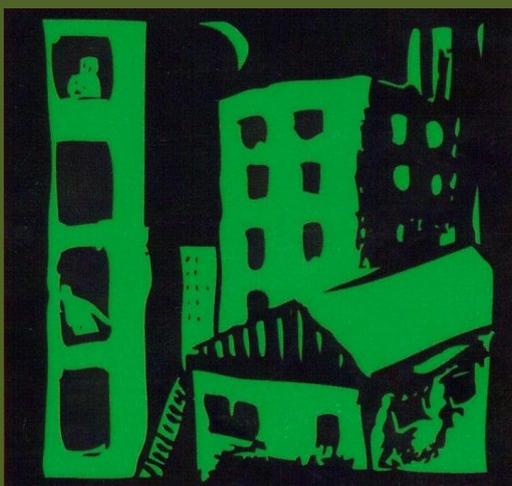


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# Application of the African Charter by African Sub-Regional Organisations: Gains, Pains and the Future

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## 1. INTRODUCTION

It is now generally accepted that the African Charter on Human and Peoples' Rights (African Charter or the Charter) is the overarching normative instrument in the African human rights system.<sup>1</sup> In almost all discourse relating to human rights at the continental stage, the African Charter receives some mention or attention. Increasingly, the African Charter is also seeping into the national legal systems of the member states of the African Union (AU). In addition to direct application of the Charter by way of domestication (or

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<sup>1</sup> The scope of what constitutes the African human rights system is open to debate. However, as used in this paper, the African human rights system refers to the regional human rights realisation structure that exists in the framework of the African Union.

incorporation) by some states<sup>2</sup>, there are claims that Charter provisions have been duplicated in national bills of rights by other states.<sup>3</sup>

Against the background that post-colonial African regimes were reluctant adopters of the African Charter,<sup>4</sup> the entrenchment of the Charter within continental structures and national legal systems is already a huge achievement. It is an achievement that the agitators and drafters of the Charter may well not have envisaged.

If the degree of entrenchment of the African Charter in national and continent frameworks is truly significant because it was unexpected, then the spread of the Charter's influence into the framework of sub-regional organisations is by far a greater and less anticipated achievement. Arguably, one of the advances made by international law in the days following independence from colonialism in Africa was the acceptance of the idea of integration by otherwise fiercely nationalist leaders. Integration was to be pursued through the establishment of regional economic communities (RECs) in different parts of the continent. Generally, as evidenced in their original founding treaties, African RECs were created with clearly defined socio-economic goals and little, if any human rights focus. However, flowing with what has been termed 'new regionalism', as opportunities arose for African RECs to amend their original treaties or adopt new treaties, aspects of human rights have been introduced into the integration agenda. The introduction of human rights in the treaties has created what can loosely be referred to as human rights regimes within the frameworks of African sub-regional organisations. A significant feature of the sub-regional human rights regime in these early days is the absence of dedicated human rights catalogues specific to the RECs. Almost inevitably, human rights in the RECs have had to be linked to the African Charter.

Despite the claim of an inevitable link between RECs' human rights regimes and the African Charter, the relationship has not been without its share of high and low points. Ranging from challenges facing officials who strive to apply the Charter in the absence of strong normative bases to officials who have had to accommodate and deal with the entry of a new layer in an established human rights architecture, the application of the Charter by RECs has altered the dynamics of implementation of this instrument. Proceeding from the premise that total or partial<sup>5</sup> application of the African Charter by African RECs is here to stay and that it comes with positive and negative implications,

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<sup>2</sup> Eg, Nigeria has domesticated the African Charter and transformed it into national legislation in order to give it the force of law within the Nigerian legal system.

<sup>3</sup> For instance, Tanzania claims in one of its country reports to the African Commission on Human and Peoples' Rights that the bill of rights contained in its constitution is a reflection of the provisions of the African Charter. The Tanzanian Constitution guarantees the right to education but does not expressly guarantee the right to health. The Constitutions of certain francophone African countries affirm national commitment to the African Charter. See for instance, the Constitution of the Republic of Chad which makes reference to the African Charter in its preamble and contains a number of the rights guaranteed in the African Charter. Also see the preamble to the Constitutions of Burundi and Senegal.

<sup>4</sup> See Viljoen F, *International Human Rights Law in Africa*, (2007) 169 who makes the claim that the adoption of the African Charter was done without any fanfare and in a manner suggestive of 'a formal resignation to the inevitable'.

<sup>5</sup> Towards the end of 2011, the East African Community (EAC) through its East African Legislative Assembly (EALA) adopted a regional bill of rights. In the event that the bill is passed into law according to the legislative processes of the EAC, application of the African Charter in the framework of the EAC would arguably be partial.

this contribution argues that the future of this relationship depends on the ability of all players to anticipate and engage consequences of the relationship.

In furtherance of its thesis, this contribution analyses the juridical and non-juridical human rights activities of the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern Africa Development Community (SADC). The contribution also peeps into the standard setting activities of the International Conference on the Great Lakes Region (ICGLR).

## 2. AFRICAN RECS AND THE AFRICAN CHARTER: RELATED, BUT HOW?

To allow for a proper contextualisation of the present discourse, it is necessary to locate the intersection between African RECs and the African Charter. One of the more visible effects of the so-called fragmentation of international law in the last few decades is the introduction of the concept of self-contained regimes.<sup>6</sup> As employed by the International Law Commission (ILC), self-contained regimes refer to international regimes of obligation created when states conclude treaties and then establish dispute settlement mechanisms to supervise compliance with obligations under such treaties.<sup>7</sup> An implication of the emergence of the concept is that a huge part of state responsibility in international law has moved from the ambit of the general law of responsibilities into the often narrower and more specific dispute settlement regime established under the given treaty. As a general rule, this practice which involves the “allocation of authority within a complex system of legal prescriptions”<sup>8</sup> and the provision of regime-specific secondary rules, effectively creates regimes of specialisation around international treaties. Strictly viewed, a self-contained regime should exclude the application of secondary rules that are not specific to that particular regime. However, a loose understanding of the concept would accommodate any international law subsystem that provides some form of secondary rules for the implementation of its own primary rules or norms.<sup>9</sup> It is the application of the reasoning behind this concept that raises the question whether African RECs are sufficiently related to the African Charter treaty regime to warrant their application of that treaty.

Historically, socio-economic integration in Africa occurred amongst neighbouring states, with either colonial ties or proximity as the connecting factor. Consequently, RECs have emerged as sub-regional international organisations with their own normative and institutional frameworks distinct from the framework of the Organisation of African Unity (OAU) and its successor organisation – the AU. In other words, just as the (O) AU exists as an autonomous international organisation, the RECs

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<sup>6</sup> It is suggested by Simma B and Pulkowski D, “Of planets and the Universe: Self-contained regimes in international law” (2006) 17(3) *European Journal of International Law*, 483 – 529 at 491 that the concept of self-contained regimes was first introduced into the vocabulary of international law by the Permanent Court of International Justice in the *S.S. Wimbledon Case*, PCIJ, Ser. A, No. 1, at 23. However, it is the International Court of Justice (ICJ) that elevated the concept to the level of a secondary norm in its 1980 judgment in the *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980), at 38 (Hostage case).

<sup>7</sup> The concept of self-contained regime is said to have been popularised by the ILC’s second Special Reporter who referred to them as subsystems.

<sup>8</sup> Simma and Pulkowski, (2006) 483.

<sup>9</sup> It is important to note that some writers are not convinced that any strict self-contained regime currently exists in international law.

also boast of their own autonomies. By implication, the establishment of RECs brings into existence a collection of self-contained regimes or at least a caricature of such regimes similar to what can loosely be described as the AU's self-contained regime. Significantly, it is difficult to suggest that the AU is *the* (or *a*) conglomerate of the RECs. This is because even though nearly all the member states of the known RECs also belong to the AU, the treaty relations between the states that are members of the RECs currently exist independently of the treaty relations that exist between them and other states on grounds of ratification of the AU Constitutive Act.

At this point it is necessary to recall that, the African Charter at adoption came complete with its own treaty-based supervisory body: the African Commission on Human and Peoples' Rights (African Commission). It is also necessary to recall that several years after the entry into force of the Charter, a Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Human Rights Court Protocol) was adopted. The African Human Rights Court Protocol has since entered into force, resulting in the operationalisation of the Court envisaged in the Protocol.<sup>10</sup> Insofar as an African human rights system, hinged on the African Charter on Human and Peoples' Rights is concerned, these two institutions along with the rules guiding their operations constitute the applicable "self-contained regime".

Notwithstanding the assertion above, it would be noticed that no provision in the African Charter or in the African Human Rights Court Protocol confers exclusive jurisdiction on any of the Charter's supervisory institutions. In fact, by article 1 of the African Charter, it is envisaged that state "parties to the present Charter ... shall undertake to adopt legislative and other measures to give effect to them". An obvious implication of article 1 of the Charter is the obligation on state parties to take initiatives at the national level to ensure that the African Charter is implemented. However, the provision in article 1 is merely permissive, so that it is also possible to envisage or contemplate other forms of measures, including international cooperation between treaty parties on platforms other than the AU.<sup>11</sup> This could very well have been the entry point for the adoption of Charter-based norms by African RECs.

As already stated, RECs were established by African states in exercise of their individual sovereignties, independent of the AU. Accordingly, they owe their existence to their individual founding treaties rather than any AU document. However, beginning with the advent of the idea of an African Economic Community (AEC) on the platform of the continental international organisation, proposals were made for the RECs to take the character of building blocks for the AEC/AU. In furtherance of these proposals, relevant documentations were concluded, resulting in the recognition of eight (8) RECs as sub-regional building blocks for the AEC/AU.<sup>12</sup> Although the nature and scope of this

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<sup>10</sup> Since the operationalisation of the African Human Rights Court, the AU member states have adopted instruments aimed at substituting the existing Court with an African Court of Justice and Human Rights. See Assembly/AU/Dec.83 (V), Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union – (Doc. Assembly/AU/6 (V)) available at <http://www.africa-union.org/summit/july%202005/Assembly%20Decisions%20-%20%2073-90%20Sirte%205th%20Session.pdf>

<sup>11</sup> Such cooperation could be comparable to that contemplated by the International Covenant on Economic, Social and Cultural Rights.

<sup>12</sup> See the 1980 Lagos Plan of Action as well as the 1991 Abuja Treaty of the African Economic Community where the idea of the RECs as building blocks of the AU emerged. More recent documents of the AU retain this idea.

character is still not very clear, at the very least, it links the RECs to the organisational framework of the AU and by extension, to the African Charter.<sup>13</sup>

It has to be conceded that the relation to the AEC/AU as building blocks could be too remote to mean much in terms of authority for RECs to implement the African Charter. This is especially as the African Charter is a self-standing treaty in the AU framework with its own ratification regime. Hence, the universal ratification of the African Charter by itself may not be sufficient to admit RECs to membership of the Charter's treaty regime and confer rights and obligations on the RECs.<sup>14</sup>

This is in spite of the fact that traditionally, only states have been known to be parties to international treaties. This tradition may have changed with the amendment of the European Convention on Human Rights (ECHR) in order to create room for the accession of the European Union to that treaty. Consequently, similar to the debates that raged in Europe on the relationship between the EU and the ECHR,<sup>15</sup> there may be need for ratification of the African Charter by African RECs in order for the RECs to fully confer rights and obligations based on the Charter.

However, the point may be made that while ratification by RECs may be necessary for purposes of imposing Charter obligations on the RECs (and their organs) in their capacities as subjects, there appears to be no such requirement in relation to their usage as platforms for the implementation of Charter obligations by their member states. In fact, by the operation of articles 30 and 59 of the Vienna Convention on the Law of Treaties (VCLT), insofar as the founding treaties of the RECs were adopted subsequent to the African Charter and there is no incompatibility between any of those treaties and the Charter, the Charter obligations apply as between all states that are parties to both treaties.

Further, the applicability of the one treaty within the regime of a subsequent treaty is expressly contemplated where the subsequent treaty envisages and makes mention of the prior treaty.<sup>16</sup> Thus, to the extent that converging states in the various RECs make mention of the African Charter in the texts of their founding treaties, an intention to be bound by Charter provisions even under the framework of the subsequent (REC) treaties can be detected. In this regard, the African Charter is mentioned in the founding documents of nearly all the RECs in Africa.<sup>17</sup> On that basis and in the absence of any clear and unambiguous exclusion provision in either treaty, African states arguably

<sup>13</sup> Generally see the Protocol on the relations between the African Union and the Regional Economic Communities, available at <http://www.caast-net.org/xwiki/bin/download/Main/document+library/AU-RECs-Protocol.pdf> (accessed 30 April 2012)

<sup>14</sup> However, note Viljoen, F, *International human rights law in Africa* (2012) 494 – 495 who suggests that in relation to global human rights instruments, the African Charter should preferably serve as a common standard in view inter alia, of its universal ratification. Also see Murungi LN & Gallinetti J, 'The role of sub-regional courts in the African human rights system (2010) 13 *SUR International Journal of Human Rights* 125 who contend that there is no express link between the RECs and the African Human Rights System notwithstanding the relationship that RECs share with the AU.

<sup>15</sup> See for instance, Sera JM, 'The case for accession by the European Union to the European Convention for the Protection of Human Rights (1996) 14 *Boston University International Law Journal* 151

<sup>16</sup> See arts 30 and 59 of the VCLT.

<sup>17</sup> See art 6(e) of the EAC Treaty and art 4(g) of the 1993 Revised Treaty of the Economic Community of West African States (ECOWAS). The African Charter is not mentioned in the founding treaties of the Arab Maghreb Union (AMU) and the Southern Africa Development Community (SADC). However, in the case of SADC, the Charter is mentioned in subsequent treaties adopted under the platform of that organisation.

retain the right to employ the structures of the various RECs for the purpose of implementing the African Charter. This is a relation that sustains application of the Charter by REC human rights regimes.

### 3. THE AFRICAN CHARTER IN THE HANDS OF THE SUB-REGIONAL COUSINS

Despite what could be considered as the remoteness of the link between African RECs and the African Charter, the RECs are increasingly becoming vital media for the application and implementation of the Charter. Often building on the recognition given to the African Charter in their constitutive documents, African RECs have adopted and (in some cases) generously applied the Charter within their budding human rights regimes. This has occurred essentially in two broad ways: either in the process of setting human rights standards or for the purpose of building their own human rights jurisprudence. This section of the work will set out and analyse these practices.

#### 3.1 Application as a tool for human rights standard setting

##### 3.1.1 *Reference to the Charter in constitutive instruments*

Perhaps one of the most important forms in which the African Charter is applied as a tool for setting human rights standard in RECs is in the references made to the Charter in the constitutive instruments of the RECs. Although this has been mentioned above as a basis for the application of the African Charter, it is still necessary to record the practice under this heading as such references have been interpreted as creating human rights obligations for member states of the RECs.<sup>18</sup>

Application of the Charter by reference is best exemplified in the treaty frameworks of the EAC and ECOWAS.<sup>19</sup> In these treaties, state parties to the African Charter in the East Africa and West Africa regions agree that the “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights” should be a fundamental principle upon which their integration agenda are based. With regards to ECOWAS, reference to the African Charter appears first in paragraph 4 of the Preamble to the 1993 revised Treaty and afterwards in article 56(2) where ECOWAS member states “agree to cooperate for the purpose of realising the objectives” of the African Charter.

Flowing from the principles underlying the concept of new regionalism, the argument can be made that the references to the recognition, promotion and protection of human rights in the constitutive instruments of the RECs are merely acknowledgments of the nexus between the realisation of rights and the pursuit of integration. Accordingly, it could further be argued that there is no special implication

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<sup>18</sup> This point will be explored further when the contribution considers the jurisprudence of some sub-regional judicial organs.

<sup>19</sup> See art 6(d) of the 1999 EAC Treaty and arts 4(g) and 56(2) of the 1993 Revised ECOWAS Treaty. Also see art 6(e) of the 1993 Treaty of the Common Market for Eastern and Southern Africa (COMESA); art 15 of the 2004 Dar es Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region which brought the International Conference on the Great Lakes Region (ICGLR) into existence; as well as art 6A (f) of the 1996 Agreement Establishing the Intergovernmental Authority on Development (IGAD). In all of these provisions, the founding documents make clear reference to the realisation of human rights based on the African Charter.

in such references as they fall outside the statement of objectives of the RECs. However, there has to be some significance in the fact that the references to human rights in the cited instruments are linked specifically to the African Charter since in the treaties of some other RECs statements of human rights are not linked to the African Charter.<sup>20</sup> This argument has recently been given judicial backing by the East African Court of Justice when that court stated in the very recent case of *Plaxeda-Rugumba v The Secretary General of the EAC & Another*<sup>21</sup> that ‘the invocation of the African Charter on Human and Peoples’ Rights was not merely decorative of the Treaty’.<sup>22</sup>

Reference to a regional human rights instrument in the founding instrument of a regional economic-oriented international organisation is relatively recent practice. As such there is very little state practice to guide thinking in the area. As far as the EU is concerned, its original treaties make precious little reference to human rights and absolutely no reference to the ECHR.<sup>23</sup> Accordingly, when the need arose for the European Court of Justice to apply human rights in the EU treaty framework, it was to a conception of general principles of law made up of constitutional traditions common to EU member states and aspects of the ECHR that the that court turned to. Apparently, almost similar to the prevailing practice amongst African RECs, all that has changed in the EU framework following the introduction of article 6(3) in the EU Lisbon Treaty which now makes specific reference to the ECHR and requires the EU to accede to the ECHR.<sup>24</sup>

Arguably, specific mention of the African Charter in the REC treaty documents amounts to an intention to apply Charter-based human rights as the guiding standards in relation to the human rights aspects of integration. At the very least, that amounts to some evidence of internalisation of the Charter since states could have opted not to tie statements of fundamental principles to any document. Thus, even assuming that the statements of fundamental principles do not amount to a positive obligation to implement the African Charter, they have to be seen as imposing some sort of obligation to refrain in a negative sense from doing anything to defeat the purpose of the African Charter. Notwithstanding the foregoing argument, as will be shown from the jurisprudence of some sub-regional tribunals, the references to the Charter in the constitutive instruments arguably impose some positive obligations on states to ensure the realisation of rights as a basis for integration.<sup>25</sup> As such, the Charter is applied by states under the platforms of the RECs to set human rights standard in the absence of their own organisation-specific human rights catalogues.

The provisions of article 56(2) of the revised ECOWAS Treaty provide a basis for a second leg of argument that reference to the African Charter in a constitutive document amounts to standard setting. In article 56(2), ECOWAS member states undertake to

<sup>20</sup> For instance, in the treaties of AMU and SADC, though there are clear references to human rights, those references are not linked to the African Charter.

<sup>21</sup> Unreported, reference no 8 of 2010, judgment of 1 Dec 2011

<sup>22</sup> See p 26 of the *Plaxeda-Rugumba v The Secretary General of the EAC & Another* decision.

<sup>23</sup> See Shelton D, ‘The boundaries of human rights jurisdiction in Europe’ (2003), 13 *Duke Journal of Comparative and International Law* 95, 111.

<sup>24</sup> See Landau EC, ‘A new regime of human rights in the EU?’ (2008) 10 *European Journal of Law Reform* 557; Weiß W, ‘Human rights in the EU: Rethinking the role of the ECHR after Lisbon’ (2011) 7 *European Constitutional Law Review* 74 - 95

<sup>25</sup> On this point, see Ebobrah ST, ‘A critical analysis of the human rights mandate of the ECOWAS Court of Justice’ available at [http://www.escri-net.org/usr\\_doc/S\\_Ebobrah.pdf](http://www.escri-net.org/usr_doc/S_Ebobrah.pdf) (accessed 29 April 2012)

cooperate to ensure the realisation of the objectives of certain earlier instruments to which they are all parties. It would be noted that the other two instruments mentioned in the article are ECOWAS-specific. Thus, article 56(2) has to be a positive indication of intention to implement the Charter despite the fact that it was not adopted on the platform of ECOWAS. This could only mean a conscious decision to implement a prior treaty through the instrumentality of a subsequent treaty. In that context, the obligation to implement the Charter is positive and accordingly, the Charter applies to set human rights standards independent of its status in the AU framework.

### 3.1.2 *The Charter as inspiration for the adoption of other instruments*

Another form in which the African Charter is employed in human rights standard setting by African RECs is in the application of the Charter as inspiration for the adoption of further thematic and/or region-specific instruments. There are two broad types of instruments that can be identified in this regard. First, there are instruments which do not indicate too much human rights content but in which, similar to the founding treaties, reference is made to the principle of respect for human rights hinged on the African Charter. Second, there are those instruments with very heavy human rights or rights related content, which instruments still contain ample reference to the Charter. At least one example of the first type of instrument can be found in the stables of both ECOWAS and SADC.

The ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (ECOWAS Good Governance Protocol)<sup>26</sup> is an example of an instrument in the first category. As demonstrated in the title, this instrument targets issues of democratisation and good governance in ECOWAS member states. However, in its article 1(h), it provides that “the rights set out in the African Charter on Human and Peoples’ Rights shall be guaranteed in each member state...” This statement comes after acknowledgement in the Preamble that ratification of the African Charter imposes obligations of implementation on states.<sup>27</sup> In this instrument, ECOWAS member states again demonstrate their intention to enthrone the African Charter as the standard by which to regulate human rights in their various states, acting on the ECOWAS platform. Accordingly, article 1(h) of the Protocol goes to the extent of obligating states to create special jurisdictions for the purpose of implementing Charter obligations. In the absence of a special jurisdiction, the Protocol authorises regular courts to exercise the necessary jurisdiction. Clearly, this barely comes short of domesticating the African Charter since the effect of domestication is to give legal force to the Charter within the national legal systems.<sup>28</sup> The SADC Protocol on Politics, Defence and Security Cooperation (SADC Protocol on Politics)<sup>29</sup> is the equivalent instrument under the SADC regime.<sup>30</sup>

<sup>26</sup> Adopted in 2001 and entered into force on 20 Feb 2008. Reproduced in Ebobrah and Tanoh (2010) 220.

<sup>27</sup> See para 5 of the Preamble to the ECOWAS Good Governance Protocol.

<sup>28</sup> For instance, sect 12 of the Nigerian Constitutions prohibits the domestic application of international treaties that have not been transformed into national legislation through the normal process of law making in that state.

<sup>29</sup> Adopted in 2001 and entered into force in 2004. Reproduced in Ebobrah and Tanoh (2010) 407.

<sup>30</sup> See particularly art 2(g) of the SADC Protocol on Politics. Although this instrument does not mention the African Charter, it arguably refers to it as it alludes to ‘human rights as provided for in the Charters and Conventions of the Organisation of African Unity and United Nations’.

The instruments adopted on the platform of the ICGLR provide the best examples in the second category of instruments i.e. instruments with relatively heavy human rights content. The outstanding feature of the instruments in this class is that they deal with issues addressed in the African Charter or in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Ordinarily, applying the domestic law principle of covering the field, the subject matter or one of the subject matter of the REC treaty could have been covered by the African Charter in some limited way. However, that fact alone does not prevent the adoption of REC treaties to address the same issues. The ICGLR Protocol on the Property Rights of Returning Persons<sup>31</sup>; the ICGLR Protocol on the Prevention and Suppression of Sexual Violence against Women and Children<sup>32</sup>; and the SADC Protocol on Gender and Development<sup>33</sup> are examples of instruments in this category. Through references in their preambles and (in some cases) in the body of the instrument, the African Charter is applied as some sort of benchmark for the rights guaranteed in these instruments. Again, this is practice that is not peculiar to African RECs. At least one commentator has argued that the European Fundamental Rights Charter which is an instrument of the EU 'was drafted in the image of the Convention' and 'half of the Charter rights are taken from the Convention or Strasbourg case law'.<sup>34</sup> Against this background and especially in view of article 52(3) of the European Fundamental Rights Charter, the ECHR applies as a standard for interpretation of rights within the European Charter.

### 3.1.3 *The African Charter as inspiration for soft law instruments*<sup>35</sup>

The African Charter has also been applied by RECs as inspiration and motivation for initiating and adopting soft law human rights instruments. This has been essentially in the form of resolutions and declarations but also by way adoption of policy documents and at least one charter. The 1991 Declaration of Political Principles of the Economic Community of West African States is an example of a declaration that is partly inspired by the African Charter.<sup>36</sup> The Charter of Fundamental Social Rights in SADC which is a soft law instrument dealing with labour relations also draws some inspiration from the African Charter. Resolutions have emerged mostly from the East African Legislative Assembly (EALA).<sup>37</sup> In reality, the human rights resolutions that have emerged from the EALA are far and in between and mostly draw on the African Women's Protocol. However, there is some trace of the African Charter in those few resolutions to warrant a claim that the Charter partly inspired those resolutions.

Overall, in terms of standard setting, the influence of the African Charter on the "legislative activities" of African RECs may not be so obvious. In fact sceptics could have valid grounds to suggest that the influence of the Charter is more apparent than real, considering that references have not been exclusive. However, it has to be borne in

<sup>31</sup> Adopted in 2006 and entered into force in 2008. Reproduced in Ebobrah and Tanoh (2010) 139

<sup>32</sup> Adopted in 2006 and entered into force in 2008. Reproduced in Ebobrah and Tanoh (2010) 115

<sup>33</sup> Adopted in 2008 but had not entered into force as at June 2011. Reproduced in Ebobrah and Tanoh (2010) 425

<sup>34</sup> Weiß (2011) 69

<sup>35</sup> I have used the term soft law advisedly here to refer to instruments which do not require ratification by state parties on the grounds that such instruments are not intended to attract binding obligations in the event of non-compliance.

<sup>36</sup> See para 4 of the Preamble to the Declaration.

<sup>37</sup> The EALA is the legislative arm of the EAC.

mind that even in the stables of the AU, reference to the Charter in subsequent documents is minimal and not exclusive of other earlier universal human rights instruments. Thus, to the extent that such references to the Charter exist in the instruments of the RECs, those instruments have very well been inspired, motivated or influenced by the African Charter.

### 3.2 Creating sub-regional Charter based human rights jurisprudence

Arguably, the application of the African Charter in the human rights regimes of African RECs is most evident in the work of the judicial organs of at least three of these international organisations. The East African Court of Justice (EACJ)<sup>38</sup>; the ECOWAS Community Court of Justice (ECCJ)<sup>39</sup> and the SADC Tribunal<sup>40</sup> have all directly or indirectly applied the African Charter in the development of their jurisprudence.

Of the three judicial organs which have been involved in applying the African Charter at the sub-regional level, only the ECCJ lays claim to an express human rights competence.<sup>41</sup> The EACJ and the SADC Tribunal currently do not have express grant of competence to receive human rights cases.<sup>42</sup> However, a perusal of the relevant documents of all three judicial institutions will show that none of them has express authority to apply the African Charter. Notwithstanding the lack of express authorisation, the Charter has featured in the jurisprudence of sub-regional courts in two broad ways: either as the actual basis of a human rights claim or as interpretative aid in claims based on norms located in other instruments.

#### 3.2.1 *The African Charter as a basis for claims before sub-regional courts*

Application of the Charter as a source of rights has essentially taken place on the platform of ECOWAS. Although, certain normative formulations couched in human rights language can be found in the revised ECOWAS Treaty and in other Community instruments, there is currently no human rights catalogue in the ECOWAS framework.

<sup>38</sup> The EACJ which is the judicial organ of the EAC is established by art 9(1) (e) of the 1999 EAC Treaty (as amended). The Court is divided into a First Instance Division and an Appellate Division. The jurisdiction of the EACJ, as set out in arts 23 and 27 of the Treaty, is to interpret and apply the Treaty

<sup>39</sup> The ECCJ is established by arts 6 and 15 of the 1993 revised ECOWAS Treaty as the judicial organ of ECOWAS. The ECCJ was operationalised by a 1991 Protocol which granted access only to state parties. In 2005, a Supplementary Protocol was adopted to extend access to individuals and confer human rights competence on the Court.

<sup>40</sup> The SADC Tribunal is established by articles 9 and 16 of the 1992 SADC Treaty (as amended). The composition, powers and functions of the SADC Tribunal are set out in the Protocol on the Tribunal and the Rules of Procedure thereof which was adopted in 2000. The operations of the Tribunal have recently been affected by challenges to its legality and legitimacy. As at the time of writing (April 2012), the SADC Tribunal was effectively in limbo as its operations had been grounded by the Southern Africa heads of state and government.

<sup>41</sup> By arts 9(4) and 10 of the 2005 Supplementary Protocol of the ECCJ, the Court is competent to receive and adjudicate on allegations of violations of human rights that have occurred in the territory of ECOWAS member states.

<sup>42</sup> According to art 27(2) of the 1999 EAC Treaty as amended, the Council of the EAC retain the right to confer additional jurisdiction (including human rights jurisdiction) on the EACJ at a future date by adopting a protocol to that effect. This had not occurred as at the time of writing. There is absolutely no mention of a human rights jurisdiction in relation to the SADC Tribunal. However, in the *Campbell v Zimbabwe* case, (2008) AHRLR 199 (SADC 2008) the Tribunal has interpreted its jurisdiction under the Treaty to include competence over human rights claims. One of the fallouts of the *Campbell* case was the suspension of the SADC Tribunal.

Curiously, in conferring competence over human rights on the ECCJ, the ECOWAS authorities failed or refused to either adopt a region-specific catalogue or specify the catalogue to be applied by the ECCJ. Faced with the dilemma of a mandate without a catalogue, the ECCJ has actively encouraged its litigants to claim rights based on the African Charter. In fact, while the Charter is not the only catalogue invoked before the Court, the ECCJ appears to have exhibited more attachment to the Charter, practically adopting it on the basis of reference to it in the 1993 revised ECOWAS Treaty. This practice of the ECCJ is manifest in the jurisprudence that has emerged from that Court since 2005.

In the very first rights-related case of *Olajide v Nigeria*,<sup>43</sup> the litigant based his claim for ventilation of his right to freedom of movement on article 12 of the African Charter.<sup>44</sup> Although the ECCJ declined to exercise jurisdiction in the *Olajide* case on grounds that individuals had no access at that time, there was no indication even at that time that the Court was averse to the claim being based on the Charter. However, it was in the *Ugokwe v Nigeria*<sup>45</sup> case that the ECCJ came all out to express its attachment to the African Charter. The ECCJ pointed out that in article 4(g) of the revised ECOWAS Treaty, member states are “enjoined to adhere to ... principles including the recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”.<sup>46</sup> On the basis of article 4(g), the ECCJ reasoned that it “behoves on the Court by article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter”.<sup>47</sup>

With the decision of the ECCJ in the *Ugokwe* case, the law was established through precedent<sup>48</sup> that the African Charter was one of the main (if not the main) applicable instruments as far as human rights before the Court was concerned.<sup>49</sup> Accordingly, the Charter has been invoked in nearly all the cases decided by the ECCJ since the *Ugokwe* case. In the celebrated *Koroua v Niger* case,<sup>50</sup> the ECCJ reaffirmed the special position that the African Charter occupies in the ECOWAS human rights regime. According to the ECCJ

the adherence of the Community to the principles of the Charter signifies that in the absence of ECOWAS legal instruments relating to human rights, the Court ensures the protection of the rights spelt out in the Charter.<sup>51</sup>

If there were any doubts regarding the applicability of the Charter before the ECCJ, such doubts were dispelled by the dictum in the *Koroua* case. It was evident that the ECCJ had adopted the Charter, especially since no exclusive jurisdiction exists in relation to the Charter in any institution’s favour. However, the ECCJ also used the medium of the

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<sup>43</sup> Unreported suit no. 2004/ECW/CCJ/04

<sup>44</sup> Technically, it could be argued that in the *Olajide* case, it was not the African Charter that was invoked as the litigant relied on the version of the Charter domesticated under Nigerian laws.

<sup>45</sup> Unreported suit no Suit no ECW/CCJ/APP/02/05, reproduced in Ebobrah and Tanoh (2010) 261.

<sup>46</sup> See para 29 of the judgment in the *Ugokwe* case as above.

<sup>47</sup> As above.

<sup>48</sup> Clearly, the evolution of law through precedent in previous cases is a feature of the common law legal systems that appears to have gradually seeped into the practice of international tribunals.

<sup>49</sup> The Universal Declaration on Human Rights is another instrument that features prominently in the jurisprudence of the ECCJ.

<sup>50</sup> (2008) AHRLR 182 (ECOWAS 2008); also reproduced in Ebobrah and Tanoh (2010) 286.

<sup>51</sup> Para 40 of the judgment in the *Koroua* case, as above.

*Koroua* case to make the point that its application of the Charter is restricted to juridical protective activities rather than promotional or other activities for the implementation of the Charter.<sup>52</sup> Effectively, the ECCJ tried to distinguish between its use of the Charter and the more expansive functions of the African Commission in relation to the Charter. Thus, as it currently stands, the Charter is a major source of human rights claim before the ECCJ. Hence, in more recent cases such as the case of *Habré v Senegal*<sup>53</sup> the ECCJ has had no difficulty in comprehensively applying the African Charter as a catalogue of rights under its human rights regime.

Although the EACJ cannot boast of an ingrained practice of applying the African Charter as a source of human rights claims, there is emerging practice in that regard. The point must be made that the EACJ currently exercises a restrained human rights jurisdiction in view of the limitations imposed by article 27(2) of the 1999 EAC Treaty (as amended).<sup>54</sup> In the recent case of *Ariviza & Another v AG Kenya & Others*,<sup>55</sup> the claim before the EACJ was partly based on articles 1, 3, 7 and 9 of the African Charter.<sup>56</sup> Despite this fact, the EACJ declined to throw out the application given the opportunity provided by the preliminary objection raised by the respondent state. The EACJ rather elected to consider issues such as the applicability of the Charter as questions on the merit to be considered at that stage. Slowly but surely, the attitude of the Court would encourage litigants to increasingly invoke the African Charter before the EACJ in human rights claims. It is therefore not surprising that claimants in most of the more recent cases submitted to the EACJ, especially since 2010, make some reference to the African Charter even though the EACJ itself has been careful to avoid any wholesale adoption of the Charter.<sup>57</sup>

Unlike the ECCJ, the EACJ has not made a categorical statement to claim the African Charter as instrument of choice in its human rights regime. However, as will be shown shortly, the EACJ has also not shied away from making references to the African Charter in previous jurisprudence. The practice of basing rights claim totally or partly on the African Charter is one that did not occur before the SADC Tribunal even before its current travails. A possible explanation would be that the EACJ and the ECCJ are emboldened to encourage direct application of the Charter in proceedings before them because of express references to the Charter in their respective founding treaties. In the absence of such express reference in the founding Treaty of SADC, it is bound to be a little more challenging for the SADC Tribunal to act in the same way.

<sup>52</sup> See para 60 of the *Koroua* case, n 50 above.

<sup>53</sup> Unreported Gen. List no: ECW/CCJ/APP/07/08; Judg No: ECW/CCJ/APP/02/10, ruling delivered 14 May 2010.

<sup>54</sup> From the EACJ's decision in the case of *Katabazi & 21 others v Secretary General of the EAC & Others*, (2007) AHRLR 119 (EAC 2007), the EACJ demonstrated its willingness to take on rights related cases in spite of the limitation in art 27(2) of the EAC Treaty.

<sup>55</sup> Unreported Suit: Application 3 of 2010 (arising out of Reference 7) 2

<sup>56</sup> See Ebobrah ST, "Human rights developments in African sub-regional economic communities during 2010", (2011) 11 *African Human Rights Law Journal* 216 for a brief discussion of the *Ariviza* case.

<sup>57</sup> The case of *Plaxeda-Rugumba v The Secretary General of the EAC & Another* is an eg of a case where the African Charter was invoked by the claimant and the EACJ made some pronouncement on the implication of the Charter's mention in the EAC legal framework. Another eg is *Sebalu v The Secretary General of the EAC and Others*, reference no 1 of 2010. Judgment delivered on 30 June 2011 where the EACJ pointed out that national courts had the primary duty to promote and protect African Charter guaranteed rights which were applicable by virtue art 6(d) of the EAC Treaty.

### 3.2.2 *Invoking the Charter to aid interpretation*

A second and less frequent form of juridical application of the African Charter in African Sub-regional courts has been the use of the Charter as aid to the interpretation of otherwise bare normative formulations of rights contained in a founding treaty. This application of the Charter has occasionally occurred subtly in the jurisprudence of both the EACJ and the SADC Tribunal. Perhaps as a result of the fact that the Charter is directly invoked before the ECCJ as a source of human rights claims, such indirect application of the Charter is not in vogue.

In the *Katabazi* case,<sup>58</sup> the African Commission's understanding of article 26 of the Charter was brought into play even though the claim before the EACJ was that there had been a violation of an obligation to respect the rule of law.<sup>59</sup> Admittedly, the application of the Charter in that case was very restrained given that the Court had to positively refrain from appearing to adjudicate on human rights, which reference to the Charter would amount to. However, in order to explain the rule of law-content in the EAC Treaty as encompassing independence of the judiciary, the EACJ was compelled to apply the Charter by reference to the jurisprudence of the African Commission. In most other cases that have come before the EACJ, the nature of claims has not lent themselves to application of the Charter.

Before the SADC Tribunal, despite the fact that the African Charter is not mentioned in the SADC Treaty, there was very robust invocation of the Charter to aid interpretation in the case of *Campbell and Others v Zimbabwe (Campbell case)*.<sup>60</sup> First, in order to address the question of exhaustion of local remedies in litigation practice before international tribunals, the SADC Tribunal had to consider article 50 of the Charter.<sup>61</sup> Then, in relation to the right of access to justice and effective remedies, the Tribunal found itself referring to articles 1 and 7 of the African Charter.<sup>62</sup> Further, in relation to the prohibition of discrimination, the Tribunal had to refer to article 2 of the Charter.<sup>63</sup> Again, it has to be noted that the African Charter did not enjoy exclusive mention as instruments such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights were also considered. However, it is significant that in seeking to develop "its own Community jurisprudence" the Tribunal considered the Charter as an applicable treaty to be applied.

Perhaps as a result of the challenges the SADC Tribunal faced following the events that accompanied its decision in the *Campbell* case, the only other clear reference to the Charter in the Tribunal's decisions was in the case of *Tembani v Zimbabwe*.<sup>64</sup> In the *Tembani* case, while recalling its previous decision in the *Campbell* case, the Tribunal again referred to the African Charter's provision on exhaustion of local remedies.<sup>65</sup> As was the case with the EACJ discussed above, the approach of the SADC Tribunal

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<sup>58</sup> n 46 above.

<sup>59</sup> See pages 21 and 22 of the *Katabazi* case, n 46 above.

<sup>60</sup> (2008) AHRLR 199 (SADC 2008). Also reproduced in Ebobrah and Tanoh (2010) 482.

<sup>61</sup> See page 20 of the *Campbell* case n 36 above.

<sup>62</sup> See pages 30 to 33 of the *Campbell* case, n 36 above.

<sup>63</sup> Page 47 of the *Campbell* case, n 36 above.

<sup>64</sup> Unreported case no SADC 7/2008, reproduced in Ebobrah and Tanoh (2010) 497.

<sup>65</sup> Paras 17 and 18 of the judgment in the *Tembani* case as above

suggests that given the opportunity, it will have no qualms applying the African Charter to interpret, define and expand the scope of human rights contained in the Treaty. Expectedly, there are positive as well as negative consequences associated with the application of the African Charter by African RECs. The following section of this contribution explores some of those consequences.

#### **4. CONSEQUENCES OF SUB-REGIONAL USAGE - THE GAINS AND PAINS**

REC application of the African Charter invites analysis of consequences based on the relationship between the AU and African RECs<sup>66</sup> just as much as it touches on general principles of international law. Some of these consequences may appear neutral to the extent that they do not have any self-evident negative or positive effect. For instance, questions whether treaties entered into by member states of an international organisation can, without more obligate such an organisation under that treaty framework or conversely, whether consent by an international organisation, to be bound by a treaty necessarily imposes obligations on its member states under such a treaty are germane.<sup>67</sup> However, this contribution aims to view consequences from the lens of positive (gains) and negative (pains) implications. In doing so, it does not seek to suggest that those neutral questions are less important, rather, it is hoped that those issues will be investigated in the not-too-far future.

##### **4.1 The gains in sub-regional application of the African Charter**

As already alluded to above, there are gains that can be identified in the emerging practice of direct and indirect application of the African Charter within the frameworks of African RECs. First, related to (what I have termed) the neutral question whether international organisations can incur treaty obligations in relation to a treaty to which they are not parties, it is a gain that the emerging practice opens the window for the invocation of Charter obligations against African RECs. It is common to find headquarters agreements which shield international organisations from the jurisdictions of local courts. Hence, the possibility of invoking the Charter in proceedings before the sub-regional courts which often retain exclusive jurisdiction over the organs and institutions of RECs creates room for persons claiming violation of their Charter-guaranteed-rights by such organs and institutions to bring actions before the courts. In essence, the gain is that international organisations which could have fallen out of the horizon of human rights responsibility as a result of their peculiar nature are now brought under the scope of the Charter.

In taking the position above, there is need to pay attention to the challenges that have been identified elsewhere in relation to the relationship between international organisations and treaties ratified by their member states. For instance, in the European Union (EU) context, the question had raged as to whether the EU and its organs could incur obligations under a treaty (the ECHR) to which the EU was not party. Similarly,

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<sup>66</sup> For instance, the question whether the need exists for RECs to accede to the African Charter? Or whether, it is possible to perceive the AU as a party to the African Charter and if so, whether a treaty relationship between international organisations in Africa is thereby created.

<sup>67</sup> Generally see Tomuschat C, "International Organisations as third parties under the law of international treaties" in Cannizarro E (ed) *The Law of Treaties Beyond the Vienna Convention* (2011) 207.

arising from *Kadi v Council and Commission*,<sup>68</sup> questions have emerged regarding the obligation of the United Nations (UN) under the various human rights treaties adopted under the UN framework.<sup>69</sup> Against the background that international organisations may “consent” to obligations under treaties to which they are parties, the argument could be made that such consent exists as between the RECs and the Charter since the RECs have elected to apply the Charter.

A far less contentious gain is the expansion of the scope of implementation of the Charter that is triggered by the REC practice of applying that instrument. Evidently, the article 1 obligation imposed by the African Charter is one of result rather than of specific conduct. In that regard, the ultimate expectation is that state parties to the African Charter will find innovative ways of ensuring that the guarantees in the Charter are made available to African peoples. By creating additional fora for the ventilation of Charter based grievances, this emerging practice takes the reach of the Charter wider than would have been possible if implementation remained strictly with state parties and the AU organs. This is particularly the case as the application of the Charter in the RECs goes beyond juridical enforcement (with its attendant limitations) and into the work of the executive organs of the RECs such as the organisational secretariats and commissions.

Another gain that results from REC application of the African Charter is the reduction of the negative impact of the limited (and qualified) individual access to the African Court on Human and Peoples’ Rights (African Human Rights Court). In view of the reluctance of state parties to make the declaration required by article 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights Establishing the African on Human and Peoples’ Rights, not more than five states fall within the jurisdiction of the African Human Rights Court.<sup>70</sup> Accordingly, the possibility of invoking the Charter directly or indirectly before the sub-regional courts provides alternative outlets that to some extent, reduces the impact of limited access to the African Human Rights Court.

A recurring criticism of the African human rights system has been the almost non-existent enforcement regime under the African Charter. In fact, part of the justification for the call for the African Human Rights Court was the hope that it carries for a more effective enforcement regime. While conceding that the challenges of enforcement at international law exists in relation to courts as much as it does in relation to non and quasi-judicial organs, it would appear that the RECs provide better motivation for compliance by state with international obligations. Consequently, REC adoption of the African Charter theoretically holds a promise for the improvement of compliance with Charter obligations.<sup>71</sup> However, the experiences in Southern Africa (SADC Tribunal against Zimbabwe) and in West Africa (ECCJ against the Gambia) requires caution with regards to the claim that the RECs and their courts can be better protectors of Charter rights.

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<sup>68</sup> [2008] ECR I-6351

<sup>69</sup> See for instance Tomuschat, (2011) 223.

<sup>70</sup> Burkina Faso, Ghana, Malawi, Mali and Tanzania are the only states that have made the required declaration. The relevant chart is available at <http://www.au.int/en/sites/default/files/992achpr.pdf> (last assessed 26 Jul 2012)

<sup>71</sup> For instance, the government of Niger did not waste time in implementing the decision of the ECOWAS Court in the *Koroua* case.

It is also gain that the African Charter is increasingly becoming a point of orientation and a source of inspiration for human rights regimes in the continent. Generally, the recognition of the Charter as the “common standard” for human rights in Africa<sup>72</sup> holds the promise that rights would probably not fall below the threshold of the Charter. In effect, standard setting in the field of human rights will constantly be measured against the African Charter which arguably applies as some of sort quality control mechanism. This is a practice that has also emerged in the use of the ECHR by EU organs, especially the ECJ in its jurisprudence.

## 4.2 Some pains arising

Notwithstanding the gains claimed above, there are pains and therefore, dangers in the application of the African Charter by African RECs. Some of these pains are on the flip sides of the gains identified above. These pains are mostly associated with the application of the Charter by sub-regional courts. Thus, in relation to the issue of limited access to the African Human Rights Court, it would appear that the possibilities offered by African RECs, particularly, the potential for juridical protection before sub-regional courts waters down motivations for advocacy towards improved access to the African Human Rights Court. Since there are no statistics to support this claim, it is made with a load of caution. However, the point remains that recent activities by major civil society players have zoomed in on the human rights activities of RECs,<sup>73</sup> thereby either diffusing or diverting resources that could have been dedicated to advocacy in favour of improved access. This is certainly a loss, and therefore pain that arises as a result of REC application of the Charter.

Another pain worthy of note is the creation of overlapping jurisdictions and its potentially threatening consequences. As a general rule, overlapping jurisdictions exist where there is similarity of claim and processes before two or more jurisdictions.<sup>74</sup> To the extent that the African Charter is applicable by and before sub-regional courts, which courts are empowered to make binding decisions after an adversarial process, there is similarly of, and thus, overlapping jurisdiction as between the sub-regional courts and the supervisory organs of the African Charter (particularly, the African Human Rights Court). While of itself, overlapping jurisdiction may not be negative, it holds the potential of resulting in forum shopping as well as conflicting jurisprudence. To date, the risk of conflicting jurisprudence remains more apparent than real. However, the fact remains that as the sub-regional courts (especially the ECCJ) continue to apply the Charter, the likelihood of conflicting interpretation of the Charter is not too far away.

A less challenging pain is the misinterpretation and/or severance of the procedural aspects of the Charter from its substantive elements. As is commonly known, the fusion of primary norms and secondary rules brings about the existence of a legal system. In relation to the practice of the sub-regional courts, the ECCJ has maintained that its

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<sup>72</sup> Viljoen (2007) 555. However, Murungi & Gallinetti (2010) 130 make an important observation that the universal use of the African Charter as a rights catalogue ‘blurs the normative hierarchy between regional and sub-regional human rights instruments that underlies the intention of the eventual unification at the regional level’.

<sup>73</sup> Recent activities of organisations such as the African Section of the International Commission of Jurists (ICJ), AfriMAP and the Pan African Lawyers Union (PALU) for instance are indicative of this trend.

<sup>74</sup> Generally see Yuval S (2004) *The competing jurisdictions of international courts and tribunals*

obligation with regards to the Charter does not extend to adopting the procedure recommended in the Charter as that is directly at the African Commission.<sup>75</sup> This could easily be interpreted as creating multiple legal systems on the basis of a single set of primary norms. It is open to debate whether this is negative trend. It has also emerged that some sub-regional courts apply admissibility provisions that should regulate inter-state communications to individual complaints.<sup>76</sup> While this does not appear to have resulted in the miscarriage of justice, it exemplifies the danger of contradictions that exist in relation to interpretation of the Charter.

## 5. LOOKING INTO THE FUTURE

Two recent events provide the opportunity for peeking into the future for the relationship between the African RECs and the African Charter. Sometime in October 2010, the “first-ever Colloquium of the African Human Rights Court and Similar Institutions” took place in Arusha, Tanzania at the seat of the Court. Documents emerging from the registry of the African Human Rights Court indicate that the purpose of the colloquium was to explore ‘ways and means of promoting judicial dialogue amongst continental and sub-regional bodies responsible for human rights protection in the continent’.<sup>77</sup> In attendance at this colloquium were representatives of the EACJ, the ECCJ and the SADC Tribunal.<sup>78</sup>

The other important event was the presentation of the first draft of the African Human Rights Strategy.<sup>79</sup> The Strategy self-proclaimed objectives include seeking to address issues of ‘coordination, complementarity and coherence amongst human rights institutions’ in Africa. The strategy also paid attention to the ‘structures and functions of the Regional Economic Communities (RECs) and their Institutions in the area of human rights, including their relations with the AU’.<sup>80</sup> These two events arguably set the tone for the future to the extent that they recognise the increasingly important role that RECs play in the African human rights system, which system revolves around the African Charter.

One of the main challenges envisaged for the continued application of the African Charter by RECs is the potential for jurisdictional competition and the consequences that are linked to such competition. As much in terms of further standard setting as in judicial and non-judicial realisation of human rights, acknowledgement of the concurrency of application of the Charter and its associated instrument is going to be crucial for peaceful co-existence. Clearly, the ability of the continental and sub-regional organisations to coordinate their activities depends very much on the avoidance of the ‘ostrich approach’ of ignoring one another. Thus, the idea of bringing sub-regional

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<sup>75</sup> See the *Koroua* case

<sup>76</sup> For instance, in the *Tembani* case, at para17, the SADC Tribunal invoked art 50 of the African Charter to an individual complaint. Similarly, in its ruling in *Essien v Gambia* (2007) AHRLR 131 (ECOWAS 2007) at para23, the ECCJ also addressed exhaustion of local remedies on the basis of art 50 of the African Charter even though the matter before the court was brought by an individual.

<sup>77</sup> Press release titled ‘Closing of the colloquium of African human rights courts and other similar institutions’ (available at [http://www.african-court.org/ar/images/documents/coloq/AfCHDP\\_Press\\_release\\_closing\\_colloquium\\_6\\_oct\\_2010\\_Eng.pdf](http://www.african-court.org/ar/images/documents/coloq/AfCHDP_Press_release_closing_colloquium_6_oct_2010_Eng.pdf))

<sup>78</sup> As above.

<sup>79</sup> On file.

<sup>80</sup> Page 4 of the Zero Draft African Human Rights Strategy.

organisations and their organs together to address issues of common concern –centred on the exercise of concurrent jurisdiction over the African Charter is commendable. It definitely opens up space for further engagement between all the AU organs (that apply the African Charter) and the RECs and their organs. In so doing, some of the threats that could have emerged from concurrent application of the Charter can be addressed by direct dialogue between and among these stakeholders. Further, there is potential for encouraging strategic judicial dialogue in the form of consideration of jurisprudence of the other institutions. This hopefully, allows these institutions to discard the notion of institutional superiority.

The inclusion of RECs and their organs in the development of the draft African human rights strategy also moves in the direction of the colloquium. With such coordinated efforts, the risk of duplication of work and its attendant potential for dispersal or waste of resources will be significantly reduced. Further, the acceptance of the reality of REC presence in the African human rights system is more likely to result in proper planning that will aim at taking advantage of the location of sub-regional structures to take the continental human rights agenda far beyond its present scope and reach.

## **6. CONCLUSION**

This contribution set out to argue that the African Charter has exceeded the expectations of its founding fathers in previously unimaginable ways, not the least of which is its adoption by sub-regional international organisations in the African continent. As the discourse has shown, the adoption of the African Charter by African RECs has occurred in varying ways: directly or indirectly, aggressively or subtly. It has also been shown that the application of the Charter has occurred at both the judicial and non-judicial levels of sub-regional activities. While all of these have been going on, actors in the African human rights system have only recently acknowledged the trend so that mechanisms have only begun to be developed to meet the realities of sub-regional application of the Charter. Since there is nothing to indicate that African RECs will discontinue the use of the African Charter in the near future, this contribution supports the idea of embracing this new reality in order to enable the system perfect the practice of taking advantage of the gains and tackling the challenges with the aim of putting this phenomenon into positive effect.

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