/west-africa-foreign/211540-ecowas-court-
East African Court of Justice (EACJ)
The East African Community (EAC) was first established in 1967.\(^7\) The Community was dissolved in 1977 and later re-established in 1999 with the adoption of a new founding treaty.\(^8\) The Treaty for the Establishment of the EAC (EAC Treaty) was signed on 30 November 1999 and entered into force on 7 July 2000. Kenya, Tanzania and Uganda are the founding member states of the EAC. Membership of the Community is open to any geographically proximate state that expresses willingness to abide by EAC’s membership conditions as stipulated in article 3 of the EAC Treaty. Burundi and Rwanda acceded to the Treaty and have since 1 July 2007 become full members of the EAC.\(^9\) The main aim of the EAC whose headquarters is in Arusha, Tanzania, is to deepen cooperation among states in the East African sub-region in a vast number of areas including trade, culture, research, technology, security and legal affairs for the mutual benefits of the participating states.\(^5\) One of the seven principal organs established under the 1999 EAC Treaty is the East African Court of Justice (EACJ).\(^1\) The Court was formally inaugurated at Arusha on 30 November 2001.\(^3\) The EACJ was established as a judicial body in terms of the EAC Treaty and its primary role is to ensure ‘adherence to law in the interpretation and application of and compliance with the Treaty.’\(^4\) The Court consists of two chambers: First Instance Division and Appellate Division.\(^5\) The First Instance Division has original jurisdiction on matters to which the Court has jurisdiction subject to a right of appeal to the Appellate Division.\(^6\) At inception, the Court composed of six Judges, two from each of the three founding state

\(^{49}\) East African Community, ‘Overview of the EAC’ <http://www.eac.int/about/overview> accessed on 29 March 2019. South Sudan has recently acceded to the Treaty on 15 April 2016. It will become full member once the instrument of accession is deposited with EAC Secretary General.
\(^{50}\) 1999 EAC Treaty, art 5(1).
\(^{51}\) See 1999 EAC Treaty, art 9. The EACJ succeeds the Court of Appeal for East Africa (CAEA) which is the main judicial organ of the defunct EAC. Other organs of the EAC include: The Summit, the Council, the Co-ordination Committee, Sectoral Committees, the East African Legislative Assembly, the Secretariat and such other organs as may be established by the Summit.
\(^{53}\) Treaty for the Establishment of the East African Community, art 23.
\(^{54}\) 1999 EAC Treaty, art 23(2).
\(^{55}\) 1999 EAC Treaty, art 23(3).
parties.\textsuperscript{56} With the accession of Rwanda and Burundi to the EAC Treaty in 2007, the membership of the Court was expanded to ten; five of which serve in each division of the Court. The EAC Treaty allows for a maximum of 15 Judges appointed by the ‘Summit’ from among persons recommended by state parties referred to as ‘Partner States’ in the EAC Treaty.\textsuperscript{57} Not more than ten of the Judges serve at the First Instance Division while at least five serve in the Appellate Division.\textsuperscript{58} As at the time of writing, only five judges have been appointed to the First Instance Division.

\textbf{Jurisdiction}

The primary jurisdiction of the EACJ is to interpret and apply the EAC Treaty.\textsuperscript{59} In addition to ensuring adherence to law in the interpretation and application of the EAC Treaty, the EACJ may exercise such other original, appellate or supervisory jurisdiction as may be conferred on it by the Council of Ministers.\textsuperscript{60} For this purpose, the EAC Treaty enjoins state parties to conclude a Protocol to operationalise the extended jurisdiction.\textsuperscript{61} Ojeinde argues that the original intention of the drafters of the EAC Treaty was to develop the jurisdiction of the EACJ progressively, commencing with interpretation and application of the Treaty, and then to other jurisdictions when the relevant instruments have been adopted.\textsuperscript{62} The argument above cannot be faulted because the Treaty states clearly ‘the Court shall \textit{initially} have jurisdiction over the interpretation and application of this Treaty’.\textsuperscript{63} However, the above argument misses a very important point. While the EACJ may not qualify as a fully-fledged human right court with competence to receive human rights complaints, it has jurisdiction where actions of the state parties contravene the principles and objectives of the Community. Arguably, the Court has inherent powers to issue redress whenever actions of the Community organs or state parties are inconsistent with agreed principles stipulated in the Treaty. This is not only applicable to human rights but also principles relating to sovereign equality of states, pacific settlement of dispute, and equitable distribution of benefits as enunciated in article 6 of the founding Treaty. In addition to these, the EAC Treaty expressly stipulates that recognition and respect for human rights shall be one of the factors to be considered for admission of new members into the Community.\textsuperscript{64} One of the ‘Fundamental Principles’ of the EAC is ‘good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human

\textsuperscript{56} East African Court of Justice, \textless Establishment\textgreater http://eacj.org/?page_id=19\textgreater accessed on 29 March 2019.
\textsuperscript{57} 1999 EAC Treaty, art 24.
\textsuperscript{58} As above.
\textsuperscript{59} 1999 EAC Treaty, art 27(1).
\textsuperscript{60} 1999 EAC Treaty, art 27(2).
\textsuperscript{61} 1999 EAC Treaty, art 27(2).
\textsuperscript{63} 1999 EAC Treaty, art 27(1).
\textsuperscript{64} 1999 EAC Treaty, art 3(3).
and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.65 Interestingly, human rights was not just listed as a principle to be followed; state parties actually ‘undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.’66 Thus the human rights mandate of the EACJ derives from articles 6(d) and 7(2) of the EAC Treaty. Despite the clear reference to human rights as a fundamental principle of the EAC in articles 6 and 7 of the EAC Treaty, the EACJ has demonstrated considerable reluctance to rely on the ‘human rights clause’ as the basis for adjudicating on human rights related cases. Rather, the Court has been more inclined towards the ‘rule of law, democracy and good governance’ clause. This is perhaps due to the specific restriction placed on the Court’s human rights jurisdiction under article 27(2) of the EAC Treaty.67 As discussed earlier, this provision makes the exercise of ‘human rights jurisdiction’ conditional on the adoption of a supplementary protocol. Article 27(2) may be viewed in two ways. In a broad sense, it could imply that the Court is forbidden from entertaining any kind of matter that contains allegations of human rights violations. In a narrow and restrictive sense, it could indicate that the Court could adjudicate on any matter alleging a breach of states’ obligations under EAC Treaty but may not develop systematic rules of procedure for handling human rights petitions until a protocol has been adopted for that purpose. The practice of the Court shows that its leans towards the restrictive interpretation to article 27(2). In several cases, the EACJ has held that it will not abdicate its duty of applying and interpreting the EAC Treaty just because there are elements of human rights violation in a matter referred to it.68 In other words, the Court can hardly escape dealing with human rights.69

The EAC Treaty empowers state parties, the Secretary General of the EAC and all legal and natural persons to refer to the Court for determination matters relating to the ‘legality of any act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.’70 In the case of a reference by individuals, the reference must be made within two months of the action or omission complained of.71 This limitation period was imposed following a failed attempt by the government of Kenya to abolish the EACJ. The proposal to abolish the EACJ was the

---

65 1999 EAC Treaty, art 6(d).
66 1999 EAC Treaty, art 7(2).
67 See Possi (n. 47) p. 64.
68 See for instance James Katabazi and 21 others v Secretary General of the East African Community and Attorney General of the Republic of Uganda REF NO 1 of 2007, decided on October 31, 2007 (Katabazi case) 39; Possi (n. 47) p.98.
69 See Possi (n. 47) p.119.
71 1999 EAC Treaty, art 27(2).
aftermath of the Court’s ruling in the case of Anyang Nyong’o v Attorney General of Kenya\textsuperscript{72} which nullified the election of a Kenya national into the East African Legislative Assembly.\textsuperscript{73} Although the proposal to abolish the EACJ failed, Kenya succeeded in securing a revision of the EAC Treaty. The amended Treaty introduced an appellate chamber, added a new ground for removal of judges, restricted the court’s material jurisdiction and imposed, as stated earlier, a limitation period for private litigants intending to submit complaints to the EACJ.\textsuperscript{74}

Even though the EACJ has no explicit human rights jurisdiction, the Court has established itself beyond any dispute that it has jurisdiction over matters alleging violation of ‘rule of law, democracy and good governance.’\textsuperscript{75} Using this catchphrase, the Court relying on the EAC Treaty has resolved cases that are essentially human rights in nature. The Court has decided cases related to the unlawful arrest of some applicants by the Ugandan military after applicants had been granted bail by a High Court;\textsuperscript{76} the failure of the government of Kenya to prevent, investigate and prosecute perpetrators of the 2007 post-election violence;\textsuperscript{77} and the incommunicado detention of a military officer by the government of Rwanda.\textsuperscript{78} The question whether the EACJ has jurisdiction to entertain human rights cases was first raised in 2007 in the case of Katabazi and 21 others v Secretary General of the EAC (Katabazi case).\textsuperscript{79} In that case, the Court asked: ‘Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No, it does not have.’\textsuperscript{80} In that case, the applicants alleged that sometimes in 2004, they were charged with treason before the High Court of Uganda. On 16 November 2006, the High Court granted them bail. While their counsel was preparing documentations for their release, armed security personnel surrounded the courtroom and re-arrested them. The applicants claimed before the Constitutional Court of Uganda that this interference with judicial proceedings was unconstitutional. The Constitutional Court agreed with the applicants. Despite the decision of the Constitutional Court, the government of Uganda refused to release the applicants; thus, the reference to the EACJ. Before the EACJ, the applicants claimed that the refusal of the respondent state to respect and enforce the decisions of the High Court and the Constitutional Court amounted to violation of articles 6, 7(2) and 8(1)(c) of the EAC Treaty. Because the subject matter of the case relates to human rights violation, the respondent urged the Court to dismiss the case for lack of

\textsuperscript{72} Reference No 1 of 2006 & Appeal No 1 of 2009.
\textsuperscript{74} As above.
\textsuperscript{75} Possi (n. 47) 107; see also S Spelliscy, ‘The Proliferation of International Tribunals : A chink in the armor’ (2001) 40 Columbia Journal of Transnational Law 143, 144.
\textsuperscript{76} Katabazi case.
\textsuperscript{77} Independent Medical Unit v Attorney General of Kenya (Independent Medical Unit case) Reference No 3 of 2010.
\textsuperscript{78} Rugumba v Attorney General of Rwanda (Rugumba case) Reference No 8 of 2010.
\textsuperscript{79} Katabazi case.
\textsuperscript{80} Katabazi Case, 14.
jurisdiction. The Court held that although it has no human rights jurisdiction, it nonetheless has jurisdiction to interpret and apply the EAC Treaty even if the case involves human rights violations. In the words of the Court: ‘While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference involves allegations of human rights violations.’\(^{81}\) The Court clearly maintains that the EACJ has jurisdiction to interpret the African Charter in the context of the EAC Treaty. It has been argued that the reasoning in the Democratic Party case demonstrates a further and clear decision by the EACJ to establish for itself a fully-fledged human rights jurisdiction.\(^ {82}\) Since about 90 percent of the cases in the EACJ’s docket are human rights related, it is only logical for the Court to progressively adjust its stance regarding its human rights jurisdiction if it wants to stay relevant in the sub-region.\(^ {83}\)

**States’ obligation to comply with judgments of the EACJ**

Once a dispute has been referred to the EACJ, states are required to refrain from actions which may aggravate the dispute or detract from the dispute resolution process.\(^ {84}\) Judgments of the EACJ are binding on states; in order words, states have a legal obligation to implement them. As soon as the judgment of the Court has been communicated to the state, state officials must take measures without delay to give effect to it.\(^ {85}\) As the Court does not ‘execution machinery’ to compel the implementation of its judgments, responsibility for implementation of the Court’s judgments rests on member states of the EAC.\(^ {86}\) State compliance therefore depends largely on the political willingness of member states. The procedures for the execution of judgments of the Court which impose financial obligations on states are governed by the rules of civil procedures applicable in each state.\(^ {87}\) Upon receipt of the judgment of the EACJ, duly certified by the Court’s registrar, the state affected by the judgment is required to proceed to execute the judgment. Neither the EAC Treaty nor the Rules of Procedure of the EACJ provides for ways by which implementation of the Court’s decisions is monitored.\(^ {88}\)

\(^{81}\) Katabazi case.


\(^{84}\) EAC Treaty, art 38(2).

\(^{85}\) EAC Treaty, art 38(3).

\(^{86}\) See Possi (n. 47) p.178.

\(^{87}\) EAC Treaty, art 44.

\(^{88}\) See, for instance, Possi (n. 47 above) 178.
SADC Tribunal
The Southern African Development (SADC) is a regional economic community comprising 15 southern African states. It was established in 1992 to replace the Southern African Development Coordination Conference (SADCC). The Treaty establishing the Community was adopted on 17 August 1992. The Treaty established the following principal institutions for the Community: the Summit of Heads of State and Government, the Council of Ministers, Commission, the Standing Committee of Officials, the Secretariat, and the Tribunals. The focus of this section is on the Tribunal.

Jurisdiction
The role of the SADC Tribunal (now defunct) was threefold: ensuring adherence to the SADC Treaty, ensuring proper interpretation of the SADC Treaty and other subsidiary instruments, and adjudicating on disputes referred to it. The material jurisdiction of the Tribunal covered disputes relating to the interpretation and application of the SADC Treaty and other protocols as well as subsidiary instruments adopted by SADC institutions. The Tribunal was first inaugurated on 18 November 2005. Its seat was in Windhoek, Namibia. As a result of the rulings, especially the Campbell decisions, made by the Tribunal against the government of Zimbabwe, the Tribunal was suspended in 2010. On 18 August 2014 during a SADC Summit at Victoria Fall, Zimbabwe, a new Protocol on the SADC Tribunal was adopted. When the new Protocol eventually come into force, the jurisdiction of the SADC Tribunal will be limited to inter-state disputes, and only member states of SADC will be competent to refer a dispute to the Tribunal.

93 1992 SADC Treaty, art 16(1).
96 As above.
States’ obligation to comply with judgments of the suspended SADC Tribunal

Decisions of the SADC Tribunal are final and binding on state parties, and enforceable in all state parties of the Community.99 The law and rules of procedure for the enforcement of foreign judgment in the respective member states are applicable to the enforcement of the Tribunal decisions. It is the responsibility of all state parties as well as institutions of the Community to take all measures to ensure the judgments of the Tribunal are executed and complied with.100 Where a state party fails or delays in executing a judgment of the Tribunal, any state concerned shall bring such non-compliance to the attention of the Tribunal and the Tribunal shall report the non-complying state to the Summit for appropriate action.101 Notwithstanding the disbandment of the Tribunal and the closure of the Tribunal to private individuals, the obligations of member states of SADC to execute, implement and comply with all the existing 19 decisions of the defunct SADC Tribunal remain active.

1.1 3. Conclusion

This paper set out to examine the contributions of three sub-regional courts to the promotion and protection of human rights in Africa. For this purpose, the paper provides background information about the mandate, jurisdiction and jurisprudence of selected sub-regional courts as well as the legal status and methods of enforcing their decisions and judgments. The paper also takes a look at the institutional designs of the tribunals as well as the political milieu in which the tribunals are situated. It must be noted that in addition to the three main sub-regional courts whose jurisprudence formed the basis of the analysis in this paper, there are other less known sub-regional courts or tribunals in Africa. For instance, the founding treaties of each of the following sub-regional intergovernmental organisations established at least one judicial body: the Common Market for Eastern and Southern Africa (COMESA), Organisation for the Harmonisation of Business Law in Africa (OHBLA or OHADA), West African Economic and Monetary Union (UEMOA),102 Economic Community of Central African States (ECCAS),103 Economic and Monetary Community of Central African States (CEMAC), Southern Africa Custom Union (SACU),104 and the Economic Community of Great Lake Countries (CEPGL).105 However, only three of the several sub-regional courts or tribunals, namely the ECCJ, EACJ and the SADC Tribunal, have decided significant human rights or human rights related cases.106 Of these three, only the ECCJ has clear and unlimited jurisdictional mandate to adjudicate

100 2000 SADC Tribunal Protocol, art 32(2).
101 2000 SADC Tribunal Protocol, art 32(5).
102 See 1996 WAEMU Treaty, art 16.
104 2002 SACU Agreement, arts 7(f) & 13.
human rights cases.\textsuperscript{107} The other two, the EACJ and the SADC Tribunal (before its suspension in 2010), repurposed their mandate and did craft a ‘limited human rights mandate’ for themselves through creative interpretive strategies. It is expected that as African RECs grow in size and sophistication, more sub-regional courts or tribunals will be established and operationalised. Also, as these tribunals find a niche for themselves to justify their existence, they could as well take on limited human rights jurisdiction like the EACJ and the SADC Tribunal.

There is no doubt that the foray of sub-regional courts into human rights adjudication is a welcome development. Firstly, it will expand access to justice; thus making huge contributions through their cases and judgments to the development of international human rights jurisprudence in Africa. The reliance of some of these sub-regional courts on the African Charter and other African Union (AU) standards contributes to the legitimisation of human rights norms and standards at the sub-regional and domestic level. Already, the founding treaties of two of the three regional economic communities in Africa – ECOWAS and EAC – refer to the African Charter as the centrepiece of their human rights agenda. The SADC Tribunal has in its judgments relied copiously on provisions of the African charter as well as the jurisprudence of the African Commission. Beyond merely recognising human rights as an organisational objective, the Economic Community of West African States (ECOWAS) has clearly conferred human rights jurisdiction on its judicial organ, the ECCJ.

Despite the above, significant progress still remain to be made to harmonise regional and sub-regional protection of human rights in Africa. Concerns have been expressed by some commentators about the lack of effective coordination and the problem of overlap of jurisdiction. For instance, what happens if a sub-regional court gives interpretations to the provisions of the African Charter that deviate from interpretations given by the African Commission, the African Court and the African Children’s Rights Committee? Again, can judgments and decisions of sub-regional courts create \textit{res judicata} effect on proceedings of the three main human rights bodies listed immediately above? In other words, is it possible to re-litigate a human rights matter before the African Commission, the African Court or the African Children’s Rights Committee after losing at a sub-regional court? Conversely, can an unsuccessful party before a regional tribunal subsequently approach a sub-regional tribunal over the same dispute? Even though some of these questions may make human rights adjudication by sub-regional courts somewhat controversial, it is the considered view of this writer that the involvement of sub-regional courts in human rights adjudication will lead to more access to justice and greater protection of human rights, and that is what should matter the most.

\textsuperscript{107} As above.