

# Human rights developments in African sub-regional economic communities during 2009

Solomon T Ebobrah\*

Researcher, Centre for Human Rights, University of Pretoria, South Africa;  
Lecturer, Niger Delta University, Nigeria

## Summary

*The year 2009 saw important judicial and non-judicial human rights developments within the framework of three of the most active regional economic communities in Africa. During the year, each of the three communities engaged in some form of standard-setting in the field of human rights. Further, in East Africa, thematic meetings relevant to human rights were convened. In Southern Africa and West Africa, the communities embarked on activities aimed at strengthening democracy. Sub-regional courts in Southern Africa and West Africa were also involved in human rights cases during 2009. These developments are reviewed to highlight their overall significance in the context of human rights in Africa.*

## 1 Introduction

Keen observers of the African human rights system would agree that over the past few years, the traditional architecture of human rights realisation on the continent has changed significantly.<sup>1</sup> One form in which this change has manifested itself is the expansion of the system, especially in relation to the creation or development of new institutions or mechanisms concerned with the promotion and protection of human rights. Most of the expansion has been internal in the sense that it has occurred within the framework of the African Union (AU),

---

\* LLB (Rivers State), LLM (Human Rights and Democratisation in Africa), LLD (Pretoria); seborah@yahoo.co.uk

<sup>1</sup> African human rights scholars are increasingly acknowledging this fact. See generally F Viljoen *International human rights law in Africa* (2007) and J Akokpari & DS Zimble (eds) *Africa's human rights architecture* (2008).

the institutional platform upon which the African human rights system is founded. However, some expansion has taken place outside the AU framework. Increasingly, important human rights developments have occurred in the frameworks of various regional economic communities (RECs) on the continent.

Although Africa currently boasts over 14 regional economic groupings of different compositions and sizes, only eight of these are recognised by the AU as building blocks of the African Economic Community erected by African Heads of State and Government as part of the AU framework.<sup>2</sup> While the concept of human rights manifests itself in some form or another in nearly all the AU-recognised RECs, the East African Community (EAC), the Economic Community of West African States (ECOWAS), and the Southern Africa Development Community (SADC) have engaged more actively in the issue area of human rights within their respective institutional frameworks. To varying degrees, the EAC, ECOWAS and SADC have all been involved in the judicial and non-judicial promotion and protection of human rights within their jurisdictional spheres. Thus, while the judicial protection of human rights by African RECs appears to have attracted greater attention over the years,<sup>3</sup> each of these RECs has also made non-judicial contributions to the expansion of international human rights protection on the continent. In fact, it is safe to assert that human rights protection in Africa no longer is limited to the regional level. In 2009, EAC, ECOWAS and SADC engaged in human rights activities or activities that, although not entirely rights-related, could be seen to have clear implications for human rights in parts of the continent. Consequently, this contribution records and analyses some of the most important human rights activities of these RECs.

In this contribution, the work during 2009 of the three RECs is reviewed. The human rights activities of each REC is sub-divided into judicial and non-judicial aspects and considered from that perspective. This contribution does not present an exhaustive record of all the human rights developments that occurred in African RECs in 2009; instead it presents a window onto the expansive work of the RECs in the field.

---

<sup>2</sup> Viljoen (n 1 above) 488.

<sup>3</sup> See eg ST Ebobrah 'Human rights developments in sub-regional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 312; OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 275 -319.

## 2 The East African Community

The EAC was established in 1999 when its founding treaty was adopted by Kenya, Tanzania and Uganda.<sup>4</sup> Under article 5 of the EAC Treaty, the main objective of the Community is to develop and engage in ‘policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs’. To achieve this objective, the Treaty sets out a programme of action for the progression of the Community from a Customs Union, through a Common Market and a Monetary Union to the establishment of a Political Federation.<sup>5</sup> Thus, while the EAC has begun as an organisation for economic integration, it aims to emerge as a political integration initiative.

In addition to the main objectives set out in article 5, the 1999 EAC Treaty authorises the Community to engage in other activities related to human rights. These include ‘mainstreaming of gender’ in all Community programmes and ‘the promotion of peace, security, and stability within, and good neighbourliness among the partner states’.<sup>6</sup> The partner states<sup>7</sup> further agreed that the achievement of Community objectives is to be governed by certain fundamental principles. In that regard, the EAC is expected to proceed on the fundamental principle of respect for good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights (African Charter).<sup>8</sup>

The 1999 EAC Treaty further sets out an undertaking by partner states ‘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’. Thus, while the recognition, promotion and protection of human rights is not the main objective of the EAC, the legal foundations of the Community is not completely bereft of interest in the realisation of human

<sup>4</sup> Kenya, Tanzania and Uganda were members of the original East African Community which was established in 1967 but was dissolved in 1977. The 1999 Treaty of the rejuvenated EAC was adopted in culmination of efforts commenced in 1991 to revive the EAC after a period of inactivity following the dissolution of the original organisation. The 1999 Treaty was amended in 2007. On 18 June 2007, Burundi and Rwanda acceded to the EAC Treaty, bringing the membership of the organisation to five states. The EAC Treaty is available at <http://www.eac.int>. (accessed 28 February 2010).

<sup>5</sup> Art 5(2) of the EAC Treaty as amended.

<sup>6</sup> Arts 5(3)(e) & (f) of the EAC Treaty as amended.

<sup>7</sup> Converging states of the EAC are referred to as partner states.

<sup>8</sup> Art 6(d) of the EAC Treaty as amended.

rights. Despite the promise of human rights realisation contained in the Treaty, there were few significant human rights developments in the EAC during 2009.

## 2.1 Non-judicial human rights developments

The term ‘non-judicial human rights developments’ is used here to cover all activities that promote and protect human rights within the Community other than through judicial processes.

### 2.1.1 Standard-setting<sup>9</sup>

During the period under review, the adoption of a resolution by the East African Legislative Assembly (EALA) to urge action to tackle violence against women in the region was arguably the most significant human rights development in the EAC.<sup>10</sup> Entitled ‘Resolution of the Assembly urging the East African Community and partner states to take urgent and concerted action to end violence against women in the EAC region and particularly in the partner states’ (Resolution), the Resolution builds on global and regional human rights instruments adopted to promote and protect the rights of women. The Resolution was timed to coincide with the International Day for the Elimination of Violence against Women and forms part of the EALA’s activities to mark the day.<sup>11</sup>

Although the significance of the Resolution is watered down by the fact that it is not a binding instrument and was adopted by the EALA which appears less influential than the Summit of the EAC, the Resolution represents one of the most daring human rights actions taken on the platform of the EAC.<sup>12</sup> Couched in terms that compliment action and shame inaction on the part of partner states, the Resolution holds the promise of having a strong persuasive effect on EAC partner states in addressing violence against women. For example, the Resolution identifies Rwanda and Tanzania for commendation ‘for having ratified

<sup>9</sup> This sub-heading is used advisedly in the whole of this contribution in recognition of the fact that the term ‘standard-setting’ is more commonly associated with the adoption of treaties and, to a lesser extent, declarations by legislative and decision-making bodies of international organisations.

<sup>10</sup> The EALA is the legislative organ of the EAC. Other organs of the EAC are the Summit, the Council of Ministers, the Co-ordinating Committee, the Sectoral Committees, the East African Court of Justice and the Secretariat. See generally art 9 of the 1999 EAC Treaty as amended.

<sup>11</sup> 25 November of each year is generally set aside as the International Day for the Elimination of Violence Against Women.

<sup>12</sup> The EALA is the legislative arm of the EAC and has some form of actual legislative powers, but it is the Summit that drives the process of integration in the EAC.

the Maputo Protocol<sup>13</sup> and then shames other states by expressing concern that ‘the Republic of Kenya, Uganda and Burundi are yet to ratify the Maputo Treaty’.<sup>14</sup> The Resolution further conveyed concern that ‘Kenya expressed reservations on the Maputo Protocol’.<sup>15</sup>

The ‘complimenting and shaming’ approach adopted in the Resolution is important for a variety of reasons. Firstly, the EALA is the popular arm of the Community as it consists of parliamentarians elected by citizens to represent their interests in the affairs of the EAC. Accordingly, it can be argued that the endorsement of action by the EALA carries weight almost equivalent to that of national parliaments. Further, it is possible to argue that the condemnation of reservations and endorsement of ratifications by the EALA is suggestive of popular support for the Maputo Protocol. This is relevant because some would argue that there is usually a disconnect between executive action by national governments in the ratification of international instruments and the informed will of ordinary people, especially in African states. Second, there is the creation of an expectation that legislative approval of domestication of the Maputo Protocol would be easier in the region since legislators have demonstrated acceptance of the Protocol. Third, in the absence of a corresponding advocacy mechanism at the continental level to put pressure on states to ratify the Maputo Protocol, the importance of sub-regional pressure is self-evident.

In terms of substance, the Resolution is a significant addition to the normative framework for the protection of women in the region from gender-based violence. There is a feeling that the Resolution strongly complements the Maputo Protocol in addressing the scourge of violence against women.<sup>16</sup> It would be noticed, for example, that in a manner that is more expansive than the Maputo Protocol, the Resolution recognises that there is an intersection between violence against women and HIV and AIDS.<sup>17</sup> The Resolution also pays particular attention to the precarious position of women who are already vulnerable, identifying them as ‘chief targets of organised violence against them because of their vulnerability’.<sup>18</sup> The Resolution essentially amplifies the main concerns around violence against women and calls on EAC

<sup>13</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted in 2003 and entered into force in 2005) is generally referred to as the Maputo Protocol. See para 14 of the Resolution. Also see para 8 of the Resolution where Tanzania is congratulated for being a signatory to UNIFEM’s ‘Say No to Violence against Women Campaign’.

<sup>14</sup> See para 15 of the Resolution.

<sup>15</sup> Para 16 of the Resolution.

<sup>16</sup> See generally F Banda ‘Building on a global movement: Violence against women in the African context’ (2008) 8 *African Human Rights Law Journal* 1-22 on the highlights of the Maputo Protocol.

<sup>17</sup> Para 17 of the Resolution.

<sup>18</sup> Para 19 of the Resolution.

partner states to take concrete action at the national level to fulfil obligations imposed by the relevant international instruments.

As already noted, the Resolution is not binding on the EAC or its partner states. However, the advocacy value of the document cannot be overemphasised. Apart from the persuasive value it has among EAC partner states and the EAC Council, the Resolution can be employed by civil society organisations involved in this aspect of human rights work. Further, in the absence of a region-specific human rights catalogue, documents like this Resolution become significant in proceedings before the East African Court of Justice (EACJ) and other Community institutions.

### 2.1.2 Thematic meetings

Other important human rights developments that took place within the institutional framework of the EAC during 2009 were high-level meetings with implications for human rights. In October 2009, a meeting of the Forum for EAC Ministers Responsible for Social Development was held in Bujumbura, Burundi. Convened as part of the EAC calendar of activities for 2009, the meeting was significant for human rights purposes because of the nature of the rights-related recommendations that it produced. The Forum recommended that the EAC Council urge EAC partner states which had not ratified the African Youth Charter to do so.<sup>19</sup> The Forum further recommended that the EAC 'conduct regional campaigns against harmful cultural practices including female genital mutilation, gender-based violence, HIV and AIDS and drug abuse'.<sup>20</sup> The Forum called on the EAC Council to 'develop a gender policy', 'harmonise and mainstream youth, disabled and elderly and children issues in development policies, strategies and plans'.<sup>21</sup> Similarly, the Forum made recommendations for the regional campaigns on 'child labour and trafficking and all forms of violence against children', the establishment and harmonisation of 'policies on orphans and vulnerable children' and the promotion of 'social protection for poor and vulnerable groups'.<sup>22</sup>

Viewed from the lens of global and continental human rights lawyers, the conduct and outcome of the meeting may not be too important since norms in the form of hard law currently exist on these issues at those levels. However, it has to be noted that the scope for implementation and, more importantly, close monitoring of implementation of existing norms by global and continental supervisory mechanisms remains acutely limited. This gap of implementation amplifies the

<sup>19</sup> See para 4.5.2(i) of Report Ref EAC/SDF/10/2009 (Report of the Forum for EAC Ministers Responsible for Social Development) of 7 October 2009.

<sup>20</sup> Para 4.5.2(iv) of Report Ref EAC/SDF/10/2009.

<sup>21</sup> See paras 4.5.2 (v) and (vii) of Report Ref EAC/SDF/10/2009.

<sup>22</sup> See paras 4.5.2(xii), (xiii) and (xiv) of Report Ref EAC/SDF/10/2009.

significance of sub-regional interventions, even of a soft law variety. Further, considering the hesitant manner in which the EAC and its organs have approached the subject of human rights, meetings such as this carry the promise of more robust engagements with human rights within the Community. Proximity to the partner states and their institutions and the possibilities of reinforced pressure for implementation at this level make such an intervention desirable.

The rights of persons with disabilities were also a subject for discussion. In December 2009, a meeting was organised by the EAC with partner states to address 'matters relating to persons with disabilities in the region'.<sup>23</sup> The meeting is a precursor to a proposed East African conference on persons with disabilities.<sup>24</sup> The overall aim of these meetings is to enhance the creation of appropriate regional mechanisms for the promotion and protection of the rights of persons with disabilities.<sup>25</sup> With article 120(c) of the 1999 EAC Treaty, the partner states undertook to adopt a common approach towards disadvantaged and marginalised groups. Thus, all the meetings and processes initiated by the EAC to promote and protect the rights of vulnerable groups are not without treaty foundations.

It is important to note that these initiatives are taking place independently of wider continental efforts initiated by the African Commission on Human and Peoples' Rights (African Commission) to address issues concerning the right of disabled and elderly persons in Africa. Arguably, there is the potential for a duplication of efforts between the EAC and the African Commission. However, this could also be more apparent than real since, in the spirit of their position as building blocks of the AEC, RECs such as the EAC are supposed to aid the implementation of regional policies and norms. From another perspective, the sub-regional approach to policy development could be beneficial to vulnerable peoples as it directly engages partner states and EAC institutions and has a better chance of ownership and implementation. This contrasts with the current continental approach in which the African Commission sometimes appears to be operating without the active involvement of AU member states and the main organs of the AU.<sup>26</sup>

<sup>23</sup> 'EAC set to improve social protection for the disabled in East Africa' <http://www.newstimesafrica.com> (accessed 14 March 2010).

<sup>24</sup> As above.

<sup>25</sup> As above.

<sup>26</sup> In August 2009, the African Commission hosted an experts' meeting in Accra, Ghana, to discuss modalities for the adoption of an African Protocol on Disabled Persons and Elderly Persons. As the commissioners are expected to act independent of the states that nominated them, the extent of state participation in the process can only be negligible. While there is a possibility of the AU Authority of Heads of State and Government taking over the process, there is also the possibility of the process ending up like the Declaration of Principles on Freedom of Expression.

## 2.2 Judicial protection by the East African Court of Justice

During 2009, the EACJ, which is the main judicial organ of the EAC, did not hear any human rights cases. This may not be too surprising as the Court is yet to be endowed with express jurisdiction to hear human rights cases. Although the Court had previously heard cases touching on human rights issues,<sup>27</sup> the Protocol's requirement that the Court's jurisdiction be extended to the field of human rights has yet to be adopted.<sup>28</sup> However, during 2009, pressure was exerted on the EAC to expand the jurisdiction of the EACJ not only to cover human rights cases, but also to extend it to the field of international criminal law. In October 2009, at a conference on East African Peace and Security, a representative of the International Criminal Tribunal on Rwanda (ICTR) introduced the idea of the EAC considering the option of 'letting the East African Court of Justice handle cases of Rwandan genocide that will not be concluded by the end of the tribunal's life'.<sup>29</sup>

While this suggestion was made outside the framework of the EAC, it is significant as it created an opportunity to assess Community feelings on the matter. At the conference itself, some participants opposed the idea on the grounds that it will 'negate the philosophy behind the establishment of the regional court'.<sup>30</sup> Clearly, such concerns relate to the legitimacy of such a process but do not affect the legality of the idea as the partner states can elect to expand the jurisdiction of the Court to cover such issues. A possible significant outcome of planting the idea at the October conference is that similar ideas resurfaced in December 2009 at a meeting of the EAC Forum of Chief Justices convened by the EAC Secretariat. The Forum made recommendations 'to the EAC Council of Ministers for consideration with a view to strengthening the administration of justice in the region', and called for the 'ratification and domestication of relevant international law instruments dealing with impunity and human rights abuses and allowing for empowerment of regional and national judicial mechanisms to handle these issues'.<sup>31</sup> The final report of the Forum advocated the establishment

---

<sup>27</sup> See *Katabazi & Others v Secretary-General of the East African Community & Another* (2007) AHRLR 119 (EAC 2007)

<sup>28</sup> By art 27(2) of the 1999 EAC Treaty as amended, the EACJ is expected to have a clear jurisdiction to hear human rights cases when a protocol to that effect is adopted by partner states. Although the process towards adopting such a protocol had begun as far back as 2007 with the EAC Secretariat-initiated draft, the protocol is yet to come into being.

<sup>29</sup> See 'Bid to let EA Court of Justice to try genocide and human rights suspects' *The East African* <http://www.theeastafrican.co.ke/news> (accessed 14 March 2010).

<sup>30</sup> As above.

<sup>31</sup> See 'EAC chief justices propose harmonisation of regional legal systems' <http://www.appablog.wordpress.com> (accessed 14 March 2010).



of 'an *ad hoc* committee to study and recommend ways to expand the Court's jurisdiction as well as give it teeth'.<sup>32</sup>

From a human rights perspective, the calls for the expansion of the jurisdiction of the EACJ are important because under the existing legal regime, the Court is only authorised to interpret and apply the Treaty of the Community.<sup>33</sup> While there is a statement of intent to endow the Court with human rights jurisdiction, the failure to do so in practice creates difficulties for litigants with human rights complaints. This is because the partner states of the EAC have not removed the obstacles that hinder access of individuals and NGOs in the region to the African Court of Human and Peoples' Rights (African Court).<sup>34</sup> Accordingly, East African citizens lack direct access to international judicial mechanisms for the protection of human rights. Further, without popular use, the EACJ has little or nothing to do as states are unlikely to engage in litigation. In fact, there have even been calls for transformation of the EACJ into a regional Court of Appeal similar to the regime under the defunct EAC in order to create activity for the Court.<sup>35</sup> Similar pressure in West Africa, with the active involvement of the ECOWAS Court of Justice, resulted in the adoption of a protocol in 2005 to confer express human rights jurisdiction on the ECOWAS Community Court of Justice (ECCJ). Thus, the current wave of pressure in East Africa could work in favour of an expanded jurisdiction for the EACJ.

The emerging pressure for the expansion of the jurisdiction of the EACJ is also important from the perspective of international criminal law and international humanitarian law. In view of the growing conflict between the political interests in Africa and the International Criminal Court (ICC), there have been increasing agitations for the establishment of an international criminal jurisdiction in Africa.<sup>36</sup> The agitation has even led to questions within and outside the structures of the AU whether existing continental judicial and quasi-judicial structures should be endowed with criminal jurisdiction. In this regard, it is important to note the risk of conflict between such a continental criminal jurisdiction and the mooted criminal jurisdiction of the EACJ. Further, in view of the fact that many of the conflicts that have given rise to demands for an end to impunity in Africa occur in East Africa and the Horn of Africa regions, there has to be a concern about the risk of

<sup>32</sup> 'East Africa Court to try rights-abuse cases' <http://allafrica.com/stories> (accessed 13 March 2010).

<sup>33</sup> See art 27 of the 1999 EAC Treaty as amended.

<sup>34</sup> As at 15 March 2010, no EAC partner state had made the declaration required by art 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights.

<sup>35</sup> See 'CJ touts for East Africa Court of Appeal' *Daily News* <http://www.dailynews.co.tz> (accessed 14 March 2010) on the call by the Chief Justice of Tanzania for the transformation of the EACJ into an East African Court of Appeal.

<sup>36</sup> Civil society and African research organisations have been involved in research around this issue.

political interference with an EACJ exercising criminal jurisdiction.<sup>37</sup> It is also important to consider how all of these developments influence the relationship between the EAC as a building block of the AEC and the AU as a body into which RECs, including the EAC, may eventually converge.

Overall, while there was no concrete standard-setting or judicial protection of human rights in the EAC during 2009, it is obvious that there is a growing recognition of the importance of human rights within the Community framework. What remains to be seen is whether these will culminate in concrete and tangible human rights benefits for the citizens of EAC Partner states.

### 3 The Economic Community of West African States

ECOWAS was established in May 1975 when a treaty for that purpose was adopted by 15 West African states.<sup>38</sup> Following a series of events that challenged the legal foundations of the Community in the 1990s, the 1975 ECOWAS Treaty was amended. In 1993, a revised ECOWAS Treaty was adopted by ECOWAS member states.<sup>39</sup> Under the 1993 revised Treaty, ECOWAS, among other things, aims to establish an economic union in West Africa with a view to raising the living standards of its peoples, enhancing economic stability and contributing to development of the African continent.<sup>40</sup>

Although the promotion and protection of human rights are not mentioned in the statement of objectives contained in the 1993 revised ECOWAS Treaty, the Treaty contains references to human rights that have been employed to sustain a budding ECOWAS human rights regime. The 1993 revised Treaty makes reference to human rights in its Preamble as well as in the body of the Treaty itself.<sup>41</sup> In its statement of fundamental principles, the Treaty affirms the desire of member

<sup>37</sup> Issues in Kenya, Somalia, Sudan and the Democratic Republic of Congo have been touted as areas where the ICC should act. While Kenya is the only member of the EAC among the states listed, there is sufficient proximity to encourage any of these states to join the EAC and shut out the ICC. However, it is important to note that the clause that allows the ICC to exercise jurisdiction where national proceedings appear to be aimed at protecting perpetrators could also be applicable.

<sup>38</sup> The original member states of ECOWAS were Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone and Togo. With the accession of Cape Verde to the 1975 ECOWAS Treaty, membership of the Community grew to 16. In 2000, Mauritania withdrew its membership of the Community.

<sup>39</sup> The ECOWAS Revised Treaty was signed in Cotonou, Benin on 24 July 1993 and entered into force on 23 August 1995. The 1993 revised Treaty was signed by the then 16 member states of the organisation before the withdrawal of Mauritania in 2000.

<sup>40</sup> Art 3(1) of the 1993 revised ECOWAS Treaty.

<sup>41</sup> See para 4 of the Preamble to the 1993 revised ECOWAS Treaty.

states to pursue integration based on an adherence to the principle of ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’.<sup>42</sup> ECOWAS member states further agree in article 56(2) of the Treaty to ‘co-operate for the purpose of realising the objectives’ of the African Charter. These treaty provisions form the legal foundation upon which the organs and institutions of ECOWAS have based their involvement in the field of human rights promotion and protection.<sup>43</sup> In addition to (and perhaps in furtherance of) these treaty foundations, the ECOWAS Authority of Heads of State and Government (ECOWAS Authority) has adopted instruments with human rights implications, one of the most prominent of which is the supplementary protocol that empowers the ECCJ to hear human rights cases.<sup>44</sup> During 2009, ECOWAS organs were involved in the judicial and non-judicial spheres of human rights promotion and protection.

### 3.1 Non-judicial human rights developments in ECOWAS

Non-judicial human rights developments under the ECOWAS framework cover the human rights and rights-related activities of ECOWAS organs other than the ECCJ.

#### 3.1.1 Standard-setting

During the period under review, standard-setting in the field of human rights within the ECOWAS framework was essentially by way of the formulation of policy documents on specific human rights concerns. In April 2009, Ministers responsible for women and children in ECOWAS member states met on the platform of ECOWAS to adopt a regional policy for the rehabilitation of victims of human trafficking in the West African region.<sup>45</sup> Aimed at creating a ‘supportive and friendly environment’ for victims, the policy commits member states to ‘the restoration of victims of human trafficking and exploitative and hazardous child labour to the fullest possible state of physical, psychological, social, vocational and economic wellbeing through sustainable assistance programmes’.<sup>46</sup> The policy’s 12 core areas of intervention elaborate strategies for reception, identification, sheltering, health, counselling,

<sup>42</sup> See art 4 of the 1993 revised ECOWAS Treaty on the principles of ECOWAS.

<sup>43</sup> The organs or institutions of ECOWAS include the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice and the ECOWAS Commission.

<sup>44</sup> Supplementary Protocol A/SP1/01/05 Amending Protocol A/P1/7/91 relating to the Community Court of Justice adopted in 2005.

<sup>45</sup> ‘Regional policy for rehabilitation of trafficked persons for adoption’ <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>46</sup> As above.

family tracing, return/repatriation, integration, empowerment, follow-up, after care and disengagement of victims.<sup>47</sup>

The adoption of this regional policy is significant for at least two reasons. First, despite the challenge that trafficking in persons poses for African states, very little attention has been paid to the phenomenon at the continental level. Hence, save for isolated articles in continental instruments obligating states to prevent trafficking in persons,<sup>48</sup> the AU does not have a satisfactory normative regime on trafficking in persons. Consequently, the involvement of sub-regional organisations in Africa is important to the extent that it contextualises the phenomenon to local realities. Second, in view of the arguably criminal law approach of global instruments on trafficking in persons, a policy that focuses on the rights and needs of victims rather than on their supposed criminality is a welcome development. Further, the cross-boundary nature of trafficking in persons and the fact that free movement in the region has a tendency to facilitate trafficking, make it desirable for ECOWAS to engage actively in addressing the phenomenon.

In the course of April 2009, Ministers of Labour and Employment in ECOWAS member states also met on the platform of the Community to adopt a regional policy and plan of action on labour.<sup>49</sup> The Ministers used the opportunity to call on ECOWAS member states to ratify and domesticate 'all legal texts relating to labour and employment, especially the fundamental ILO Conventions'.<sup>50</sup> The labour policy is aimed at promoting dignity of labour, promoting employment for young people and persons who are physically challenged as well as promoting the rights of migrant workers. It is worth noting that the AU does not have a labour policy nor does it have any document that speaks to the needs and rights of migrant workers. Thus, the sub-regional documents fill gaps in the continent's normative framework in these areas. More importantly, as one of the aims of integration is to promote the mobility of capital and labour within the region, it is necessary to put in place a region-specific structure to address concerns which will arise.

At their 62nd session held in May 2009, the ECOWAS Council of Ministers endorsed both the regional Policy on the Protection and Assistance to Victims of Trafficking in West Africa and the ECOWAS

<sup>47</sup> The Policy is only the latest in the ECOWAS response to the challenge of trafficking in persons in the region. In 2001, ECOWAS adopted a plan of action to combat trafficking in persons in West Africa. This was followed in 2006 with the adoption of a joint plan of action with the Economic Community of Central African States to address the scourge of trafficking in the two regions.

<sup>48</sup> See eg art 4(2)(g) of the Maputo (African Women's) Protocol and art 29 of the African Charter on the Rights and Welfare of the Child.

<sup>49</sup> 'ECOWAS Ministers adopt labour policy' <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>50</sup> As above.

Labour Policy and Plan of Action.<sup>51</sup> With these endorsements, both documents will enter into force as soon as they are approved by the ECOWAS Authority. It is important to note that the Council of Ministers used the opportunity to urge ECOWAS member states to ‘endeavour to respect and apply all the Community’s decisions and protocols with a view to accelerating the integration process’, emphasising that it might consider the possibility of imposing sanctions against defaulting states. Though not specific to human rights, the statement may be significant as state obligations under the ECOWAS framework include the human rights decisions of the ECCJ and other organs of the Community.

### 3.1.2 Strengthening democracy

ECOWAS activities relating to democracy and democratisation are governed by a protocol on democracy and good governance adopted in 2001.<sup>52</sup> During 2009, the Community focus in this area was mostly on Guinea and Niger. Following the death in December 2008 of long-time President Lansana Conte, the armed forces of Guinea seized power in a bloodless *coup* in violation of the principles of the 2001 ECOWAS Protocol on Democracy and Good Governance. ECOWAS reacted in January 2009 when the ECOWAS Authority rejected the unconstitutional change of government as a violation of the 2001 Protocol. As a first step, the Authority barred the military leaders of Guinea from attending meetings of all decision-making bodies of the Community. By this action, ECOWAS had immediately implemented the sanction regime contained in article 45(2) of the 2001 Protocol. In a continental environment where the culture of sanction is nearly as weak as the culture of voluntary compliance with standards and decisions, the action by the ECOWAS Authority was a rare demonstration of political will.

It is important to note that by article 45(3) of the 2001 Protocol, despite the suspension of a member state, ECOWAS retained a duty to ‘encourage and support the efforts being made by the suspended member state to return to normalcy and constitutional order’. Accordingly, the summit of the ECOWAS Authority resolved<sup>53</sup>

<sup>51</sup> ‘Council of Ministers urge respect for regional decisions and protocols’ 045/2009 <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>52</sup> Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 21 December 2001 and entered into force on 28 February 2008.

<sup>53</sup> The UN Peace-Building Fund allocates money through two funding facilities, the Immediate Response Facility and the Peace-Building Recovery Fund. Both facilities fund initiatives that respond to imminent threats to the peace process and initiatives that support peace agreements and political dialogue; build or strengthen national capacities to promote coexistence and peaceful resolution of conflict; stimulate economic revitalisation to general peace dividends and re-establish essential administrative services. See <http://www.unpbf.org/index> (accessed 31 March 2010).

to push for the inclusion of Guinea on the agenda of the UN Peace-Building Commission as a *de facto* fragile and post-conflict country to enable the country to access the UN Peace-Building Fund to develop its infrastructure and facilitate the return to sustainable development.

In addition, the Summit agreed to pursue international and internal co-operation to 'establish benchmarks and timelines for the completion of transition to democratic rule'. This 'carrot and stick' approach is commendable as it avoids total disengagement that might have resulted in more harm to democracy in the country.

While the engagement between ECOWAS and the military junta in Guinea was happening, the junta allegedly approved the use of repressive force against unarmed demonstrators. ECOWAS responded by issuing a statement in September 2009, condemning the action. More importantly, the statement called for the setting up of an International Committee of Inquiry in collaboration with the 'AU and the UN Commission for Human Rights' to identify the perpetrators and those responsible and to take the necessary measures to address the situation.<sup>54</sup> This approach is interesting as it is an indication that the ECOWAS authorities recognise the apparently superior role of the UN and the AU in maintaining global and continental peace through human rights protection and democratic good governance. It is also a commendable attempt at co-operation and co-ordination.

In the course of 2009, a constitutional crisis that qualified as 'power maintained by unconstitutional means'<sup>55</sup> occurred in Niger. This resulted in a statement by the ECOWAS Council of Ministers in which the Council expressed concern that the developments in that country had the potential to 'threaten the significant gains made in that country in the area of constitutional governance'.<sup>56</sup> As a result of the refusal of the government of Niger to comply with the directives of ECOWAS to comply with democratic principles, Niger was suspended for 'its failure to comply with the 17 October 2009 Decision of the Heads of State and Government to postpone the legislative elections of Tuesday 20 October 2009'.<sup>57</sup> The imposition of sanctions on the sitting government in Niger is significant progress as there has always been the impression that continental and sub-regional norms on democratic governance tended to be overtly protective of sitting governments, even where they remain in office unconstitutionally.<sup>58</sup> Further, the immediate imposi-

<sup>54</sup> 'ECOWAS condemns acts of repression in Guinea' 096/2009 <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>55</sup> See art 1(c) of the 2001 ECOWAS Protocol on Democracy and Good Governance.

<sup>56</sup> 'ECOWAS delegation in Niger' 047/2009 <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>57</sup> 'ECOWAS suspends Niger from membership of organisation' 113/2009 <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>58</sup> The attitude of the AU to the Zimbabwe saga is a clear example.

tion of sanctions is indicative of a growing trend on the continent to reject any form of unconstitutional change of government.<sup>59</sup>

### 3.2 Judicial protection of human rights by the ECOWAS Community Court of Justice

Originally established by the 1975 ECOWAS Treaty, the ECCJ was operationalised by a protocol adopted by ECOWAS member states in 1991.<sup>60</sup> Following a dearth of judicial activity and initial challenges to its jurisdiction, a supplementary protocol to the Court's 1991 Protocol was adopted in 2005 to expand the competence of the Court and effect individual access to the Court, among other things.<sup>61</sup> One of the highlights of the 2005 Supplementary Protocol of the ECOWAS Court was the addition of a human rights competence to the jurisdiction of the Court.<sup>62</sup> It is on the basis of this expanded competence that the ECCJ has been actively involved in the judicial protection of rights. During 2009 there were four decisions from the ECCJ that were significant from a human rights perspective.

#### 3.2.1 *Bayi and Others v Nigeria and Others*

The string of 2009 decisions in human rights cases before the ECCJ began in January with its judgment in the case of *Bayi and Others v Nigeria and Others (Bayi case)*.<sup>63</sup> In an action brought by Djot Bayi and 14 others against Nigeria and four others, the ECCJ considered whether the rights of the 15 non-Nigerian ECOWAS citizens had been violated by their arrest in international waters and subsequent prosecution by Nigerian officials.<sup>64</sup> In their action, the applicants, who were crew members of a foreign registered ship, complained that their arrest on the high seas, 16 nautical miles off the Nigerian coast, their detention for varying lengths of time, parading them before local and international press and their subsequent loss of employment, amounted to a violation of their rights by Nigeria and its officials.<sup>65</sup>

The applicants contended that their arrest was in violation of article 6 of the African Charter and section 35 of the Nigerian Constitution. They contended further that their detention from 1 December 2003

<sup>59</sup> In this regard, the AU and SADC responses to the impasse in Madagascar are instructive.

<sup>60</sup> Protocol/P1/7/91 of 6 July 1991 on the ECOWAS Community Court of Justice.

<sup>61</sup> See Supplementary Protocol A/SP1/01/05 Amending Protocol A/P1/7/91 relating to the Community Court of Justice adopted in 2005.

<sup>62</sup> See the new art 9(4) in art 4 of the 2005 Supplementary Protocol.

<sup>63</sup> Unreported Suit ECW/CCJ/APP/10/06, Judgment ECW/CCJ/JUG/01/09 delivered on 28 January 2009.

<sup>64</sup> The other four defendants were all statutory officers of Nigeria and include the Attorney-General of Nigeria, the Chief of Naval Staff, the Inspector-General of Police and the Comptroller-General of the Nigerian Prisons.

<sup>65</sup> See paras 1-8 of the *Bayi* case. All the applicants were subsequently discharged.

to 1 March 2004, the continued detention of ten of them until 30 March 2005, as well as their subsequent prosecution, violated the provisions of the African Charter and the Nigerian Constitution. Further, they contended that parading them before the press was in violation of their right to dignity under article 5 of the African Charter and the subsequent loss of employment as a result was attributable to the state.<sup>66</sup> It was contended on behalf of the state that the action was statute-barred and that the principle of privity of contract excluded the state from responsibility for the applicant's loss of employment.

The Court's position on the question of statutory limitation under the ECOWAS judicial regime deserves attention.<sup>67</sup> By the Court's determination, 'this provision only concerns cases against the Community or those of the Community against another',<sup>68</sup> hence limitation does not apply. In taking this position, the Court appears to have ignored reference to 'members of the Community' in the provision in question. Perhaps the Court could still have come to the same conclusion that the action was not statute-barred if it had seen a 'continuing violation' in the facts rather than trying to tie the date the cause of action arose to the specific date of arrest of the applicants. It is important to note further that the operation of the statute of limitation in the ECOWAS regime adds to the requirement in article 56(6) of the African Charter relating to the submission of communications within a reasonable time. Under the jurisprudence of the African Commission, it would appear that there is no fixed time for submission and the circumstances of each case determines the interpretation that would be given to that requirement.<sup>69</sup>

In its analysis of the question whether the arrest and detention of the applicants violated article 6 of the African Charter and section 35 of the Nigerian Constitution,<sup>70</sup> the ECCJ seems to have replaced the constitutional provision with article 9 of the Universal Declaration of Human Rights (Universal Declaration). In so doing, the Court re-affirms its position that the Universal Declaration is an applicable catalogue of rights in the ECOWAS regime despite the fact that it is merely a declaration. The Court also appears to be making a statement that it does not have jurisdiction over national constitutions even though it would be noted that it referred to the constitutional provision in its final decision. While the Court found the initial arrest 'justified by the necessity

<sup>66</sup> A claim that the seizure of their vessel was in violation of art 21(2) of the African Charter was abandoned.

<sup>67</sup> Art 9(3) of the 2005 Supplementary Protocol is the regime's provision on temporal limitation of action. It provides that '[a]ction by or against a Community institution or any member of the Community shall be statute barred after three (3) years from the date when the right of action arose'.

<sup>68</sup> See para 32 of the *Bayi* case.

<sup>69</sup> See eg *Chinhamo v Zimbabwe* (2007) AHRLR 96 (ACHPR 2007) on how the African Commission interprets this provision.

<sup>70</sup> Both provisions relate to the right to liberty.



of preliminary investigation', it found the subsequent and continued detention and prosecution unjustified.<sup>71</sup> It would be noticed that the Court was apparently encouraged to reach this conclusion because a Nigerian court had previously declared the action by the Nigerian officials unlawful. The question is whether the ECCJ would continue to defer to national decisions before it can find violations of human rights. Considering the need for the ECCJ to establish its judicial authority in the region, the Court may need to reconsider its practice in this regard. However, in the present case, the nexus between the findings cannot be denied and the ECCJ should be blameless in making the link.

Another aspect of the decision that calls for attention is the finding on whether article 5 of the African Charter was violated.<sup>72</sup> The ECCJ came to a conclusion that the fact of being paraded before the press in a manner that suggested a declaration of guilt before trial may have violated the right to a presumption of innocence under article 7(b) of the African Charter rather than article 5 of the Charter.<sup>73</sup> However, there is no indication that a violation was found in the final and effective part of the decision.<sup>74</sup> It raises the question as to whether the ECCJ prefers to insist on strict technicality in the formulation of relief. Such a position would contradict the more liberal approach of the African Commission.

On the issue of reparations, it was significant that the Court came to the conclusion that it had a duty to make relevant orders even though the 2005 Supplementary Protocol is silent on the point. Considering that it is the 2005 Supplementary Protocol that empowers it to hear human rights cases, a restrictive reading by the Court could have left it powerless to make orders for reparation. However, the Court chose to explore its legal framework, specifically finding the required competence in article 19 of the 1991 Protocol which authorises the ECCJ to apply article 38(1) of the Statute of the International Court of Justice.<sup>75</sup> Arguably, such courageous display of innovation works in favour of human rights victims in the region.

### 3.2.2 *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v Nigeria and Another*

On 27 October 2009, the ECCJ delivered its ruling on a preliminary objection raised by the second defendant in the case of *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v*

<sup>71</sup> Para 37 of the *Bayi* case.

<sup>72</sup> Art 5 of the African Charter protects the right to dignity.

<sup>73</sup> Para 42 of the *Bayi* case.

<sup>74</sup> See para 51 of the *Bayi* decision.

<sup>75</sup> Para 49 of the *Bayi* case.

*Nigeria and Another (SERAP case)*.<sup>76</sup> The case related to a complaint by SERAP that the defendants had violated ‘the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and the right of peoples to economic and social development’ guaranteed in the African Charter.<sup>77</sup>

Before the hearing of the case on its merits, an objection was raised on the grounds that the Court lacked jurisdiction to entertain the matter. The preliminary objection was based on three main grounds. First, it was argued that article 9 of the Supplementary Protocol of the ECCJ upon which the Court sought to exercise jurisdiction could not sustain the exercise of jurisdiction by the Court over the subject-matter as it only gave the Court power over the treaties, conventions and protocols of ECOWAS. Second, it was contended that the right to education was not justiciable under the Nigerian Constitution and the Court could therefore not hear that issue. Third, it was argued that SERAP lacked *locus standi* to initiate the action.

Affirming that its jurisdiction hinged on article 9 of the 2005 Supplementary Protocol, the ECCJ emphasised that article 9 empowered it to hear human rights cases. The Court stressed that article 9 had to be read as a whole in order to appreciate the scope of its jurisdiction.<sup>78</sup> The Court’s resolution of the first ground of objection is arguably straightforward as the Court has always hinged its human rights competence on the expanded article 9 of the 2005 Supplementary Protocol.<sup>79</sup> However, it is important that the Court emphasised the need for a holistic reading of the provisions for a clearer appreciation of its jurisdiction.

The second ground of objection relating to the justiciability of the right to education was also critical. It had remained a matter of debate whether the inclusion of certain rights, essentially of a socio-economic nature, in chapter II of the 1999 Nigerian Constitution could be translated as a blanket exclusion of those rights from the terrain of justiciability of any sort.<sup>80</sup> On this point, the ECCJ observed that, although the claim was factually based on domestic legislation, pri-

<sup>76</sup> Unreported Suit ECW/CCJ/APP/08/08. The case was against Nigeria as first defendant and the Nigerian Universal Basic Education Commission as second defendant.

<sup>77</sup> See para 2 of the *SERAP* case (n 76 above). The rights claimed were allegedly in violation of arts 1, 2, 17, 21 and 22 of the African Charter.

<sup>78</sup> Para 14 of the *SERAP* case.

<sup>79</sup> See eg *Essien v The Gambia*, unreported Suit ECW/CCJ/APP/05/05.

<sup>80</sup> See eg, ST Ebobrah ‘The future of socio-economic rights litigation in Nigeria’ in F Emiri (ed) *Called to the law: Essays in honour of Late Justice E Igoniwari* (2009). The debate is sparked off by the fact that sec 6(6)(c) of the 1999 Nigerian Constitution declares that judicial powers vested in Nigerian courts ‘shall not, except as otherwise provided in this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution’.

mary reliance was placed on the International Covenant on Economic, Social and Cultural Rights (ICESR) and the African Charter.<sup>81</sup> Accordingly, the Court took the view that, despite the fact that the right to education was contained in the directive principles of state policy in chapter II of the 1999 Constitution of Nigeria (1999 Constitution), that fact alone did not oust the ECCJ's jurisdiction to hear a matter alleging a violation of those rights, where reference is made to the international instruments.<sup>82</sup>

One of the critical issues in the justiciability of chapter II debate relates to whether a claim for any of the rights contained in one form or another in chapter II of the Nigerian Constitution could not be made in a court of law, where the claim is based on an instrument or law other than the provisions in the Nigerian Constitution. Tackling the issue in a rather progressive manner, the ECCJ stressed:<sup>83</sup>

It is essential to note that most human rights provisions are contained in domestic legislations as well as international human rights instruments ... Hence the existence of a right in one jurisdiction does not automatically oust its enforcement in the other. They are independent of each other.

By this *dictum*, the Court appears to be taking a dualist approach to the relationship between international law and domestic law in the sense that the Court sees the operation of individual international human rights systems to be independent just as domestic systems are independent. This would mean that each system takes responsibility for the protection of the rights guaranteed as norms in that particular system. Thus, the *dictum* appears to reinforce an understanding that a state which has ratified an international human rights instrument remains bound to international supervisory bodies notwithstanding the domestic consequences that may result from a transformation or domestication of parts or the whole of the instrument into national law.

Further, the ECCJ reaffirmed its position that it has competence to supervise the implementation of the African Charter in ECOWAS member states. Thus, the Court emphasised that Nigeria's ratification and domestication of the African Charter and ratification of the revised ECOWAS Treaty brought it under the scrutiny of the Court notwithstanding the domestic effect of the Nigerian Constitution. By taking this position, the ECCJ has created an avenue for judicial enforcement of African Charter-based socio-economic rights. However, it also increased the potential for forum shopping as between the ECCJ and continental supervisory bodies of the African Charter.

On the third ground of objection, the Court felt that the argument in favour of the *actio popularis*, as presented by the plaintiff, was more

---

<sup>81</sup> Para 17 of the *SERAP* case.

<sup>82</sup> Para 18 of the *SERAP* case.

<sup>83</sup> Para 19 of the *SERAP* case.

convincing. Hence, the Court ruled that SERAP had standing before it.<sup>84</sup> This approach was significant in relation to enhancing access to the Court and providing human rights victims with access to remedies. Although the 2005 Supplementary Protocol does not expressly provide for the *actio popularis*, the Court had no difficulty in allowing itself to be swayed towards finding that it is 'a healthy development in the promotion of human rights' that the Court finds itself obliged to 'lend weight to'.<sup>85</sup> The Court was convinced that this route was necessary 'in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime'. It is interesting that the ECCJ followed the path that the African Commission had taken in the early days of its work. However, it is worth pointing out that the ECCJ made no reference to the African Commission's jurisprudence on this issue or any of the other issues that came up in the ruling. Hence, the ECCJ appears to be further limiting judicial dialogue between itself and the continental supervisory bodies of the African Charter.

One last point to be noted about the *SERAP* ruling is that it exemplifies the challenge of forum shopping that the African human rights system faces in the sense that cases that have been unsuccessful before continental mechanisms could be resubmitted to a sub-regional mechanism, albeit in a reformulated format. The applicants in the *SERAP* ruling had previously brought a communication before the African Commission, among other things, alleging a violation of the right to education by Nigeria.<sup>86</sup> Although the communication before the African Commission was formulated differently and could even be said to have arisen on the basis of different facts, the fact that it was declared inadmissible for the non-exhaustion of local remedies suggests that the *SERAP* ruling could have failed on similar grounds if it were brought before the African Commission. Hence, the chances of litigants bringing such cases before the ECCJ would be stronger. However, from the perspective of greater access to a remedy for a human rights violation, the point must be made that this is not necessarily a negative trend.

### 3.2.3 *Habré v Senegal (Application for intervention)*

During the period under review, the ECCJ delivered its ruling on an application by certain persons to join the case of *Habré v Senegal* (*Habré* ruling).<sup>87</sup> In October 2008, the former President of Chad,

<sup>84</sup> Para 30 of the *SERAP* case.

<sup>85</sup> Para 34 of the *SERAP* case.

<sup>86</sup> *Socio-Economic Rights and Accountability Project v Nigeria* (2008) AHRLR 108 (ACHPR 2008).

<sup>87</sup> Unreported Case ECW/CCJ/APP/07/08; ADD NO ECW/CCJ/APP/11/09.

Hissène Habré, brought an action against Senegal before the ECCJ.<sup>88</sup> In his action, Mr Habré contended that by amending its Constitution and part of its national laws in order to create the legal foundation for his trial on a retroactive basis, Senegal had violated Community law generally and his rights specifically.

Seeking intervention in their capacities as right-holders who are alleged victims of Mr Habré's repressive government or as assignees of such right-holders, the applicants for intervention jointly brought this application in December 2008. The main thrust of the application was that, in some form or another, the applicants have pursued or are in the process of pursuing action against Mr Habré. Particular mention was made of the fact that some of the applicants were beneficiaries of a decision by the UN Committee against Torture.<sup>89</sup> Consequently, the applicants were of the view that a finding in favour of Mr Habré by the ECCJ in his 2008 action would render the existing decision and other process redundant and ineffective. Thus, the applicant contended that they had sufficient interest in the *Habré v Senegal* matter to warrant their intervention. The application for intervention was brought in accordance with article 89 of the Rules of Procedure of the ECOWAS Court.

While Senegal did not take part in the intervention proceedings, counsel for Mr Habré opposed the application for intervention on certain procedural and substantive grounds. Among other things, it was argued on Mr Habré's behalf that the application for intervention touched the heart of the substantive action, that intervention before international courts was an exclusive preserve of states and that article 21 of the 1991 Protocol of the ECCJ relating to intervention in cases before the Court anticipated state parties rather than non-state parties or individuals.<sup>90</sup>

In addressing the question relating to competence to intervene in cases before it, the ECCJ rightly noted that article 21 of the 1991 Protocol on intervention was unaffected by the amendment introduced by the 2005 Supplementary Protocol. However, the Court recognised that its *ratione materiae* and *ratione personae* had been significantly altered by the 2005 Supplementary Protocol and in that spirit, it found no reason to restrict the competence of legal and natural persons to intervene where states have opened up direct access in human rights cases

<sup>88</sup> Hissène Habré ruled Chad from 1982 to 1990 when he was overthrown in a military *coup*. Since he was deposed, Mr Habré has lived in asylum in Senegal where several attempts have been made by alleged victims of his regime's repression to seek justice against him in Senegalese and Belgian courts.

<sup>89</sup> Communication 181/2001, *Guengueng v Senegal*, decision of 17 May 2006. See para 7 of the *Habré* ruling.

<sup>90</sup> See para 14 of the *Habré* ruling. It was also subtly suggested that Senegal colluded with the applicants as there was no explanation for the access that the applicants had to the processes filed by Mr Habré before the court.

before the Court.<sup>91</sup> Using strong language that considered human rights obligations of states as *erga omnes*, the ECCJ stressed that once the right of access to court for remedy was granted, it could not be limited and thereby be rendered ineffective.<sup>92</sup>

The position taken by the Court is positive as it demonstrates a determination on the part of the Court not to be unduly literal in its interpretation, especially where the outcome would be absurd. It seems to acknowledge that drafters of international instruments could inadvertently omit phrases and create ambiguities that courts should be courageous enough to fill. Consequently, reading the relevant protocols together in a progressive manner, the ECCJ considered the principal right of access and the right to intervene as two sides of the same right of access to court. Thus, it emphasised that ECOWAS member states would be violating a norm highly valued by the 'family of nations' if they granted the principal right of access and withheld the right to intervene.<sup>93</sup> While it may be observed that the Court seems to use the term *erga omnes* with ease and thereby risks watering down the weight that the term should carry, the Court's approach to interpretation in this case carries some promise for judicial protection of human rights in the region.

On the question whether the applicants had sufficient interest to warrant intervention, the ECCJ had no difficulty in finding that there was no necessity for the applicants to show direct interest in the principal claim in the main case.<sup>94</sup> Accordingly, the Court concluded that the possibility of its decision in the main action affecting the interests of the applicants was sufficient for intervention.<sup>95</sup> This is important because in the widening landscape for international litigation in Africa, there is a strong chance that defendants in human rights cases can collude with willing litigants to get a conflicting decision in one court to undermine a favourable decision of another court. Thus, allowing intervention by persons with subsisting or anticipated judgments on similar or related facts can be a useful bulwark against such a challenge. Regrettably, despite the interesting premise, the ECCJ still found that the overall interests of the applicants would not be restricted by whatever judgment it would give in the main *Habré* case.<sup>96</sup> Thus, while the ECCJ has shown a tendency to be liberal in interpretation, it also shows that

---

<sup>91</sup> Paras 18–21 of the *Habré* ruling.

<sup>92</sup> See para 21 of the *Habré* ruling where the court stated: '*[L]a Cour, au regard de la valeur d'obligation erga omnes des droits fondamentaux de l'homme affirmés dans plusieurs conventions de portée universelle et régionale, estime que le droit au recours, une fois reconnu, ne peut souffrir de limitation tendant à le rendre inefficace.*'

<sup>93</sup> Para 23 of the *Habré* ruling. The court also saw the right to intervene as an *erga omnes* obligation.

<sup>94</sup> Para 27 of the *Habré* ruling.

<sup>95</sup> Para 30 of the *Habré* ruling.

<sup>96</sup> Paras 32–34 of the *Habré* ruling.

it would require evidence of strong probability of negative impact on interests before it would allow interventions in cases before it.

### 3.2.4 *Amouzou and Others v Côte d'Ivoire*

On 17 December 2009, the ECCJ delivered its judgment in the case of *Amouzou and Others v Côte d'Ivoire* (*Amouzou case*).<sup>97</sup> Filed in January 2009, the case related to a request by Amouzou and five others, linked to the management of the cocoa and coffee trade in Côte d'Ivoire, seeking certain relief for wrongful detention and treatment by the state. Following investigation of the cocoa and coffee sector of the Ivorian economy, the state prosecutor allegedly held a press conference to update the public on the progress of the investigations. At the press conference, 23 persons were pronounced as being under indictment for a series of offences touching on dishonesty. The names released during the press conference, including those of the applicants and their images, were allegedly subsequently published in the news media. A government daily newspaper was specifically quoted as emphasising that 'heads will roll'. The applicants were also detained in preventive custody for a period of time. On these grounds, the applicants concluded that they were made the objects of 'judicial and media lynching' and exposed to 'condemnation by public opinion' even before the trial.<sup>98</sup>

Upon the facts, the applicants brought the action before the ECCJ alleging that their rights had been violated on five main grounds. Relying on article 11 of the Universal Declaration, it was alleged that their right to be presumed innocent until proven guilty had been violated. On the basis of article 12 of the Universal Declaration, it was alleged further that the events had resulted in a violation of the applicants' right to respect for honour and reputation. Further relying on article 137 of the Ivorian Penal Procedure Code and article 9 of the Universal Declaration, the applicants alleged a violation of their right not to be subjected to arbitrary detention. On the basis of article 11 of the Universal Declaration, it was claimed that the applicants had a right to be tried in an equitable and public judicial process in which all guarantees necessary for their defence are provided. In relation to one of the applicants, who was pregnant at the time of arrest and delivered in detention, it was argued that article 3 of the Convention on the Rights of the Child (CRC) and article 30 of the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>99</sup> had been violated. These provisions deal respectively with the best interests of the child and the right of pregnant or nursing women to receive special treatment when they are in conflict with the law. The defendant state argued, *inter alia*, that the Universal Declaration and the African Char-

<sup>97</sup> Unreported Suit ECW/CC/APP/01/09; Arrêt ECW/CC/JUG/04/09.

<sup>98</sup> Paras 4-8 of the *Amouzou case*. Also see paras 9-10 of this case.

<sup>99</sup> Generally see paras 12-26 of the *Amouzou case*.

ter guaranteed freedom of the press and it was incumbent on the state to protect that right. The state also argued that the some of the claims were vague while the detention could be justified on the grounds that it was upon judicial order necessary in view of the circumstances of the alleged offences.<sup>100</sup>

In its analysis, the ECCJ considered the rights as guaranteed in the Universal Declaration, the African Charter and the International Covenant on Civil and Political Rights (ICCPR). The Court then emphasised the significant position of these instruments in the ECOWAS legal order.<sup>101</sup> This is important in view of the fact that the ECOWAS legal regime lacks its own human rights catalogue. With respect to the Universal Declaration, the Court took the view that reference to the instrument in the Preamble to the ECOWAS Protocol on Democracy was the foundation for its recognition as a vital source of human rights in the ECOWAS order.<sup>102</sup> In the face of the constant usage of the Universal Declaration in cases before the Court, it is open to debate whether this is sufficient foundation for applying the Universal Declaration, especially in view of its existence as a declaration rather than a treaty. However, the counter argument could be that the Universal Declaration now constitutes customary international law. Overall, the *dictum* re-affirms the fact that the non-existence of an ECOWAS-specific catalogue is not fatal to the Court's human rights competence.

On the merits of the case, the Court did not find a link between the release of information at the press conference and the treatment of the issues by the media. Consequently, the Court found no fault on the part of the state.<sup>103</sup> The ECCJ went on to stress that a violation of respect for honour and reputation that occurs in the course of the exercise of press freedom could not invoke the liability of the state. In other words, the Court tried to strike a balance between contending rights. It is open to debate whether the Court could have arrived at a different decision on the link between the press conference and the media reports, in view of the calibre of officials and the presentation at the conference. However, it is important that the Court stressed that the main responsibility of a state was to provide the framework for the applicant to pursue civil vindication if they felt aggrieved.<sup>104</sup> What can be said to be the most controversial part of the decision is the Court's finding that in the circumstances of the case, pre-trial detention of seven months could not be said to be unreasonable.<sup>105</sup> Interestingly, while it took the view that prior judicial sanction and the necessity

<sup>100</sup> See paras 27 & 34 of the *Amouzou* case.

<sup>101</sup> See para 58 of the *Amouzou* case.

<sup>102</sup> Para 60 of the *Amouzou* case.

<sup>103</sup> Paras 76-77 of the *Amouzou* case.

<sup>104</sup> See para 81 of the *Amouzou* case. This is similar to the position that the ECCJ took in *Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008).

<sup>105</sup> Para 95 of the *Amouzou* case.



of criminal investigation justified the preventive detention, the Court admitted that unreasonable detention could make an otherwise lawful detention arbitrary.<sup>106</sup> The Court even considered international instruments and jurisprudence to support its position that there are no laid down criteria for determining reasonableness.

On the question of special treatment of pregnant or nursing mothers, the Court found that there was no clear obligation on the state to refrain from incarcerating this category of persons.<sup>107</sup>

While the analyses by the Court cannot be faulted in certain aspects, detractors would argue that the general impression created by the *Amouzou* case appears to be that it cannot be taken for granted that the ECCJ would find state responsibility each time it finds that there has been a violation. It remains to be seen whether this would turn out to be a justifiable concern.

### 3.2.5 *Co-ordination Naitonale Des Delegates Departmentaux de la Filiere Café Cacao (CNDD) v Côte d'Ivoire*

In the *Co-ordination Naitonale Des Delegates Departmentaux de la Filiere Café Cacao (CNDD) v Côte d'Ivoire (CNDD case)*,<sup>108</sup> a legal person, the CNDD, sought a declaration that the rights of its members to equitable remuneration and to equal treatment before the law as guaranteed in the Universal Declaration had been violated. The claim was premised on the ground that the fiscal regime imposed by the state was discriminatory against cocoa and coffee producers and thereby limited the profit that accrued to them.<sup>109</sup> The state argued *inter alia* that the applicant lacked the capacity to bring the case and the subject matter was outside the competence of the Court or was baseless.<sup>110</sup> The state's argument partly touched on the question whether legal persons could bring a claim for human rights before the ECCJ on the basis of the 2005 Supplementary Protocol.

Addressing the question of access to legal persons in human rights cases, the ECCJ emphasised that, although the 2005 Supplementary Protocol did not expressly grant access to legal persons, there was room to accommodate claims from such entities. The Court specifically referred to the ECOWAS Protocol on Democracy to support its posi-

<sup>106</sup> See paras 83-90 of the *Amouzou* case.

<sup>107</sup> Paras 99-104 of the *Amouzou* case.

<sup>108</sup> Unreported Suit ECW/CCJ/APP/02/09; Arrêt ECW/CCJ/JUD/05/09, delivered on 17 December 2009.

<sup>109</sup> Paras 6-11 of the *CNDD* case (n 108 above).

<sup>110</sup> Para 12 of the *CNDD* case.

tion.<sup>111</sup> Very importantly, the Court considered itself bound to apply measures that guaranteed a greater degree of protection for human rights.<sup>112</sup> By taking such an approach, the ECCJ once again exhibits a tendency to be more protective than restrictive of human rights. This is a positive trait in a court that increasingly appears to regard itself as a human rights court. It therefore holds some promise for the guarantee of the right of access in borderline cases. The other point to be noted is that the Court appears to be looking more often and deeper into the Community legal framework to find a foundation for its human rights jurisdiction.

The ECCJ failed to find a violation on the merits of the case. It pointed out that there was a need to show a labour relationship in order to successfully invoke the right to equitable remuneration. This position is consistent with the Court's earlier decision in *Essien v The Gambia*<sup>113</sup> which the Court itself cited. Considering that the continental bodies are yet to have an opportunity to interpret the equivalent provision in the African Charter, the ECCJ is setting the pace in that area. This raises the question whether the judicial and quasi-judicial continental bodies would consider themselves bound by the ECCJ's interpretation if a similar case comes before them. On the question of equality, it is significant that the Court pointed out that the issue should only arise as between comparable indices.<sup>114</sup>

The ease with which the Court appears to be engaging in human rights issues suggests that the Court is becoming increasingly comfortable with its character as an ever-growing international human rights court. Although the trend in some of its decisions may raise a debate regarding its qualification for the purpose, the Court can only improve. However, one major question remains whether the Court would be able to co-ordinate its existence with the other human rights supervisory bodies in the African human rights system. From a more general perspective, the involvement of the main Community organs in soft standard-setting and the willingness to enforce sanctions make the ECOWAS regime similar to the national tripartite governmental structure for human rights realisation.

---

<sup>111</sup> See art 1(h) of the ECOWAS Democracy Treaty which states that 'each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on human rights, to ensure the protection of his/her rights'.

<sup>112</sup> Para 29 of the *CNDD* case.

<sup>113</sup> n 74 above.

<sup>114</sup> See paras 55-56 of the *CNDD* case.

## 4 The Southern African Development Community

Originally founded in 1980 as the Southern Africa Development Co-ordination Conference (SADCC), the SADC was established in 1992 when a treaty was adopted to transform the SADCC into a new organisation to be known as SADC.<sup>115</sup> In 2001, the 1992 SADC Treaty was amended and this resulted in increasing Community objectives to include the promotion of<sup>116</sup>

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 the socially disadvantaged through regional integration.

In addition, the Community aims 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>117</sup> These provisions are indicative of a Community that goes beyond the narrow confines of economic integration.

Under its amended Treaty, SADC and its member states undertake to proceed in accordance with principles which include human rights, democracy and the rule of law.<sup>118</sup> It should be noted that reference to human rights in the SADC Treaty is not linked to the African Charter or any other human rights catalogue. Consequently, over the years the Community has engaged in various forms of standard-setting in the field of human rights.<sup>119</sup> The SADC Tribunal has also been involved in the judicial protection of human rights.<sup>120</sup> During 2009, SADC's involvement in human rights was essentially in the promotion of democracy and in the judicial protection of human rights.

<sup>115</sup> The Treaty of SADC was signed in Windhoek, Namibia on 17 August 1992, but was amended in 2001. The current member states of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Mozambique, Swaziland, South Africa, Tanzania, Zambia and Zimbabwe.

<sup>116</sup> See art 5(1)(a) of the Consolidated SADC Treaty. The Treaty is available at <http://www.sadc.int/index> (accessed 31 March 2010).

<sup>117</sup> Generally see art 5 of the Consolidated SADC Treaty.

<sup>118</sup> Art 4(c) of the SADC Treaty as amended.

<sup>119</sup> Eg, SADC has a region-specific Fundamental Rights Charter and a Protocol on the rights of women.

<sup>120</sup> The SADC Tribunal is the judicial organ of SADC. Other organs of the Community are the Summit of Heads of State and Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; and the SADC National Committees.

## 4.1 Non-judicial human rights developments

Non-judicial activities that promote and protect human rights in SADC occur mostly in the work of the Summit of Heads of State and Government or the Secretariat, but to a lesser degree also in the work of other organs. These organs often delegate responsibilities in the field to other bodies.

### 4.1.1 Standard-setting

During 2009, some form of standard-setting in the field of human rights was undertaken at Ministerial level. In May 2009, the SADC Ministerial Conference on the Development of a Strategic Plan of Action on Combating Trafficking in Persons adopted the SADC Draft Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children in the SADC region.<sup>121</sup> The Plan of Action is founded and builds on the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Ouagadougou Action Plan to Combat Trafficking in Persons, especially Women and Children of the African Union, and the SADC Protocol on Gender and Development. In the absence of a strong continental normative framework and in view of the expected increase in trafficking during the FIFA World Cup in South Africa in 2010, the Plan of Action is relevant. The Plan's chances of implementation are arguably better at the sub-regional level.

### 4.1.2 Strengthening democracy

Owing to the number of elections that took place in the region during 2009, the most visible human rights-related work of the SADC Community was in this area. In the period under review, SADC Electoral Observation Missions were dispatched to observe elections in Botswana, Mozambique and Namibia. SADC work in the field of elections is founded on the SADC Principles and Guidelines Governing Democratic Elections.<sup>122</sup> In each of the elections observed during 2009, the mission was sent prior to the elections to allow for adequate consultation with relevant stakeholders.<sup>123</sup> In view of the importance of the pre-election events, it is significant that SADC missions give allowance for constructive engagements.

While in each case the observer mission took note of complaints from opposition parties and other stakeholders concerning the elections, each mission took the view that 'though some of the concerns

<sup>121</sup> See Record of SADC Ministerial Meeting of May 2009 (on file with author).

<sup>122</sup> A set of non-binding principles adopted in 2004.

<sup>123</sup> The Botswana elections took place on 16 October 2009 and the mission was launched on 8 October 2009. The mission to Mozambique was launched on 18 October 2009 while the elections took place on 28 October 2009. The elections in Namibia took place on 27 and 28 November 2009.

raised were pertinent, they were not of such a magnitude as to affect the credibility of the overall electoral process'.<sup>124</sup> The similarity of the phrasing in the three reports gives the impression that the three missions uncritically follow what could be a unified SADC position. However, it could also be argued that the similarity results from the fact that members are trained together and have standard formats in which to report back. It is important that SADC missions do not create negative impressions that could result in a loss of confidence on the part of national stakeholders.

Another important development during 2009 was the triggering of the SADC sanctions regime against Madagascar for the unconstitutional change of government that took place in that state. Following the refusal of the head of the junta to restore democratic governance in Madagascar, in March 2009 SADC decided to impose sanctions on the junta for violating 'the basic principles, protocols and treaties' of SADC.<sup>125</sup> The imposition of sanctions is important as it sends a clear message that SADC does not intend to accommodate unconstitutional changes of governments. However, it also raises concerns as to whether the SADC regime is aimed at protecting sitting regimes as the organisation failed to take similar decisive actions against Zimbabwe. On a more general note, the imposition of sanctions reinforces the continental resolve to discourage unconstitutional changes of government.

## 4.2 Judicial protection of human rights by the SADC Tribunal

The SADC Tribunal is established by articles 9 and 16 of the 1992 SADC Treaty, as amended. The Tribunal itself is constituted by the Protocol on the Tribunal and the Rules of Procedure thereof adopted in 2000. Although no express human rights mandate is given to the Tribunal, it has held that it is competent to hear human rights cases on the basis of its competence to interpret and apply the SADC Treaty.<sup>126</sup> During 2009, there were three decisions from the Tribunal that had human rights implications.

### 4.2.1 *Campbell and Another v Zimbabwe*

Despite the judgment in favour of the applicants in the *Campbell* case in 2008, issues from the case arose in 2009 as Zimbabwe allegedly refused to comply with the orders of the Tribunal. Consequently, the case of *Campbell and Another v Zimbabwe (2009 Campbell case)*<sup>127</sup> was filed in accordance with article 32(4) of the Tribunal's Protocol. The main

<sup>124</sup> The reports of the observer missions are on file with the author.

<sup>125</sup> 'SADC suspends Madagascar' <http://www.mg.co.za/article/2009-03-31-madagascar-neighbours-mull-sanction> (accessed 27 February 2010).

<sup>126</sup> See *Mike Campbell (Pvt) Limited & Others v Zimbabwe* (2008) AHRLR 199 (SADC 2008) (*Campbell case*) in which judgment was delivered on 28 November 2008.

<sup>127</sup> Unreported Case SADC (T) 03/2009.

question was whether Zimbabwe was in breach and contempt of the Tribunal's decision of 28 November 2008. Although Zimbabwe refused to take part in the proceedings, the Tribunal found that the actions and omissions of the Zimbabwean authorities provided evidence of the state's breach. Thus, the Tribunal declared that it would invoke article 32(5) of its Protocol to report its finding to the SADC Summit.<sup>128</sup>

Although the case itself was straightforward, the events triggered by the finding and the report of the finding to the Summit have been monumental. The Summit had referred the matter to the SADC Ministers of Justice and Zimbabwe had challenged the legality and legitimacy of the SADC Tribunal. These events raise questions on the legitimacy of the Tribunal's human rights competence and amplify the need for a decision on whether to confer express human rights jurisdiction on the Tribunal. They also demonstrate the difficulty of enforcing decisions against un-co-operating states and the question whether options for encouraging compliance other than enforcement sanctions need to be explored.

#### 4.2.2 *Zimbabwe Human Rights NGO Forum v Zimbabwe*

The main question decided by the SADC Tribunal in *Zimbabwe Human Rights NGO Forum v Zimbabwe (NGO Forum case)*<sup>129</sup> was whether an NGO could take the place of aggrieved persons as a party in a human right case before the Tribunal. The Tribunal found that only the aggrieved persons could properly come before it and ordered that the application be amended to enable the proper parties to come before the Tribunal.<sup>130</sup> On a continent where victims of human rights violations are often too poor to seek a remedy, the importance of civil society intervention cannot be overemphasised. However, the decision triggers the question whether public interest litigation cannot be undertaken in the name(s) of the alleged victim(s).

#### 4.2.3 *Tembani v Zimbabwe*

During 2009, the SADC Tribunal gave its decision in the case of *Tembani v Zimbabwe (Tembani case)*.<sup>131</sup> Similar to the *2008 Campbell case*, the question before the Tribunal was whether sections of Zimbabwean national legislation was in conformity with the principles of human rights, democracy and the rule of law contained in the SADC Treaty.<sup>132</sup> It is important to note that despite the challenges thrown up from the *2008 Campbell case*, Zimbabwe took part in the *Tembani* proceedings, albeit belatedly and to challenge the jurisdiction of the Tribunal. The

<sup>128</sup> 2009 *Campbell case 2*.

<sup>129</sup> Unreported Case SADC (T) 05/2008.

<sup>130</sup> See *NGO Forum case 3*.

<sup>131</sup> Unreported Case SADC (T) 07/2008.

<sup>132</sup> *Tembani case 2*.

Tribunal used the case to re-emphasise the importance of exhaustion of local remedies in international human rights law and cited provisions from the African Charter and the European Convention on Human Rights and Fundamental Freedoms. This is significant in the sense that the Tribunal holds out its intention to engage in dialogue with the norms and jurisprudence of other human rights systems.

In its analysis before it found the case admissible, the Tribunal took the view that one of the aims of the requirement to exhaust local remedies is to avoid parallel proceedings.<sup>133</sup> This recognition is important as it has the potential to prevent a conflict of jurisdiction between the Tribunal and national courts. While it acknowledged the applicability of the requirement, the Tribunal employed the exceptions to declare the case admissible.<sup>134</sup> In relation to the merits of the case, the Tribunal followed its precedent in the *2008 Campbell* case and found in favour of the applicant.<sup>135</sup> It was interesting that the Tribunal made a subtle suggestion that Zimbabwe could have elected to pursue what can be described as an amicable settlement.<sup>136</sup>

Notwithstanding the fact that it has no clear competence in human rights matters, the SADC Tribunal continues to stand out as an institution with a strong potential for the judicial protection of human rights. This is significant in the face of the limited access to the African Human Rights Court granted by states in the region. The Community's involvement of promoting democratic governance is also commendable even though it may be necessary to ensure that a substantial impact is made rather than allowing the SADC mechanisms to become rubber stamps for otherwise inadequate processes. In terms of enforcement, there is a clear challenge that needs to be addressed if the Community mechanisms are to remain relevant.

## 5 Conclusion

The human rights developments in the three sub-regional systems considered in this contribution are illustrative of the emergence of another level of human rights regionalism in Africa. To different degrees, the involvement of the RECs in the field of human rights is becoming bolder as much in the non-judicial sector as in the sector of judicial protection. Both the ECCJ and the SADC Tribunal are increasingly becoming more analytical and positive in their engagement in determining complex human rights questions. The EACJ is taking an active part in seeking the expansion of its competence to include human rights issues. RECs

<sup>133</sup> *Temhani* case 12.

<sup>134</sup> As above.

<sup>135</sup> See *Ebobrah* (n 3 above).

<sup>136</sup> See *Temhani* case 24.

and their organs are also taking the lead in expanding the normative framework for human rights protection in Africa.

While these developments may be positive signals, they also come with some challenges. The potential for conflicting decisions from the different judicial bodies continues to exist and calls for conscious action. It is also open to debate whether there is a threat of lowered judicial standards. In the realm of non-judicial human rights developments, the involvement of all organs of the RECs in the field should serve as a lesson for the AU where most of its human rights work is seen as a concern of the African Commission. In this area also, there is a need for co-ordination in order to protect the sanctity of the African human rights system.