

# Human rights developments in African sub-regional economic communities during 2010

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## Summary

*In 2010, judicial and non-judicial human rights developments continued to grow within the framework of three of the most active regional economic communities in Africa, albeit at different paces. During the year, the East African Community and Economic Community of West African States structures sought to consolidate their existing human rights work. The East African Court of Justice tried to establish itself as a human rights court, making pronouncements that will shape the direction of human rights litigation before it. The EACJ continued to assert its role despite the non-adoption of the protocol required to expressly confer human rights jurisdiction upon it. In Southern Africa, while the Summit endeavoured to shape the democratic culture in the region, the Southern African Development Community Tribunal faced a serious challenge to its continued existence and operation as a forum for human rights realisation. These developments are analysed against the background of their overall significance to human rights in Africa.*

## 1 Introduction

Within the last two to three years, the involvement of African sub-regional organisations in the promotion and protection of human rights on the continent has increasingly become entrenched. Progressively, even if sometimes grudgingly, important actors in the African human

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rights system have had to deal with the reality that sub-regional bodies now contribute to the development of Africa's human rights agenda. Hence, for instance, in the development of a human rights strategy for Africa, the African Union (AU) recognised the emerging role of sub-regional bodies by creating room for their continued operation in the field whilst ensuring that they address the threat of conflict with continental institutions.<sup>1</sup> In a similar vein, the human rights work of the judicial arms of the sub-regional organisations has been acknowledged by the African Court on Human and Peoples' Rights (African Human Rights Court), to the extent that these sub-regional judicial bodies were invited to participate at a colloquium for Africa's international judicial and quasi-judicial bodies operating in the field of human rights.<sup>2</sup> These seemingly isolated events, when taken together, paint a picture of an expanded continental human rights system with sub-regional building blocks and justify the growing attention being paid to these sub-regional institutions.

Notwithstanding what could pass as an increasing acceptance of their involvement in the field of human rights in Africa, it is not all known sub-regional organisations in Africa that have ventured into the field. Over the relatively short span of visible sub-regional human rights activity on the continent, only three of the over 14 regional economic communities currently existing in Africa have maintained some form of sustained action in the field.<sup>3</sup> As has been the case in the last two years, the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) have remained visible and active in one form or another in the promotion and protection of human rights on the continent.<sup>4</sup> While it is beyond the scope of this contribution to try to understand and explain this trend, any keen observer would notice that these three sub-regional organisations have exhibited some evidence of deep integration in what theorists have branded as 'new regionalism'.<sup>5</sup> Some would argue that 'new regionalism', as practised by these three sub-

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<sup>1</sup> A zero draft of the Human Rights Strategy for Africa emerged some time in 2010 (on file with author).

<sup>2</sup> The Colloquium of the African Human Rights Court and Similar Institutions took place in Arusha, Tanzania, between 4 and 6 October 2010.

<sup>3</sup> As noted by F Viljoen *International human rights law in Africa* (2007) 488, the AU recognises eight RECs as building blocks of the African Economic Community (AEC) and, by extension, the AU. However, it has to be noted that sub-regional organisations such as the International Conference on the Great Lake Region (ICGLR) have also developed sub-regional human rights standards that are worthy of note even though no significant institutional human rights activity is evident in its organisational structure.

<sup>4</sup> See, generally, ST Ebobrah 'Human rights developments in the African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Law Journal* 233.

<sup>5</sup> Generally, see B Hettne 'The new regionalism: A prologue' in B Hettne *et al* (eds) *National perspectives on the new regionalism in the South* (2000).

regional bodies, may have accounted for their sustained involvement in the field of human rights realisation. Whatever the explanation may be, the involvement of African sub-regional bodies in the field has not been without its detractors.

In some ways, the year 2010 was a significant watershed for sub-regional human rights work in Africa. While advancements were recorded in some sectors, in others less than impressive events occurred that potentially threaten the continued existence of sub-regional *loci* for human rights realisation. This contribution sets out and undertakes a modest analysis of some of the most important human rights developments in the organisational frameworks of the EAC, ECOWAS and SADC. Divided into three main sections, each of which deals separately with each organisation, the contribution considers both judicial and non-judicial human rights activities that occurred in these organisations in 2010. Owing to obvious limitations of access to primary materials and space, the contribution does not attempt to present an exhaustive consideration of its subject matter. However, an effort has been made to include the most significant developments.

## 2 East African Community

In 1999, the Treaty establishing the EAC was adopted by the three original founding partner states, namely, Kenya, Tanzania and Uganda.<sup>6</sup> The main objective of the EAC is to develop and engage in 'policies and programmes aimed at widening and deepening co-operation among partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs'.<sup>7</sup> In pursuit of its objectives, article 5(2) the 1999 Treaty (as amended) envisages the progressive establishment of a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation.<sup>8</sup>

Under the 1999 Treaty of the EAC, the promotion and protection of human rights is not one of the expressly-stated objectives of integration.<sup>9</sup> However, the Treaty contains ample references to human rights

<sup>6</sup> The EAC was initially founded by Kenya, Tanzania and Uganda in 1967 but became dissolved in 1977 following disputes between the partner states. With the new wave of regionalism partly prompted by reactions to globalisation, the EAC was revived with the adoption of a new founding Treaty in 1999. This Treaty was first amended in 2006 and later in 2007. With the accession of Burundi and Rwanda to the Treaty of the EAC, the Community now has five partner states. The Treaty of the EAC (as amended) is reproduced in S Ebovrah & A Tanoh (eds) *Compendium of African sub-regional human rights documents* (2007) 37.

<sup>7</sup> See art 5 of the 1999 Treaty of the EAC as amended.

<sup>8</sup> In 2010, the EAC adopted a Protocol to formally create a Common Market, thereby effectively moving into the second major phase of its existence.

<sup>9</sup> Some would argue, based on the theory of 'new regionalism', that there is no need for such express statement of objective to enable a regional organisation to engage in human rights work.

that currently sustain EAC action in the field of human rights. By article 6(d) of the 1999 Treaty of the EAC (as amended), one of the fundamental principles governing the achievement of Community objectives is respect for the principle of:

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.

By article 7(2) of the 1999 Treaty, EAC partner states further undertake 'to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally-accepted standards of human rights'. These and other provisions setting out rights-related objectives of the EAC<sup>10</sup> constitute the legal foundation upon which a delicate EAC human rights regime is built. Relying on this foundation, in 2010, the EAC engaged in both the judicial and non-judicial realisation of human rights.

## 2.1 Non-judicial human rights developments

Non-judicial human rights developments as used in this contribution refers to all human rights-related activities undertaken by organs and institutions of the EAC other than the East African Court of Justice (EACJ). Such non-judicial human rights developments cover activities as diverse as standard setting, thematic meetings and activities aimed at strengthening democracy within the partner states of the EAC.

### 2.1.1 Standard setting<sup>11</sup>

The East African Legislative Assembly (EALA), which is the legislative organ of the EAC, was fairly active in setting human rights and rights-related standards in 2010. In February 2010, the EALA adopted a resolution urging EAC partner states to 'take action against the practice of Female Genital Mutilation/Cutting (FGM/C) for non-medical reasons'.<sup>12</sup> It would be recalled that the scourge of FGM/C is one that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) expressly

<sup>10</sup> See, generally, art 5(3)(b), (d) (e) and (f) of the 1999 EAC Treaty as amended.

<sup>11</sup> Generally, the term 'standard setting' is associated with the adoption of treaties and, to a lesser extent, declarations by legislative and decision-making bodies of international organisations. However, owing to the limited scope of human rights standard setting in African sub-regional organisations, the term is liberally applied in this contribution to cover every activity that sets or re-affirms standards even in non-binding contexts.

<sup>12</sup> 'Resolution to urge partner states to fight FGM/C' press statement released by the Public Relations Department of the EAC.

addresses.<sup>13</sup> This raises the question whether such a resolution by the EALA has any additional value for the protection of women and girls in the East African region. However, as noted by the EALA in the build-up to the resolution, the laws and policies against the practice of FGM/C in most EAC partner states are hardly implemented. Against this background, there is very little chance that the African Women's Protocol can be successfully invoked as a bulwark against the scourge. In this regard, and in view of the relatively high incidence of FGM/C still recorded in at least three partner states of the EAC, the resolution by the EALA is a significant effort to protect the rights of vulnerable girls and women.

Although the potentially persuasive effect of the resolutions of the EALA in EAC partner states cannot be denied, there is yet to be any concrete measurement of the effectiveness of such resolutions. Further, there is room for civil society organisations (CSOs) and non-governmental organisations (NGOs) to build active campaigns on such resolutions.

The adoption of a draft election observation manual by the EALA was another important rights-related development during 2010. It is important to note that both ECOWAS and SADC have previously adopted regional guidelines for the conduct of democratic elections. These guidelines, which apparently take global standards into account, are generally applied as a yardstick to measure the conduct of elections in member states of these organisations. Thus, the adoption of this manual by the EALA allows the EAC to catch up with the other two sub-regional bodies. This is particularly important considering that the AU-initiated Charter on Democracy, Elections and Governance is yet to enter into force.<sup>14</sup> The EAC Election Observation Manual is seen by the EALA as an instrument that will 'enhance democracy, rule of law and governance, which is essential for political, social and economic development of the region'. Further, the EALA perceives the manual as one that 'sets a common standard to determine the credibility of electoral processes and the legitimacy of electoral outcomes in the five countries of the East Africa Community (EAC)'. Although the argument could be made that there is a risk of the creation of 'regional standards' that fall below accepted global and continental standards for conducting elections, the fact remains that the chances of enforcement of electoral standards are higher within sub-regional organisations in view of the potential risk that failed elections pose to neighbouring states.

By far the most important human rights standard-setting activity in the EAC during 2010 was the consolidation of the process for the

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<sup>13</sup> The African Women's Protocol was adopted in 2003 on the platform of the AU and entered into force in 2005. It is reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 61.

<sup>14</sup> The African Charter on Democracy, Elections and Governance was adopted in 2007. It is yet to enter into force.

adoption of an EAC Bill of Rights. At a meeting of the National Human Rights Commissions (NHRCs) of EAC partner states that took place in June 2010, a draft copy of the EAC Bill of Rights was adopted for recommendation to the EAC Council of Ministers.<sup>15</sup> The EAC Bill of Rights is an initiative of the EAC NHRCs and is facilitated by a regional CSO, the *Kituo cha Katiba* (Centre for Constitutional Development). The active involvement of civil society and the initiative by NHRCs gives a *prima facie* impression of transparency and local ownership rather than the imposition of standards by governments in the region. It remains to be seen how much governments of EAC partner states will be willing to accept from the draft Bill of Rights.

The EAC Bill of Rights proposes to set common standards in partner states and builds on municipal bills of rights in these states. Significantly, the Bill of Rights is expected to ‘support the development of the EAC Good Governance Protocol and its four pillars, namely, democracy and democratisation processes; human rights and equal opportunities; anti-corruption, ethics and integrity; and rule of law and access to justice’.<sup>16</sup> Clearly, this process comes with a risk of conflicting standards *vis-à-vis* the African Charter on Human and Peoples’ Rights (African Charter) and other continental human rights standards. However, it cannot also be denied that the process leading up to the adoption of the EAC Bill of Rights is significantly inclusive and has the potential to be ‘owned’ by all stakeholders in the region. In order to address the risk of conflicting standards that would allow pariah states to claim competing loyalty, it is expected that the EAC Bill of Rights will make clear reference to the African Charter as a statement of the minimum standard upon which the Bill of Rights stands. It has to be noted further that the adoption of a bill of rights potentially opens room for the operationalisation of the express human rights jurisdiction of the EACJ.<sup>17</sup>

### 2.1.2 Thematic meetings

Thematic meetings targeted at specific human rights and rights-related issues featured in the activities of the EAC during 2010. One of the most prominent of such meetings was the EAC Conference on Persons with

<sup>15</sup> ‘Heads of Human Rights Commissions Recommend Draft EAC Bill of Rights to Council of Ministers’, press release by the Public Relations Department of the EAC. As at the time of writing, the draft bill was still only with the EAC Secretariat.

<sup>16</sup> The EAC Good Governance Protocol is currently undergoing review by stakeholders in EAC partner states. E-mail communications between the author and an official at the EAC Secretariat give the impression that it is only after the current round of consultations that the document would be released to the general public.

<sup>17</sup> By art 27(2) of the 1999 EAC Treaty (as amended), the human rights jurisdiction of the EACJ is made subject to the adoption of a protocol to that effect by partner states.

Disabilities.<sup>18</sup> The conference brought together policy makers in EAC partner states, EAC organs and institutions, national parliamentarians and the private sector to stimulate 'new thinking' on ways to positively impact on the lives of people living with disabilities.<sup>19</sup> The conference adopted specific resolutions aimed at the different groups of stakeholders that participated. Thus, for instance, EAC partner states were implored to develop credible statistics on people with disabilities and to create disability focal points in key ministries. The private sector was encouraged to consider affirmative action for the employment of persons with disabilities, including through the use of quota systems. The EAC organs were challenged to establish a regional Disability Development Fund and to rally partner states to ratify the UN Convention on Disability as a regional block.

The EAC initiative on persons with disabilities is coming at a time when the AU, through the African Commission on Human and Peoples' Rights (African Commission), is still in the process of consulting for the purpose of developing a continental protocol to protect the rights of people with disabilities. Consequently, the EAC initiative fills an existing gap and engages actors at levels that continental and global initiatives would find difficult to access. Thus, there is some sense of a complementary role emerging from the region. Despite the positives, it is not clear whether any conscious effort is being made to feed the EAC initiative into the wider continental project of the AU.

In relation to conflict management, the EAC engaged in a meeting with the International Conference on the Great Lakes Region (ICGLR) that resulted in the signing of a Memorandum of Understanding (MoU) to enable both organisations to create synergy for the promotion of human rights-related concerns.<sup>20</sup> The MoU is said to aim at 'preventing, managing and resolving conflicts in the Great Lakes region; promote democracy and good governance; support measures aimed at the prevention of sexual violence against women and children and; promote measures aimed at improving protection of human rights and the environment, among others'.<sup>21</sup> It would be noted that all partner states of the EAC are also members of the ICGLR. Accordingly, the signing of a MoU allows the states to avoid unnecessary duplication of responsibilities and encourage joint action that potentially saves scarce resources. Clearly, the scale of conflicts in the region creates the need for responses that continental organisations have yet to proffer solutions to. Thus,

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<sup>18</sup> 'Conference designs robust resolutions to guide PwD's engagement with EAC partner states, private sector, EAC organs and institutions and national parliaments', press release by the Public Relations Department of the EAC Secretariat.

<sup>19</sup> As above.

<sup>20</sup> 'EAC, ICGLR sign MoU' press release by the Public Relations Department of the EAC Secretariat.

<sup>21</sup> As above.

joint action by the EAC and ICGLR is likely to promote and protect the rights of the most vulnerable during regional conflicts.

It is significant to note that the ICGLR has adopted region-specific instruments that seek to address the human rights and other challenges that persons displaced by conflicts face in the Great Lakes region. In the absence of similar instruments in the EAC, joint action by both organisations would have far-reaching consequences for human rights protection in the region. This is especially so as the AU instruments on internally-displaced persons still have a long way to go before they come into effect.<sup>22</sup>

### 2.1.3 Strengthening democracy

A significant addition to the human rights work of the EAC in 2010 related to activities aimed at strengthening democracy among partner states. During 2010, the EAC was involved in observing elections in two of its partner states. In July 2010, a 25-member EAC election observer team was sent to observe legislative elections in Burundi.<sup>23</sup> An outstanding feature of the team was that it comprised of diverse actors, including representatives of NHRCs of partner states. In including NHRCs in its election observer team, the EAC appeared to be affirming the link between human rights and democratic governance.

In October 2010, at the invitation of the National Electoral Commission of Tanzania, the EAC also sent an Election Observer Mission to observe elections. As was the case with the Mission to Burundi, the team to Tanzania was diverse and included representatives of NHRCs.<sup>24</sup> The listed objectives of the Mission to Tanzania include to 'assess whether conditions exist for free and fair elections ... assess consistency with the provisions of the African Charter on Human and Peoples' Rights, the AU Declaration on the Principles Governing Democratic Elections in Africa, the United Nations Declaration on Human Rights and the International Covenant on Civil and Political Rights' and to 'determine whether the results of the election reflect the wishes of Tanzanians'.<sup>25</sup>

The EAC justifies its involvement in election observation by placing reliance on the provisions of articles 3(1)(b), 6(d) and 7(2) of the 1999

<sup>22</sup> The AU Convention for the Protection and Assistance of Internally-Displaced Persons was adopted in 2009 and is yet to enter into force.

<sup>23</sup> 'EAC Election Observer Mission for legislative elections in Burundi', press release by the Public Relations department of the EAC Secretariat.

<sup>24</sup> 'EAC Election Observer Mission to the 2010 general elections in the United Republic of Tanzania', press release by the Public Relations department of the EAC Secretariat.

<sup>25</sup> See the interim statement released by the EAC Election Observer Mission (on file with author).



EAC Treaty (as amended) and also on article 123 of the Treaty.<sup>26</sup> It is noteworthy that the work of the election observation missions is hinged on continental and global standards rather than the more recent EAC draft guidelines adopted by the EALA. Apart from the fact that the newly-adopted guidelines are not binding, the reference to continental and global standards potentially ensures that lower standards are not applied in the assessment of elections. Against the fact that in some cases, election observation and monitoring missions have unwittingly legitimised fraudulent elections, the critical nature of the interim report of the EAC Mission to Tanzania creates expectations of objectivity that would be beneficial for the promotion of democracy in the EAC.

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

The EACJ is the judicial organ of the EAC. The Court is divided into a First Instance Division and an Appellate Division. The jurisdiction of the EACJ, as set out in articles 23 and 27 of the 1999 EAC Treaty (as amended), is to interpret and apply the Treaty.<sup>27</sup> It is envisaged that the jurisdiction of the Court would be expanded by a protocol adopted by partner states to that effect to cover additional issues, including human rights.<sup>28</sup> As of 31 December 2010, no protocol had been adopted to expand the jurisdiction of the Court. Thus, during 2010, the EACJ did not have an express human rights jurisdiction, even though the Court had previously assumed an implied jurisdiction over human rights.<sup>29</sup> Consequently, the Court's five year strategic plan adopted in 2010 has very little reference to human rights.

Notwithstanding that the human rights jurisdiction of the EACJ is not yet a reality, in 2010 the EACJ entertained cases that touched on human rights. It is also significant to note that in one of these cases, for the first time, the EACJ moved away from its seat to hear a matter in the *locus*.<sup>30</sup> This is to the benefit of litigants who may be unable to travel to the Court. Despite the expectations raised by the Court after the initial case, only one decision with a human rights effect was handed down during 2010.

<sup>26</sup> See the press release announcing the Mission (on file with author). The first three provisions listed relate to '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 rights'.

<sup>27</sup> See art 27(1) of the 1999 EAC Treaty (as amended).

<sup>28</sup> Art 27(2) 1999 EAC Treaty (as amended).

<sup>29</sup> See the decision in *Katabazi & Others v The Secretary-General of EAC & Others* Ref 1 of 2007 (unreported) <http://www.saflii.org/ea/cases/EACJ/2007/3.html> (accessed 1 April 2011).

<sup>30</sup> See *AG Kenya v Anyang Nyoung* Application 1.

### 2.2.1 *Ariviza and Another v AG, Kenya and Others*

In their (main) action before the EACJ, the claimants invited the Court to find that the process of the referendum and the promulgation of a new Constitution in Kenya amounted to a violation of the EAC Treaty. The claim was brought under articles 5(1), 6(c) and (d), 7(2), 8(1)(c), 27(1) and 29 of the EAC Treaty as well as articles 1, 3, 7(1) and 9(2) of the African Charter.<sup>31</sup> As well, the claimants applied for an injunction to restrain any further action by Kenya while the action was pending before the EACJ. The respondents reacted by filing a preliminary objection challenging the competence of the EACJ to receive the claim. They alleged that it fell outside the scope of the jurisdiction conferred in article 27(1) of the EAC Treaty.

In its ruling on the preliminary objection, the EACJ considered the relevant provisions of the EAC Treaty dealing with its establishment and competence. The Court came to the conclusion that it could hear a claim brought by 'residents of the East African Community alleging that a partner state has committed acts that violate the provisions of the Treaty'.<sup>32</sup> According to the Court, the question whether there is merit in the claim was separate from the question whether the Court had jurisdiction since, in its view, the question of jurisdiction had been settled. Consequently, the EACJ claimed jurisdiction despite the fact that the claimants sought relief based on the African Charter which should arguably fall under the envisaged human rights jurisdiction to be conferred on the Court. Effectively, the EACJ was following its earlier decision in the *Katabazi* case, that it would not shy away from interpreting and applying the Treaty merely because claims of a human rights nature were included in an action.<sup>33</sup> However, it would be noted that, unlike the *Katabazi* case, the claim in this action is not exclusively based on the EAC Treaty, but includes reliance on provisions of the African Charter. A fundamental question that the Court would have to face is whether under its present statement of competence, it can exercise jurisdiction over such African Charter-based claims.

Considering that the protocol required to expand the jurisdiction of the Court has been delayed for years, the EACJ appears to be taking a somewhat activist posture to claim jurisdiction in matters that touch on human rights issues. The EACJ currently stands as the only international court before which a claim such as this could be brought as Kenya is yet to make the relevant declaration that would grant direct individual access against it before the African Human Rights Court. In effect, if the Court had shut out the claim at this preliminary stage, the claimants would have been left with no credible judicial option outside

<sup>31</sup> *Ariviza & Another v AG Kenya & Others* Application 3 of 2010 (arising out of Reference 7) 2.

<sup>32</sup> *Ariviza* (n 31 above) 9.

<sup>33</sup> See the *Katabazi* case (n 29 above).

the municipal courts of Kenya.<sup>34</sup> One can venture to say that, if the proposed EAC Bill of Rights is passed, the competence of the EACJ over human rights would no longer be in debate and litigants may then focus their energies on the substances of their cases.

### 3 Economic Community of West African States

The original Treaty establishing ECOWAS was adopted in 1975.<sup>35</sup> In 1993, a revised Treaty was adopted by ECOWAS member states to replace the original 1975 Treaty. The main objective of ECOWAS under the 1993 Treaty is 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 the development of the African continent.<sup>36</sup> Although human rights as an issue area was hardly mentioned in the 1975 Treaty, the 1993 ECOWAS Treaty makes robust references to human rights and creates a suitable environment for the introduction of a human rights regime in the ECOWAS organisational framework.

Building on an initial reference to human rights in its Preamble, the 1993 revision of the ECOWAS Treaty contains commitments by ECOWAS member states to respect human rights as guaranteed under the African Charter. Thus, in their statement of fundamental principles, ECOWAS member states undertake to adhere 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>37</sup> They further commit in article 56(2) of the Treaty to 'co-operate for the purpose of realising the objectives' of the African Charter. These commitments are reinforced by the adoption of other instruments with human rights implications within the ECOWAS Community framework. Together, the Treaty provisions and the other instruments have provided a legal foundation for ECOWAS to engage in human rights work. It is on this basis that the human rights activities of the judicial and non-judicial organs of ECOWAS were carried out in 2010.

<sup>34</sup> The African Commission is not a court and therefore cannot be a substitute for the EACJ, even though it is also an international forum for human rights litigation in Africa.

<sup>35</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>36</sup> Art 3(1) of the 1993 revised ECOWAS Treaty.

<sup>37</sup> See art 4 of the 1993 revised ECOWAS Treaty on the principles of ECOWAS.

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

Non-judicial human rights activities in the organisational framework of ECOWAS occur within and outside the ECOWAS Commission.<sup>38</sup> This is because certain ECOWAS institutions operate outside the seat of the ECOWAS Commission. Owing to the challenge of access to primary materials from the ECOWAS institutions based outside the ECOWAS Commission, this contribution focuses on non-judicial developments that took place within the ECOWAS Commission during 2010. In this regard, no significant standard-setting activities were recorded. However, thematic meetings and activities to strengthen democracy in the West African region were visible in the work of the ECOWAS Commission during 2010.

#### 3.1.1 Thematic meetings and programmes

During 2010, the scourge of human trafficking, especially in women and children, once again came under the spotlight in the work of ECOWAS. In February 2010, officials of ECOWAS concerned with tackling the crime of trafficking in persons within the region were involved in a crucial meeting with strategic partners, including the International Organisation on Migration (IOM), the United Nations Children's Emergency Fund (UNICEF), and the United Nations Office on Drugs and Crimes (UNODC).<sup>39</sup> The meeting was called to review the status of the implementation of the regional plan of action which was developed from the Palermo Protocol relating to the prevention, suppression and punishment for trafficking in persons, particularly women and children. One outcome of the meeting was a call for an ECOWAS Roadmap and Work Plan that focuses on counter-trafficking and the protection of children. In specific terms, the meeting proposed that the documents should 'focus on the four pillars of ensuring the development of appropriate institutional policy and legal framework; developing the methodologies and approaches for measuring and ensuring progress; ensuring adequate sensitisation on the twin issues and developing [links] between member states and stakeholders while building the capacity of member states for effectively combating the menace'.<sup>40</sup>

Although trafficking in persons has received attention from the relevant UN agencies for a while, the AU response to trafficking is still in its infancy. Thus, direct co-operation between sub-regional bodies and UN agencies appears to have become the preferred approach to adequately tackle the threat. The intensity of ECOWAS action in

<sup>38</sup> The ECOWAS Commission is the Executive Secretariat of the Community and hosts most of the institutions and executive activities of the Community.

<sup>39</sup> 'Strategic partners call for roadmap and work plan to combat trafficking of women and children in West Africa' <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2010> (accessed 31 March 2011).

<sup>40</sup> As above.

co-operation with member states appears to have made global instruments against trafficking more effective in the region. In the face of known challenges regarding the implementation of international human rights instruments, the question arises whether smaller congregations of states proximate to each other should not be explored as options to create waves of pressure to ensure greater efficiency in the application of international human rights instruments.

In March 2010, ECOWAS collaborated with the AU to host another programme on combating trafficking in persons.<sup>41</sup> The programme 'recommended a variety of initiatives under a three-tier arrangement that would enable countries of origin, transit and destination to address the dimensions of the menace, particularly as it affects women and children'. The collaboration is indicative of a greater sense of awareness on the part of the AU regarding the scourge of trafficking in persons on the continent. Hence, the 'joint programme was meant to evaluate the status of implementation of the plan and launch the ECOWAS phase of the African Union Commission Campaign Initiative against Trafficking (AU COMMIT), which seeks to galvanise the various stakeholders for a synergised and co-ordinated action in combating human trafficking'.<sup>42</sup> The AU/ECOWAS programme was followed by another collaborative action, involving the AU, ECOWAS and IOM. This latter programme was aimed at launching 'a new two-pronged campaign to operationalise the continent's four year-old instrument to address the challenges of human trafficking, particularly women and children' through regional workshops.<sup>43</sup> Arguably, collaborations such as these are indicative of the acceptance of the role of sub-regional bodies in advancing the cause of human rights in Africa. Additionally, the risk of duplication of action and of potential competition will be reduced significantly to the benefit of all stakeholders.

During 2010, humanitarian concerns arising from ongoing and past conflicts in the region received the attention of the ECOWAS authorities. In March 2010, ECOWAS collaborated with the United Nations High Commission for Refugees (UNCHR) and the African Development Fund (ADF) to seek ways to implement the humanitarian dimension of the ECOWAS Peace and Development Project.<sup>44</sup> Cognisant of the increasing humanitarian concerns that regional conflicts have caused over the years, the collaboration focuses on 'issues ranging from social

<sup>41</sup> 'African Union campaign against trafficking in persons launched for ECOWAS' <http://news.ecowas.int/presseshow.php?nb=050&lang=en&annee=2010> (accessed 31 March 2011).

<sup>42</sup> As above.

<sup>43</sup> 'ECOWAS joins AU, IOM to extend fight against human trafficking' <http://news.ecowas.int/presseshow.php?nb=049&lang=en&annee=2010> (accessed 28 March 2011).

<sup>44</sup> 'ECOWAS, UNCHR, ADF explore issues on humanitarian dimension to regional peace and development project' <http://news.ecowas.int/presseshow.php?nb=038&lang=en&annee=2010> (accessed 31 March 2011).

reintegration of refugees, displaced and repatriated persons and economic recovery of local economies in the post-conflict period in member states'.<sup>45</sup> It would be noticed that some of the issues listed are those covered by the AU Convention for the Protection and Assistance of Internally-Displaced Persons. However, in view of the fact that the Convention, itself, is yet to come into force, sub-regional initiatives represent the best opportunity for protecting the rights of vulnerable people affected by conflict. Clearly, the benefits of such sub-regional interventions sufficiently weigh in favour of the regionalisation of human rights.

### 3.1.2 Strengthening democracy

As was the case in previous years, activities aimed at building and strengthening the democratic culture in ECOWAS member states featured prominently in the work of the organisation during 2010. Building on strategies from 2009, based on the 2001 ECOWAS Protocol on Democracy and Good Governance, the organisation continued to engage with national authorities in member states in which democratic governance has been disrupted.<sup>46</sup> Thus, in February 2010, the ECOWAS Heads of State and Government piled pressure on the military junta in Niger to show a greater commitment to the mediation process in order to return the country to constitutional democracy.<sup>47</sup> Similarly, the Heads of State and Government reviewed the progress towards resolving the political impasse in Guinea. By maintaining contact with the unconstitutional governments in these countries, ECOWAS keeps open a window of opportunity for the restoration of democracy in such states. This is significant in view of the twin facts that the African Charter on Democracy, Elections and Governance is yet to enter into force and the AU does not have a history of positive mediation of return to democracy. Overall, the results of ECOWAS mediation in these countries demonstrate the usefulness of peer pressure for the restoration of democracy in the sub-regions.

Another manifestation of ECOWAS initiatives to strengthen democracy in the West African sub-region came in the form of election observer missions. Hence, in February 2010, a 300-member ECOWAS Election

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<sup>45</sup> As above.

<sup>46</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. By art 45 of the ECOWAS Protocol on Democracy and Good Governance, member states of ECOWAS are liable to sanctions in the event that a democratic government is overthrown.

<sup>47</sup> In late 2009, the military in Niger overthrew the civilian government of Mamadou Tandja following that government's attempt to amend the Constitution to extend its term of office.

Observer Mission was sent to monitor presidential elections in Togo.<sup>48</sup> The ECOWAS approach was to put together a team of civilian and military experts to assess different segments of the electoral process. Unlike the EAC model, members of NHRCs were not involved in the ECOWAS missions, although experts from civil society were included in the team. ECOWAS election observer missions were similarly sent to observe elections in Côte d'Ivoire in October 2010 and to Guinea and Burkina Faso in November 2010.

With respect to Togo, although the Observer Mission gave a general pass mark on the elections, it challenged the Electoral Commission of Togo to seek a more independent and permanent structure in order to enhance its performance. Against the background that 'diplomatic speak' is a common feature of the report of electoral missions, the call made by the ECOWAS team to Togo could almost read as an indictment, since the 2001 ECOWAS Protocol on Democracy and Good Governance requires states to set up electoral commissions that are independent.<sup>49</sup> Concerning the elections in Côte d'Ivoire, the summary of the report of the ECOWAS Mission was that 'the ECOWAS Observer Mission did not observe any major irregularities likely to taint the freedom, credibility and transparency of the 31 October 2010 presidential election in Côte d'Ivoire'.<sup>50</sup> The summary of the report of the Mission to Guinea stated that '[t]here were no major irregularities or incidents likely to taint the freedom, credibility and transparency of the 7 November 2010 presidential election in Guinea'.<sup>51</sup> Such similarity of language creates room for questioning the authenticity of the reports of electoral missions.

By observing, monitoring and reporting on the electoral process, the ECOWAS missions provide materials for the organisation to append its mark of approval on such elections. The approval given by sub-regional organisations rates very high since the perception and support of neighbouring leaders provide the impetus that newly-elected leaders require to claim legitimacy at home and in front of the international community. Thus, the credibility of such reports needs to be maintained and any temptation to provide unwarranted peer protection of incumbent heads of states needs to be avoided. Arguably, activities aimed at strengthening democracy have a strong potential to impact on other human rights developments within the ECOWAS institutional frame.

<sup>48</sup> 'ECOWAS deploys an observation mission to monitor the 2010 presidential elections in Togo' <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2010> (accessed 31 March 2011).

<sup>49</sup> See art 3 of the 2001 ECOWAS Protocol on Democracy and Good Governance.

<sup>50</sup> 'The 31st October 2010 presidential election in Côte d'Ivoire was held in a peaceful environment' <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2010> (accessed 31 March 2011).

<sup>51</sup> 'ECOWAS welcomes the proper conduct of the second round of the presidential elections in Guinea' <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2010> (accessed 31 March 2011).

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

Although the ECOWAS Community Court of Justice (ECCJ) came into being in 1991, it was not until the early part of the new millennium that it became active.<sup>52</sup> Following challenges that the Court faced in the early years of its existence, including the issue of a lack of individual access, internal and external pressure was mounted on ECOWAS authorities resulting in the adoption in 2005 of a Supplementary Protocol on the Court.<sup>53</sup> Some of the high points of the 2005 Supplementary Protocol on the ECOWAS Court were the conferment of a clear human rights competence on the Court and the liberalisation of individual access to the Court. Since the coming into force of the 2005 Supplementary Protocol, ECCJ has been very active in the field of human rights protection. During 2005, several cases with huge implications for human rights passed through the doors of ECCJ and these are briefly dealt with below.

#### 3.2.1 *Garba v Benin*<sup>54</sup>

In February 2010, ECCJ delivered its decision in this action brought by a Nigerian national alleging that he had been brutalised by officials of the Beninese Immigration Service for his refusal to pay a bribe demanded by a Beninese immigration officer. The Nigerian applicant was travelling from Nigeria through Benin to Burkina Faso in the company of a colleague when the events leading to the action allegedly occurred. In the action before ECCJ, the applicant claimed that the acts of the Beninese officials amounted to a violation of his right to dignity and his right to free movement as guaranteed in articles 2, 4, 5 and 12 of the African Charter. The applicant relied on article 1(1) of the ECOWAS Protocol on the Definition of a Community Citizen, article 10(c) of the 2005 Supplementary Protocol of the Court as well as article 4 of the 1993 Revised Treaty as the legal foundation for his action.

Upon the facts and on the basis of the instruments cited, the applicant invited ECCJ *inter alia* to declare that the demand for money without receipt before the stamping of his passport was a violation of his right to free movement as protected by ECOWAS Protocol A/PP1/5/79 on Free Movement of Persons, Right of Residence and Establishment as well as article 12 of the African Charter. The applicant also sought a declaration that the physical assault on him and the wounds

<sup>52</sup> Originally established in the 1975 ECOWAS Treaty, the ECCJ was operationalised by Protocol /P1/7/91 of 6 July 1991 on the ECOWAS Community Court of Justice adopted by ECOWAS member states in 1991.

<sup>53</sup> Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 relating to the Community Court of Justice adopted in 2005.

<sup>54</sup> Gen List ECW/CCJ/APP/03/09; judgment ECW/CCJ/JUD/01/10, judgment delivered 17 February 2010.



he sustained violated his right to dignity protected by article 5 of the African Charter. Consequently, the applicant asked for US \$300 000 as general damages.

For its part, the state of Benin argued that the action was in violation of article 33(a)<sup>55</sup> of the Rules of the ECOWAS Court and article 10(d) of the 2005 Supplementary Protocol.<sup>56</sup> Essentially, the state's position was that the applicant had failed to comply with certain procedural requirements and, therefore, the Court lacked the competence and jurisdiction to hear the matter. Thus, the Court was faced with an action on merit and the preliminary objection. Both aspects were argued together and the Court elected to address both aspects in a single decision.

In its analysis on the preliminary objection, ECCJ rightly emphasised that 'the mere absence of the citation of the applicant's address on his application cannot constitute an obstacle to the admissibility of the application'.<sup>57</sup> Further, the Court took the view that the 'anonymity of an application presupposed that the author is not identified: That implies that neither the name nor status nor profession or nationality of the applicant is known.'<sup>58</sup> Against this background and on the basis that the applicant was represented by counsel, the Court held that the application was not anonymous. As simple as this decision may appear, the fact cannot be ignored that it is possible for an international court to unnecessarily defer to states and prioritise procedural requirements to the detriment of justice. Decisions such as the present one characterise ECCJ as a court which does not unduly insist on technicalities.

With regard to the merits of the case, the Court took the view that the applicant had not proved his case as the burden of proof lay on him as the person who made the allegation. The Court was convinced that, as the applicant did not link the event alleged to any particular officer, did not show any evidence that any report was made to any national police authority and did not call any witness, no case had been proved against the state. Accordingly, the claim was dismissed.

A point to be made is that the issue of evidence was crucial before ECCJ because the Court was the forum of first instance in this case. In so far as ECCJ continues to find itself in the role of a court of first instance, issues of evidence and proof will remain critical. This has not been the case with the African Commission and is not likely to be the case with the African Court since such cases requiring evidence are often first

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<sup>55</sup> Art 33 of the Rules relates to the form of applications before the ECCJ. Subpara 1 requires the name and address of an applicant to be included on the processes filed.

<sup>56</sup> Art 10(d) of the 2005 Supplementary Protocol grants individual access in human rights cases in so far as the application is not anonymous and had not instituted before another international court.

<sup>57</sup> Para 26 of the judgment in the *Garba* case (n 54 above).

<sup>58</sup> Para 28.

brought before national courts. Thus, lawyers appearing before the ECCJ may need to condition their minds to the need for evidence of the type that would be adduced before municipal tribunals.

### 3.2.2 *Habré v Senegal* (ruling on preliminary objection)<sup>59</sup>

It would be recalled that Hissène Habré, who ruled Chad from 1982 until 1990 (when he was overthrown in a military *coup*), brought an action against Senegal before the ECCJ in 2008. In his action, Mr Habré claimed that Senegal, by amending its laws to accommodate the possibility of trying him for offences of an international character allegedly committed by him during his term in office, had violated ECOWAS law, generally, and his rights specifically.<sup>60</sup> According to Mr Habré, Senegal violated the principle of non-retroactivity of penal law (article 11(2) of the Universal Declaration of Human Rights (Universal Declaration) and article 7(2) of the African Charter); the right to an effective remedy (article 8 of the Universal Declaration and article 3 of the International Covenant on Civil and Political Rights (ICCPR)); and the principle of equality before the law (articles 7 and 10 of the Universal Declaration; articles 14 and 26 of ICCPR; article 3 of the African Charter; and article 7(4) of the Constitution of Senegal). Mr Habré claimed further that Senegal's actions were in violation of the principles of *res judicata*,<sup>61</sup> separation of powers and the independence of the judiciary as well as the right to a fair trial.

Following service of the court processes on Senegal, the state was heard and a preliminary objection was raised regarding the competence of ECCJ to entertain the matter and the admissibility of the case. After analysing the issues, the Court held that it had the competence to hear the case and that the matter was admissible. No significant issues emerged from the ruling. The judgment on the merits is discussed below in 3.2.5.

### 3.2.3 *David v Uwechue*<sup>62</sup>

A significant feature of this case is that it is one between two individuals and involves no state parties. The applicant, a Nigerian national and an officer in the Nigerian police force, brought this action against the defendant, another Nigerian national and a former special representative of the Executive Secretary of ECOWAS.<sup>63</sup> Alleging that the

<sup>59</sup> Gen List ECW/CCJ/APP/07/08; judgment ECW/CCJ/APP/02/10, ruling delivered 14 May 2010.

<sup>60</sup> See Ebobrah (n 4 above).

<sup>61</sup> The French term *chose jugée* has been roughly translated here as *res judicata*.

<sup>62</sup> Suit ECW/CCJ/APP/04/09; judgment ECW/CCJ/RUL/03/10, ruling delivered 11 June 2010.

<sup>63</sup> Under the original structure, the head of administration in ECOWAS was known as the Executive Secretary rather than the President of the ECOWAS Commission as the office is now known.

defendant did not pay him the complete sum of money released by ECOWAS as his salary and allowances during his service as a security orderly attached to the defendant, the plaintiff claimed a violation of his right to property, his right to work under equitable and satisfactory conditions and his right to respect and freedom from discrimination under articles 1, 14, 15 and 28 of the African Charter.<sup>64</sup>

The plaintiff's action was brought under article 10(c) of the 2005 Supplementary Protocol instead of the more common article 10(d).<sup>65</sup> The plaintiff invited ECCJ to declare that the non-payment of his allowances was unlawful and to make an order compelling the defendant to pay the outstanding sum of US \$80 470. The plaintiff further sought general damages and the payment of his solicitors' fees. The thrust of defendant's case was that the plaintiff was not owed any dues and further that as a co-employee of ECOWAS, he was not liable to the plaintiff.

Although neither party questioned the competence of the Court, ECCJ placed reliance on article 88 of its Rules of Procedure and invited the parties to present legal arguments on the question of its competence.<sup>66</sup> Contrary to the positions taken by the parties, the Court focused on the question whether it could 'adjudicate on cases of human rights violations brought by an individual against another individual'. ECCJ also sought to know whether actions between individuals qualify as 'disputes relating to the Community and its officials' or whether actions for damages relating to an act of a Community institution or official could be entertained without the Community being sued as defendant.<sup>67</sup>

The questions raised *suo moto* by ECCJ are fundamental questions that ought to have been addressed in a previous case.<sup>68</sup> These issues touch on the status and character of ECCJ as an international court. While international human rights law and international humanitarian law may have catapulted individuals into international courtrooms, for now, individuals can only be defendants in international criminal jurisdictions rather than human rights courts. In its analysis of the questions it raised, ECCJ acknowledged the ambiguous nature of article 9(4) of the 2005 Supplementary Protocol regarding who can be

<sup>64</sup> See paras 1 to 6 of the *Uwechue* ruling (n 62 above).

<sup>65</sup> Art 10(c) is open to challenges to acts and inactions of a Community official which violate the rights of an individual or corporate body.

<sup>66</sup> Paras 24 to 34 of the *Uwechue* ruling (n 62 above).

<sup>67</sup> Para 34 of the *Uwechue* ruling (n 62 above).

<sup>68</sup> In the earlier case of *Ukor v Layele* (2005), unreported Case ECW/CCJ/APP/01/04, the ECCJ entertained a case involving only individuals even though the case was dismissed on some other grounds. See ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307-321-322 for an initial critique of the Court's decision to receive cases between individuals.

a defendant in a human rights claim before the Court.<sup>69</sup> ECCJ reasoned (correctly in my view) that an unrestricted reading of article 9(4) could lead to an unimaginable situation where the Court would ‘replace the ... domestic courts which would become redundant’ and the Court ‘would metamorphose itself from an international jurisdiction into a domestic one’.<sup>70</sup> In the Court’s opinion, this would result in ECCJ being ‘overwhelmed by a flood of all kinds of disputes coming from all member states’.<sup>71</sup> Should the Court allow itself to be dragged into such a role, not only will it find itself in competition with national courts, but it will lose the hegemonic position and the respect of state parties and municipal courts alike.

Perhaps, in demonstrating the importance the Court attached to the questions, it went further to emphasise that neither the drafters nor ECOWAS states could have intended ‘such a result and unrealistic task’ which had ‘never [been] conferred on any international or regional body of a similar nature’.<sup>72</sup> ECCJ made a point to re-emphasise the canons of interpretation, indicating a preference for contextual interpretation even though it made no reference to the Vienna Convention on the Law of Treaties (VCLT), which other international tribunals would have referred to.<sup>73</sup> Hence, in this decision, ECCJ appears to have departed from general practice, a direction that will determine further claims before it.

To further buttress its point that it is an international court, ECCJ made other crucial pronouncements that are likely to shape the future litigation in the budding ECOWAS human rights regime. The Court took pains to stress that it was the practice of international courts to rely ‘essentially on treaties to which states are parties as the principal subjects of international law’.<sup>74</sup> A quick point to note is that ECCJ had previously never indicated whether it would only apply treaties that a state respondent before it is party to. Consequently, the present *dicta* could be interpreted as a clear statement that only ‘relevant treaties ratified by the state concerned’ can be applicable against a given state.<sup>75</sup> However, the *dicta* could also merely be a restatement of the practice amongst international tribunals aimed at emphasising that ECCJ is an

<sup>69</sup> Paras 35 to 38 of the *Uwechue* ruling (n 62 above).

<sup>70</sup> Para 37 of the *Uwechue* ruling.

<sup>71</sup> As above.

<sup>72</sup> Para 38 of the *Uwechue* ruling (n 62 above).

<sup>73</sup> See para 39.

<sup>74</sup> Paras 41 to 43.

<sup>75</sup> See the formulation in art 3 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 41. Professors Laurence Helfer and Karen Alter, at a meeting in Abuja, March 2010, confirm that there is already a growing feeling among some stakeholders that by *dicta* such as the present one, the ECCJ is taking a position that it will only apply treaties ratified by states before it.

international court. The latter is supported by the fact the claim that the Court was analysing did not involve any state party and, further, was based on the African Charter which all ECOWAS member states have ratified. This would mean that there was no dispute as to whether an unratified treaty could be applicable against a state. Despite the debate as to the motivation for the *dicta*, ECCJ will align more with the practice in international law if it applies relevant treaties that a respondent state has ratified.

Other important issues are present in the *Uwechue* ruling. For instance, in contrast with its previous practice, ECCJ made clear references to continental institutions such as the African Court and the African Commission as examples of institutions with which the human rights practice of ECCJ can be compared.<sup>76</sup> It is open to debate whether this is one of the fruits of increasing acceptance of the human rights role of sub-regional bodies as evidenced by the participation of such institutions at the 2010 colloquium hosted by the African Court.<sup>77</sup> It was also significant that ECCJ went further to emphasise that, although individuals could not be defendants in an international tribunal like ECCJ, victims of violations by individuals could have resort to municipal courts, thus emphasising the possibility of the horizontal applicability of human rights.<sup>78</sup>

A final point to highlight is that ECCJ emphasised that, in the event of an ineffective or unavailable domestic remedy, action could lie vicariously against a state.<sup>79</sup> This aligns with the position of the Inter-American Court in the *Velasquez Rodriguez v Honduras* decision.<sup>80</sup> However, it also tempers the Court's earlier position that it stands in an integrated relationship with national courts in the sense that ECCJ may have to 'sit on appeal' on certain decisions from national courts. The Court's current position may also make it impracticable to insist against the exhaustion of local remedies since, by necessary implication, a cause of action can only arise against a state where it has failed to provide proper domestic remedies.

### 3.2.4 *Tandja v Djibo and Another*<sup>81</sup>

Following the overthrow of former Niger President Mamadou Tandja by a military *coup* in the early part of 2010, Mr Tandja was arrested and detained without trial. The present action was brought on behalf Mr Tandja against General Salou Djibo, head of the military junta and

<sup>76</sup> See paras 42 and 43 of the *Uwechue* ruling (n 62 above).

<sup>77</sup> See n 2 above.

<sup>78</sup> Para 46 of the *Uwechue* ruling (n 62 above).

<sup>79</sup> As above.

<sup>80</sup> (1988) Ser C No 4.

<sup>81</sup> Role Gen No ECW/CCJ/APP/05/09; Arret No ECW/CCJ/JUD/05/10, judgment of 18 November 2010.

the state of Niger. In the action, it was claimed that Mr Tandja's arrest and detention without trial or indictment amounted to a violation of his rights by the defendants. It was further claimed that the refusal to allow Mr Tandja to proceed abroad for treatment amounted to a violation of his rights. Consequently, Mr Tandja alleged a violation of articles 4 and 5 of the 1993 revised ECOWAS Treaty; articles 1, 2, 3, 5, 6 and 18 of the African Charter; articles 2, 3, 8 and 26 of ICCPR, articles 5, 7, 8, 9, 13 and 25 of the Universal Declaration; and a domestic statute. He also claimed that he had been subjected to torture. Mr Tandja invited ECCJ to declare that his rights had been violated and to order the defendants to send him for treatment abroad at the expense of the state.

Although Niger was under sanctions by way of its suspension from political activities of ECOWAS, it entered appearance and defended the action. The defendants argued that ECCJ lacked jurisdiction since the matter for which Mr Tandja was being detained was of a political nature. It was argued further that the matter was inadmissible because neither defendant had been served as required by article 32(4) of the Court's Rules of Procedure. Subsequently, the defendants also contended that the action was incompetent because it had emerged by an affidavit allegedly signed by Mr Tandja that he had not briefed or authorised any one to file an action on his behalf.<sup>82</sup> Overall, the defendants denied that any violations had occurred.

In its analysis, ECCJ once again raised the crucial question whether it could exercise jurisdiction over General Salou Djibo, who was the first defendant since the general is an individual. The Court raised the issue even though neither party had raised it. Making reference to its earlier decision in *David v Uwechue*<sup>83</sup> and citing the example of *Koraou v Niger*,<sup>84</sup> ECCJ concluded that an individual could not be a defendant before it. Coming soon after the decision in *David v Uwechue*, there was little or no surprise that ECCJ came to such a quick conclusion. By so doing, it is hoped that it shut the door to further actions involving individuals as defendants.

On the argument that political detention did not fall within the jurisdiction of ECCJ conferred by article 9(4) of the 2005 Supplementary Protocol, the Court pointed out that no distinction between political and other violations could be found in its Protocol. The Court stressed that merely alleging the existence of a human rights violation triggered its jurisdiction. Thus, the Court nipped in the bud an untenable distinction between political and other forms of detention. The Court also had no difficulty in ruling that the failure to serve process on one defendant could not be a ground for inadmissibility.<sup>85</sup> Perhaps the more signifi-

<sup>82</sup> Paras 16 & 17 of the *Tandja* decision (n 81 above).

<sup>83</sup> See n 62 above.

<sup>84</sup> Suit ECW/CCJ/APP/08/08, judgment ECW/CCJ/JUD/06/08, judgment delivered on 27 October 2008.

<sup>85</sup> See p 13 of the *Tandja* decision (n 81 above).

cant decision made by the Court on the preliminary objections was the decision not to dismiss the action based on the affidavit alleging that Mr Tandja had not authorised the action.<sup>86</sup> Considering that Mr Tandja was in the custody of the defendants at the time of the application, it could have been easy for state officials to compel him to make the affidavit or even to forge the affidavit. Thus, by refusing to accept such a request, the Court may have prevented other pariah states from adopting similar methods in cases before the Court.

On the merits, ECCJ returned to address the attempt to justify detention without trial on the grounds that it was political. The Court emphasised that arrest and detention had to be founded on recognised legal and judicial grounds.<sup>87</sup> The Court's analysis regarding the allegation of torture left lots to be desired. The Court lumped 'torture, cruel, inhuman and degrading treatment' together without regard to the distinction that exists between these terms under international law.<sup>88</sup> While it rejected the preliminary objection that was based on an alleged affidavit by Mr Tandja, the Court based its decision to reject the claim on torture on a report allegedly made by a human rights NGO that was said to have visited Mr Tandja. It leaves open the question whether the Court was consistent in its admission of evidence in this case. A further point that is worth noting is the Court's position that persons in detention are under state care and have a right to proper health care. However, such right to health care while in detention does not result in a duty to transfer a detained person abroad for treatment.<sup>89</sup> In the final analysis, ECCJ made an order for the release of Mr Tandja.

It should be noted that the processes in this matter were filed in July 2010 along with an application for an accelerated hearing.<sup>90</sup> By November 2010, a final decision on the matter was made. By any standard, this was an excellent turnover. Set against the delay that is commonly associated with a procedure before the African Commission, there exists a sure motivation for prospective litigants in West Africa to approach ECCJ rather than the African Commission. This is notwithstanding the provisional measure procedure of the African Commission. In cases where there is some urgency, the African Commission could create room for applications for accelerated hearings similar to the ECCJ practice. From another angle, this decision allows for an evaluation of the influence of ECCJ in the West African region in the sense that it calls into question the impact that the Court has in states that have been suspended from mainstream ECOWAS activities.

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<sup>86</sup> See pp 11 & 12 of the *Tandja* decision.

<sup>87</sup> p 17 of the *Tandja* decision.

<sup>88</sup> As above. See the definition of torture and cruel, inhuman and degrading treatment as set out in the reports of the UN Special Rapporteur on Torture, Cruel, Inhuman and Degrading Treatment.

<sup>89</sup> p 18 of the *Tandja* decision (n 81 above).

<sup>90</sup> p 2 of the *Tandja* decision.

Simply put, it poses the question whether military juntas and other unconstitutional governments facing sanctions would feel compelled to comply with the decision of an ECOWAS Court. It remains to be seen how this will pan out.

### 3.2.5 *Habré v Senegal* (main judgment)<sup>91</sup>

After disposing of all the preliminary applications in this case, ECCJ delivered its final judgment on the merits of the case in November 2010.<sup>92</sup> In its analysis, ECCJ set out five main headings upon which to address the claim. These include whether criminal proceedings are ongoing against Mr Habré; what the proper interpretation of the 2001 ECOWAS Protocol on Democracy and Governance is; what constitutes an effective remedy as guaranteed in international human rights law; what the principles of separation of powers and independence of the judiciary entail; and what is entailed in the prohibition of retroactive application of criminal law.<sup>93</sup>

In relation to the existence of ongoing proceedings, the Court took the view that the claims regarding equality before the law, the operation of *res judicata* and the right to a fair hearing cannot be raised and applied *in vacuo*. According to the Court, such claims cannot be hypothetically applied but should relate to actual proceedings. Consequently, the Court found no violation. This is consistent with the Court's earlier position in the *Koraou* case where ECCJ emphasised that it is a court of law and that it does not deal with hypothetical cases. The Court also failed to find a violation regarding the Protocol on Democracy and Good Governance as it considered that individuals were not entitled to enforce ECOWAS Community obligations under the Protocol. This could set a precedent for states to formulate instruments in manners that create state obligations without conferring individual rights and thereby limit the enforceability of such instruments. For instance, there are obligations in the African Democracy Charter that do not appear to confer corresponding rights on individuals. Approaches such as this could potentially make such instruments or those specific provisions redundant.

While it found no violation as regards the claims on the right to a fair hearing and non-respect for the principles of separation of powers and independence of the judiciary, the Court found a violation of the prohibition of retroactive application of criminal law.<sup>94</sup> This decision has huge implications for AU initiatives to bring Mr Habré to justice

<sup>91</sup> Role Gen ECW/CCJ/APP/07/08; Arret ECW/CCJ/JUD/06/10, judgment delivered on 18 November 2010. The decision was delivered in French.

<sup>92</sup> The main aspects of the claim are summarised in the section on the *Habré* ruling (n 59 above).

<sup>93</sup> Para 27 *Habré* case (main judgment) (n 91 above).

<sup>94</sup> Paras 51 to 58 *Habré* case.



for alleged violations of human rights perpetuated during his term as President of the Republic of Chad. It is a setback for the plan to try Mr Habré within the African continent and apparently amplifies the perception of a need to establish a tribunal with international criminal jurisdiction in Africa.

### 3.2.6 *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria and Another (SERAP case)*<sup>95</sup>

Perhaps the most popular judgment of ECCJ in 2010, the *SERAP* case, was brought by a Nigerian NGO, the Socio-Economic Rights and Accountability Project (SERAP) against Nigeria and the government agency responsible for basic primary education in Nigeria. The action was founded on a report of a Nigerian anti-corruption agency indicating that certain funds set aside for primary education in Nigeria had been mismanaged. Hence, SERAP sought the intervention of the ECCJ on the grounds that article 4 of the ECOWAS Treaty and articles 1, 2, 17, 21 and 22 of the African Charter had been violated by the defendants.

In the action, the plaintiffs sought a declaration that every Nigerian child is entitled to free and compulsory education; a declaration that the diversion of the sum of 3,5 billion naira<sup>96</sup> from the Universal Basic Education fund was illegal and a violation of rights; an order that the defendants make adequate provisions for the compulsory and free education of every Nigerian child; an order compelling the Nigerian government to recognise the freedoms of a primary school teachers' union and to solicit their views in educational planning and policy formulation; and an order that the Nigerian government assesses the progress of the realisation of the right to education with emphasis on universal basic education.

For their part, the defendants rejected the claim and argued, *inter alia*, that the Court lacked jurisdiction over the claim, the plaintiff failed to establish the claim, the second defendant is not a competent body to answer to the claim and that the proper parties were not before the Court.<sup>97</sup> In a ruling in October 2009, ECCJ disposed of the preliminary objections raised and therefore declined to revisit similar grounds raised by the defendants.

In its analysis of the case on the merits, the Court took the view that the second defendant — a non-state party and a non-community official or institution, an agency of the first defendant — was the bearer of obligations under a given national statute and was therefore a proper

<sup>95</sup> Suit ECW/CCJ/APP/12/07; judgment ECW/CCJ/JUD/07/10, judgment delivered 30 November 2010. It would be recalled that in 2009, the ECCJ overruled the preliminary objection raised by the defendants in this case. See Ebobrah (n 4 above).

<sup>96</sup> The exchange rate of the Nigerian Naira to the US dollar is currently \$1-N150.

<sup>97</sup> See paras 10 to 11 of the *SERAP* case (n 95 above).

party before it. This position appears to contradict two of the Court's earlier decisions in which it held categorically that only states were proper defendants before it. There is also the question whether ECCJ ought to delve into national statutes considering that it is an international body. It is doubtful if continental institutions such as the African Commission would take a similar position.

In relation to the alleged corruption, ECCJ declined to be drawn into issues it considered to be within the realm of criminal law. The Court emphasised that its jurisdiction could only be triggered to 'hold a state accountable if it denies the right to education to its people'.<sup>98</sup> While it conceded that mismanagement and embezzlement of funds could negatively impact on the right to education in a state, the Court took the view that it took more than 'mere mismanagement to amount to a denial of the right to education'.<sup>99</sup> This case presented a rare opportunity for an international tribunal in Africa to pronounce on the link between corruption and the denial of human rights. Perhaps ECCJ could have done a little more to set the right tone for the development of its jurisprudence. Looking at the bigger picture, ECCJ appears to be faced with situations where it needs to adjudicate on human rights issues beyond the regular run-of-the-mill issues.

In the final analysis, ECCJ issued the declaration sought by SERAP to the effect that every Nigerian child is entitled to free basic education. This was easy as the defendants did not contest this general fact, even though the right is not a justiciable right under the Nigerian Constitution. In relation to the request for 'an order directing the defendants to make adequate provision for the compulsory and free education of every child forthwith', the Court took time to explain that the alleged acts of theft and mismanagement may well have led to a shortage of allotted funds to the basic education sector. Consequently, ECCJ went further to say that<sup>100</sup>

[w]hilst steps are being taken to recover the funds or prosecute the suspects ... it is in order that the defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme ...

ECCJ concluded as follows: 'In conclusion, subject to reliefs 1 and 3 which the court grants in terms as stated above ...'<sup>101</sup> From the perspective of civil society and human rights advocates, ECCJ had granted the order sought, thereby probably becoming the first international court to make an order to implement rights of a socio-economic nature. However, at closer scrutiny, it would be noticed that the Court was careful to present its decision in a manner that suggests that it was

<sup>98</sup> Para 21 *SERAP* case (n 95 above).

<sup>99</sup> Para 19.

<sup>100</sup> Para 28.

<sup>101</sup> Para 31.

implores the state to replenish funds that the state had consciously elected to allocate to the basic education sector. It would also be noted that the order follows the language in the International Covenant on Economic, Social and Cultural Rights (ICESCR) in that it invites the state to 'take the necessary steps' instead of making an immediate order for the allocation of funds to the sector. This raises the question whether the state would be in contempt if it spreads the allocation of funds over several financial years subject to the approval of legislative authorities. Overall, the order calls into focus the challenges associated with judicial decisions directing the allocation of resources — an accepted preserve of the legislative and executive authorities of a state. A big challenge relates to the enforcement of this part of the decision.

### 3.2.7 *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria and Eight Others (SERAP case 2)*<sup>102</sup>

This ruling, which also involves SERAP, was brought against Nigeria, the Nigerian state-owned oil corporation and five multinational oil companies with operations in the Niger Delta region of Nigeria. Alleging abuse arising from decades of unwholesome corporate practices in the region, the applicant claimed violations of the rights to food, work, health, water, life, human dignity, a clean and healthy environment and to economic and social development.<sup>103</sup> In their preliminary objections, most of the defendants argued that ECCJ lacked jurisdiction over the non-state-actor defendants. It was also argued that SERAP lacked both the capacity and the *locus standi* to institute the action.<sup>104</sup>

Although ECCJ found that SERAP was a legal entity, had not brought the action in a representative capacity and could claim *locus standi* based on the nature of the dispute, the Court declined jurisdiction on the grounds that the defendants that were before it were not states.<sup>105</sup> In seeking to justify its liberal rules on standing, ECCJ had to resort to a 'convention on access to information, public participation in decision making and access to justice in environmental matters' which it acknowledged was not binding on African states. This calls to question the attitude of the Court to instruments not ratified by a state concerned, despite the impression that the Court is tilting towards such a position. It remains unclear why the Court did not restrict itself to the jurisprudence of the African Commission to which institution liberal

<sup>102</sup> Suit ECW/CCJ/APP/08/09; Ruling ECW/CCJ/APP/07/10, ruling delivered on 10 December 2010.

<sup>103</sup> Para 3 *SERAP case 2* (n 102 above).

<sup>104</sup> Para 26 *SERAP case 2* (n 102 above).

<sup>105</sup> Paras 52 to 64 & 71 *SERAP case 2* (n 102 above). It is worth noting that no appearance was entered on behalf of the state. Hence, all the parties before it were non-state actors.

standing has been frequently attributed.<sup>106</sup> It would appear that the present action was aimed at extending the gains of the *SERAC*<sup>107</sup> decision of the African Commission by getting non-state actors to be held responsible by an international court. While ECCJ acknowledged the challenges associated with the human rights responsibility of multinationals, the apparent goal was not realised in this case.

### 3.2.8 *Saidykiian v The Gambia (Saidykiian case)*<sup>108</sup>

In the *Saidykiian* case, the applicant, a Gambian national and former editor of a Gambian newspaper, alleged that he had been arrested, detained and tortured by Gambian state officials contrary to the ECOWAS Treaty and the African Charter. The applicant claimed a violation of article 4 of the ECOWAS Treaty and articles 1, 2, 5, 6, 7(b) and (d) of the African Charter. Following the state's complete denial of the facts claimed by the applicant, the applicant was compelled to adduce evidence to support his case. At the end of the applicant's case, ECCJ distilled four main questions for determination, including whether the applicant had actually been arrested and detained by agents of the state; whether the applicant had been tortured and whether the applicant was entitled to compensation.<sup>109</sup>

At the close of the proceedings, ECCJ found and declared that the state had violated articles 5, 6 and 7 of the African Charter to the extent that the applicant's right to dignity, a fair hearing and personal liberty had been violated. The Court declined to grant a fourth relief concerning the protection of the applicant's family. Based on its findings, including the finding that the applicant had been tortured, ECCJ awarded damages in the applicant's favour to the tune of US \$200 000 as opposed to the US \$2 million sought by the applicant.

Owing to the nature of the case, ECCJ had to deal with evidence in a manner similar to what domestic courts would do. In these peculiar circumstances, the applicant could only call two witnesses — himself and a medical doctor — as expert witnesses. It is not clear who bore the cost of bringing the expert witnesses to testify at the proceedings. Although there has been talk about the possibility of legal aid in the African human rights system, ECOWAS is yet to have a dedicated legal aid scheme. This creates a sense of inequality of arms as states are more likely to be able to afford witnesses to the detriment of individual applicants.

<sup>106</sup> The ECCJ referred to the popular *SERAC v Nigeria* decision of the African Commission to support the 'usefulness of *actio popularis*'.

<sup>107</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>108</sup> Suit ECW/CCJ/APP/11/07; judgment ECW/CCJ/JUD/08/10.

<sup>109</sup> Para 27 *Saidykiian* case (n 108 above).

In the build-up to its decision, ECCJ looked at the facts without engaging in a definitional analysis to determine if the facts amounted to torture or cruel, inhuman and degrading treatment. It is also important to note that the Court referred to principles that it had laid down to guide the award of damages.<sup>110</sup> No other human rights mechanism seems to have 'codified' principles in this regard.

Overall, in 2010, ECCJ was relatively busy in the realm of human rights realisation. The Court appears to be getting bolder and more comfortable with its role as a human rights court. Consequently, its practice is being shaped in its case law.

## 4 Southern African Development Community

SADC came into existence in 1992, following the dissolution of the Southern African Development Co-ordination Conference (SADCC). In 2001, the 1992 SADC Treaty was amended and this resulted in an increase of Community objectives to include the promotion of<sup>111</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.

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>112</sup> It is on this basis that SADC has developed its human rights regime. During 2010, the human rights foundations of SADC were challenged, especially in relation to the judicial protection of rights. However, other activities to promote human rights and democracy took place on the platform of SADC.

### 4.1 Non-judicial human rights developments

Within the SADC framework, non-judicial human rights activities were not so pronounced in 2010. However, there were a few events and developments that related to the promotion and protection of human rights or had implications for the realisation of human rights. These were mostly in the realm of thematic meetings and activities aimed at strengthening a democratic culture in the SADC region.

#### 4.1.1 Thematic meetings

In April 2010, Ministers responsible for employment and labour issues in SADC member states engaged SADC social partners at a meeting in

<sup>110</sup> Paras 43 to 44.

<sup>111</sup> See art 5(1)(a) of the Consolidated SADC Treaty. The Treaty is available at <http://www.sadc.int/index> (accessed 31 March 2011).

<sup>112</sup> Art 4(c) SADC Treaty as amended.

Maputo, Mozambique, to address issues touching on labour rights.<sup>113</sup> Targeted at enhancing labour relations and improving working conditions in the SADC region, the meeting set five broad priority areas for implementation between 2010 and 2011.<sup>114</sup> Some of the objectives of the meeting included ‘cushioning children workers and their families from economic hardships of poverty and social workplace ills such as child labour, poor working conditions’.<sup>115</sup> Although a number of these issues are commonly addressed by the International Labour Organisation, sub-regional initiatives such as the SADC meeting have the potential for realising better results.

Around June 2010, Ministers responsible for gender and women’s affairs in SADC member states also held a meeting in Kinshasa, Democratic Republic of the Congo. The meeting discussed the SADC Regional Gender Programme, particularly the status of the SADC Gender Protocol. The meeting named Namibia, Tanzania and Zimbabwe as states that have ratified the Protocol, thereby putting pressure on others to follow. Importantly, the meeting set a target of adequate ratification by the end of 2010. Gender issues were also in the top burner when the SADC Gender Unit, in July 2010, hosted a SADC business trade fair for women with support from the United Nations Development Fund for Women (UNIFEM), United Nations Development Programme (UNDP) and the United Nations Economic Commission for Africa (UNECA).

The SADC Gender Unit has been one of the most consistent SADC institutions working in the field of human rights. In the absence of a robust gender unit or office in the AU, the outreach programmes of SADC fill a gap that would otherwise have resulted in a denial of rights.

#### 4.1.2 Strengthening democracy

During the last few years, conflicts arising from unwholesome and undemocratic practices have plagued certain SADC member states.<sup>116</sup> Accordingly, efforts and activities aimed at restoring and strengthening democracy have become a common feature in the SADC framework. As early as January 2010, SADC leaders met to discuss the state of affairs in Madagascar and Zimbabwe and urged the international community to reject plans by the current leadership of Madagascar to reject a power-sharing arrangement aimed at resolving the crisis. SADC further released a statement to reject ‘any attempt to use democratic means, institutions and processes to legitimise governments that came

<sup>113</sup> Inside SADC, Issue 2, May 2010.

<sup>114</sup> As above.

<sup>115</sup> As above.

<sup>116</sup> Madagascar and Zimbabwe are examples.

to power through unconstitutional means'.<sup>117</sup> SADC's reaction was apparently triggered by moves by the junta in Madagascar to engage in elections.

During 2010, SADC was also busy with the events in Zimbabwe where, as a result of SADC intervention, a power-sharing arrangement had been put in place. Acting through its facilitator on the Zimbabwe coalition government, SADC expressed its unwillingness to support elections in that country until there is 'a clear roadmap for peaceful, free and fair elections'.<sup>118</sup> Increasingly, the task of defending democracy and democratic culture is being regionalised. Both the wider international community and the AU appear to defer to the sub-regional bodies like SADC to lead the way for international responses to disruption of the constitutional order in states. In order to avoid bloody conflicts, SADC appears to favour power-sharing arrangements between the main antagonists in a state. This is not provided for in the AU instruments on democracy and elections. However, the immediate threat of bloodshed is tackled by such arrangements. So far, SADC has not been too successful in its attempt to resolve the crisis in Madagascar.

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

As the judicial organ of the SADC, the SADC Tribunal carries the responsibility for the judicial protection of human rights within the SADC framework. The Tribunal is established by articles 9 and 16 of the 1992 SADC Treaty (as amended). The composition, powers and functions of the SADC Tribunal are set out in the Protocol on the Tribunal and the Rules of Procedure thereof.<sup>119</sup> While no express human rights competence is conferred on the Tribunal, since 2007, the Tribunal has understood its power to interpret and apply the SADC Treaty as sufficient to adjudicate on claims that human rights have been violated in an SADC member state contrary to the provisions of the SADC Treaty.<sup>120</sup>

Following the celebrated decision of the SADC Tribunal in 2008, the SADC Community was faced with the dilemma of enforcing the judgment against Zimbabwe or subjecting the Tribunal and, by extension the entire SADC legal regime, to ridicule. During 2010, the SADC Tribunal faced what could turn out to be its biggest challenge ever as it

<sup>117</sup> See report at <http://www.reuters.com/article/2010/01/15/idUSLDE60E005> (accessed 31 March 2011).

<sup>118</sup> *The Zimbabwean* 'No elections unless free and fair' [http://www.thezimbabwean.co.uk/index.php?option=com\\_content&view=article&id=36161:no-elections-unless-free-and-fair-says-sadc&catid=69:sunday-top-stories&Itemid=30](http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=36161:no-elections-unless-free-and-fair-says-sadc&catid=69:sunday-top-stories&Itemid=30) (accessed 31 March 2011).

<sup>119</sup> Adopted in 2000 and entered into force without the originally required number of ratifications as the Protocol was annexed (or understood to be annexed) to the amended SADC Treaty in 2001.

<sup>120</sup> See *Campbell & Another v Zimbabwe (Campbell interim 2007)* SADC (T) Case 2/2007, ruling of 13 December 2007 2. Also see SADC (T) Case 2/2007 in which judgment was delivered on 28 November 2008.

found itself not only struggling to retain legitimacy and relevance, but also fighting to survive a threat to its existence. Prompted by some of the applicants in the *Campbell* case, the Tribunal found that Zimbabwe had failed to comply with the judgment against it.<sup>121</sup> Hence, the Tribunal referred the fact of Zimbabwe's non-compliance to the Summit of SADC for action in accordance with article 32(4) of the Protocol of the SADC Tribunal.<sup>122</sup> This triggered a chain of events that culminated in Zimbabwe's submission of a legal opinion challenging the legality of the SADC Tribunal on the grounds that the Protocol on the Tribunal never entered into force.<sup>123</sup> At a meeting in April 2010, Ministers of Justice and Attorneys-General of SADC deliberated on Zimbabwe's non-compliance and submitted their advice to the Summit. While all this was going on, the Tribunal made another ruling in July 2010 to establish further acts of non-compliance. The cumulative effect was that in August 2010, acting on the advice of the SADC Council of Ministers, the SADC Summit decided not to reappoint judges or appoint replacements for retiring judges of the Tribunal. The remaining members of the Tribunal were allowed to hear and conclude cases already pending, but the Tribunal was instructed not to accept any new cases.<sup>124</sup>

The action taken by the Summit raises several legal issues beyond the scope of this contribution (some of which have been eloquently canvassed by the many reactions of civil society to the 'suspension' of the Tribunal). In recognition of the challenge it faced, the SADC Summit commissioned a study on the jurisdiction and functioning of the Tribunal. This series of events naturally had an impact on the judicial protection of rights in the SADC framework. Despite this challenge, the SADC Tribunal concluded a few cases, some touching on labour relations in the SADC institutional framework. The cases selected here are those with relatively clear links to human rights.

#### 4.2.1 *Tanzania v Cimexpan (Mauritius) Ltd*<sup>125</sup>

Cimexpan Ltd, the respondent in the present application, had brought an action against Tanzania claiming a violation of rights and seeking to have a deportation order made against the third respondent rescinded. The third respondent, a natural person and servant of the first and second respondents, had claimed before the Tribunal that he had been detained by Tanzanian immigration authorities and detained

<sup>121</sup> According to art 32 of the SADC Tribunal Protocol, the state where a decision of the Tribunal is to be enforced has the responsibility to enforce such a decision in accordance with its foreign judgment enforcement rules.

<sup>122</sup> The SADC Summit consists of the heads of state and government of the SADC member states and is the supreme policy-making organ of the organisation. The referral to the Summit by the Tribunal took place in July 2008.

<sup>123</sup> The legal opinion submit by Zimbabwe is on file with the author.

<sup>124</sup> Record of the August 2010 meeting (on file).

<sup>125</sup> Case SADC (T 01/2009), ruling delivered 11 June 2010.



in jail for one week, during which time he was allegedly subjected to ill-treatment bordering on torture. In the present application, Tanzania contended that the Tribunal did not have the jurisdiction over the matter on the grounds that the respondents did not have any standing before the Tribunal and had not exhausted local remedies.<sup>126</sup> It was also contended that there had been no disclosure of an international delinquency to warrant an action under international law.<sup>127</sup> Overall, Tanzania contended that the original action did not fall within the ambit of articles 14 and 15 of the Protocol of the SADC Tribunal.

After affirming that it had jurisdiction over actions involving legal and natural persons against state parties, the Tribunal addressed the issue of exhaustion of local remedies. It was not disputed that the exhaustion of local remedies is a vital precondition for action before the Tribunal. The crucial question was whether, within the context of the local statute, and in view of the deportation of the third respondent, it was still necessary to exhaust local remedies. In other words, the Tribunal had to decide whether the facts could support an exception to the requirement to exhaust local remedies. According to the Tribunal, the mere fact of physical absence from a state did not amount to a denial of access to the courts in Tanzania. Hence, it was decided that local remedies had not been exhausted. While there may be differences in the specific facts, the Tribunal may have benefited from the African Commission's jurisprudence in this regard.<sup>128</sup> In some cases where an applicant is a fugitive away from the territory of a state, the African Commission had relaxed the requirement to exhaust local remedies.

The Tribunal had no qualms accepting the state's argument that it retained the right to determine whether to allow or deny any alien admission into its territory. However, the Tribunal suggested that the process of deporting a non-national could be open to scrutiny. Consequently, at this preliminary stage, the Tribunal sought evidence to sustain the claim that the third respondent had been subjected to torture. An important question that arises is whether a tribunal should enter into issues on the merit at the preliminary stage of an inquiry. In the opinion of the SADC Tribunal, the applicant's objection was sustainable and it accordingly dismissed the original action.

#### 4.2.2 *Fick and Four Others v Zimbabwe*<sup>129</sup>

This action is one of the fall-outs of the *Campbell* case concluded in 2008. Following Zimbabwe's refusal to comply with and implement the judgment of the Tribunal and the various acts and statements of Zim-

<sup>126</sup> p 4 *Cimexpan* ruling (n 125 above).

<sup>127</sup> As above.

<sup>128</sup> See, eg, *Africa Legal Aid v The Gambia* (2000) AHRLR 119 (ACHPR 2000); *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996).

<sup>129</sup> Case SADC (T) 01/2010.

babwean state officials, the present action was brought under article 32(4) of the Protocol of the Tribunal. The action aimed at prompting the SADC Tribunal to report Zimbabwe's failure to the SADC Summit for possible action.

In furtherance of the notice to the Tribunal by the Zimbabwean Ministry of Justice, the state refused to take part in the present proceedings. Thus, the Tribunal only had to consider the evidence adduced by the applicants to reach its decision. Naturally, the Tribunal concluded that the 'existence of further acts of non-compliance with the decision of the Tribunal had been established'.<sup>130</sup> The Tribunal decided to once again report non-compliance to the Summit.

Considering that Zimbabwe's non-compliance was already before the Summit at the instance of the Tribunal, it is not clear what use the present proceedings served other than to perpetuate the impression of the impotence of the Tribunal. However, from another perspective, a second report of non-compliance against the same state may have piled some pressure on the Summit to take some action. Overall, the entire affair amplifies the weakness of the SADC enforcement and implementation regime. In some ways, the current challenge could be a window into the future as it may be representative of enforcement challenges an institution such as the African Human Rights Court may face. An important question would then be whether the relevant authorities are following these events and developing strategies to tackle challenges such as this, if and when they occur. It is also a crucial test for the SADC Community leadership and its dedication to the rule of law as envisaged in the SADC Treaty.

## 5 Conclusion

If there were lingering doubts regarding the place of sub-regional human rights regimes in the overall African human rights system, events in 2010 should have laid these to rest. At judicial and non-judicial levels, AU institutions appear to have embraced the involvement of sub-regional institutions in human rights promotion and protection. Global institutions working in the field of human rights in Africa also seem to have warmed to sub-regional human rights mechanisms. Hence, collaborations between UN agencies and African sub-regional bodies for the promotion of human rights apparently intensified during 2010. Clearly, these are positive signs as they are likely to consolidate the gains of previous years.

While external actors were warming to sub-regional regimes, mixed signals emerged from within the sub-regions. In the EAC, little but certain steps were taken to improve the Community's collective human rights presence. In the judicial sector, EACJ continued to demonstrate

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<sup>130</sup> n 129 above, 4.

unusual courage by accepting human rights-related cases even though the protocol to expand its jurisdiction was yet to be adopted. In the ECOWAS regime, thematic meetings and activities to consolidate a regional democratic culture continued. ECCJ's growing presence as a human rights court continued, especially with firm statements that will shape its practice. It is only in SADC that negative trends were experienced, leading to concerns regarding the continuation of its budding human rights regime. While non-judicial human rights work continued, it appears that the future of the Tribunal's human rights work is uncertain.

Overall, the human rights developments that took place in the sub-regions reinforce the need for greater attention to be paid to these emerging regimes. Up until now, a hugely negative conflict has arisen as between these regimes and the continental structures. Apart from this, the gains of the sub-regional involvement in human rights can only be beneficial for the most vulnerable in Africa.