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Human rights developments in African sub-regional economic communities during 2011

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Summary

During 2011 there were both negative and positive developments in the human rights work of African sub-regional economic communities. From the negative perspective, the travails of the Southern Africa Development Community Tribunal in 2011 stand out as the most notorious as they brought about a limitation in the effectiveness of this erstwhile budding human rights regime in Southern Africa. Arguably, as a consequence of the suspension of the Tribunal, there was very little human rights activity from Southern Africa to report on. Thus, the focus in this contribution is squarely on developments that occurred in the human rights regimes in East Africa and West Africa. Significantly, there was an increase in human rights litigation activity before the sub-regional courts in both regions. Activities in the judicial sector and other non-juridical human rights activities in the respective regimes of the East African Community and the Economic Community of West African States are analysed critically in this contribution. Developments during 2011 demonstrate the growing confidence of actors and institutions in the human rights regimes of the two sub-regions.

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1 Introduction

Since the early part of this millennium,[1] the subtle expansion of the African human rights system, largely as a result of the emergence of human rights protection regimes within the frameworks of sub-regional economic communities, has been one of the means by which international law has aided the promotion and protection of human rights on the African continent. As challenges such as restricted individual access to the African Court on Human and Peoples' Rights (African Court) increase frustration and dissatisfaction with the continental human rights framework, victims of human rights violations and support organisations (such as non-governmental organisations (NGOs)) have increasingly turned to the nascent regimes in the sub-regions for succour.[2] The best evidence of this trend is the increasing human rights case load of the most prominent sub-regional judicial institutions.[3] Notwithstanding the fact that there is an annual increase in the number of human rights cases that come before some of the sub-regional courts, there has not been an equivalent avalanche of activities in the non-juridical sector. Thus, in the past few years, sub-regional contributions to the African human rights system have been most visible in the judicial sector.

Within the period of observable activity, the sub-regional contribution to the expansion of the scope of human rights realisation in Africa has been spear-headed by the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern Africa Development Community (SADC). It is against this backdrop that stakeholders in the African human rights system have focused their attention on these three sub-regional organisations in developing strategies to accommodate increased sub-regional

1 The idea of the sub-regional realisation of human rights emerged with the resurgence of economic regionalism in the late 1990s as evidenced in the revision of the treaties of regional economic communities or the adoption of new treaties. However, it was the increased involvement of the ECOWAS Community Court of Justice in judicial protection of human rights in 2005 that heralded the entry of RECs in the field of continental protection of human rights that was previously the exclusive preserve of the African Union. Generally, see F Viljoen *International human rights law in Africa* (2012) 469 for a discussion of the realisation of human rights through sub-regional institutions in Africa.

2 Fortunately, the increased use of sub-regional human rights realisation mechanisms does not appear to have negatively impacted on the demands on continental structures such as the African Commission on Human and Peoples' Rights.

3 Eg, the ECCJ is reported to have received 100 cases between 2005 and 2011. See S Ojelade 'ECOWAS Community Court handles 100 cases in six years – President', http://www.nationaldailyngr.com/index.php?option=com_content&view=article&id=2378:ecowas-community-court-handled-100-cases-in-six-years-president&catid=372:news-extra&Itemid=617 (accessed 15 May 2012).

presence in human rights.[4] Accordingly, academic attention has also beamed more on the human rights activities of the EAC, ECOWAS and SADC.

The year 2011 has generally not been significantly different from previous years in terms of sub-regional human rights realisation. However, there are a few areas in which critical developments have taken place. Notorious among such events is the forced withdrawal of the SADC Tribunal from the field.[5] From a positive perspective, in spite of the difficulties that have been experienced in the effort to actualise the envisaged expanded human rights jurisdiction of the East African Court of Justice (EACJ), the EACJ continued to assert itself as a major player in the field. These and other human rights-related events that occurred in 2011 are the focus of this contribution.

The analysis is undertaken in four broad sections. Section one, the introduction, lays out the framework for the discourse. Sections two and three highlight and analyse major human rights developments in the EAC and ECOWAS. Section four concludes the contribution. As a result of space constraints, the article omits the challenges to the human rights jurisdiction of the SADC Tribunal. This contribution demonstrates that the sub-regional realisation of human rights, especially in the area of judicial protection, is gradually coming of age as the practices of two sub-regional courts in 2011 indicate that there is growing institutional confidence.

2 Developments in the East African Community framework

Since the idea of 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' was introduced as a fundamental principle in the 1999 Treaty of the EAC (as amended), the EAC has increasingly developed positive action in the field of human rights.[6] EAC action in the field over the years has been diverse. For present purposes, the human rights work of the EAC during 2011 can broadly be classified into judicial and non-juridical activities.

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4 Eg, the development of strategies on the platform of the African Union has commonly focused on the EAC, ECOWAS and SADC regimes. Similarly, donors and development partners from outside the continent have been more interested in understanding and supporting the human rights work in these three organisations.

5 In May 2011, the operations of the SADC Tribunal were suspended and the Tribunal all but wound up.

6 See ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2010' (2011) 11 *African Human Rights Law Journal* 216 for a brief introduction of the nature of the EAC human rights regime.

2.1 Non-juridical developments

Other than the EACJ, there are six major organs in the framework of the EAC that work together towards the realisation of organisational objectives.[7] The overarching nature of human rights in the EAC obligates all of these organs to play some role or another in the field. During 2011, non-juridical human rights developments occurred in areas such as standard setting, thematic meetings and activities aimed at strengthening democracy within the partner states.[8]

2.1.1 Setting human rights standards

It has to be borne in mind that the EAC is not a regular or conventional human rights organisation to the extent that the realisation of human rights is not enumerated in its main organisational objectives.[9] Accordingly, up until December 2011, the EAC has yet to develop a dedicated EAC-specific human rights instrument. However, since 2004 when it was first initiated by national human rights commissions in the region (in collaboration with an NGO), the idea of a dedicated bill of rights for the EAC has grown stronger in the region.[10]

During 2011 efforts aimed at actualising the adoption of a regional Protocol on Good Governance and the regional Bill of Rights were intensified in the framework of the EAC. Building on fundamental principles set out in article 6 of its Treaty and a growing campaign that links democratic good governance to successful regional integration,[11] the EAC initiated national stakeholders' consultative meetings as early as February 2011 to discuss the proposed Protocol.[12] The draft

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7 By art 9 of the 1999 EAC Treaty (as amended), the organs of the EAC include the Summit, the Council, the Co-ordination Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat.

8 The classification of activities under these headings is not rigid and is not to suggest that these are standard labels for human rights activities. It has been done liberally (as in previous years) to easily capture connected human rights or rights-related activities under the same heading for the sake of convenience. Hence, a term like 'standard setting' is used here to capture all activities relating to setting new standards through treaty or policy adoption as well as activities aimed at re-affirming existing human rights standards.

9 Art 5 of the 1999 EAC Treaty as (amended) enumerates the objectives of the EAC.

10 See Ebobrah (n 6 above) 216 220-221.

11 The EAC Deputy Secretary-General in charge of Political Federation draws this link probably to justify intensified action in this area. See 'EAC – COMESA – IGAD Observer Mission Interim Report of 2011 General Elections in the Republic of Uganda', http://www.eac.int/about-eac/eacnews/567-press-release-eac-comesa-igad-oberver-mission-interim-report-general-election-republic-of-uganda-2011.html (accessed 15 May 2012).

12 Pressrelease'StakeholdersdiscussdraftGoodGovernanceProtocolandBillofRightsin Burundi' http://www.eac.int/about-eac/eacnews/574-press-release-stakeholders-discuss-draft-good-governance-protocol-and-bill-of-rights-in-burundi.html (accessed 15 May 2012).

Protocol stands on four main pillars which include 'democracy and democratisation processes; human rights and equal opportunities; the rule of law and access to justice; and anti-corruption, ethics and integrity'.[13] The proposed Bill of Rights creates room for the establishment of an East African Human Rights Commission, which will have the mandate to promote and protect human rights in the region.[14] While the establishment of the regional Commission adds to the proliferation of international human rights supervisory bodies on the continent, it can also be read as an indication that the EAC considers the subject of human rights sufficiently important to warrant the establishment of a department dedicated to its realisation.

In relation to the proposed Protocol on Good Governance, part of its significance lies in the fact that it is expected to provide a platform for actualising expanded jurisdiction for the EACJ which would cover human rights as envisaged in article 27(2) of the EAC Treaty. For instance, stakeholders at the municipal consultation in Burundi took the view that the adoption of the Protocol on Good Governance had to go hand in hand with the expansion of the jurisdiction of the EACJ to cover issues of good governance and human rights.[15] Arguably, the adoption of region-specific standards of good governance potentially increases pressure on the heads of state and government to actualise the expanded jurisdiction of the EACJ. The addition of a region-specific bill of rights could be interpreted to mean that the human rights jurisdiction of the EACJ may be linked to such a document. If this is correct, it would mean that the African Charter on Human and Peoples' Rights (African Charter) may lose its central position as the preferred human rights catalogue in the EAC framework. While this can reduce the potential for a conflicting interpretation of the African Charter, since the EACJ will begin to apply the region-specific instrument rather than the African Charter, it remains to be seen whether it would also lead to lowering the standard of protection that exists under the African Charter regime.

Although the pace at which the Protocol to expand the jurisdiction of the EACJ has been adopted was as slow as the proposed EAC Bill of Rights in previous years, there was significant progress towards the adoption of the proposed Protocol on Good Governance in 2011. Following successful national consultations early in the year, experts converged on the platform of the EAC in May 2011 to finalise the draft Protocol for presentation to a multi-sectoral meeting of ministers of

13 As above.

14 As of the time of writing, the East African Legislative Assembly had passed the Bill of Rights into law. See 'EALA passes bill on human rights', http://www.eac.int/index.php?option=com_content&view=article&id=988:eala-passes-bill-on-human-rights&catid=146:press-releases&Itemid=194 (accessed 28 May 2012).

15 As above.

the partner states.[16] The draft was then presented to and adopted by the sectoral meeting for transmission to the EAC Council of Ministers. Two points are to be noted in relation to the consultation that is being undertaken on the proposed instrument. Firstly, the nature and depth of consultation on the Protocol create some level of legitimacy that previously has not been associated with human rights treaty making in Africa. To some extent there is a prospect for popular ownership of such a treaty in the ratifying states with a consequent expectation of internalisation of norms and standards. The second connected point to be made is that the involvement of both civil society and the different layers of national government is likely to impact on the speed with which states sign and ratify the Protocol.

2.1.2 Thematic meetings

Another form of non-juridical human rights development in the EAC during 2011 was the hosting of meetings on human rights or rights-related subjects. In this regard, the EAC provided a platform for national electoral commissions in the region to meet for the purpose of sharing experiences on improving elections and democratic governance.[17] An important feature of the meeting was that it provided room for collective consideration of the reports of EAC observer missions to partner states that were involved in elections. In addition to providing opportunities for sharing best practices, such meetings could very well serve as naming and shaming devices that would potentially bring peer pressure to bear on electoral umpires and consequently improve performance.

During the period under review, the EAC also hosted a regional conference on good governance. In the context of the EAC, good governance encompasses aspects of human rights as well as respect for the rule of law. The 2011 conference, which built on two previous conferences on good governance, brought together about 200 participants drawn from the governments of partner states, ministries, parliaments, judiciaries, regional and global governance institutions, academia and civil society generally.[18] The conference aimed at linking respect for the rule of law and constitutionalism to regional integration. Considering that the EAC aims to ultimately achieve political integration, hosting such programmes with the potential to impact

16 See 'EAC Protocol on Good Governance in final stages' http://www.eac.int/about-eac/eacnews/633-protocol-on-good-governance-in-final-stages.html (accessed 15 May 2012).

17 'EAC heads of NECs discuss best practices in conducting credible elections' http://www.eac.int/about-eac/eacnews/613-necs-discuss-best-practices.html (accessed 15 May 2012).

18 'AC Conference on good governance opens in Kampala' http://www.eac.int/about-eac/eacnews/738-eac-conference-on-good-governance-opens-in-kampala-tomorrow.html (accessed 15 May 2012).

on domestic democratic cultures appears crucial for the realisation of organisational goals. Programmes such as the conference are more feasible at sub-regional levels than at the continental level, both in terms of practical convenience and overall impact potential. Hence, by hosting such programmes, the EAC unconsciously complements the work of the African Union (AU). Encouraging good governance in the EAC partner states has the potential to enhance the realisation of human rights, both in terms of creating a favourable domestic environment for the enjoyment of rights and ensuring the availability of resources necessary for the provision of certain rights.

2.1.3 Activities to strengthen democracy

A third genre of rights-related activities that the EAC engaged in during 2011 was targeted at promoting and consolidating democracy in the region. Following the now common practice of involving sub-regional organisations in the observation and monitoring of elections, as early as January 2011 the EAC was involved in putting up a 70-member Joint Election Observation Mission (in collaboration with the Common Market for Eastern and Southern Africa (COMESA) and the Intergovernmental Authority on Development (IGAD)), to observe the general elections in Uganda.[19] This joint election observation exercise was at the invitation of Uganda and is part of a regional political integration programme to promote political best practices and democracy in the region. The EAC takes the view that election observation is a tool for conflict prevention as it enables the organisation to track and resolve politically-motivated conflicts as early as possible.[20]

An outcome of increased EAC action in election observation and monitoring is the decision to adopt an EAC Election Monitoring and Observation Manual that aims to guide practice in this area. It should be noted that under the African Charter on Democracy, Elections and Governance (Democracy Charter),[21] the AU is expected to observe and monitor elections in African states that are party to the Democracy Charter.[22] While the involvement of more than one international organisation in observing elections in a state is not uncommon, there may be a need for co-ordination between sub-regional bodies such as the EAC and the AU in this regard, at least to reduce and save costs. It should also be noted that conducting a joint election observation

19 'EAC, COMESA, IGAD plan joint election observation for Uganda' http://www.eac.int/about-eac/eacnews/533-joint-election-observation-for-uganda.html (accessed 15 May 2012).

20 See the comments of the EAC Deputy Secretary-General in charge of Political Federation (n 11 above).

21 Adopted by the AU in 2007, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 108.

22 See art 19 of the Democracy Charter.

mission prevented a situation where all three sub-regional bodies to which Uganda belongs could have conducted separate and independent missions. Such co-operation between international organisations with overlapping membership is important in the face of the proliferation of sub-regional organisations. It is also significant that African governments and international organisations are beginning to find common ground on an issue as politically volatile as elections, especially against the background that such issues were previously considered to be exclusive domestic affairs by fiercely nationalistic post-independence African leaders. Overall, the activities in this area show that the work of the EAC has gone way beyond the narrow area of economic integration.

2.2 Judicial protection of human rights

The 1999 Treaty of the EAC recognises the EACJ as the judicial organ of the EAC. The EACJ consists of a First Instance Division and an Appellate Division.[23] By article 27(2) of the EAC Treaty, human rights jurisdiction is envisaged for the EACJ 'as will be determined by the Council at a suitable subsequent date'. Despite the fact that the envisaged human rights jurisdiction is yet to be conferred on the EACJ, this Court had previously engaged in creative judicial practice to adjudicate on matters touching on human rights.[24] Perhaps as a result of the uncertain nature of the human rights in the scheme of the EACJ's jurisdiction, not too many human rights-related cases were submitted to the Court. However, during 2011 a number of human rights-related cases were received and dealt with by the EAC. The next section briefly analyses the most important of those cases.

2.2.1 *Independent Medical Unit v Attorney-General of Kenya and Others*[25]

Between 2006 and 2008, over 3 000 Kenyans in the Mount Elgon district of Kenya were allegedly tortured and inhumanly treated. In this action, the Independent Medical Unit (an NGO) contended that Kenyan

23 Arts 9(e) & 23 1999 EAC Treaty.

24 The case of *Katabazi & Others v Secretary-General of the EAC & Others* was the first case where the EACJ faced the challenge of addressing complaints of human rights violations in spite of the absence of a human rights jurisdiction.

25 Unreported suit, reference 3 of 2010, ruling delivered on 29 June 2011. It must be noted that the significance of the findings in this case have been greatly watered down by the fact that the decision has been overruled in the appellate decision in *Attorney-General of Republic of Kenya v Independent Medical Legal Unit*, Appeal 1 of 2011, judgment of 15 March 2012. This later case falls outside of the temporal scope of this article, hence it has not been discussed.

officials[26] and the Secretary-General of the East Africa Community (as 1st to 5th defendants) failed in their respective duties to prevent, investigate and punish the perpetrators of the wrongs against the 3 000 Kenyans. Basing its action on article 30 of the 1999 EAC Treaty (as amended),[27] the International Medical Unit (IMU) argued that the failure of the relevant Kenyan officials to act was in violation of several international human rights conventions, the Kenyan Constitution and the EAC Treaty. Similarly, IMU argued that the failure of the Secretary-General of the EAC to investigate and take the necessary action against Kenya was a violation of article 71(d) the EAC Treaty. The respondents opposed the action and raised a preliminary objection to challenge its competence before the EACJ on the grounds that the Court lacked jurisdiction to receive human rights cases, that certain parties were wrongly joined, that the action was statute-barred and that certain procedural regulations had not been complied with.

Three of the grounds upon which the preliminary objection was raised are fundamental issues that touch on the very foundation of the current state of human rights litigation before the EACJ. First, the question was raised whether, in spite of article 27(2) of the EAC Treaty which attaches the exercise of human rights jurisdiction by the EACJ on the making of a yet-to-be-made protocol, the EACJ can still determine cases that partially or fully complain that human rights had been violated by a partner state. As will be seen shortly, this point recurs in all the cases alleging violations of human rights. Second, seeing that article 30 of the EAC Treaty has become the main entry point for human rights-related cases before the EACJ, the question of limitation of time is brought into light as article 30(2) stipulates that actions hinged on article 30 need to be instituted within two months of the occurrence of the wrong. Third, the respondents' objection raised the question as to who can properly be brought as a respondent in an action before the EACJ, especially if the action is based on article 30 of the Treaty.

The first point tackled by the EACJ was the question of jurisdiction. Considering the EACJ's decision in the case of *Katabazi and Others v Secretary-General of the East African Community and Another*,[28] that the Court will not shy away from determining cases touching on human rights in spite of article 27(2) of the Treaty, the objection raised in this

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26 The officials include the Attorney-General (official legal representative of the state), the Minister of Internal Security of the Republic of Kenya, The Chief of General Staff of the Republic of Kenya and the Commissioner of Police of the Republic of Kenya.

27 Art 30(1) of the 1999 EAC Treaty (as amended) provides that, subject to art 27 of the Treaty, any resident of a partner state may refer for the determination of the EACJ, the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the Community on the ground that such was unlawful or is an infringement of the provisions of the Treaty.

28 (2007) AHRLR 119 (EAC 2007).

matter was a subtle invitation to the EACJ to strongly motivate the legal basis for its exercise of human rights jurisdiction.[29] In its response to the objection, the EACJ apparently took an easy way out by pointing out that a similar objection was raised in the *Katabazi* case, yet the Court's panel in that case declared that it would not abdicate its duty to interpret the Treaty simply because the reference includes allegations of a human rights violation. Aligning itself with the panel in the *Katabazi* case, the Court asserted that it will also not abdicate its duty merely because an allegation that human rights have been violated is made.[30] The approach taken by the Court on this issue was a lost opportunity since the introduction of article 30 as the basis for the action should have prompted the Court to make a clear pronouncement as to whether allegations of human rights violations can be accommodated under article 30, especially as the article is expressly made subject to article 27.[31] As it stands, this decision provides authority for human rights-related cases to be brought before the EACJ under article 30 of the Treaty.

On the question of limitation, although the applicant's response to the objection was that the complaint involved allegations of a criminal nature and concerned good governance, justice and the rule of law and therefore could not be subject to limitation, the EACJ invoked the concept of continuing violation to reach a decision. According to the Court, the matters complained of 'are failures in a whole continuous chain of events' and therefore 'could not be limited by mathematical computation of time'.[32] The concept of continuing violation is not new to international human rights jurisprudence and its invocation by the EACJ is probably an indication that the Court will not encourage states to claim immunity for state officials on very flimsy grounds.

Regarding the objection on the joinder of individual officials of Kenya, the EACJ pointed out that article 30 related to actions of partner states and community institutions but not individual officials.[33] The

29 As ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges' (2009) 17 *African Journal of International and Comparative Law* 91 argued, it was evident from *Katabazi* that, in the absence of an unequivocal grant of human rights jurisdiction, the EACJ treads on a thin and delicate line when it is faced with cases alleging human rights violations. Hence, practitioners and litigants need to carefully couch claims before the court whenever a human rights violation is involved.

30 See p 6 of the *IMU* decision.

31 As at the time of writing, the Appellate Division of the EACJ, sitting on appeal over the present case, had criticised the First Instance Division for failing to properly analyse the basis for its claim of jurisdiction beyond the 'lone reference to the *Katabazi* decision'. Even though the Appellate Division considered *Katabazi* to be sound law, it felt that the question of jurisdiction raised issues of mixed law and fact and therefore required deeper evaluation and analysis. See *Attorney-General of Republic of Kenya* (n 25 above).

32 See p 10 of the *IMU* decision.

33 See p 7 of the *IMU* decision.

appearance of non-state actors as defendants or co-defendants in human rights cases before an African sub-regional court is an issue that the ECOWAS Community Court of Justice has also had to deal with in the last few years.[34] While it conceded that the present decision of the EACJ is based specifically on article 30 of the EAC Treaty (as amended), the decision is consistent with the current posture of the ECOWAS Court which has moved from accepting non-state actors as defendants to insisting that non-state actors are not proper defendants before an international court.[35] Although there is room for application to intervene in the EACJ regime, in order to maintain its status as an international court, the EACJ needed to clarify the point that only states can validly be respondents before it. Whatever its shortcomings might have been, this decision is a clear statement by the Court that human rights matter in its scheme of things, despite the delay in process to enlarge the jurisdiction of the Court.

2.2.2 *Sebalu v Secretary-General of the EAC and Others*[36]

The applicant in the *Sebalu* case was a candidate at the elections in Uganda who unsuccessfully challenged the results of the elections before municipal courts in Uganda. Basing his claim before the EACJ on articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the EAC Treaty, the applicant claims a right of appeal to the EACJ. The applicant contends that the failure of the institutions and organs of the EAC to convene and adopt the necessary legal instrument to confer appellate jurisdiction on the EACJ over decisions of municipal courts was in violation of the Treaty, especially as it concerns 'fundamental principles of good governance, adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally-acceptable standards of human rights'.[37]

Although a number of issues involved in this case have very remote connections with human rights, certain points of importance were raised and addressed. In relation to the question whether a cause of action existed in favour of the applicant to warrant the action, the EACJ outlined the distinction between a cause of action under common law and a cause of action under statute and legislation (perhaps this is to be read to include a treaty).[38] Relying on an earlier decision of the EACJ

34 See, eg, the case of *Ukor v Layele*, unreported Suit ECW/CCJ/APP/01/04, as well as the cases of *David v Uwechue*, unreported Suit ECW/CCJ/APP/04/09 and *SERAP v The President of Nigeria & 8 Others*, unreported Suit ECW/CCJ/APP/07/10 (discussed by Ebobrah (n 6 above) 216).

35 See *David v Uwechue* (n 34 above).

36 Unreported, reference 1 of 2010, judgment delivered on 30 June 2011. The 2nd, 3rd and 4th respondents are the Attorney-General of Uganda, one Hon Sam Njuba (the winner of the election) and the Electoral Commission of Uganda.

37 See p 2 of the *Sebalu* decision.

38 See p 16 of the *Sebalu* decision.

in the case of *Prof Peter Anyang' Nyong'o and Others v Attorney-General of Kenya and Others*, the Court emphasised that in an action under article 30 of the EAC Treaty, there is no requirement for the claimant to show a right or interest or damage suffered before a cause of action will exist in favour of such a claimant.[39] By necessary implication, from a human rights perspective, the EACJ appears to be saying that under article 30, there is no victim requirement in actions before the court. Accordingly, human rights defenders with little or no connection with victims other than the general interest of the public at heart can rely on article 30 to bring actions in defence of human rights.

The decision in this case also provided an opportunity for the EACJ to stress that, as presently constituted, the Court cannot exercise appellate jurisdiction over municipal courts as its current appellate jurisdiction is merely internal. There is an underlying suggestion that a future EACJ would not merely play a supervisory role over partner states' compliance with treaty obligations, but will probably actively review the decisions of municipal courts. The feasibility and desirability of such a role in the field of human rights need to be properly investigated and assessed. For now, it is sufficient to observe that the EACJ regime provides a prototype for the creation of appellate divisions in international court systems in Africa.

On the merits of the case itself, the EACJ agreed with the contention that the delay in adopting the protocol necessary to expand the jurisdiction of the Court has a negative effect on the fundamental principles of good governance, adherence to the principles of democracy and the rule of law.[40] Considering that the same protocol is expected to confer an explicit human rights jurisdiction on the EACJ, this decision may very well be saying that the delay in granting a human rights jurisdiction to the Court is itself a violation of the EAC Treaty. In fact, the EACJ holds the view that 'endless consultative meetings without tangible results is (*sic*) unproductive'.[41]

Another crucial point made by the EACJ in the *Sebalu* case relates to its finding on the justification for sub-regional courts to play a role in human rights adjudication. The EACJ noted that partner states had a treaty obligation not to jeopardise the objective of integration.[42] The Court apparently considers good governance and human rights to be vital for successful integration. Hence, after stressing that national courts had a primary obligation to promote and protect human rights, the EACJ went on to state as follows:

> But supposing human rights abuses are perpetrated on citizens and the state in question shows reluctance, unwillingness or inability to redress the abuse, wouldn't regional integration be threatened? We think it

39 See pp 17 to 19 of the *Sebalu* decision.

40 See p 19 of the *Sebalu* decision.

41 See p 32 of the *Sebalu* decision.

42 See p 29 of the *Sebalu* decision.

> would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the community partner state concerned to access their own regional court, to wit, the EACJ, for redress? We think they would.

Having established a basis for its intervention, the EACJ appeared to have recognised its present limitations as a forum for human rights litigation. It acknowledged that it could only make declarations on whether human rights have been violated in disregard of treaty obligations. Thus, the Court stated that '[t]he EACJ is a legitimate avenue through which to seek redress, even if all the Court does is to make declarations of illegality of the impugned acts, whether of commission or omission'.[43] Hopefully, after a declaration is made by the EACJ, other authorities, including partner states and EAC institutions, will ensure that states act to right such established wrongs.

2.2.3 *Mjawasi and 748 Others v Attorney-General, Republic of Kenya*[44]

In the *Mjawasi* case, brought under articles 27 and 30 of the EAC Treaty, 749 people claimed that Kenya's refusal and failure to pay to them pensions and other benefits for services they rendered to the defunct East African Community was a violation of articles 6(d) and 7(2) of the EAC Treaty. The claimants specifically sought a declaration that the omissions were a 'travesty upon the recognition, promotion and protection of their rights as enshrined in the African Charter on Human and Peoples' Rights of 1981' and a failure to 'maintain universally-accepted standards of human rights'.[45] In his objection, the respondent *inter alia* raised issues relating to a lack of jurisdiction, non-retroactivity of the Treaty and the failure of the claimant to exhaust local remedies.[46] As a result of the fact that a similar claim had been brought by the claimants and rejected by the High Court in Kenya, the objection to the exercise of jurisdiction in this matter relates to the absence of the instrument necessary to confer appellate as well as human rights jurisdiction on the EACJ. Expectedly, on the issue of jurisdiction, the claimants' response was hinged on the decision in the *Katabazi* case.

In addressing the challenges raised by the respondent, the EACJ pointed out the necessity to read articles 23 and 27 together in locating the jurisdiction of the Court. The Court then went on to concede that in the face of article 27(2), it has neither an appellate jurisdiction nor a jurisdiction to adjudicate on disputes concerning violations of

43 See p 41 of the *Sebalu* decision.

44 Reference 2 of 2010, ruling delivered on 29 September 2011.

45 See p 1 of the *Mjawasi* decision.

46 See p 3 of the *Mjawasi* decision.

human rights *per se*.[47] However, it came to the conclusion that it has competence to make a determination whether a state or institution of the EAC had acted in violation of the Treaty. In effect, the Court sought to draw a distinction between cases involving human rights *per se* and cases in which allegations of violations of human rights are invoked but are peripheral to the central theme of an alleged violation of the Treaty. Clearly, such a distinction does not ordinarily mean much. However, in the context of the realities under which the Court currently operates, it is crucial for the determination whether the EACJ is acting *ultra vires* its Treaty powers. From another perspective, the position of the Court is a subtle restatement of the obvious fact that the EAC Treaty is not a human rights document.

On the question of exhaustion of local remedies, the EACJ restated the rationale for the rule as well as the exceptions to the rule. It then acknowledged that a requirement to exhaust local remedies featured in international human rights instruments, including the African Charter, but emphasised that there was no express requirement under the EAC Treaty that local remedies be exhausted. Making reference to the *N'yongo* case, the Court pointed out that even the provisions relating to reference from municipal courts could not be read to mean the existence of a requirement to exhaust local remedies.[48] This position is similar to the attitude of the ECOWAS Community Court of Justice and effectively lays to rest any speculation that the EACJ may read in such a requirement to exhaust local remedies. Finally, applying article 28 of the Vienna Convention on the Law of Treaties, the EACJ also ruled that the Treaty did not apply retrospectively. Although the EACJ threw out the *Mjawasi* claim, it used the opportunity of the case of clarify certain grey areas regarding practice before it.

2.2.4 *Ariviza and Another v Attorney-General of the Republic of Kenya and Another*[49]

The *Ariviza* case is a fall-out of the constitutional amendment process in Kenya. The claimants, who took issue with aspects of the constitutional review process, originally brought the challenge before municipal courts (including an *ad hoc* Independent Constitutional Dispute Resolution Court) in Kenya. In the action before the EACJ, the claimants sought a declaration that the referendum law and the process of constitutional amendment were not in respect of, and in compliance with, the rule of law and therefore amounted to a violation of the EAC Treaty by Kenya. It was also claimed that the failure of the Secretary-General of the EAC to take action in the face of the alleged violation by Kenya amounted to a violation of the Treaty by the Secretary-General.

47 See pp 5 & 6 of the *Mjawasi* decision.

48 See p 8 of the *Mjawasi* decision.

49 Unreported, reference 7 of 2010, judgment delivered 30 November 2011.

Along with their substantive action, the claimants sought provisional relief to prevent Kenya from passing and implementing legislation to give effect to the new Constitution.

In its formulation of issues for determination, the EACJ *inter alia* indicated an intention to determine whether due process had been followed and, if not, whether Kenyan law and, by extension, the EAC Treaty, had been violated. On this point, the EACJ concluded that the claimants had not made out a successful case. From an international law perspective, it is open to debate whether the EACJ ought to concern itself with allegations that the municipal law of a given state has been infringed. The EACJ also elected to determine whether there was a failure on the part of the Interim Independent Constitutional Dispute Resolution Court (IICDRC) to resolve the claimants' petition following its decision to dispose of the matter before a hearing on the merits. Taking judicial notice of the IICDRC's ruling that there was no valid petition before it,[50] the EACJ concluded that it had no competence to determine the correctness or otherwise of that decision since it was a judicial decision. The Court took pains to engage in an analysis to show that municipal judicial decisions were not part of items listed in article 30 of the EAC Treaty for which the jurisdiction of the EACJ could be triggered.

While it appears that the EACJ's aim was to avoid friction with the municipal courts of partner states, it is common for international human rights supervisory mechanisms to insist that they do not sit on appeal against national courts. Once again, the ECOWAS Court provides a prime example of such an attitude. In its decision in cases such as *Ugokwe v Nigeria*[51] and *Amouzou and Others v Côte d'Ivoire*,[52] the ECOWAS Court has made a conscious effort to point out that it has no power to review the decisions of municipal courts of state parties. Hence it is not surprising that the EACJ finally concluded on this point that it had neither appellate nor review jurisdiction over national courts.[53] An additional point worthy of observation is the EACJ's decision not to penalise unsuccessful litigants before it by requiring them to pay costs. The EACJ's apparent motivation was that persons acting in the public interest ought not to be discouraged.[54] In view of the notorious reluctance of states and their officials to monitor compliance with human rights obligations, reliance on persons acting in the public interest is critical and needs to be encouraged and sustained.

50 See p 24 of the *Ariviza* judgment.

51 Community Court of Justice ECOWAS Law Reports (2004-2009) 35.

52 Unreported, role general. ECW/CCJ/APP/01/09.

53 See pp 24 to 25 of the *Ariviza* judgment.

54 See p 30 of the *Ariviza* decision.

2.2.5 *Plaxeda-Rugumba v The Secretary-General of the EAC and Another*[55]

The claimant in this case brought the action on behalf of her brother, a lieutenant-colonel in the Rwandan army, who was allegedly a victim of unlawful arrest and detention by Rwandan authorities. The victim had been held in an unknown destination without access to family or lawyers. It was against this background that the action was brought pursuant to articles 6(9), 7(2) and 30(1) of the EAC Treaty as well as Rule 24(1) of the EACJ Rules of Procedure. In her action, the claimant invited the EACJ to declare that both the arrest and detention of Lieutenant-Colonel Ngabo by Rwanda and the failure of the Secretary-General of the EAC to investigate the failure of Rwanda were in breach of the fundamental principles of the community.

Based on the facts supplied by the claimant, five broad issues were formulated for determination by the Court.[56] These include the questions whether the EACJ could exercise jurisdiction over the claim, whether the matter was not filed out of time and whether local remedies ought to be exhausted before the claim could be heard by the EACJ.[57] Effectively, the case provided an opportunity for the EACJ to reaffirm its position on the nature of actions that could be accommodated under article 30 of the EAC Treaty.

On the question of jurisdiction, the Court reaffirmed and aligned itself with the position under the *Katabazi* and *Mjawasi* cases. However, the Court went on to point out that by its interpretation of the claim, the claimant was merely seeking interpretation of the Treaty to know whether the acts complained about infringed Treaty obligations.[58] As far as the Court was concerned, the request fell squarely within the boundaries of article 27(1), so that the Court would be offending its oath of office if it failed to make the enquiry that the claimant sought.[59] According to the EACJ, notwithstanding reference to the African Charter, 'the use of the words "other original, appellate, human rights and other jurisdiction" is merely in addition to, and not in derogation to, existing jurisdiction to interpret matters set out in articles 6(d) and 7(2)', thus, 'the applicant is quite within the Treaty in seeking such interpretation and the Court quite within its initial jurisdiction in doing so and it will not be shy in embracing that initial jurisdiction'.[60] The EACJ added that the claimant was seeking a declaration of rights rather than an enforcement of human rights before it.[61] Clearly, the

55 Unreported, reference 8 of 2010, judgment of 1 December 2011.

56 See pp 11 to 12 of the *Plaxeda-Rugumba* decision.

57 As above.

58 Para 23 of the *Plaxeda-Rugumba* case.

59 As above.

60 As above (my emphasis).

61 Para 24 of the *Plaxeda-Rugumba* case.

EACJ is eager to ensure that the current state of EAC Treaty law does not shut out cases touching on human rights.

On the question of time, the EACJ agreed with the claimant's position that cases involving issues that are criminal and continuous in nature do not lend themselves to mathematical computation of time for the purpose of determining a limitation of time. This is similar to the position that the Court took in the earlier case of *Independent Medical Unit v Attorney-General of Republic of Kenya*. On the question of exhaustion of local remedies, the EACJ reaffirmed that there was no such requirement under its legal regime.

The cases considered by the EACJ during 2011 show the EACJ to be a court that is becoming bolder in its determination to promote and protect human rights in spite of the obvious jurisdictional challenge that the current state of EAC law throws at it. It should also be noticed that, probably as a result of the perception of a bolder court, civil society in East Africa is encouraged to approach the Court to protect human rights.

3 Developments in the Economic Community of West African States framework

As is the case with the EAC, the idea of recognising, promoting and protecting human rights as a fundamental principle for economic integration under the ECOWAS Treaty framework was only introduced when the decision to revise the 1975 original Treaty was made.[62] Under the current Treaty regime,[63] in addition to a preambular reference to human rights and the recognition that the realisation of human rights is a fundamental principle for integration,[64] ECOWAS member states undertake under article 56(2) to 'co-operate for the purpose of realising the objectives of the African Charter'. On the strength of these treaty foundations, a budding human rights regime centred on the African Charter has since emerged under the ECOWAS framework. During 2011, the bulk of human rights activities in the Community took place by way of the judicial protection of human rights. However, there were some non-juridical human rights activities worthy of note in the period under review.

62 See generally Viljoen (n 1 above) 498; 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.

63 The revised ECOWAS Treaty was adopted in 1993.

64 Art 4(g) 1993 revised ECOWAS Treaty.

3.1 Non-juridical human rights developments

The year 2011 was somewhat stormy for the ECOWAS community with political upheavals in certain ECOWAS member states attracting the focus of the organisation. Despite these distractions, some activities of a human rights nature occurred within the framework of the ECOWAS Commission.[65] These were mostly in the areas that can broadly be termed thematic meetings and activities aimed at strengthening democracy in the ECOWAS region.

3.1.1 Thematic meetings

Unlike previous years, ECOWAS meetings on human rights-related matters were few. Two important thematic areas that were covered in 2011 were children and humanitarian assistance. In March 2011, two meetings relevant for the protection of the rights of children were held under the ECOWAS platform. First was a meeting to review the West Africa Regional Plan of Action for the elimination of child labour in the region.[66] As is the case in most parts of Africa, child labour is a huge concern in West Africa. With widespread poverty in the region, the engagement of children in the informal sector is a common sight in most countries. Hence, the involvement of ECOWAS is likely to attract attention to the issue and enhance collective action to tackle challenges. Also in March 2011, ECOWAS convened a workshop on the protection of children in an educational setting. The programme focused on developing and strengthening protection for vulnerable children in the school environment. The focus on the protection of children in the region is a critical addition to the human rights agenda in ECOWAS, especially considering that the African Committee of Experts on the Rights of the Child in Africa is not sufficiently equipped to cover the entire continent in detail.

Another area in which ECOWAS thematic meetings were convened in 2011 was in the area of humanitarian assistance. Probably as a result of the many conflicts that the region has experienced, over the years ECOWAS has collaborated successfully with donor organisations and other inter-governmental organisations to improve the quality of assistance that it is able to offer to people in conflict and post-conflict settings. During 2011, the major ECOWAS activity in the area was the Ministerial Conference on Humanitarian Assistance and Internal

65 The ECOWAS Commission is one of the main institutions of ECOWAS and the nerve centre of most of the organisation's activities. By art 6 of the 1993 revised ECOWAS Treaty, other institutions include the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, the Fund for Co-operation, Compensation and Development and the Specialised Technical Commissions.

66 http://news.ecowas.int/presseshow.php?nb=046&lang=en&annee=2011 (accessed 15 May 2012).

Displacement in West Africa.[67] One of the main achievements of the meeting was the development of strategies to encourage universal ratification of the AU Convention for the Protection and Assistance of Internally-Displaced Person adopted in 2009. About 11 out of 15 ECOWAS member states have signed the convention as a result of the awareness created by the ECOWAS institutions on the subject.

Engagement on the platform of sub-regional organisations such as ECOWAS contributes in no small measure to the promotion and protection of human rights in Africa as the AU continues to struggle with the size of the continent and the challenge of an insufficient direct involvement of states in the implementation of strategies for human rights realisation.

3.1.2 Activities aimed at strengthening democracy

During 2011, ECOWAS faced some of the biggest challenges to its efforts to enthrone democracy in the region. As early as January, an ECOWAS election observer mission was dispatched to supervise legislative elections in Niger.[68] Coming soon after the military incursion into governance in Niger, the elections themselves were a testimony to the success of ECOWAS intervention in the country.[69] The monitoring of the elections was followed by similar missions to monitor the presidential elections in Nigeria in April 2011 as well as the elections in Cape Verde and Liberia in August and October respectively.[70] In each case, while citing minor irregularities, observer missions endorsed the elections.[71]

One of the most significant developments in the area of democratisation and strengthening democracy within the ECOWAS framework during 2011 occurred in November 2011 when the ECOWAS authorities refused to deploy any mission to monitor the elections in The Gambia. In its communication to the President of The Gambia, the ECOWAS Commission stated that it took the decision because 'the preparations and political environment for the said election are adjudged by the Commission not to be conducive

67 http://www.comm.ecowas.int/ (accessed 15 May 2012).

68 'ECOWAS observers deployed to supervise the 2011 legislative and presidential elections in Niger', http://www.comm.ecowas.int/ (accessed 15 May 2012).

69 In early 2010, then President Mamadou Tandja of Niger was overthrown by a military *coup* after he tried to amend the Constitution of Niger in order to extend his stay in power beyond the stipulated two terms.

70 'Former Liberian leader to head ECOWAS observer mission to Nigeria's presidential election' http://www.comm.ecowas.int/ (accessed 15 May 2012); 'ECOWAS Head of Mission advises Cape Verdeans on run-off presidential elections' http://www.comm.ecowas.int/ (accessed 15 May 2012).

71 Reports of ECOWAS election observation missions are available at the ECOWAS Commission, Abuja, Nigeria.

for the conduct of free, fair and transparent polls'.[72] Citing reports of its fact-finding mission and the ECOWAS Early Warning System, the ECOWAS Commission stressed that 'a picture of intimidation, an unacceptable control of the electronic media by the party in power, the lack of neutrality of state and parastatal institutions, and an opposition and electorate cowed by repression and intimidation' prevailed in The Gambia.[73] Accordingly, it was decided that the minimum standard under the ECOWAS Protocol on Democracy and Governance had not been met to warrant the dispatch of an observer mission to The Gambia for the elections. At the very least, the action by ECOWAS is a statement of disapproval and constitutes pressure on the government in The Gambia to democratise. In view of the perception that external monitors to African elections are merely rubber stamps to validate elections that are widely considered to be irregular, this action is bold and reassuring. However, it must be noted that the action taken here contrasts sharply with the Community's failure to act to enforce the decision of the ECOWAS Court against The Gambia.[74]

A final point to be noted under this heading is the active involvement of ECOWAS in the resolution of politically-motivated crises in some states in the region. Worthy of note is the pressure brought to bear on the former government in Côte d'Ivoire following the announcement of results in that country's presidential elections. Although it has been subjected to criticism, the decision taken by the ECOWAS Authority of Heads of State and Government to intervene to restore democratic rule in Côte d'Ivoire is an indication that the political will exists among ECOWAS leaders to maintain democracy as an acceptable form of government in the region. With the resurgence of military *coups* in Africa, firm actions by international organisations should send the right message to prospective coupists. As would be shown shortly, the decision by the ECOWAS authority to engage in military intervention was the subject of litigation before the ECOWAS Court and led to the issuing of provisional measures to prevent that action. It is not clear whether the provisional measure issued by the ECOWAS Court partly or wholly motivated the decision not to follow through with the threat of ECOWAS military action in Côte d'Ivoire.

72 'ECOWAS statement on the 24 November 2011 presidential elections in The Gambia', http://www.comm.ecowas.int/ (accessed 15 May 2012).

73 As above.

74 The decision against The Gambia in the case of *Ebrimah Manneh v The Gambia*, Community Court of Justice, ECOWAS Law Report (2004-2009) 181 has remained unenforced as The Gambia declined to comply.

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

Articles 6 and 15 of the 1993 revised ECOWAS Treaty establish the ECCJ as the judicial organ of the ECOWAS community.[75] Under the 1991 Protocol adopted by ECOWAS Heads of State and Government to set up the ECCJ,[76] the Court was not clothed with human rights jurisdiction and individuals did not have direct access to the Court. All of that changed in 2005 with the adoption of a Supplementary Protocol which opened up direct individual access to the ECCJ and endowed the Court with jurisdiction over cases that allege violations of human rights in ECOWAS member states.[77] Since the adoption of the 2005 Supplementary Protocol, the ECCJ has become a viable forum for the resolution of disputes alleging human rights violations in ECOWAS member states. During 2011, as the review of cases will show, the Court consolidated its human rights work, showing signs that it is becoming a formidable judicial force in the field of human rights.

3.2.1 *Aboubacar v La Banque Centrale des Etats de L'Afrique de L'Ouest*[78]

In November 2009, Mr Aboubacar brought an action against the *Banque Centrale des Etats de L'Afrique de L'Ouest* (BCEAO) and the Republic of Niger alleging that Niger had violated his right to property as guaranteed in article 17(2) of the Universal Declaration of Human Rights (Universal Declaration), articles 14 and 21 of the African Charter as well as the Constitution of the Republic of Niger. Acting on a 2003 decision of the West African Economic and Monetary Union (UEMOA),[79] which directed the withdrawal of a range of bank notes from circulation, the BCEAO released new bank notes and authorised financial authorities of member states to exchange notes between 15 September and 31 December 2004. However, citing social reasons, the exchange window was extended from 17 January to 18 February 2005.

Having failed to conclude the exchange of his notes within the specified period, Mr Aboubacar tried and failed to get his notes exchanged by the financial authorities in Niger. He contended that, in view of the fact that BCEAO had released money to the Nigerien

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75 The ECCJ was originally established by art 4(1)(d) of the 1975 ECOWAS Treaty as the 'Tribunal of the Community'.

76 Protocol A/P.1/7/91 adopted and provisionally entered into force in July 1991.

77 Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 relating to the Community Court of Justice.

78 Unreported Role Generale ECW/CCJ/APP/18/08; Arret ECW/CCJ/JUD/01/11, judgment delivered on 9 February 2011.

79 The *Union Economique et Monetaire Ouest Afrique* (UEMOA) is the monetary and economic union of francophone West African countries.

authorities and there was no rigidity in the period stipulated for the exchange of bank notes, the refusal to exchange his old notes amounted to an infringement of his right to property and protection from arbitrary disposal of property.[80] According to him, Niger had applied the funds released by BCEAO to other purposes and this was a violation of his rights. Both BCEAO and the Republic of Niger challenged the competence of the Court and the admissibility of the action on different grounds. While BCEAO contended that it did not come within the jurisdiction of the ECCJ, Niger argued that no *prima facie* case of a violation had been established and, further, that article 15 of the Rules of Procedure of the UEMOA Court of Justice conferred exclusive jurisdiction on that court over disputes arising from acts and omissions of the organs of UEMOA.[81]

In its analysis, the ECCJ reaffirmed that, insofar as a complaint contained allegations of the violation of human rights within the territory of an ECOWAS member state, its jurisdiction as a court would be triggered. However, recognising that BCEAO fell outside the scope of its jurisdiction, the ECCJ did not hesitate to accept Mr Aboubacar's withdrawal of his claims against BCEAO.[82] The ECCJ further recognised the exclusive jurisdiction of the UEMOA Court of Justice and accordingly declined to exercise jurisdiction on the matter.[83] While it may not appear significant, this case provided an opportunity for the ECCJ to demonstrate the viability of internal provisions in international treaties as tools to manage conflicting jurisdictions of international courts. By implication, it arguably shows that in the application of the African Charter, the ECCJ will respect the competence and jurisdiction of other specialised courts should the need arise.

3.2.2 *Ibrahim and Others v Niger*[84]

In February 2011, the ECCJ delivered its ruling in a case brought by successors at law of the late Sidi Ibrahim who was a victim of torture and assassination in Niger. In terms of the facts brought before the Court, Sidi Ibrahim and his fellow travellers were murdered in cold blood after they were dispossessed of their goods soon after they had followed the travel advice of representatives of the Nigerien defence force. The plaintiffs contended that the failure of the Nigerien authorities to investigate, capture and try the perpetrators despite repeated demands was a violation of article 4(g) of the 1993 revised ECOWAS Treaty; articles 1, 4, 5 and 7(1)(a) of the African Charter; articles 3, 5, 8 and 13 of the Universal Declaration; articles 2(1), 3(a)(b), 6(1) and 7 of

80 See paras 1 to 6 of the *Aboubacar* decision.

81 Paras 15 to 19 of the *Aboubacar* decision.

82 Paras 20 to 21 of the *Aboubacar* decision.

83 Paras 31 to 35 of the *Aboubacar* decision.

84 Unreported Role Generale ECW/CCJ/APP/12/09, Arret ECW/CCJ/JUD/11.

the International Covenant on Civil and Political Rights (ICCPR); as well as articles 2(1), (2), (3), 12, 13 and 14 of the Convention Against Torture (CAT). Based on the conflicting facts before the ECCJ, the Court had to determine the admissibility of the case, the qualification of counsel for the state to appear before the court, the right of the plaintiffs to effective remedy in Niger, and the responsibility of Niger to find and prosecute the murderers of the late Ibrahim and his companions.[85]

On the question of admissibility, the ECCJ had no difficulty in finding that the matter was admissible since there had been compliance with articles 9(4) and 10(d) of the 2005 Supplementary Protocol of the ECCJ.[86] With the abandonment of the objection to the admissibility of the pleadings submitted by counsel whose qualification was contested and the replacement of the counsel, the Court had no need to make a pronouncement on the issue. This is a lost opportunity as it would have clarified the right of audience of counsel before the ECCJ. On the question of an effective remedy within Niger, the ECCJ considered the argument that the plaintiffs had failed to take advantage of a municipal rule of criminal procedure which allowed them to seek civil relief on the claim where the authorities decline to pursue criminal action. After a detailed analysis of the procedure suggested by Niger as unexplored by the plaintiffs, in the context of international human rights law, the ECCJ concluded that the right to an effective remedy had been violated.[87] The Court's analysis is illuminating and is a clear indication of the growing confidence and competence of the ECCJ in the field of human rights.

The ECCJ's consideration of the question whether the Nigerien amnesty law provided a shield for the state from demands to investigate, arrest and charge the perpetrators of the murder is a further demonstration of how the Court is embracing its role as a human rights court. Making clear reference to international criminal law, the Court considered the enactment of blanket amnesty laws as a violation of the right to an effective remedy.[88] However, it is worth noting that the Court did not consider itself competent to order the state to charge anyone. Instead, the ECCJ found the state responsible for the murder of the victims. The Court's appreciation of the limits of its powers and the alternatives that it has in international law has a potential to increase user confidence in the ECCJ. However, it is also important to point out that a failure to make specific orders after a finding that protected rights have been violated carries a risk of lowering the perception of effectiveness of the ECCJ.

85 See para 29 of the *Ibrahim* decision.

86 Para 30 of the *Ibrahim* decision.

87 Paras 37 to 45 of the *Ibrahim* decision.

88 See paras 50 & 51 of the *Ibrahim* decision.

3.2.3 *Mrakpor v Five Others*[89]

Following the receipt of three suits filed on the same subject matter, each filed independently, at a sitting on 10 March 2011 the ECCJ decided to consolidate the three matters. The ruling delivered on 18 March 2011 addressed preliminary issues raised in the individual cases. Relying on articles 9(1)(a) and (c) of the 2005 Supplementary Protocol of the ECCJ, on 24 December 2010, three NGOs[90] registered under the laws of Côte d'Ivoire requested the ECCJ to closely examine a decision of the ECOWAS Authority of Heads of State and Government (ECOWAS Authority) reached on 7 December 2010. On 31 December 2010, Godswill Mrakpor, a Nigerian national domiciled in Abuja, Nigeria, submitted another application against the ECOWAS Authority and the United Nations (UN) operations in Côte d'Ivoire (UNOCI) seeking for a declaration that the decision of the ECOWAS Authority to issue a threat to resort to the use of military action was illegal. Mr Mrakpor relied on articles 4(g), 15 and 56 of the revised ECOWAS Treaty, articles 9(1)(a)(c) and 10(d) of the 2005 Supplementary Protocol as well as articles 1, 2, 3(2), 4, 18(4), 23, 27, 29(2) and (8) of the African Charter.

A third application was one jointly submitted on 31 January 2011 by the Republic of Côte d'Ivoire and Mr Laurent Gbagbo in which they requested the Court to closely examine the 7 and 24 December 2010 decisions of the ECOWAS Authority to take military action against Côte d'Ivoire. In addition to their applications, both Mr Mrakpor, on the one hand, and Côte d'Ivoire and Mr Gbagbo, on the other, filed applications for interim measures to restrain the ECOWAS Authority from resorting to military action while their respective actions were pending.[91] Although the ECOWAS Authority did not respond to the applications filed by the Ivorian NGOs and by Côte d'Ivoire and Mr Gbagbo, the Authority raised preliminary objections to Mr Mrakpor's action on the grounds that Mr Mrakpor lacked *locus standi* to bring the action and further that the matter was an electoral dispute over which the ECCJ could not exercise jurisdiction.[92]

In its analysis of the objections, the ECCJ made reference to article 9(1) of the 2005 Supplementary Protocol and concluded that it had jurisdiction to adjudicate on disputes involving the interpretation and application of the regulations, directives, decisions and other subsidiary

89 Unreported consolidated Suit ECW/CCJ/APP/17/10; ECW/CCJ/APP/01/11, judgment ECW/CCJ/ADD/01/11, judgment of 18 March 2011.

90 The Foundation Ivorienne pour l'Observation et la Surveillance des Droits de l'Homme et de la Politique (FIDHOP), the Actions pour la Protection des Droits de l'Hommes (APDH) and the Fideles à la Democratie et à la Nation de Côte d'Ivoire (FIDENACI) combined to submit the application to the ECCJ.

91 See para 4 of the *Mrakpor* ruling.

92 See paras 5 to 6 of the *Mrakpor* ruling.

instruments adopted by ECOWAS.[93] The Court's position is necessary since it is likely that national courts would decline jurisdiction over the acts and decisions of an organ of an international organisation. However, as regards the *locus standi* of Mr Mrakpor, the ECCJ considered article 10(c) of the 2005 Supplementary Protocol and reasoned that it only opened access to individuals and corporate bodies whose rights have been violated. In response to the argument that ECOWAS Community citizenship clothes Mr Mrakpor with standing, the Court stressed that 'the status of a Community citizen and that of a human rights activist are not sufficient in themselves to confer the status of an applicant who is qualified to seek annulment of the ... decision'.[94] Accordingly, the entire action submitted by Mr Mrakpor was declared inadmissible. By this ruling, the ECCJ has given judicial endorsement to the position that victim status is required for access to the Court under article 10(c) of the Supplementary Protocol. One possible effect is that any speculation that NGOs acting in the public interest could access the Court on the basis of 10(c) is now extinguished. However, the decision is silent on whether an individual or corporate body authorised by a victim would be able to access the Court. In some ways, this decision gives an impression of inconsistency in the ECCJ's jurisprudence on *locus standi*. In earlier cases, notably in the case of *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria and 8 Others* (*SERAP* case 2),[95] it would be recalled that the ECCJ did not consider it fatal that the entity bringing the action was not directly affected by the violation and was not acting in a representative capacity. It is necessary for the ECCJ to be consistent in order to maintain its judicial hegemony in the region. However, the differences in the Court's position on standing could be based on the fact that the present action was brought under article 10(c) and not article 10(d) of the 2005 Supplementary Protocol.

The ECCJ took the opportunity in the *Mrakpor* case to outline the conditions that need to be fulfilled before an application for interim measures is granted. According to the Court, it must first satisfy itself that it is competent *prima facie* to adjudicate on the substantive claim or that it is not manifestly incompetent to adjudicate on the substantive claim. Secondly, the Court must satisfy itself that the substantive application is *prima facie* admissible or at least is not manifestly inadmissible. Thirdly, the Court must be satisfied that there is urgency given the circumstances of the case and that the law invoked lends itself to the granting of interim measures.[96] Applying these conditions to evaluate the application submitted by Côte d'Ivoire

93 Para 12 of the *Mrapkor* ruling.

94 Para 15 of the *Mrakpor* decision.

95 Suit ECW/CCJ/APP/08/09; Ruling ECW/CCJ/APP/07/10, ruling delivered on 10 December 2010.

96 See para 17 of the *Mrakpor* decision.

and Mr Gbagbo, the Court found the existence of a basis for making an order of provisional measures. Thus, the Court made an order that member states and institutions of the Community comply with article 23 of the 2005 Supplementary Treaty, which requires member states to refrain from action that will aggravate the situation once the ECCJ is seized of a matter.[97]

3.2.4 *Centre for Democracy and Development (CDD) and Another v Tandja and Another*[98]

The case brought by the Centre for Democracy and Development and the Centre for the Defence of Human Rights and Democracy was prompted by the political and constitutional crisis in the Republic of Niger following Mr Mamadou Tandja's bid to extend his stay in office as President of Niger. In their action before the ECCJ, the plaintiffs contended that Mr Tandja had imposed himself on the people of Niger by seeking to extend his stay in office and that this was in violation of articles 36 and 136 of the Nigerien Constitution as well as article 13 of the African Charter. It was contended further that the invitation of the military by Mr Tandja to quash demonstrations was a violation of articles 9, 10 and 11 of the African Charter.[99]

The defendants (Mr Tandja and the Republic of Niger), for their part, raised a preliminary objection to contest the admissibility of the case. The defendants argued that the plaintiffs lacked *locus standi* to act on behalf of the people of Niger and therefore did not satisfy article 10(d) of the 2005 Supplement Protocol of the ECCJ. Invoking articles 5 and 6 of the Nigerian Constitution, the defendants argued further that sovereignty belonged to the people of Niger and the plaintiff had not shown that they had been given a mandate by the people of Niger to act on their behalf.[100] Citing the ECCJ case of *Koraou v Niger*,[101] the defendants argued that the ECCJ could not exercise jurisdiction in the abstract and, lastly, that the Court was not competent to rule on the internal political process of an ECOWAS member state.[102]

In its analysis of the issues raised, the ECCJ first pointed out that the plaintiffs had failed to indicate the basis on which they were triggering the jurisdiction of the Court.[103] Minor as this may appear, the Court appears to attach some seriousness to the need for parties to indicate what was the legal basis for their actions before the Court. The ECCJ

97 See para 29 of the *Mrakpor* decision.

98 Unreported Role Generale ECW/CCJ/APP/07/09, Arret ECW/CCJ/JUD/05/11, judgment of 9 May 2011.

99 See paras 4 to 15 of the *CDD* decision.

100 Para 18 of the *CDD* decision.

101 (2008) AHRLR 182 (ECOWAS 2008).

102 Para 19 of the *CDD* decision.

103 Para 22 of the *CDD* decision.

then made a crucial point: that it was not competent by any of its empowering laws to rule on the constitutionality or legality of acts of national government that fall within the sphere of their national laws.[104] However, the Court pointed out that it could become competent if it is alleged that human rights are violated in the process. Effectively, the ECCJ is rehearsing the traditional respect of international courts for the sovereignty of states while claiming the exception that international human rights law has introduced to dent the shield of sovereignty. This additional point is crucial to the extent that it would avoid a situation where ECOWAS member states will hasten to categorise all future actions as acts based on national laws that should be immune from the scrutiny of the ECCJ.

Other important points addressed by the ECCJ in the *CDD* case relate to the *locus standi* and competence of the parties before it. In relation to the plaintiffs, the Court emphasised that by article 10(d) of the 2005 Supplementary Protocol, only victims of human rights violations or persons authorised by such victims could trigger its jurisdiction.[105] In the instant case, the Court held that the plaintiffs had not shown that they fall in either category. The ECCJ added that human rights by their nature could only be enjoyed by natural persons.[106] A last point to be noted is the reaffirmation by the ECCJ that only states may be respondents before it.[107] Accordingly, the Court ruled that the case against Mr Tandja was inadmissible before ruling that the entire action was inadmissible.

3.2.5 *Akeem v Nigeria*[108]

Mr Alimu Akeem, a private in the Nigerian army, brought this action against the Federal Republic of Nigeria, alleging that his rights as guaranteed in articles 5 and 6 of the African Charter had been violated by reason of his unlawful detention and torture by the Nigerian army on allegations that he had been indicted by a native doctor in the case of a missing rifle.[109] In the course of the proceedings, the Nigerian army brought an application to be joined as an interested party.[110] Both the government of Nigeria and the Nigerian army then raised preliminary objections to contend that the case was inadmissible as the ECCJ lacked jurisdiction. It was contended on behalf of the government of Nigeria and the Nigerian army that local remedies had

104 Para 24 of the *CDD* decision.

105 Paras 27 to 28 of the *CDD* decision.

106 Para 30 of the *CDD* decision.

107 Para 31 of the *CDD* decision.

108 Unreported Suit ECW/CCJ/APP/03/09, judgment ECW/CCJ/RUL/05/11, ruling delivered on 1 June 2011.

109 Paras 1 to 4 of the *Akeem* ruling.

110 Para 9 of the *Akeem* ruling.

not been exhausted and that the plaintiff was detained following the order of a competent military tribunal before which the case against him was still pending.

In its ruling on both the application for joinder and the objections raised, the ECCJ emphasised that human rights disputes before it must necessarily be between 'an applicant and a member state' and third parties could only join as interveners on the basis of interest in the main application.[111] The Court insisted that, apart from the word 'intervention', there was no other means by which third parties could be brought in. Consequently, the ECCJ read the army's application for joinder as an application to intervene and applied the rules for intervention that it had laid down in the *Habré v Senegal* case.[112] Clearly, the ECCJ has an attachment to the wording of its enabling laws and counsel appearing before the Court need to be mindful of this fact. Importantly, the ECCJ emphasised in the *Akeem* ruling that it is a court that applies international law, which it applies only against states and not against organs or institutions of states.[113] Thus, the application for joinder was rejected. The Court also wasted no time in rejecting the other grounds of objection. Accordingly, the ECCJ granted an extension of time for the respondent (Nigeria) to file its reply to enable the matter to be heard on its merits.

3.2.6 *Ocean King Limited v Senegal*[114]

This matter arose from maritime proceedings in which a sea vessel allegedly purchased by a Nigerian was towed by a private Spanish vessel off the coast of Cape Verde to a port in Senegal and detained until it was sold off, after the parties failed to reach agreement on the terms of their transactions, which included legal proceedings before Senegalese courts. In this action before the ECCJ, the plaintiff sought a declaration that the seizure, detention and subsequent sale of their vessel were a violation of the African Charter.[115] The defendant raised a preliminary objection, contending that the matter was inadmissible as local remedies had not been exhausted by the plaintiff. The defendant contended further that article 10(d) of the 2005 Supplementary Protocol does not apply to corporate entities and could not be applied by the plaintiff to access the Court, stressing that a corporate body cannot be the victim of human rights violations.[116]

111 See para 29 of the *Akeem* ruling.

112 Unreported Gen List ECW/CCJ/APP/07/08; judgment ECW/CCJ/APP/02/10, ruling delivered 14 May 2010.

113 Paras 34 to 36 of the *Akeem* ruling.

114 Unreported Suit ECW/CCJ/APP/05/08, judgment ECW/CCJ/JUD/07/11, judgment of 8 July 2011.

115 Para 5 of the *Ocean King Limited* decision.

116 Paras 7 to 99 of the *Ocean King Limited* decision.

Taking the preliminary objection together with its judgment on the case, the ECCJ reaffirmed that the exhaustion of local remedies was not a requirement under the ECCJ human rights regime.[117] The Court then engaged in an analysis to show that cases strictly between corporate bodies could only be brought before it where a prior agreement to that effect was in place. An important point made by the ECCJ relates to the distinction it drew between individuals as contained in article 10(d) and corporate bodies which are accommodated in article 10(c) of the 2005 Supplementary Protocol.[118] The determination of the ECCJ to show that human rights cannot be enjoyed by corporate bodies is evidenced strongly in the case of *Starcrest Investment Limited v President, ECOWAS Commission and Three Others*,[119] where the Court stressed the distinction between articles 10(c) and 10(d) of the 2005 Supplementary Protocol before going on to argue that the Universal Declaration itself is emphatic on the fact that human rights are to be enjoyed by human beings.[120] Despite its observations, the ECCJ went on to determine whether the plaintiff had been denied a fair hearing by the Senegalese authorities. The Court concluded that there had been no denial of a fair hearing.

3.2.7 *Ameganvi and Others v Togo*[121]

In October 2011, the ECCJ delivered its judgment in a case brought by a group of Togolese former national legislators against the Republic of Togo in which they alleged that their removal from parliament had been a violation of articles 1 and 33 of the ECOWAS Protocol on Democracy and Good Governance as well as articles 7(1)(c) and 10 of the African Charter. The plaintiffs had been removed from office as national legislators after they had resigned from their original political party to form their own (new) party. Relying on letters of resignation they had signed before they won the elections, the President of the Togolese Parliament triggered the Constitutional Court of Togo to affirm their removal from Parliament. Aggrieved, the plaintiffs insisted that they had not been given a fair hearing as their alleged resignation letters were irregular. They contended further that Togo had violated their obligation to respect the rule of law as stipulated in the ECOWAS Protocol on Democracy and Good Governance.

The defendant argued that due process had been followed according to Togolese laws and, therefore, that the ECCJ was not competent to hear the matter. The defendant contended that, by

117 Paras 39 to 41 of the *Ocean King Limited* decision.

118 Para 47 of the *Ocean King Limited* decision.

119 Unreported Suit ECW/CCJ/APP/01/08, judgment ECW/CCJ/JUD/06/11, judgment of 8 July 2011.

120 Paras 15 to 16 of the *Starcrest Investment* decision.

121 Unreported Role Generale ECW/CCJ/APP/12/10, Arret ECW/CCJ/JUD/09/11, judgment of 7 October 2011.

its Constitution, the decisions of its Constitutional Court are final and binding and that, by its own jurisprudence, the ECCJ could not sit on appeal against decisions of national courts.[122] It was further argued that the process by which the plaintiffs were removed from office was not part of legal proceedings that required adherence to principles of fair hearing.

In its analysis of the matter, the ECCJ noted the allegation that human rights had been violated and that natural persons were the alleged victims, noting further that international human rights instruments had been invoked.[123] The ECCJ then pointed out that, although it recognises that the President of Parliament referred the process to the Constitutional Court, it was still necessary to subject the procedure of removal of the plaintiffs to the scrutiny of international human rights law.[124] After looking closely at the provisions of the Internal Regulations of the Togolese Parliament on which the removal was based, the ECCJ concluded that the procedure adopted violated the right of the plaintiffs to be heard.[125] The Court also found that the plaintiffs' rights to freedom of association as guaranteed in the African Charter had been violated.

A few issues arise from this case. First, it appears that the ECCJ refused to be cowed by the argument that due process, in which the Constitutional Court of Togo played a significant role, had been followed according to national law. This is a shift from the observation in earlier cases that the ECCJ was not too eager to adjudicate on a matter in which national courts had been involved. It is a positive development that the ECCJ recognises the need to subject certain national acts to the scrutiny of due process standards of international law, even where national courts have played a role in the national action complained of. A second point to be noted is that the Court did not hesitate to look closely at the provisions of national law. This gives the impression that merely waving sovereignty at the Court will not suffice in cases where a *prima facie* violation of human rights has been established. Overall, it is reassuring that the ECCJ will not shy away from its responsibility to protect human rights in the region.

4 Conclusion

A common but generally unspoken fear in human rights circles in Africa has been whether shifting human rights protection to the sub-regional international organisations would not result in lowering the quality of protection that victims of human rights violations enjoy

122 Paras 25 to 45 of the *Amegabvi* decision.

123 Paras 49 to 53 of the *Amegabvi* decision.

124 Para 55 of the *Amegabvi* decision.

125 Paras 58 to 67 of the *Amegabvi* decision.

under the more familiar continental structures. This fear mostly has been expressed in informal settings where the nascent but growing sub-regional human rights regimes are analysed.[126] The review of human rights developments in sub-regional organisations during 2011 shows that such fears are largely unfounded. Hopefully, this article has shown that, although they have not been eager to adopt new human rights standards, the sub-regional human rights regimes have enhanced the project of human rights in Africa by applying existing standards closer to the citizens of their various states.

In terms of non-juridical human rights developments, this contribution has shown that sub-regional organisations in Africa have made contributions that would have been impossible, or at least would have been extremely difficult, were the business of human rights protection left entirely to the structures of the AU human rights architecture. In terms of the judicial protection of human rights, it is clear that certain cases which may have been difficult to come before continental structures are captured by the sub-regional regimes. It is also apparent from this contribution that in some areas, sub-regional courts are still grappling with the challenge of adjudicating on human rights. Inconsistencies and unexplained departures from earlier judicial positions have been noticed and pointed out. However, in specific terms, during 2011 the EACJ consolidated its credentials as a viable forum for human rights protection. Although in a few areas the infancy of its practice was obvious, the EACJ appeared to have overcome the initial restrictions that arose from the current absence of a clear human rights mandate. It was also evident from its practice in 2011 that the ECCJ has become bolder in its engagement with the restricting concept of sovereignty. The ECCJ has also begun to clearly delineate the contours and boundaries of its human rights practice. Gradually, sub-regional human rights regimes are coming of age in Africa. Insofar as they continue to complement and not compete with the continental structures, these sub-regional regimes will only make the African human rights system stronger and more useful.

126 Eg, such fears were expressed to the author during a visit to the seat of the EACJ in 2010. Similar fears have also been expressed by former students of the LLM (Human Rights and Democratisation in Africa) programme of the Centre for Human Rights, University of Pretoria in 2010.