

# The relationship between the right of access to education and work, and sub-regional economic integration in Africa

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## Summary

*After considering the core objective of the sub-regional economic communities (RECs) in Africa and the obligations that human rights impose, this article submits that the right to access education, the creation of employment and the right to access work intra-regionally are central to economic integration in Africa. Consequently, the article analyses how economic integration involves these rights and the extent to which these rights may act as catalysts to deepening economic integration in RECs. It concludes that state parties to the RECs must allow free movement of persons and the right of establishment to enable community citizens to have access to education and work.*

## 1 Introduction

Africa aims to achieve full political integration with a central government, legislative and judicial systems under the umbrella body 'United States of Africa.'<sup>1</sup> To achieve this goal, the African Union (AU) adopted a strategy that starts with economic integration, taking place at two levels: at the AU level through the African Economic Community (AEC)

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1 Accra Declaration, African Union, 9th ordinary session in Accra, Ghana, adopted 3 July 2007.

and at the sub-regional level through the sub-regional economic communities (RECs).<sup>2</sup> The RECs are regarded as the building blocks to the AEC and are expected to incrementally achieve free trade areas (FTAs), customs unions and common markets in and amongst themselves.<sup>3</sup> Arguably, the RECs are intended to merge or filter into the AEC. However, it is currently not clear how such merger will happen, given that the RECs are not parties to the Abuja Treaty and therefore not bound to merge in accordance with the Abuja Treaty.<sup>4</sup> Notwithstanding that the RECs are not parties to the Abuja Treaty, the establishment of free trade areas, customs unions and common markets is also reflected as an objective in the treaties establishing the RECs.<sup>5</sup> However, to underscore the importance of RECs in the establishment of the AEC, a Protocol on the Relations between the African Union and the RECs was adopted in 1998. Particularly, article 13 authoritatively binds RECs to comply with the benchmarks set by the AU to achieve the AEC, while article 22 is indicative of possible sanctions against any REC that fails to achieve the objectives of the AEC Treaty.

Given a goal of economic and eventual political integration, later adopted by the AU but first pursued by the Organisation of the African Unity (OAU), the OAU realised the antecedent need to promote human rights in Africa to redress the massive human rights violations and dislocations caused by conflicts and autocratic post-colonial rule.<sup>6</sup> In any case, it would be even more difficult to attain economic integration where human rights are threatened, thus a need for a stable and conflict-free region becomes a pre-condition.<sup>7</sup> This is so because 'where human rights are protected, open markets will flourish as stability and the rule of law are ensured'.<sup>8</sup> To this end, the human rights system for Africa was created in 1981 through the adoption of

2 Arts 4(1)(d) & 4(2) Constitutive Act of the African Union (Constitutive Act) adopted 11 July 2000, entered into force 26 May 2001, art 3(l) read with the Treaty Establishing the African Economic Community, adopted 1991.

3 Arts 4(d), (g) & (h) Economic Community of West African States Treaty (ECOWAS Treaty), 24 July 1993, 35 *ILM* 660, (1996) 8 *African Journal of International and Comparative Law* 193.

4 RF Oppong 'The African Union, African Economic Community and Africa's regional economic communities: Untangling a complex web' (2010) 18 *African Journal of International and Comparative Law* 93.

5 Art 2(2) East African Community Treaty (EAC Treaty), adopted 30 November 1999, entered into force 2001; art 3(2)(d) ECOWAS Treaty (n 3 above); Southern Africa Development Treaty (SADC Treaty) adopted August 1992 as amended in 2001; SADC Regional Indicative Strategic Development Plan (RISDP), adopted August 2003, para 4.10.5

6 Preamble, para 9 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 1520 UNTS 217, entered into force 21 October 1986.

7 ST Ebobrah 'Human rights developments in sub-regional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 313.

8 SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 94.

the African Charter on Human and Peoples' Rights (African Charter).<sup>9</sup> The focus for the discussion is on the relationship between economic integration and human rights, particularly rights to work and to education. The term 'economic integration' in this work is limited to the level of economic integration that the RECs aim to achieve (free trade areas, customs unions and common markets) to the exclusion of other arrangements.

The relationship between economic integration and human rights in Africa has been argued by other scholars.<sup>10</sup> At the continental level, the Abuja Treaty seeks to achieve its objectives in adherence to the promotion and protection of human rights in accordance with the African Charter.<sup>11</sup> In addition, at the sub-regional level, the revised Treaty of the Economic Community of West African States (ECOWAS) obliges ECOWAS to pursue its objectives against the backdrop of the promotion and protection of human rights in accordance with the African Charter.<sup>12</sup> Likewise, the Supplementary Protocol relating to the ECOWAS Community Court of Justice (ECCJ) empowers the Court to receive and determine human rights cases.<sup>13</sup> Further, the East African Community Treaty obliges EAC to achieve community objectives guided by principles of good governance, the rule of law, social justice, and the promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter.<sup>14</sup> In Southern Africa, the Southern Africa Development Community (SADC) Treaty binds the Community to carry out its activities in accordance with human rights, democracy and the rule of law.<sup>15</sup> More distinctively for Southern Africa, SADC adopted the Protocol on Gender and Development.<sup>16</sup>

Over and above the clear relationship established from the norms above, the marriage between human rights and economic integration has long been argued by scholars in the field. For example, Ebobrah relates the reason that the RECs extended their mandate to human rights to the fact that the realisation of economic integration can succeed better in stable and conflict-free political environments.<sup>17</sup> As a result of RECs' commitment to human rights and human rights activism, many human rights violations have been vindicated before

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9 African Charter (n 6 above); F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligations' (2004) 48 *Journal of African Law* 1.

10 Ebobrah (n 7 above); F Viljoen *International human rights law in Africa* (2007).

11 Art 3(g) Abuja Treaty (n 3 above).

12 Art 4(g) ECOWAS Treaty (n 5 above).

13 Adopted 19 January 2005, entered into force 19 January 2005, art 9(4).

14 Art 6(d) EAC Treaty (n 5 above).

15 Art 4(c) SADC Treaty (n 5 above).

16 Protocol on Gender and Development, adopted 17 August 2008.

17 Ebobrah (n 7 above) 313.

the tribunals and courts of justice in the RECs,<sup>18</sup> despite the RECs not having their own treaty-based human rights instruments. Of course, human rights protection in these cases has not been without criticism or shortcomings. To this end, in ECOWAS, for example, Ebobrah succinctly analyses the critical issues in the human rights mandate of the ECOWAS Court of Justice ranging from legitimacy to the mandate of the Court.<sup>19</sup> He concludes that the involvement of ECCJ in the human rights protection 'creates potential for resistance by ECOWAS member states, as well as potential conflict with national and international institutions'.<sup>20</sup> In Southern Africa, the involvement of the SADC Tribunal in the protection of human rights saw the Tribunal suspended indefinitely pending the review of its mandate.<sup>21</sup>

On the other hand, Musungu focuses on the relationship between economic integration and human rights at the AU and sub-regional levels. He holds that 'civil and political rights are inherently critical in ensuring the rule of law and places checks on governmental power in relation to administrative and judicial activities that affect trade'.<sup>22</sup> Other than civil and political rights, Musungu identifies the link between socio-economic rights and regional integration. In particular, he argues that 'trade rules and the idea of economic liberalisation may also mean that the rules limit states in terms of welfare policies that are inextricably linked to socio-economic rights'.<sup>23</sup>

In summing up Ebobrah and Musungu's expositions on the relationship between human rights and economic integration, Odinkalu takes the following position:<sup>24</sup>

Integration is an imperative response to the contradictory tendencies of globalisation, nationalism, and the potential institutional arbitrariness of individual states, which tend to undermine the universal protection of human rights. In these circumstances, the continuing sustainability of the promise of human rights in Africa depends significantly on effective international and regional oversight of state conduct. For this purpose, regional integration and human rights mutually reinforce one another in binding legal commitments and regional institutions for their implementation. Far from being mutually antagonistic, they are now mutually interdependent and overlap in defining the scope and functions of sovereign territoriality in Africa.

18 Eg *Mike Campbell (Pvt) Limited & Another v Zimbabwe* (2007) AHRLR 141 (SADC 2007); *Katabazi & Others v Secretary-General of the East African Community & Another* (2007) AHRLR 119 (EAC 2007).

19 ST Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' 2010 (54) *Journal of African Law* 1.

20 Ebobrah (n 19 above) 25.

21 P Mpofu 'SADC Tribunal not suspended: Salamao' <http://www.zimonline.co.za/Article.aspx?ArticleId=6288> (accessed 6 September 2010).

22 Musungu (n 8 above) 89.

23 As above.

24 C Odinkalu 'Regional integration and human rights in Africa' PhD thesis, London School of Economics, May 2008.

Taking Ebobrah, Odinkalu and partly Musungu's ideas further, and extrapolating the relationship between regional integration and human rights, Viljoen focuses strongly on socio-economic rights and submits that 'the heart of sub-regional integration would beat in vain if it does not provide a lifeline to those living in poverty'.<sup>25</sup> In explaining Viljoen's proposition, one must highlight the effect of economic integration on states. On that note, when states integrate, they pool together some of the prerogatives of nation-state sovereignty.<sup>26</sup> For example, to further economic integration, they sometimes remove tariffs and non-tariff barriers on imports from other states within the block. This may be seen at first glance as an obstacle for individual countries within the block of economic integration to fulfil the rights of their respective nationals or everyone within their jurisdiction due to a loss of revenue. However, integration is not done simply for the sake of integration or to impoverish other countries but, properly done, it is a vehicle that facilitates a level playing field for all member states within the block to fulfil human rights obligations in their respective jurisdictions.<sup>27</sup> To this end, Viljoen submits that<sup>28</sup>

ceding sovereignty to intergovernmental arrangements has value to the nationals of states concerned only if it results in an improvement in their material well-being, and if the sub-regional space allows human rights to prosper in ways that were impossible in the nation state.

Viljoen advocates a clear nexus between economic integration and human rights, particularly socio-economic rights, and this is the line of argument of this article.

Of course, not all integration is equally good. For instance, free trade is mostly closely associated with neoliberal policies that have created greater rather than lesser inequality and has trapped developing countries in policies that were not followed by the rich countries in their own paths to development.<sup>29</sup> Therefore, only integration that promotes human rights is worth pursuing, as Viljoen pointed out.

Although it may be argued that RECs were not created for the promotion of human rights, but rather for increased trade and improved economies of member states, there is a link between human rights and one of the primary objectives of the RECs,<sup>30</sup> which is improving the standard of living of their people. Such improvement of the standard of living is linked closely to the realisation of socio-economic rights.<sup>31</sup>

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25 Viljoen (n 10 above) 8.

26 M Holland *European integration: From community to union* (1994) 6.

27 Viljoen (n 10 above).

28 Viljoen (n 10 above) 495; Musungu (n 8 above).

29 S Suri 'Free trade enslaving poor countries' <http://www.ipsnews.net/news.asp?idnews=37008> (accessed 3 March 2011).

30 Art 2(b) EAC Treaty (n 5 above); art 3(1) ECOWAS Treaty (n 5 above); art 1(a) SADC Treaty (n 5 above).

31 Viljoen (n 10 above) 497.

Of importance is the further submission made by Viljoen that 'regional economic integration is not a goal in itself, but a means to an end – eradication of poverty'.<sup>32</sup> Thus, it goes without saying that the eradication of poverty and improvement of the standard of living are fundamentals to the realisation of socio-economic rights.

Having recapitulated on the desired relationship between human rights and a particular form of progressive economic integration in Africa, the article supports Viljoen's position that holds that socio-economic rights should have and do have a direct link with economic integration in the RECs. From the point of view of the link between economic integration and socio-economic rights, the article, while acknowledging the interdependency of rights, argues that the right to access education in the region, the 'states' moral obligation<sup>33</sup> to create employment and the right to access work in the region are integral to economic integration in Africa, and that there is a mutual relationship between these categories. As such, the article analyses how economic integration involves the rights in question, and the extent to which the promotion or denial of these rights, intra-regionally, can deepen or frustrate the envisaged economic integration in the RECs.

## 2 Normative and analytical framework of the right to education and the right to work

To the extent that the African Charter does not elaborate on the right to education, the 'duty to create employment' and the right to access work, reference will be made to the Declaration on Economic, Social and Cultural Rights (Pretoria Declaration).<sup>34</sup> In addition, reference will be made to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is the first legally-binding international instrument to guarantee the right to education and the right to access work.<sup>35</sup> In any event, far from being antagonistic, the United Nations (UN) treaties and African treaties are mutually reinforcing in Africa.<sup>36</sup>

32 Viljoen (n 10 above) 496.

33 Under international human rights law, there is no positive obligation on the part of states to provide individuals with employment or jobs. However, states are encouraged to have specialised services to assist and support individuals in order to enable them to identify and find available employment. In addition, states are encouraged to adopt measures aimed at achieving full employment. See General Comment 18 – The Right to Work, adopted on 25 November 2005, UN ESCR Committee, 35th session, UN Doc E/C.12/GC/18 (2006) paras 12(a), 19 & 26.

34 Declaration on Economic, Social and Cultural Rights (Pretoria Declaration), adopted December 2004, African Commission on Human and Peoples' Rights 36th ordinary session.

35 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, GA Res 2200 (XXI), UN GAOR, 21st session, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976.

36 Art 60 African Charter.

Since this article is on the RECs, it is important to explain how RECs relate to the norms cited. To this end, it has been said above that the RECs do not have their own human rights treaties, and that they expressly rely on the AU's treaties as well as UN treaties. Specifically, the RECs courts of justice and tribunals have held states accountable for violating the African Charter, thus implying that the provisions of the African Charter are binding on the RECs.<sup>37</sup> This is so because most of the RECs, as indicated earlier, in their respective treaties and protocols, undertook to achieve their objectives against the backdrop of the promotion and protection of human rights in accordance with the African Charter,<sup>38</sup> such that the African Charter has been viewed as a basis for the common regional human rights standard and a normative framework for the RECs.<sup>39</sup> Besides, except Morocco, all African states are parties to the African Charter, and this can cause the RECs' courts and tribunals to apply the African Charter to the extent that their members are parties to the African Charter. Some scholars have even argued that the African Charter itself has made it possible for RECs to apply it because it does not grant exclusive supervisory powers to any institution.<sup>40</sup> Other than the specific mention of the African Charter, the RECs' treaties further make reference to the general principles of international law, and this has made it possible for RECs' courts and tribunals to adjudicate over UN treaties. Specifically, regarding the application of UN human rights provisions as a normative framework for the RECs, Ebobrah explains as follows:<sup>41</sup>

To the extent that all [the RECs] member states are members of the UN and have acceded to the UN Charter, the positive obligation to respect human rights that is found in the UN Charter binds the [respective RECs] member states. [Also,] universal ratification of the UN Charter similarly places a binding obligation on [the RECs] as international organisation[s], especially from the perspective of article 103 of the UN Charter. At the very minimum, there is a duty on [the RECs] and [their] member states to join in co-operation under the UN platform to promote and encourage respect for human rights 'without distinction as to race, sex, language and religion'.

Although this position is not without criticism, it is supported in the article.

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37 n 18 above.

38 Eg, art 4(g) ECOWAS Treaty (n 5 above); art 6(d) EAC Treaty (n 5 above).

39 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* 315.

40 As above.

41 ST Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Community of West African States' LLD thesis, University of Pretoria, 2009 120, citing LB Sohn 'The human rights law of the Charter' (1977) 12 *Texas International Law Journal* 129.



## 2.1 Right to education

The right to education has its origins in the non-binding Universal Declaration of Human Rights (Universal Declaration),<sup>42</sup> and it was legally entrenched in ICESCR<sup>43</sup> and other subsequent international and regional treaties. Specifically for Africa, the right to education is provided for in the African Charter, although it is not as elaborate as in ICESCR.<sup>44</sup> Also, SADC adopted a Protocol on Education, the objectives whereof include, amongst others, free movement of students and staff within the SADC region.<sup>45</sup> The SADC Protocol on Education does not speak of the right to education, but regional co-operation in promoting standardisation of educational systems and qualifications and access to education,<sup>46</sup> which can serve as a template for the other RECs. The practical implementation of the SADC Protocol on Education is discussed under section three.

The right to education imposes a number of different obligations but, relevant to this work, the obligations imposed on member states are the following: As far as primary education is concerned, ICESCR requires states to provide free and compulsory education.<sup>47</sup> Unlike primary education, secondary education is not compulsory and not free; rather its realisation in terms of fees is expected to be achieved progressively, and this is in accordance with ICESCR.<sup>48</sup> In addition to the obligations on secondary education, ICESCR adds that the higher education shall be made equally accessible on the basis of capacity.<sup>49</sup> These obligations must be carried out against the principle of non-discrimination, specifically on the ground of national origin.<sup>50</sup> Even though developing countries are exempted from ensuring the realisation of the right to education to non-nationals,<sup>51</sup> it can be argued that individual states within the block of co-operation have done away with this exemption as far as member states to the respective RECs are concerned.<sup>52</sup> In summary, the right to education obliges member states to ensure access to education, which arguably for RECs must be done within the respective sub-regions. It goes without saying, however, that economic development and human development more broadly

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42 Art 26 Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III), UN GAOR, 3rd session UN Doc A/810 (1948).

43 Art 13 ICESCR.

44 Eg art 17 African Charter.

45 SADC Protocol on Education, adopted 8 September 1997, entered into force 31 July 2000.

46 As above.

47 Art 13(2)(a) ICESCR.

48 Art 13(2)(b) ICESCR.

49 Art 13(2)(c) ICESCR.

50 Art 2(2) ICESCR.

51 Art 2(3) ICESCR.

52 Eg, art 3 ECOWAS Treaty (n 5 above).



are highly dependent on deepening opportunities for good quality tertiary education.

## 2.2 Right to work

The right to work became recognised even before the Universal Declaration or UN Charter. As argued by other scholars, the famous four freedoms, by the then United States of America President Franklin Roosevelt, included the 'freedom from want', thus recognising the right to work so that a person can earn a living, and be free from want.<sup>53</sup> The importance of the right to work was underscored in the Universal Declaration in the sense that, even in the circumstances where one is unemployed; one has a right to social security.<sup>54</sup> From the RECs' point of view, SADC adopted the Charter on Fundamental Social Rights, under which member states bind themselves to provide sufficient resources and social assistance to those without employment.<sup>55</sup>

As far as the normative content of the right to work is concerned, the right to work has since been provided for by the non-binding Universal Declaration,<sup>56</sup> but no subsequent international or regional treaty ventured into elaborating on this right. Nevertheless, ICESCR is, under the circumstances, the most useful binding document to elaborate the right to work. For the purposes of this article, the right to work is limited to article 6, and the discussion does not include article 7 of ICESCR, which provides the right's derivative, that of employment.

Although the opening line of article 6(1) of ICESCR is phrased in a non-binding fashion, '[s]tates [p]arties ... recognise the right to work',<sup>57</sup> it, however, obliges states to take appropriate steps to safeguard this right.<sup>58</sup> The Covenant further clarifies the steps that state parties must take to achieve the enjoyment of the right to work.<sup>59</sup>

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53 PB Baehr *Human rights: Universality in practice* (1999) 32.

54 Art 25 Universal Declaration.

55 Art 10(2) SADC Charter on Social Rights, adopted 26 August 2003.

56 Art 23 Universal Declaration.

57 It is on this basis that the duty to create employment is referred to, by the author, as the moral duty and not the legal duty. However, it is no longer desirable for states to deny their obligations towards the enjoyment of the right to work; states are equally responsible for making the right to work available. See The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) (1989) 20 *Human Rights Quarterly* 4.

58 ICESCR (n 35 above).

59 Art 6(2) provides as follows: 'The steps to be taken by a state party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.'

The rights discussed above are looked at against the four frameworks from which all socio-economic rights are interpreted,<sup>60</sup> and the discussion is limited to access. In addition, since the article deals with RECs, the right to access education and the right to work will not be based solely on rights granted within particular states; rather access is looked at in terms of the regional framework, for example, the right to access tertiary education within the region of integration and the right to access work wherever it is available in the region without any discrimination, particularly on the basis of nationality.<sup>61</sup>

### 3 Relationship between the rights to work and education and economic integration

This section deals with the crux of the article, analysing the relationship between the right to access work and the right to access education in the region of integration and economic integration in the RECs. The primary argument is that the envisaged economic integration in the RECs ultimately depends on the rights to access education and work as is discussed below. Furthermore, it is argued below that the intra-regional promotion of the right to access education and the right to access work will deepen economic integration as intended by the state parties, much as their frustration can stifle economic integration.

#### 3.1 How does the economic integration agenda of the RECs involve the rights to access education and work?

The realisation of human rights imposes three obligations on member states, namely, the obligations to respect, protect and fulfil human rights. The discourse around these obligations was introduced by, among other scholars, Shue, who at the time referred to them as the duty to avoid, the duty to protect and the duty to aid.<sup>62</sup> At the primary level, the duty to avoid or the obligation to respect entails that there should be nothing done to violate rights or to deprive people of their rights.<sup>63</sup> At the secondary level is the duty to protect human rights, and the requirement is that people should be protected against a deprivation of their rights.<sup>64</sup> At the tertiary level, states bear the obli-

60 General Comment 13, The Right to Education, adopted 8 December 1999, UN ESCR Committee, 22nd session, UN Doc E/C 12/1999/10 (1999).

61 Although one may argue that developing countries can discriminate against non-nationals in relation to the fulfilment of socio-economic rights under ICESCR, the African Commission has ruled to the contrary; see *Union Interafricaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997).

62 H Shue *Basic rights: Subsistence, affluence and US foreign policy* (1980) 51.

63 Shue (n 62 above) 36-53.

64 Shue (n 62 above) 53.

gation to 'fulfil the basic needs (livelihood rights or basic rights)',<sup>65</sup> that is, states are the providers of the contents of human rights. That is so because 'the individual is expected, whenever possible through his or her own efforts and by use of his or her own resources, to find ways to ensure the satisfaction of his or her own needs'.<sup>66</sup>

Focusing on the obligation to provide, the expectation from nationals that states must facilitate and provide for their rights requires a substantial revenue and sustainable economy, which for many African countries is a problem. As a result, African countries came together in different and numerous groupings (RECs) with the aim to enhance the standard of living of their nationals through sub-regional integration.<sup>67</sup> Although the respective treaties of the RECs do not define aspirational 'standards of living', this can be viewed in the light of the Universal Declaration, which provides as follows:<sup>68</sup>

Everyone has a right to a standard of living adequate for the health and well-being of himself and of his family including food, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability...and other lack of livelihood in the circumstances beyond his control.

Raising the standard of living can be achieved either through social security or the provision of livelihood support. Of course, social security is not a sustainable way to improve the standard of living of people in the long run. Social security is appropriate primarily for the young, the infirm, and the aged, especially in poor countries with weak revenues.<sup>69</sup> As a result, the main focus is on providing the necessary tools for people to earn a living for themselves and their dependents. The author submits that these are largely dependent on the provision of education, the creation of meaningful employment opportunities and accessible employment. Therefore, they are the tools that RECs aim to place at the disposal of people through economic integration. Again, this is so because 'the individual is expected, whenever possible through his or her own efforts and by use of his or her own resources, to find ways to ensure the satisfaction of his or her own needs' such as food, shelter and health.<sup>70</sup> In other words, the primary responsibility to fulfil a person's needs lies with the individual concerned. The state comes in only when the individual cannot do so. However, this is not

65 A Eide 'Article 25' in A Eide *et al* (eds) *The Universal Declaration of Human Rights: A commentary* (1992) 388.

66 Eide (n 65 above) 387.

67 Art 2(b) EAC Treaty (n 5 above); art 3(1) ECOWAS Treaty (n 5 above); art 1(a) SADC Treaty (n 5 above).

68 Art 25(1) Universal Declaration.

69 P Justino 'Social security in developing countries: Myth or necessity? Evidence from India' (2003) <http://www.sussex.ac.uk/Units/PRU/wps/wp20.pdf> (accessed 13 February 2011).

70 Eide (n 65 above) 387.

as easy as that. For example, as seen in other jurisdictions, South Africa in particular, the cases of *Grootboom* and *Soobramoney* have shown that, even where socio-economic rights are guaranteed in a national constitution, it is not always the case that in the event that one cannot provide for himself, the state will step in.<sup>71</sup> As a result, one must attain a certain level of education, whether formal or informal, to be in a position to get employment and provide oneself with basic needs such as health, food or shelter. Consequently, education becomes a means to, among others, access employment in order to earn a living, although not all qualifications result in employment.<sup>72</sup>

Further, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) noted the importance of the right to work, and pointed out that ‘the right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity’.<sup>73</sup> Indeed, *Grootboom* and *Soobramoney* of South Africa could not enjoy health and shelter, respectively, because they did not have the type of work that enabled them to do so and, in the end, their dignity was compromised. However, this does not mean that all educated persons are employed or are in employment that allows them to realise their needs or that uneducated persons cannot provide for their own needs but, generally, education paves the way for people to get into a better employment sector. Therefore, the involvement of education and work as a means to raise the standard of living in the economic integration agenda of the RECs is well established.

To summarise, despite the fact that RECs have not pronounced themselves on how to raise the standard of living of people, it is argued that this may be done by making education accessible, to create employment that enables people to provide for themselves and to make such employment accessible for all within the entire area of integration. This shows how education and work are involved in the economic integration agenda of RECs. These are the integral rights to sub-regional economic integration if the RECs are to achieve the goal to raise the standard of living of the community.

### **3.2 How does the promotion/frustration of the right to access education and work, intra-regionally, affect the economic integration agenda of RECs?**

This section shows how the promotion or frustration of intra-regional rights to education and work affects economic integration.

71 *Government of the Republic of South Africa v Grootboom & Others* 2001 1 SA 46 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

72 K Drzewicki ‘The right to work and the rights in work’ in A Eide *et al* (eds) *Economic, social and cultural rights* (2001) 223.

73 General Comment 18 The Right to Work (n 33 above) para 1.

Economic integration is largely centred on the penetration of economic borders of states, and equal treatment of local and foreign trade and investment. Many African states are skeptical of doing this, largely because of state sovereignty and the protection of their own economies. Member states of RECs have the ultimate goal to create common markets, thus allowing free movement of factors of production and the adoption of a common policy, among others. This goal seems hard to reach due to fears that, in SADC, for example, once a common market is in place, then people from within the region would leave their home countries and flood the market in South Africa.<sup>74</sup> Thus far, most RECs are based solely on free trade agreements, with a few customs unions. However, little has been done to achieve the ultimate goal – common markets, which have been planned for a long time.<sup>75</sup> The question that follows is: How can the promotion of the rights to access education and work speed up the full integration process in the RECs?

In an attempt to answer this question, the author argues that labour mobility (access to work intra-regionally) is the key to economic integration, particularly for the advanced stage of integration envisaged by the RECs – common markets. Through the promotion of the right to access work and the right to access education throughout the area of integration, member states may find it easier to create common markets, thereby achieving their goal. However, such labour mobility should simultaneously address the most notable threat to deepening integration, namely, flooding the labour markets of richer states within the block.

If properly managed, labour mobility (access to work intra-regionally) can assist in lifting the barriers to trade through economic activities carried out by individuals who have crossed borders to become educated, to find work, and to engage in entrepreneurial activities; other sectors which were not previously integrated will become integrated, thereby allowing spillover which is fundamental to development and hence beneficial to economic integration. The principle of spillover provides that integration by sector cannot be achieved in isolation; as one sector is integrated there will be consequences, prompting other sectors to be integrated.<sup>76</sup> For example, labour mobility may assist in integrating the financial sector through the transfer of hard currency. A good example to illustrate this point is in Albania where the Albanian banks have developed partnerships with banks in the main destination countries for Albanian migrants.<sup>77</sup> To this end, wages sent back to labourers'

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74 JO Oucho & J Crush 'Contra free movement: South Africa and the SADC Migration Protocols' (2001) 48 *Indiana University Journal* 141-43.

75 Status of Implementation of the Regional Integration Agenda in Africa, adopted 1 July 2008. 11th ordinary session, Assembly/AU/12/(XI) (Status of Implementation).

76 PC Schmitter 'A revised theory of regional integration' in LN Lindberg & SA Scheingold (eds) *Regional integration: Theory and research* (1972) 235.

77 International Organisation for Migrants (IOM) *World Migration Report* (2010) 48.

home countries through formal banking can result in a harmonised banking system. Consequently, the banking sector is spontaneously harmonised, thus deepening economic integration through spillover. In the same manner, labour mobility (access to work intra-regionally) contributes to the circulation of financial capital in terms of wages,<sup>78</sup> and this has the potential of alleviating poverty in the region, which is core to the RECs.

Relating the idea of spillover to the RECs, one finds that spillover is almost impossible given the current low levels of integration in the economic sector. In addition, political interference leaves little room for automatic spillover contrary to neo-functionalism,<sup>79</sup> which is one of the primary theories underpinning integration in Africa.<sup>80</sup> Therefore, the author submits that it is possible with the promotion of the right of access to work intra-regionally that there can be spillover into economic integration in the RECs. Writing on ECOWAS's failure to implement the Protocol on the Right of Establishment, Adepoju acknowledges the close link to the right of free movement, integration of trade, tariff regimes and the promotion of labour mobility in the sub-region,<sup>81</sup> which the RECs should strive to achieve.

However, the free movement of persons and the establishment in the area of integration, particularly in the RECs where there is uneven economic development among the states, may be problematic.<sup>82</sup> For example, in SADC South Africa is a major power and Nigeria is a major economy in ECOWAS while other states are struggling. So, in a situation where there is uneven development in an area of integration, the tendency is that nationals of poorer states migrate to the richer states to pursue a better standard of living.<sup>83</sup> Consequently, migration

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78 H Nassar 'Intra-regional labour mobility in the Arab world: An overview' in Arab Labour Organisation *et al* (eds) *Intra-regional labour mobility in the Arab world* (2010) 31.

79 Neo-functionalism was a response to the need to relate and apply functionalist ideas to integration; see JC Senghor 'Theoretical foundations for regional integration in Africa: An overview' in AP Nyong'o (ed) *Regional integration In Africa: Unfinished agenda* (1990) 20. This theory does not necessarily imply that states have to forego their sovereignty and control over policy, but pooling so much of it as may be necessary for joint performance of the particular task. See Holland (n 26 above) 15. The main feature of neo-functionalism is the idea of automatic spillover which, according to neo-functionalism, means that integration by sector cannot be achieved in isolation; as one sector is integrated there will be consequences, influencing other tasks to be integrated; see Schmitter (n 76 above).

80 Senghor (n 79 above) 234.

81 A Adepoju 'Creating borderless West Africa: Constraints, and prospects for intra-regional migration' UNESCO SHS/2005/MWB/1 (2005) 9.

82 M Trebilcock & R Howse *The regulation of international trade* (2005) 9.

83 An example closer to home is in ECOWAS during the introduction of free movement of persons and the right of establishment where Nigeria had to expel some of the community citizens, estimated in millions, because people wanted to pursue a better standard of living in Nigeria; see JE Okolo 'Free movement of persons in ECOWAS and Nigeria's expulsion of illegal aliens' (1984) 40 *The World Today* 428-436.

improves the labour pool in the receiving country, but causes a brain drain in the sending country – a loss that is not completely rectified by the sending back of wages. This is so because, usually, those who leave their countries are young and skilled, that is, potential producers, while consumers and dependents remain behind.<sup>84</sup> Consequently, this calls for replacement migration, which may be direct or indirect.<sup>85</sup> Direct replacement migration occurs when jobs left by emigrants are filled directly by incoming migrants, while indirect replacement migration occurs when skilled emigrants leave jobs which are filled by workers from lower occupational positions.<sup>86</sup> Often in the case of SADC indirect replacement occurs, particularly with least developed countries such as Lesotho and Zambia, because of low levels of development and a lack of social services. Therefore, the jobs left vacant by departing skilled labourers do not attract foreign skilled labour from the region of integration.

A solution to the insufficiency of replacement migration is brain or labour circulation (circular migration). Here, policies are adopted to promote the return of temporary emigrants to their home countries to participate in economic and human development, hopefully with new skills and networks developed abroad.<sup>87</sup>

In order to counteract the potential negative effects of the brain drain for poorer countries in the RECs and also to prepare countries even better for economic and political integration, member states should strengthen their own internal education and job creation policies. This is the area where regional efforts must come in – to assist poorer member states to create better schools and jobs through, for example, locating community enterprises in poorer countries for job creation. It is for this reason that the Congress of South African Trade Unions (COSATU) in South Africa, while rejecting the SADC Protocol on Trade and ‘endorsing’ regional integration in SADC, advocated measures to strengthen industry in other SADC countries, especially in those areas where countries have a comparative advantage in order to create jobs in SADC countries to avoid the influx of migrants into South Africa.<sup>88</sup> What COSATU proposed is aimed at ensuring the equal distribution of benefits of integration. This was done by Andean countries, where each country was given the opportunity to establish an industry for which it was best suited. Consequently, all the Andean countries grew in industry, thereby creating job opportunities while increasing the

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84 M Jovanovic *The economics of international integration* (2007) 99.

85 Nassar (n 78 above) 22.

86 As above.

87 IOM (n 77 above) 53.

88 COSATU Submission on the SADC Protocol on Trade <http://www.cosatu.org.za/docs/subs/1999/sadctrad.htm> (accessed 27 May 2010).



capacity to export to other members within the Pact.<sup>89</sup> Further, in view of the need to create jobs, countries such as the United States invest heavily in their educational system and in research and development (R&D) to create new job opportunities. These same kinds of intensive investments in higher education and in research and development capacity are also needed in Africa, especially if Africa hopes to accelerate its path to development.

Nonetheless, the prerequisite for regional labour mobility is accessible education. This means the same treatment that is given to nationals of a particular state must be extended to the citizens of the block. For example, fees should be the same for all and there should be no visa requirements as these inhibit the right to access education in the region of integration. To this end, ECOWAS aims to enable the free movement of one of the factors of production (labour) and the right of establishment.<sup>90</sup> Once the right of establishment is in place, ECOWAS citizens will be able to access employment and education from anywhere within the region without any permit requirements (work or study permits) and without any discrimination on the basis of nationality, especially in relation to the payment of fees for education. Despite this provision not being in force in SADC, recent developments in which South Africa in response to the Zimbabwean crisis granted Zimbabweans the necessary documents to seek employment in South Africa, are commendable, and indicate some level of commitment to regional integration in SADC.<sup>91</sup>

However, notwithstanding the commitment by SADC states in the Protocol on Education, some SADC host states continue to treat students from other SADC countries as international students in terms of fees, thus discriminating against them on the basis of nationality.<sup>92</sup> The Protocol on Education was signed in 1997 and entered into force in July 2000. Therefore, 31 June 2010 marked 10 years of the Protocol being in effect. Still, there is little equal treatment for students in the SADC region. In fact, the Protocol was supposed to achieve its goal in stages – the first stage was aimed at relaxing and eventually eliminating immigration formalities in order to facilitate freer movement of students and staff within the region.<sup>93</sup> This has not occurred; students

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89 E Tironi 'A case study of Latin America' in D Seers & C Vaitos (eds) *Integration and unequal development: The experience of the EEC* (1980) 52.

90 Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment, adopted 30 May 1990 (ECOWAS Protocol on the Right of Establishment).

91 'Govt steps up plan to issue permits to Zimbabweans' <http://www.mg.co.za/article/2010-09-10-govt-steps-up-plan-to-issue-permits-zimbabweans> (accessed 12 February 2011).

92 Art 7(5) SADC Protocol on Education, adopted in Malawi on 8 September 1997, entered into force 31 July 2000.

93 Art 3(g) SADC Protocol (n 92 above).

are, to this day, compelled to apply and pay for study permits to study in SADC countries, which is a deterrent to students wishing to study in foreign SADC states.<sup>94</sup> Also, in some SADC states fees remain discriminatory on the ground of nationality: Undergraduate citizens of Lesotho pay R10 740,00 to study a Bachelor of Science degree at the University of Lesotho, while foreign students, including students from SADC countries, pay M30 580,00 to study the same course at that university.<sup>95</sup> However, in other SADC states, nationals and students from SADC countries pay the same fees as citizens, and this is commendable. Nonetheless, this and immigration formalities within the SADC region have far-reaching consequences, such as hindering the exchange and learning of African traditions and thereby slowing down the integration process.<sup>96</sup>

Educational qualifications should be harmonized as well. This is because the right to access education and the right to access work reinforce each other and require educational qualifications to be harmonised throughout the region in order to facilitate the mobility of Africans across Africa for employment.<sup>97</sup> Indeed, harmonised qualifications will expedite the return of education migrants to their countries of origin, reducing the threat of permanent migration and brain drain. At the moment it does not make sense that high school matriculants from Lesotho and Swaziland do not have direct access to tertiary education at South African universities, and of course this may be attributed to the fact that educational qualifications are not harmonised in the SADC region. In comparison, ECOWAS harmonised high school-leaving qualifications so as to enable access to tertiary education in the region. To this end, almost all ECOWAS member states adopted the general certificate of education ('A' and 'O' levels) as the standard secondary school-leaving certificates.<sup>98</sup>

Of course, not only is education important for labour mobility, but also for the integration process in general. To this end, when states venture into an advanced form of integration such as the RECs, education becomes as important to regional economic development as are factors such as transport systems, which facilitate the integration of markets. This is because when countries integrate, their success will depend, in

94 South Africa, Visas and Study Permits, <http://www.southafrica.info/travel/documents/studypermits.htm> (accessed 27 January 2011).

95 National University of Lesotho 'Fee structure for the 2010/2011 academic year' [http://www.nul.ls/export/sites/default/nul/nuldownloads/Fee\\_Structure\\_2010.pdf](http://www.nul.ls/export/sites/default/nul/nuldownloads/Fee_Structure_2010.pdf) (accessed 27 January 2011).

96 Art 1 Cultural Charter for Africa, adopted 5 July 1976, entered into force 19 September 1990.

97 S Hoosen *et al* 'Harmonisation of higher education programmes: A strategy for the African Union' (2009) 3 *African Integration Review* 2.

98 United Nations Economic Commission for Africa (UNECA) 'Human resources and labour mobility' 197 <http://www.uneca.org/aria1/Chap9.pdf> (accessed 17 March 2011).

part, on their common base of knowledge, their ability to anticipate and adapt to rapid changes in technology and trends, and their nurturing of leaders with a regional outlook, and all of these can largely be achieved through the promotion of the right to access education in the area of integration and harmonised educational qualifications.

In Africa, not only is economic integration centred on the removal of trade barriers but also on the development of the continent in terms of technology, infrastructure and otherwise. As a result, the right to education is crucial in economic integration in that, since the size of the market increases, the competition and supply of skills become important ingredients in the complex links between technological opportunities and entrepreneurial decisions. As such, research and development play a crucial role in the innovation process as it sustains a supply of knowledge.<sup>99</sup> Such research and development are highly dependent on the population's educational attainment. Therefore, the promotion of the right to education within the region of integration is vital to successful economic integration in that it creates a hub for technological skills and innovation.

As other scholars have argued, the idea of loyalties is fundamental to successful integration.<sup>100</sup> In particular, according to the functionalists, progress in international economic and social spheres is a precondition for the elimination of political conflict and wars, with the expectation that the needs of an individual will gradually direct his loyalties away from the nation state to the functional international organisation<sup>101</sup> and, for Africa, this would mean directing loyalties to the RECs. In the same manner, neo-functionalists postulate that integration is born as a result of successful transitional institutions, that is, loyalty from nation states to the larger unit.<sup>102</sup> To this end, the author argues that loyalties can easily be directed to the larger units, RECs, if the individuals get meaningful employment and access to education as a result of efforts by the RECs. On the other hand, if individuals remain in poverty due to retrogressive employment policies arising out of revenue cuts and trade diversion in an integration block, it is plausible that individuals will be unable to direct their loyalties to the RECs because the RECs would be regarded as counter-productive. Therefore, the denial of these rights intra-regionally can prevent loyalties from being directed to the RECs, yet loyalty is fundamental to the integration process.

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99 Jovanovic (n 84 above) 99.

100 Integration in Africa is best discussed in terms of functionalism and neo-functionalism. This is because African states want to protect national sovereignty while fostering international co-operation, incrementally, through the establishment of regional organisation to promote economic development, and this resonates well in the functionalism and neo-functionalism theories. See Senghor (n 79 above) 18.

101 Senghor (n 79 above) 19.

102 As above.

While the above sections deal with the link between the rights to access education and work and economic integration, this relationship cannot be discussed in isolation from political integration. This is particularly so because African countries aim to establish a pan-African government, that is, political integration. Further, some RECs, such as the East African Community, strive to achieve political integration at the sub-regional level.<sup>103</sup> More importantly, while economic and political integration are two distinct forms of integration, there can be overlaps between the two. For example, a mere free trade area among states does not give rise to political community while economic union and common markets lead to political community because of the creation of central institutions and policies as well as the free movement of labour.<sup>104</sup>

Relating the importance of the right to access education and the right to access work in deepening political integration, it is submitted that political integration involves cultures and social factors, that is, values and interests. The reason is that with political integration, not only are the governments involved, but also people must feel loyalty to the larger unit.<sup>105</sup> As Haas correctly puts it, the expectation is that, as the process of political integration proceeds, values and interests change – they shift from the national governments and will be redefined in the context of regional rather than purely national orientation, and that the national values will be superseded by the geographical new set of beliefs.<sup>106</sup> Shared cultures and values can only be achieved through the interaction of the peoples of the region, something which can be achieved through accessible education and work.

The definition of the right to education underscores its importance in political integration. Thus, education is defined as '[t]he transmission to a subsequent generation of the social, cultural, spiritual and philosophical values of the particular community'.<sup>107</sup> Clearly, the transmission of social, spiritual and philosophical values of the community cannot be achieved without the promotion of access to education within the block of integration. Also, it is only when people share their social and philosophical values within the community that events such as xenophobic attacks in countries such as South Africa would end because South Africans would see Zimbabweans as fellow citizens of the larger

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103 Art 5(2) EAC Treaty (n 5 above).

104 Holland (n 26 above) 12.

105 AH Birch *Political integration and disintegration in the British Isles* (1977) 32.

106 EB Haas *The uniting of Europe: Political, social and economic forces 1950-1957* (1958) 13-14.

107 KD Beiter *The protection of the right to education by international law: Including a systematic analysis of article 13 of the International Covenant on Economic, Social, and Cultural Rights* (2006) 19.

unit – SADC.<sup>108</sup> In ECOWAS, harassment on the roads<sup>109</sup> would cease when individuals from different nation states share values and look at each other as belonging to a larger unit – ECOWAS.

## 4 Conclusion

Despite the novelty that the RECs displayed with their involvement in hearing human rights cases, there is no doubt that sub-regional economic integration in Africa has a direct link with human rights, particularly socio-economic rights. This is especially because one of the main objectives of the RECs – ‘improving the standard of living’ – is an indication of the commitment to the realisation of socio-economic rights, particularly the right to access education, the moral duty to create employment and the right to access work. This rests on the submission that education and work are core to improving the standards of living, which is the objective of these economic bodies. It is therefore concluded that this objective creates a direct link between economic integration in the RECs and the right to access education and the right to access work, as well as states’ obligation to create employment.

Bearing in mind the primary objective of the RECs to raise the standard of living of the people and to achieve free trade areas, customs unions and common markets, it is concluded that if economic integration were to succeed in the RECs, efforts must be made to enable the free movement of persons and the right of establishment. This move would enable community citizens access to education and work, and thus improve the standard of living. This right of intra-regional movement should be supplemented, however, with policies designed to promote brain/labour circulation instead of a permanent brain drain. Nonetheless, once these rights of intra-regional mobility to access education and jobs are realised in the region of integration, they are capable of accelerating and deepening the entire integration process in the RECs. As a result, the mutually-beneficial relationship between economic integration and education/job mobility should be recognised and policies developed to achieve their realisation.

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108 D Katerere ‘Putting out “fire next time”’ *Mail & Guardian* <http://www.mg.co.za/article/2010-02-18-putting-out-fire-next-time> (accessed 28 February 2011).

109 Status of Integration (n 75 above) 29.