

**The role of the East African Court of Justice in the promotion, protection and enforcement  
of human rights in Uganda**

**Submitted in partial fulfillment of the requirements of the degree**

**LLM (Human Rights and Democratisation in Africa)**

**By**

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### **Declaration**

I, **Student No. 12376664**, hereby declare that this dissertation is my original work and has never been presented to any other institution. I also declare that all secondary information used has been duly acknowledged in this dissertation.

Signed.....

Date.....

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Signature.....

Date.....

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I dedicate this work to my late mother Mrs. Yolanda Kilama who died on 5 January 2012 just a week before I started the LLM course. It is unfortunate that she will not share in the joy come graduation day, but I am truly grateful for her contribution in my life.

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### **List of abbreviations**

EAC	:	East African Community
EACJ	:	East African Court of Justice
ECOWAS	:	Economic Community of West African States
AU	:	African Union
AIDS	:	Acquired Immuno-Deficiency Syndrome
RECs	:	Regional Economic Communities
SADC	:	Southern Africa Development Community
ICJ	:	International Court of Justice
COMESA	:	Common Market for Eastern and Southern Africa
AIDS	:	Acquired Immuno Deficiency Syndrome
HRW	:	Human Rights Watch
HIV	:	Human Immuno-Deficiency Virus
ACHPR	:	African Charter on Human and Peoples' Rights
ACmHPR	:	African Commission on Human and Peoples' Rights
AHRS	:	African Human Rights System
SADCT	:	South African Development Community Tribunal



## Chapter one

### 1. Introduction

#### 1.1 Background

Uganda has been documented in the 2012 World Report by Human Rights Watch (HRW) as a country where several human rights violations go on with impunity.<sup>1</sup> The violations were conspicuous in April 2011 following the presidential elections held earlier in February of that year. Security agents used lethal force resulting in the death of several people and opposition politicians including two former presidential candidates together with their supporters who were protesting in what they dubbed ‘walk to work’ to decry the rising fuel and food prices were violently arrested and charged with unlawful assembly and incitement of violence, which charges were later dropped. Journalists were not spared by security agents who harassed, confiscated their audio and visual recorders and equipment or deleted the recordings and beat them while they were covering the unrest, ostensibly to discourage them.<sup>2</sup>

To date, there is only one record of an effort to do justice and it is of an arrest for the killing of a child in Masaka. No prosecution has been reported as yet.<sup>3</sup> HRW also reports the incidence of torture, extrajudicial killings and arbitrary detention often beyond the constitutional 48 hours in the same year.<sup>4</sup>

Other violations reported include the harassment of human rights defenders, ‘sexual minorities’, with the proposal of the Anti-Homosexuality Bill and the HIV/AIDS Prevention and Control Bill which is aimed at criminalising intentional or attempted transmission of HIV.<sup>5</sup>

Little has changed with respect to civil and political rights even in 2012. Dr, Kiiza Besigye the leader of an opposition party Forum for Democratic Change has been in and out of police cells for protesting mismanagement of the country and showing his discontent with ‘a vote of no

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<sup>1</sup>Human Rights Watch (2011) World Report 2012 Uganda events in 2011 <http://www.hrw.org/world-report-2012/world-report-2012-uganda> (accessed 27 September 2012).

<sup>2</sup> HRW(n.1 above).

<sup>3</sup> HRW (n.1 above).

<sup>4</sup> HRW (n.1 above).

<sup>5</sup> HRW (n.1 above).

confidence' in the government. The media reported that Besigye was arrested on 6 October 2012, just 3 days before Uganda celebrated the 50<sup>th</sup> anniversary of its independence, sparking off riots in which a *boda boda* (motorcycle taxi) rider was shot and injured in the process, journalist beaten and their gadgets confiscated by security agents.<sup>6</sup>

The independence of the judiciary in Uganda is contestable. A study by the International Bar Association's Human Rights Institute concluded that in cases of a political nature, the government has wantonly criticised the judiciary, put pressure on judges and defied court orders.<sup>7</sup>

The institutional autonomy and integrity of the judiciary in Uganda was first put to the test on 25 June 2004 when the Constitutional Court ruled that the Referendum (Political Systems) Act 2000<sup>8</sup> was unconstitutional because at the time it was purportedly passed, Parliament lacked quorum. This ruling provoked an outrage from President Museveni who reportedly condemned the court for having 'usurped the powers of parliament'. He also stated that 'the work of the judges is to settle chicken and goat theft cases and not to determine the country's destiny'.<sup>9</sup> Motivated by this criticism, supporters of the National Resistance Movement (NRM) (Museveni's political party) demonstrated to protest the court's ruling where they later presented a petition to the Speaker of Parliament stating that the courts had undermined the 'progress made so far' and demanded that the Chief Justice takes disciplinary action against the so-called errant judges.<sup>10</sup>

The independence of the judiciary was again challenged in two instances in 2005 and 2007 when agents of the state invaded the High Court in Kampala<sup>11</sup> disrupting the processing of bail papers

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<sup>6</sup> 'Besigye arrested again' Sunday Monitor 7 October 2012 1.

<sup>7</sup> International Bar Association (IBA) 'Judicial independence undermined: A report on Uganda' <http://www.ibanet.org/Documents/Default.aspx> (accessed 19 March 2012). See also A. Wesaka *Uganda: Judiciary not free, says Odoki* <http://allafrica.com/stories/201109110036.html> (accessed 25 March 2012).

<sup>8</sup> *Ssemogere and Zakery Olum v Attorney General of the Republic of Uganda* <http://www.ulii.org/Ug/cases/UGSC/1999/5.html> (accessed 16 March 2012).

<sup>9</sup> IBA (n.7 above) 21.

<sup>10</sup> IBA (n. 7 above) 22.

<sup>11</sup> More details of this case are provided in the discussion of the 'Katabazi case' in Chapter 3.

in respect of bail granted by Hon, Justice Edmond Ssempe Lugayizi.<sup>12</sup> The accused persons were remanded and later jointly charged before a General Court Martial for different offences but based on the same facts for which they faced charges before the High Court.<sup>13</sup>

The Uganda Law Society petitioned the Constitutional Court and the Court ordered the immediate release of the accused persons but this was not heeded by the government.<sup>14</sup> The accused persons then brought another constitutional petition<sup>15</sup> challenging their continued detention despite an earlier decision of the Constitutional Court in Constitutional Petition No. 12 of 2006. The Constitutional Court ruled that the concurrent trials before the different courts and the sieges of the court were unconstitutional and also that the trial before the Court Martial was null and void.<sup>16</sup> The suspects were never released from custody leading to a reference to the EACJ.<sup>17</sup>

Although these incidents happened between 2004 and 2007 with no other direct attack since that time, they seriously scarred the minds of members of the judiciary as highlighted by Uganda's Chief Justice at a Chief Justices' Conference in September 2011. He decried the state's intrusion into the independence of the judiciary alluding to the 2005 invasion of the court and the failure of government to enforce judicial decisions.<sup>18</sup>

However, the appointment of judges is influenced by the NRM to bring in persons who are sympathetic to the regime which has led to the coinage 'cadre' judges, used to refer to those regarded as inclined towards the establishment.<sup>19</sup>

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<sup>12</sup> The judge later stepped down from hearing this case citing interference from the military ( See Wesaka (n.7 above).

<sup>13</sup>Facts as stated in judgment Uganda Law Society and The Attorney General of the Republic of Uganda Constitutional Petition No. 18 of 2005) copy available with the author.

<sup>14</sup> Uganda Law Society and The Attorney General of the Republic of Uganda (n. 13 above).

<sup>15</sup> Dr, Kiiza Besigye & others and Attorney General Constitutional Petition No. 07 of 2007

<sup>16</sup> Kiiza Besigye & 22 others v the Attorney General Constitutional Petition 12 of 2005(copy available with the author).

<sup>17</sup> James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda Reference 1 of 2007 <http://www.saflii.org/ea/cases/EACJ/2007/3.html> (accessed 2 April 2012).

<sup>18</sup>Wesaka (n.7above).

<sup>19</sup>Anonymous interview at University of Pretoria with a Law Lecturer at Makerere University-Uganda on 16 April 2012 (An interview for a class assignment on the Independence of the Judiciary in Uganda).

The foregoing, especially the attitude of President Museveni, demonstrate a lack of political will to prosecute alleged perpetrators of human rights violations. When put together with both a perceived and an apparent weakness of the judiciary, it is unsurprising that many seeking justice for wrongs perpetrated within Uganda consider it necessary to look instead to subregional (Regional Economic Communities-RECs) institutions especially the East African Court of Justice (EACJ).

### **1.1.1 Canvassing the relevance of the EACJ**

The question underlying this study is whether a regional institution such as the EACJ can be used as an avenue to address some of these human rights violations taking place in Uganda with impunity. The justification for case-studying Uganda rests on the present situation of human rights in the country alluded to earlier. The choice of the EACJ as the most relevant subregional organisation is hinged on the fact that it has been instrumental in expanding the opportunities for human rights realisation<sup>20</sup> in the East African subregion and it is the most proximate regional institution that may be approached to consider these matters and at the barest minimum can be counted on to 'black list' Uganda.

The call for subregional institutions of justice is no longer new or strange. It is part of the global trend to support the establishment and working of supranational institutions as part of the campaign to end impunity, a most notable example of which is the International Criminal Court (ICC).<sup>21</sup> It has been said of the EACJ that it can act as a 'safety net' in cases of violations where countries are unable or unwilling to investigate and prosecute or remedy the violations as has been shown above.<sup>22</sup>

The increasing involvement of RECs in the so-called African human rights system has been the subject of recent scholarly discourses. Ebobrah<sup>23</sup> explains that the involvement of RECs in the 'protection regime' is as a result of the restricted individual access to the African Court on Human and Peoples' Rights which has led to increased frustration and dissatisfaction with the regional (continental) framework, hence the recourse to the RECs Courts. The question of the

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<sup>20</sup>ST Ebobrah Human rights developments in African sub-regional economic communities during 2011 *African Human Rights Law Journal* 2012 224.

<sup>21</sup>M. du Plessis and J Ford No justice, no peace: unable or unwilling? Case studies on domestic implementation of the ICC statute in selected African countries Institute for Security Studies (2008)1.

<sup>22</sup> See also the judgment in the Sebalu case discussed in Chapter 3.

<sup>23</sup> Ebobrah (n.20 above).

suitability of RECs courts (in this case the EACJ) as a forum for the promotion, protection and enforcement of human rights is one that this study seeks to answer.

## **1.2 Historical development of the East African Community and its Court**

The East African Community (EAC) is one of the eight RECs recognised by the African Union.<sup>24</sup> It was established in 1999 by its original founding members - Uganda, Kenya and Tanzania - to consolidate and enhance co-operation among the member states under the EAC Treaty.<sup>25</sup>

The EACJ, one of the organs of the EAC,<sup>26</sup> has asserted its relevance by adjudicating on matters which touch on human rights, notwithstanding the fact that the Protocol to expressly confer human rights jurisdiction on it has not been adopted. The EAC Treaty only makes reference to human rights as one of the principle objectives of the Community with a provision that the human rights jurisdiction of the court will be adopted by a Protocol to be agreed upon. However, from 2010<sup>27</sup> to 2011,<sup>28</sup> the Court has entertained cases which touch and are related to human rights.<sup>29</sup> It is against this background that the study is interested in examining the role and the prospects of the EACJ in the promotion, protection and enforcement of human rights within Uganda.

### **1.2 Problem Statement**

One of the fundamental principles of the EAC is respect for human rights although the EAC was set up mainly to facilitate trade and its structures and organs are more adapted to that purpose. The question is whether and how treaty obligations under the EAC Treaty can be used to ‘call Uganda to order’ with respect to the violations of human rights taking place on its territory.

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<sup>24</sup> The African Union’s official website <http://www.au.int/en> (accessed 7 October 2012).

<sup>25</sup> Art.5 (2) the East African Community Treaty (EAC Treaty) (as amended) 1999/2000.

<sup>26</sup> Art. 9 (n.25 above)

<sup>27</sup> S.T Ebobrah Human rights developments in the African sub-regional economic communities during 2010 in the *African human rights law journal* (2011) 216.

<sup>28</sup> Ebobrah (n. 27 above).

<sup>29</sup> S.T Ebobrah (n. 20 above).

The research is motivated by the fact that the EACJ whose main objective is to adjudicate on matters concerning trade within the community has now ventured into human rights adjudication.

The question therefore, is how the EACJ can be used to promote, protect and enforce human rights in Uganda within the existing framework and whether there is need to expand the legal framework as well as enhance the responsiveness of the EACJ to realise this.

### **1.3 Research Questions**

The questions this study seeks to answer are:

- What role can the EACJ play in the promotion, protection and enforcement of human rights in Uganda?
- What opportunities exist for the EACJ to play this role effectively in the absence of an express conferment of human rights jurisdiction on it?

The study also reviewed the experiences of other subregional courts in the promotion, protection and enforcement of human rights to draw lessons for the EACJ.

### **1.4 Significance of the study**

The justification for studying the role of the EACJ in the promotion, protection and enforcement of human rights in Uganda is two-fold. First, the *status quo* in Uganda demonstrates the inability or unwillingness of government to use the court structures to redress violations of human rights warranting recourse to a supranational institution.

Second, the EACJ has been active in the human rights protection regime within the subregion warranting the need to assess its prospects for the promotion, protection and enforcement of human rights in Uganda. The goal is to determine whether the subregional organ can, indeed, act as a ‘safety net’ for the enforcement of human rights in Uganda where domestic institutions have manifestly failed or the state institutions are unwilling to utilise them to hold persons accountable.

## 1.5 Theoretical framework

The study will use the theory of cultural relativism to explain the proliferation of RECs such as the EAC, the role their institutions, especially the courts, are playing in the promotion, protection and enforcement of human rights. Proponents of RECs such as the EAC argue that the various regions within the African continent have cultural specificities and do not always experience human rights related issues in the same way; hence, there is a need for subregional human rights regimes which will be better positioned than the African human rights system to respond to these.

The geographical contiguity of EAC member states has produced cultural affinities among their peoples. All member countries have enjoyed historical ties. Kenya and Uganda were colonised by the British and Tanzania also became a British colony after the Second World War.<sup>30</sup> Both Kenya and Uganda have post-colonial experience of one-party rule. Members of the EAC admit in the preamble to the EAC Treaty that they ‘enjoy a close historical...cultural and other ties’.<sup>31</sup>

Shenker points out that the Vienna Declaration and Programme of Action notes that when dealing with human rights issues, ‘national and regional peculiarities and various historical and cultural and religious backgrounds’ must not be discounted.<sup>32</sup> Admitting that ‘[t]raditional culture cannot be substituted for human rights but can only be a context in which human rights must thrive’. She argues that human rights must be dealt with in a relevant and meaningful manner in a diverse cultural context.

Viljoen agrees and adds that it is for the reason of cultural specificities that states are allowed to enter reservations in treaties to give them a ‘margin’ [to] ‘appreciate ‘the local circumstances in respect of some rights.’<sup>33</sup> He underscores the justification of the use of subregional institutions since there is a greater possibility of norm specification because of the convergence and coherence between the states in a subregion which will also allow for a quicker response and

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<sup>30</sup>East African Community <http://www.articlesbase.com/history-articles/east-african-community-2128461.html> (accessed 23 October 2012).

<sup>31</sup> Preamble, Para 1 (n.25 above)

<sup>32</sup>DA Shenker The challenge of human rights and cultural diversity <http://www.un.org/rights/dpi1627e.htm> (accessed 13 September 2012).

<sup>33</sup> F Viljoen *International human rights law in Africa*(2012) 8

improved implementation when states are bound by economic and political ties. This is advantageous as opposed to the global plane where reaching consensus on a standard is often time consuming in an attempt to strike compromises.<sup>34</sup>

### **1.6 Literature review**

Murungi and Gallinetti<sup>35</sup> examine the history of regional integration while focusing on the subregional economic communities such as the EAC and emphasise that initially, RECs did not include protection of human rights as one of their main purposes. They note that even the Organisation of African Unity (OAU) only included it as a main agenda when it transformed in the Constitutive Act of the African Union (AU) in 2000. They however note that most RECs now have human rights included as guiding principles and that their entry into the human rights regime should be hailed. The question which arises, however, is the place of the RECs courts in the enforcement of human rights; a question that warrants an interrogation of the relationship between RECs and the whole African human rights regime. They posit that the rationale for RECs including human rights in their constitutive documents emanates from their obligation under the African Charter on Human and People's Rights (the African Charter).

Murungi and Gallinette also examine the evolution of human rights in to the mandate of the RECs reviewing the experiences of the Economic Community of West African States (ECOWAS), Southern African Development Community (SADC), the EAC and the powers granted the various regional courts with respect to human rights. They question the jurisdictional competence, structural and the legal or normative framework under which the RECs' courts operate, raising the discussion on the express and implied powers or mandates of the RECs courts to entertain human rights matters in relation to their constitutive Act. They conclude that RECs courts have a role to play in the protection of human rights in furtherance of the commitment by African states to ensure human rights. They note however that this is dependent on willingness of the African states to harmonise the functions of the RECs court with the so-called African human rights system (AHRS).

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<sup>34</sup> Viljoen(n. 33 above) 10.

<sup>35</sup> The role of sub-regional courts in the African human rights system [http://www.surjournal.org/eng/conteudos/getArtigo13.php?artigo=13,artigo\\_06.htm](http://www.surjournal.org/eng/conteudos/getArtigo13.php?artigo=13,artigo_06.htm) (accessed 30 August 2012).



Ruhangisa<sup>36</sup> examines the EACJ's ten years of operation, its achievements and challenges. He comments on access to the court by individuals and member states without having to exhaust 'local remedies' noting though that cases must relate to the breach of the EAC Treaty obligations by a member state. According to him, access to the court is possible for persons in the region irrespective of the location of the court in Arusha Tanzania because the court is allowed to hold *in situ* hearings. He discusses the initiative taken by the court to reduce delays in delivering justice through the formulation of rules of procedure to handle matters such as adjournments, delayed periods of delivering judgments and the expeditious hearing of cases, witness facilitation, execution of the judgments which depends on the national systems of the member states, the waiver of court fees for litigants, the establishment of subregistries among others.

He questions the independence and tenure of the judges of the court given that the EAC Treaty was unfavourably amended after a judgment by the court; ostensibly to have the judges develop 'cold feet' in subsequent proceedings. He further discusses one of the rulings of the court in respect to the rule of law at the community level bringing to the fore the question whether the rule of law equals to human rights.

The work explores the relationship between national courts and the EACJ as regards reference of cases by the national courts to the EACJ for preliminary rulings on issues of interpretation of the Treaty which has been used by only Kenyan national courts. He notes that the EACJ and the EAC Treaty provisions have not been adequately utilised perhaps due to lack of knowledge about them by the general membership of the community and the national courts. He also decries the delay in passing the Protocol extending the EACJ's jurisdiction to an appellate or apex court within the region and clarifying its mandate in relation to protection and promotion of human rights. He notes that the EAC deals with free movement of goods and labour, all of which come with human rights implications.

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<sup>36</sup>JE Ruhangisa 'The East African Court of Justice: Ten years of operation (achievements and challenges)', a paper presented during the sensitisation workshop on the role of the East African Court of Justice (EACJ) in the East Africa integration, Imperial Hotel, Kampala-Uganda 1-2 November, 2011 <http://www.eacj.org/docs/EACJ-Ten-years-of-operations.pdf> (accessed 30 August 2012).

Finally, he questions whether it is appropriate to have the EACJ as a court of justice with mandate over human rights issues and the implications of such and ponders also the workability of the concurrent jurisdiction of the EACJ and the African Court on Human and Peoples' Rights (the African Court on Human Rights).

It therefore calls for examining the merits and demerits of extending the jurisdiction of the EACJ as such. It also considers it worthwhile to reflect still on the principle of *locus standi* before the court given that member states have also always disputed the standing of persons from the member states and have inundated the courts with preliminary objections on this ground.

Ruhasinga concludes given that as at the end of September 2011, the court had passed 14 judgments and 29 rulings and one advisory opinion signifies its potentials.

Odoki<sup>37</sup> examines the history of the EAC, its mission and objectives contrasting these with the history, mission and jurisdiction of the defunct East African Court of Appeal (EACA) whose relationship and power to confer jurisdiction was purely the discretion of the Member States. He noted that the EACJ's jurisdiction is mainly to interpret and ensure compliance by member states with the EAC Treaty.

Odoki reviews the *modus operandi* of various regional and subregional courts such as the European Court of Human Rights, the ECOWAS Community Court of Justice (ECCJ), and the SADCT. He questions whether the proposed new East African Court of Appeal under the EACJ regime will add value and whether the conditions precedent for this are in place, for example the harmonisation of the laws and joint curriculum for the lawyers' training among others. He urges that the EAC member states should expedite the extension of the jurisdiction of the Court which has been a subject of discussion for over six years now.

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<sup>37</sup>BJ Odoki Developing international jurisprudence: A case for an East African Court of Appeal (A paper presented at the annual Kenya Judges 'colloquium 2011 on 14-19 August 2011 at Mombasa-Kenya <http://www.kenyalaw.org/klr/index.php?id=886> (accessed 25 June 2012).

This research will investigate the concerns raised in Odoki's paper especially the role of the EACJ in the promotion, protection and enforcement of human rights in Uganda, while examining the prospects and challenges.

Bossa<sup>38</sup> in a pre-emptive lecture (pre-emptive because its jurisdiction has not yet been extended to cover human rights) on the EACJ as a human rights court, gives a historical background to the EAC and discusses the proposed extension of the jurisdiction of the EACJ. She argues that the EACJ is an international court and not an ad hoc court or tribunal and asks the mind boggling question of which law should apply in the EACJ given that this is not expressly indicated in the founding treaty but only in the guiding principles which integrate universal standards of human rights as well as the African Charter.

The paper scans through subregional human rights treaties and human rights regimes such as the African Commission on Human and Peoples' Rights (AcmHPR), the African Court on Human Rights, the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR) and commends the AU for allowing the then African Court of Human Rights to apply a wide range of treaties ratified by the appearing state; an approach that enables the court to source liberally from applicable legal instruments.

She notes that a broad mandate would ensure adequate protection of human rights as the court will have jurisdiction in respect of 'contentious, advisory, preliminary, arbitral, appellate and constitutional and administrative jurisdiction' but goes on to identify some of the challenges which may arise from the dual or combined jurisdiction of the EACJ as a court of justice for the EAC as well as a human rights and appellate court. The paper urges that a clear criterion be set up for the admissibility of both state and individual cases and interstate complaints as is proposed in Draft Protocol of the EACJ which is in line with the European experience.

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<sup>38</sup> SB Bossa A critique of the East African Court of Justice as a human rights court-a paper presented at a conference organised by Kituo cha Katiba on human rights institutions in Eastern Africa on 26 October 2006 at Arusha Impala Hotel Tanzania [http://www.papers.ssrn.com/SO13/Papers.cfm?abstract\\_id=2027710](http://www.papers.ssrn.com/SO13/Papers.cfm?abstract_id=2027710) (accessed 30 August 2012).

Viljoen<sup>39</sup> examines the role of RECs such as the ECOWAS, Common Market for East and Southern Africa (COMESA), SADC and the EAC which were originally economic blocs but have emerged as ‘theatres’ for human rights struggles, ostensibly because of the weakness of the African Union. He argues that while some of the REC courts have explicit human rights mandate, others do not but this has not precluded them taking on issues around human rights and he offers the examples of the EACJ and the SADC Tribunal (SADCT). He posits that the rulings of the courts in two separate cases demonstrate the growing relevance of RECs in the African human rights protection regime. In one of the cases, Uganda<sup>40</sup> was found to have violated the EAC Treaty and breached the rule of law, a fundamental and guiding principle of the EAC, when it rearrested some accused persons after they were granted bail by the court. In the other case against Zimbabwe,<sup>41</sup> the SADCT not only ruled that it had jurisdiction under the SADC Treaty to entertain a matter relating to land reform in Zimbabwe, it held that the reform in Zimbabwe contravened Article 6(2) SADC Treaty which prohibits discrimination on the basis of race.

The study will investigate details of cases handled by other RECs as comparators with the EACJ placing emphasis on issues relating to *locus standi*, admissibility and jurisdiction.

Ebobrah<sup>42</sup> explores the application of the African Charter by African subregional organisations and the challenges and prospects experienced. He reviews the link between the African RECs and the African Charter noting that most constitutive documents of the RECs adopt the Charter as a guiding principle for their operations. He traces cases in which the various courts of the RECs have used the standards in the African Charter to adjudicate on matters before them, for example the Katabazi and the Campbell cases.

Ebobrah espouses the advantages, disadvantages and implications of the RECs applying the African Charter as the minimum human rights standard in their respective regions. The

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<sup>39</sup>F Viljoen International human rights law: A short history <http://www.un.org/wcm/content/site/chronicle/cache/bypass/home/archive/issues2009/wemustdisarm/internationalhumanrightslawashorthistory?print=1> (accessed 5 August 2012).

<sup>40</sup>James Katabazi and others v Secretary-General of the EAC and Attorney General of Uganda, Reference 1 of 2007(East African Court of Justice) 1 November 2007.

<sup>41</sup>Mike Campbell (Pvt) Limited and Others v Republic of Zimbabwe, Case SADCT 2/07 SADC Tribunal 28 November 2008.

<sup>42</sup> ST Ebobrah Application of the African Charter by African Sub-regional organisations: gains, pains and the future in *Law democracy & development* vol.16.2012 <http://dx.doi.org/10.4314/idd.v16i1.3> (accessed 5 September 2012).

advantages are individual direct access as opposed to what obtains under the African Human Rights Court where individual access hinges on states acceptance of the court's jurisdiction to entertain cases brought by individuals. The situation is made worse by the fact that most states have not made the necessary declarations assenting to such jurisdiction. He contends also that enforcement of court orders is made easier by the proximity of the RECs to the member states. He, however, notes that RECs may have different interpretations of the African Charter from what the African Commission or African Court may give, causing a proliferation of interpretations of the same document with the attendant problems.

Ebobrah's article does not examine in detail the role of the EACJ in the promotion, protection and enforcement of human rights in Uganda which is the preoccupation of this study.

Ebobrah<sup>43</sup> in another endeavour examines the developments in the EAC especially the EACJ in 2010. The text reviews the activities at the EAC and cases handled by the EACJ but it does not purport to analyse their impact or implications for human rights in Uganda. The objective of his study is to show the general developments in the human rights in the RECs in the year under consideration.

The current study is therefore justified because it will interrogate the role of the EACJ in the promotion, protection and enforcement of human rights by analysing its judgments and how they ensures the promotion, protection and enforcement of human rights in Uganda.

Ruppel<sup>44</sup> provides an overview and history of RECs and lists the various RECs recognised by the African Union (AU), the successor to the Organisation for African Unity (OAU). He posits that RECs have integrated human rights into their mandates because human rights and good governance have a bearing on the investment climate. He argues that RECs have potential to impact the human rights situation in the individual member states noting that enforcement of human rights can be effected through administrative means such as decision making based on human rights considerations. Thus, RECs can enforce human rights but the greatest challenge is

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<sup>43</sup> Ebobrah (n.42 above).

<sup>44</sup>OC Ruppel Regional economic communities and human rights in East and Southern Africa [http://www.kas.de/upload/auslandhomepage/namibia/Human\\_Rights\\_in\\_Africa/a\\_Ruppel.pdf](http://www.kas.de/upload/auslandhomepage/namibia/Human_Rights_in_Africa/a_Ruppel.pdf)(accessed 30 August 2012).

the overlap of jurisdiction and membership of countries in the various RECs, a situation that justifies the call for consolidation of the RECs.

Ruppel deals with the various RECs such as COMESA, SADC, EAC showing their human rights mandates. He states that concerns about good governance come more to the fore as the EAC gets deeper into the integration process. He concedes that the EACJ does not have an express human rights jurisdiction by virtue of the fact that a protocol to extend its jurisdiction as a human rights and (appellate) court has not yet been adopted.

There are a couple of other publications on the EAC and the EACJ but no article examines into detail the role of the EACJ in the promotion, protection and enforcement of human rights in Uganda. Available studies provide only a general overview of the court and its jurisdiction.<sup>45</sup>

## **1.6 Methodology**

The study uses secondary information to achieve the objective. The information was obtained from the library through desk research of books, journals, the Constitutive Acts of the AU, EAC, ECOWAS among others and credible internet sources.

The study analyses the findings and deduces from these lessons as well as conclusions.

## **1.7 Assumptions, delineation and limitation of the study**

It was assumed by the researcher that the study will be relevant to the discourse on the significance of the EACJ in the promotion, protection and enforcement of human rights and that resources and literature would allow the completion of the undertaking.

However, it was noted that studies on the subject of RECs courts is budding with few authors and materials on the subject which posed some challenge to this study.

The study is limited to examining the role of the EACJ in the promotion, protection and enforcement of civil and political rights genre of human rights in Uganda. The limitation to this genre of rights is informed by the fact that even though they are expressly recognised and

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<sup>45</sup> The East African Court of Justice <http://www.claiminghumanrights.org/eac.html> (accessed 11 June 2012).

guaranteed under the Bill of Rights in chapter 4 of Uganda's Constitution, they are widely violated.

Also, the study only interrogated the role of the EACJ and not all organs of the EAC hence it did not undertake a detailed inquiry into the role and prospects of these organs. The limitation of the study to the EACJ however enabled some comparison with the ECCJ, an active REC court, to ensure that justice was done to the topic.

## **1.8 Chapters overview and structure of the dissertation**

Chapter one of this dissertation contains the background, historical development of the EAC and EACJ, problem statement, research questions, significance of the study, theoretical framework, literature review, methodology, delineation and limitation of the study and assumptions underlying the study.

Chapter two reviews the legal framework of the EAC and the EACJ, chapter three contains the jurisprudence of the EACJ and how it has interpreted several aspects of litigation before it, and chapter four contains the legal framework of ECOWAS and the ECCJ as a comparator to the EACJ. Chapter five contains the conclusions, lessons to learn and recommendations

## **Chapter 2**

## **AN OVERVIEW OF THE LEGAL FRAMEWORK OF THE EAST AFRICAN COURT OF JUSTICE (EACJ)**

This chapter provides the context to this study by reviewing the legal framework of the EAC as it relates to the establishment and composition of the EACJ, its jurisdiction, judicial and non-judicial role in the promotion, protection and enforcement of human rights. The issues of access, *locus standi* of natural and legal persons, material (subject matter) jurisdiction and the requirement of exhaustion of local remedies, the relationship between the court and the domestic judiciaries and the African Commission and Court, its application of the African Charter and the enforcement of its the judgments are also investigated. The Draft Protocol<sup>46</sup> to extend the jurisdiction of the EACJ and the ‘Draft East African Bill of Rights’ although not binding are discussed anticipating the implications if adopted in their current form.

### *2.1 Establishment and organs of the EAC*

The organs of the community are the Summit of the Heads of State or government, the Council, Co-ordination Committees, the Secretariat (all these share executive power) and the East African Legislative Assembly (EALA), EAC have federal, judicial and legislative powers respectively.<sup>47</sup> The Summit may establish other institutions as and when the need arises.<sup>48</sup>

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<sup>46</sup> The Draft Protocol was named the ‘Zero Draft’ by the East African Community Secretariat. See also BB Solomy, A critique of the East African Court of Justice as a human rights court in P.C Maina *Human rights commissions and accountability in East Africa* Kituo cha Katiba Kampala (Fountain Publishers) 287.

<sup>47</sup> KG Adar East African Community in the democratization of international organizations in F. Giovanni, L. Lucio & V. Nicola (eds) Centre for studies of federalism, *First International Democracy Report (2011) East African Community* 13. See also OM Richard Human rights within the context of deepening integration of the East African Community (EAC) March 2012 2 and CO Ruppel Regional economic communities and human rights in East and Southern Africa 302.

<sup>48</sup> Art.9 (n.25 above).



## 2.2 The EACJ

The EACJ was established in 1999 by article 9 of the Treaty and commenced operations in 2001.<sup>49</sup> It is temporarily housed in Arusha Tanzania at the EAC secretariat pending the determination of its permanent seat by the Summit. Its judges convened as and when the need arose<sup>50</sup> although this position changed from 2 July 2012 following a directive from the Council of Ministers which assigned the Judge President and the Principal Judge to work on a full time basis at the court in Arusha.<sup>51</sup>

Its first six judges were sworn on 30 November 2001 but the number increased to ten to accommodate the new members of the community Rwanda and Burundi.<sup>52</sup> The Court received its first case in December 2005 and passed the decision in October 2006.<sup>53</sup> Member States, the Secretary-General, legal and natural persons can seize the court.<sup>54</sup> It can also hear cases between the EAC and its employees.<sup>55</sup>

Its membership is composed of two judges from each member state appointed by the Summit and each of whom shall serve a full term of seven years, save for death, resignation, attainment of the age of 70 years, or removal by the Summit on the recommendation of a duly constituted and independent tribunal comprising legal experts.<sup>56</sup>

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<sup>49</sup> Ruppel (n. 44 above) 306.

<sup>50</sup> Ruppel (n.44 above) 306, See also The Danish Institute for Human Rights (2008) African human rights complaints handling mechanism, a descriptive analysis 126.

<sup>51</sup> EACJ Judge President, principal judge now full-time in Arusha [http://www.eacj.org/eacj\\_judges\\_now\\_fulltime.php](http://www.eacj.org/eacj_judges_now_fulltime.php) (accessed 18 October, 2012).

<sup>52</sup> Danish Institute (n.50 above) 126. See also P. Anne van der Mei *Regional integration: the contribution of the Court of Justice of the East African Community* Max Planck –Institu(2009) 408, [http://www.zaoerv.de/69\\_2009/69\\_/2009\\_2b\\_403\\_426.pdf](http://www.zaoerv.de/69_2009/69_/2009_2b_403_426.pdf) (accessed 30 August 2012).

<sup>53</sup> Danish Institute (n.50 above) 126.

<sup>54</sup> Arts 28, 29, 30 & 27 (n.25 above).

<sup>55</sup> Adar (n.47 above) 16. See also K. Philip the state of constitutionalism in East Africa: the role of the East African Community 2007 in K. Wanzo *Constitutionalism in East Africa: progress, challenges and prospects in 2007* (Kituo Cha Katiba Kampala) Fountain Publishers (2009) 11. See also L.K Jean, *The East African community treaty and the protocol on the new East African Community Customs Union*, a paper presented at the dissemination workshop for different stakeholders at Hilton Hotel Nairobi on 16-18 August 2005 46.

<sup>56</sup> Adar (n. 47 above) 15.

## 2.5 Divisions/chambers of the EACJ

The Summit of the Heads of State of the EAC at their 8<sup>th</sup> Ordinary Session between November and December 2006<sup>57</sup> resolved to reconstruct the Court into two divisions - the First Instance and Appellate Divisions as envisaged in article 23 of the EAC Treaty. One judge from each member state was elevated to sit in the Appellate Division in the interim, balancing the membership of each division to five judges, all of whom will serve on an *ad hoc* basis until a further decision by the EAC Council.<sup>58</sup> The reconstructed court became operational on 1 July 2007.<sup>59</sup>

It comprises the President and Vice-President appointed by the Summit to serve on a rotational one-term basis.<sup>60</sup> It shall have a maximum of 15 Judges of whom, not more than ten shall be appointed to the first instance division and not more than five to the appellate division.<sup>61</sup> The term of one third of the judges on first appointment shall terminate at the end of five years, the term of another one third shall expire at the end of six years and the remaining one third of the judges shall serve a full term of seven years.<sup>62</sup> The judges whose terms expire at the end of each initial period shall be decided by a lot to be drawn by the Summit immediately after their first appointment.<sup>63</sup>

## 2.3 Qualification of the judges

Judges of the court are to be persons with integrity, independence and impartiality appointed by the Summit on the recommendation from the member states<sup>64</sup> but there is no obligation that they should be qualified in human rights. This is unsurprising because the initial conception of the court gave it the primal task of interpreting the Treaty in respect of disputes relating to the economic (subregional) integration.<sup>65</sup>

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<sup>57</sup> Phillip (n.55 above) 12.

<sup>58</sup> Danish Institute (n.50 above) 126, See also Art. 140(4) (n.25 above).

<sup>59</sup> Philip (n. 55 above) 12.

<sup>60</sup> Adar (n. 47 above) 15, See also Art. 24(4)(n.25 above).

<sup>61</sup> Art 24(2)(n.25 above).

<sup>62</sup> Danish Institute (n.50 above) 126.

<sup>63</sup> DW Ogalo East African Court of Justice: wanting in goodwill <http://www.africanexecutive.com/modules/magazine/articles.php?article=777> (accessed 30 August 2012).

<sup>64</sup> Art.24 (n.25 above).

<sup>65</sup> Danish Institute (n. 50oabove) 130.

## *2.6 Role, jurisdiction and function of the EACJ*

The Court's initial jurisdiction is interpretation and application of the Treaty, with an original and appellate as well as human rights jurisdiction on matters associated with the Treaty.<sup>66</sup>

### *2.6.1 Jurisdiction in relation to member states*

The Treaty allows member states to refer matters in respect of other members in the event that there is an infringement of any treaty provision, for example, in the observance of human rights and good governance.<sup>67</sup>

### *2.6.2 Judgment, advisory opinion and appeal process at the EACJ*

The Court can entertain and adjudicate on all references and render advisory opinions to the other organs of the EAC on specific questions posed to it while being guided by its Rules of Procedure in arriving at a (final) decision, subject only to a review or an appeal.<sup>68</sup>

### *2.6.3 Human rights jurisdiction of the EACJ*

The question of the human rights jurisdiction of the EACJ has been contentious given that the Protocol required to extend this mandate has not yet been adopted.

Among legal scholars, there are clearly divergent views. Commentators such as Ruppel<sup>69</sup> contend that the EACJ lacks the human rights jurisdiction, while Viljoen quoted by Murungi and Gallinetti argues that there is uncertainty although he contends that the human rights jurisdiction of the EACJ may be implied from the reference to human rights in the Treaty and the fact that the EACJ has adjudicated on matters of a human rights nature.<sup>70</sup> Ojienda quoted by Murungi contends that the jurisdiction of the EACJ must necessarily be extended in phases as intended by the Council, therefore locking out a human rights jurisdiction for the court at present.<sup>71</sup>

However, Murungi and Gallinetti contend that the mandates under articles 27(1), 31 and 32 of the Treaty will inevitably involve adjudication on human rights; thus, they challenge the EACJ to

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<sup>66</sup> Adar (n. 47 above)16.

<sup>67</sup> Art. 28(n.25)

<sup>68</sup> Art.35 &35A (n.25 above).

<sup>69</sup> Ruppel ( n.44 above) 306.

<sup>70</sup> Murungi & Gallinetti(n. 35 above).

<sup>71</sup> Murungi & Gallinetti (n. 35 above) 16.

determine whether it has jurisdiction to hear human rights related matters or whether it has to await the adoption of the Protocol to specifically extend its jurisdiction to entertain human rights matters.

The court is not left behind in the debate as to whether it has jurisdiction over human rights matters. While not asserting that it has such express mandate given that article 27(2) of the Treaty stipulates that a protocol must be passed to confer it with jurisdiction on human rights related matters, it has stated that it will not abdicate its responsibility of interpreting the Treaty merely by the fact that cases brought before them contain aspects of human rights.<sup>72</sup>

It however remains to be seen whether the court will determine cases alleging breach by member states of the substantive rights in the African Charter by the mere reference in the Treaty to the African Charter absence of the Protocol.<sup>73</sup>

Many commentators posit that members states considered human rights important in the integration process as demonstrated by the inclusion of principles such as ‘equality, gender equality, freedom, democracy, fundamental freedoms, the rule of law and the maintenance of universally accepted standards of human rights and from this argument they find a basis for the position that the court necessarily has a human rights mandate.<sup>74</sup>

We, however, contend from a legal practitioners’ point of view, that an express human rights mandate in the Treaty will save litigants and Counsel’s time and resources often spent in trying to ‘establish’ the court’s jurisdiction over human rights.

In the light of the uncertainty, it is imperative to examine the views of the court whether it has a human rights mandate which is the mission of chapter 3 of this work.

#### *2.6.4 Combined jurisdiction of the Court*

The Court is anticipated to have a dual mandate as a court of justice to interpret and apply the EAC Treaty as well as a human rights and appellate court.<sup>75</sup> This dual mandate is likely to give

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<sup>72</sup>B Anton & D Joseph *Human rights in Africa, legal perspectives on their protection and promotion*, (2009) Konrad Adenauer Stiftung (Macmillan Education Namibia) 306.

<sup>73</sup> The Danish Institute (n. 50 above) 16.

<sup>74</sup> BB Solomy (n.1 above) 285.

<sup>75</sup> Art .27(n.25 above).

rise to some challenges necessitating the adoption of the Protocol to extend the court's jurisdiction to capture these distinct mandates.<sup>76</sup> Murungi argues that the judges will be overwhelmed by the volume of work that the combined responsibilities will yield and given their limited number, this will inevitably affect efficiency and the expeditious disposal of cases.<sup>77</sup>

### *2.6.5 Relationship of the EACJ with national courts*

The Treaty allows national courts of member states to adjudicate on disputes in which the community is a party, unless the jurisdiction is exclusively bestowed upon the EACJ by the Treaty.<sup>78</sup> Any decision of the EACJ in respect of the interpretation of the Treaty takes precedence over those of national courts.<sup>79</sup> National courts are at liberty to refer matters to the EACJ for preliminary rulings if they are of the opinion that the finding of the EACJ will enhance their decision on the subject matter.<sup>80</sup> This, arguably, may deflect some of the legal contentions from the court since only appellate reviews will come before it.

## 3. Access to the EACJ and other incidental issues

### *3.1 Locus standi*

Member States<sup>81</sup> as well as EAC residents - individual and legal persons<sup>82</sup> - may challenge the validity of any Act, regulation, directive, decision or actions of a member state or any organ of the community which infringes the Treaty with individual cases being subject to article 27 of the Treaty discussed above. Litigants are obliged to bring references within two months of the time the matter arose and only in respect of matters where no reservation is entered under the Treaty by a member state.<sup>83</sup>

### *3.2 Individual access*

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<sup>76</sup> BB Solomy (n.1 above) 294, See also Ruhangisa(n.36 above) 33

<sup>77</sup> Murungi (n. 12 above) 18.

<sup>78</sup> Art. 27(1) (n.25 above).

<sup>79</sup> Art. 33(n.25 above), See also L.K Jean (n. 55 above) 47.

<sup>80</sup> Art.34(n.25 above), See P. Anne van der Mei Regional integration:The contribution of the court of justice of the East African community(Plank-institute) (n. 52above)409, see also .J .E Rutangisa (n.33 above)20.

<sup>81</sup> Art 28 (n.25 above). See also Danish Institute(n. 50 above) 127.

<sup>82</sup> Art. 30 (n.25 above) See also Rutangisa (n.33) 3.

<sup>83</sup> Art. 30(3) (n.25 above).

The Treaty provides for access to any person who is resident in the community to have audience before the EACJ.<sup>84</sup> It is however silent about NGOs seizing the court on behalf of a victim where the NGO, have not suffered any (direct or indirect) injury.

Some commentators contend that the rules governing observer status is cumbersome given the requirement that an institution should be registered in all the member states. The unnecessary effect of this requirement is a locking out of national organisations capable of adding value to the community's activities, which is negative outcome of such an approach.<sup>85</sup>

### *3.3 Exhaustion of local remedies*

Local remedies are 'ordinary common law remedies accessible to persons seeking justice in national jurisdictions' and the purport of the rule requiring exhaustion of local remedies is that states are given the initial opportunity to redress any infringement within the national legal regime.<sup>86</sup> The Treaty and the Rules of Procedure of the EACJ are silent on the requirement of exhaustion of local remedies before matters can be brought before the court.<sup>87</sup> From a literal reading of the Treaty and the rules therefore, it can be surmise that litigants can access the court without having to exhaust local remedies. The position of the court on this issue is examined in more detail in the next chapter.

### *3.4 Procedure before the court*

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<sup>84</sup> Art. 30(n.25 above).

<sup>85</sup> JO Onyango Who owns the East Africa community? (Occassional paper series No.1 ) Makerere University – Kampala Uganda 12.

<sup>86</sup> Murungi and Gallinetti (n.35 above) 11

<sup>87</sup> The East African Court of Justice Rules of Procedure 5 May 2010.

The Rules of Procedure of the Court<sup>88</sup> prescribe rules similar to those obtaining in national (domestic) courts with regards to drafting of pleadings, notice and reply by parties and natural justice or fair hearing guarantees.<sup>89</sup>

### *3.5 Language of the Court*

The official language of the court is English.<sup>90</sup>

### *3.6 Representation before the EACJ*

A party may chose to be represented by an advocate with the right of audience before a superior court of a member state.<sup>91</sup> The Rules of Procedure also allow for the representation of parties before the court by non- lawyers.<sup>92</sup>

### *3.7 Sitting of the Court*

The proceeding and judgment of the court shall be in the open.<sup>93</sup> Parties are allowed call witnesses for oral testimony at their cost.<sup>94</sup>

### *3.8 Court fees and costs*

It is imperative that the requisite fees are paid before a party can lodge their case.<sup>95</sup> However, these fees may be waived if the applicant is indigent but the case must have a 'reasonable possibility of success'.<sup>96</sup>

The minimum filing fees for a cause is USD 400.<sup>97</sup> The requirement of fees and indeed, such amount of fees as prescribed may put the court out of reach of some persons. The minimum

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<sup>88</sup> Rules of Procedure of the Court(n.87 above).

<sup>89</sup> Danish Institute (n. 50 above) 130.

<sup>90</sup> Art. 46 (n.25 above).

<sup>91</sup> Article 33(n.25 above).

<sup>92</sup> Rule 15(n.87)

<sup>93</sup> Rule 35 &58 (n.87 above).

<sup>94</sup> Rule 55 &56 (n.87 above).

<sup>95</sup> Rule 80(n.87 above).

<sup>96</sup> Rule 82 (n.87 above)

<sup>97</sup> Third schedule (n.87 above).

amount of USD 400 is on the high side for an average Ugandan litigant given that Uganda's per capita income was estimated in 2011 to be USD 453.<sup>98</sup>

The cost of accessing justice before the court may be higher with the application of the rule that the losing party bears the costs.<sup>99</sup>

### *3.9 Time within which to lodge case*

It is obligatory that all references must be lodged within two months from the date of the alleged violation.<sup>100</sup>

### *4. Matters pending before other courts, dispute settlement institutions or mechanisms*

Murungi and Gallinetti argue that the Treaty provides for finality of the decisions of the EACJ by virtue of the provision that the judgment of the court 'shall be final, binding and conclusive and not open to appeal' and matters submitted to the Court shall only be settled by the Court strictly by means recognised in the Treaty.<sup>101</sup> Other commentators argue that the question (of matters pending before other international or domestic courts or any other dispute resolution mechanisms) was not contemplated by the drafters of the Treaty because the EACJ was the only institution contemplated at that time to interpret the EAC Treaty and all state parties and individuals are to seize it.<sup>102</sup>

#### *4.1 Res judicata issues*

Murungi and Gallinetti advance the view that since the African Commission is silent on admissibility of matters pending before RECs courts, it allows for 'forum shopping', a situation making it possible to have cases before the RECs and African Commission or the African court concurrently.<sup>103</sup> They also add that if unsuccessful litigants at RECs (subregional) fora are allowed to seize the African Court, it would amount to establishing the African Court as an appellate institution of sorts contrary to its mandate.

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<sup>98</sup> Global Property <http://www.globalpropertyguide.com/Africa/Uganda/gdp-percapita> (accessed 12 October 2012).

<sup>99</sup> Rule 75(n.87 above).

<sup>100</sup> Art. 30(2) (n.25 above).

<sup>101</sup> Murungi & Gallinetti (n.35 above) 12. See also Arts. 35 & 38(n.25 above).

<sup>102</sup> Danish Institute (n. 50 above)128.

<sup>103</sup> Murungi &Gallinetti (n. 35 above) 11.



#### 4.2 *Actio popularis*

This is a doctrine developed under Roman law to enable citizens to challenge an infringement of a public right before a court. It safeguards against the restrictive rules of standing requiring a direct victim or that a person has been affected by the action complained of, which rules discourage vigilant individuals from challenging the *status quo*.<sup>104</sup> The Treaty is silent on the possibility of bringing cases on the basis of *actio popularis* although it is yet to be seen how the matter will be dealt with by the court. We can deduce some indication of this in some decisions of the court discussed in the next chapter.

#### 4.3 *Admissibility*

This is the criterion by which a court determines which cases it can entertain between natural or legal persons and a Member State or between member states while considering the viability of the claim, nationality of a claimant, exhaustion of local remedies and undue delay in presenting the claim and other incidental matters affecting the admission of the case (admissibility).<sup>105</sup> There is no express provision in the Treaty but the draft Protocol does and this is discussed in more detail below.

#### 4.4 *Geographical/physical access to the court*

Although the Court is based at the EAC Secretariat, it has opened several registries as a follow up of its undertaking to 'bring justice closer to the people.' Registries were opened in Rwanda on 7 August 2012<sup>106</sup> and Tanzania on 7 September 2012<sup>107</sup> and at the time of writing there was word of plans to establish one in Kampala-Uganda. As stated, when the court sits *in situ*, that place will be deemed to be the registry for the time being.<sup>108</sup>

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<sup>104</sup>The ECOWAS Community Court of Justice in Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & another Suit No. ECW/CCJ/APP/0808 29 October 2009.

<sup>105</sup> BB Solomy (n .1 above) 295

<sup>106</sup> EACJ to Launch Sub-registry in Kigali 10 August [http://www.eacj.org/press\\_releases.php](http://www.eacj.org/press_releases.php)(accessed 18 October 2012).

<sup>107</sup>EACJ to Launch sub-registry in Dar es Salaam 7 September [http://www.eacj.org/eacj\\_to\\_launch\\_dar\\_subregistry.php](http://www.eacj.org/eacj_to_launch_dar_subregistry.php) (accessed 18 October 2012)

<sup>108</sup> Rule 8(1) and 2 of the Court's Rules of Procedure. See also Rutangisa (n. 36above) 8.

#### *4.5 Finality of and enforcement of the judgment of the EACJ*

The decision of the EACJ is final and binding<sup>109</sup>, only subject to an appeal to its appellate division.<sup>110</sup> The EAC Council is obliged to immediately implement the decisions of the Court or put in place measures to ensure compliance. A critique of the Court is that it does not have its own enforcement mechanism or power to sanction a party defaulting and only relies on the procedure of enforcement of foreign judgments in domestic courts of the member states.<sup>111</sup>

#### *4.6 Relationship of the EACJ with civil society and other dispute resolution mechanisms*

The Treaty provides for observer status for ‘inter-governmental organisations and civil society’ which shall be determined by the Council.<sup>112</sup> The requirements for observer status are that the intending organisation should have similar objectives as those of the EAC and should be registered in all the Member States, a requirement that has been identified as encumbering.<sup>113</sup>

#### *4.7 Interim orders and urgent proceedings*

The court is empowered to make binding interim decisions which may include halting proceedings or actions in the form of injunctions and other interdicts.<sup>114</sup>

#### *4.8 Non-interference from member states*

The court is insulated from interference from member states under the Treaty as they are obliged to desist from activities which undermine or adversely affect the resolution of a dispute before the court.<sup>115</sup>

### *5. Relationship of the EACJ with the African Commission and the African Court on Human and Peoples’ Rights*

Subregional or RECs courts such as the EACJ preceded the African Charter and were not contemplated by the drafters of the Charter.<sup>116</sup> Nonetheless, they necessarily have relationship

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<sup>109</sup> Art. 35(1) (n.25 above). See also Danish Institute (n. 50 above) 130.

<sup>110</sup> Art. 35A (n.25 above).

<sup>111</sup> Art. 44 (n.25 above) See also Danish Institute (n.50 above) 130.

<sup>112</sup> Art.3(3) (n.25 above).

<sup>113</sup> Kyazze (n. 55 above).

<sup>114</sup> Art.39(n.25 above).

<sup>115</sup> Art. 38(2)(n.25 above).

with the African human rights institutions, the African Commission and the African Court on Human and Peoples' Rights insofar as they adjudicate on human rights related cases within the continent.<sup>117</sup>

Ebobrah contends that reference to the African Charter by RECs in their constitutive documents is indicative of their willingness to apply the Charter's provisions as the standards guiding aspects of human rights in the integration process since the member states could well have ignored it. He contends that while the inclusion of these principles in RECs Treaties may not be said to create binding positive obligations, at the barest minimum, it ties member states of RECs to a negative duty not to undermine their realisation.<sup>118</sup> The application of the African Charter by RECs will increase and diversify fora from which African people can realise the rights guaranteed in the African Charter.<sup>119</sup> The use of the African Charter by RECs will also redress the limited individual access to the African Court on Human and People's Rights which rests on declaration by a state under article 34(6) of the Protocol to the African Court to allow individual access. The fact that Tanzania remains the only East African country which has made the declaration demonstrates clearly the risk of relying on that provision to secure individual access before the African Court.<sup>120</sup>

A major criticism of the human rights regime under the African Charter was the absence of an enforcement mechanism outside of the political machinery of the AU member states. The creation of African Court on Human and Peoples' Rights generated some hope and excitement as it is believed that it would guarantee compliance through enforcement mechanisms, an opportunity the RECs courts additionally offer.<sup>121</sup>

Although it has been contended that the EACJ does not have an express human rights mandate or the express permission to apply the substantive rights under the African Charter, the Charter has

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<sup>116</sup> Murungi(n. 35 above) 15.

<sup>117</sup> Murungi and Gallinetti (n. 35 above) 9.

<sup>118</sup> Ebobrah (n.42 above ) 52

<sup>119</sup> Ebobrah (n.42 above) 63.

<sup>120</sup> Ebobrah (n.42 above) 3

<sup>121</sup> Ebobrah (n. 42 above) 63.

been used to ground a human rights claim or as a guide interpretation before the RECs courts and the EACJ itself has applied the Charter in its adjudication of some cases.<sup>122</sup>

This work examines further how the EACJ has dealt with the reference to the African Charter in its jurisprudence to assess its prospects in the promotion, protection and enforcement of human rights in Uganda.

### *5.1 Sources and law to be applied by the EACJ*

The Treaty makes no mention of the sources of legislation which may be used by the EACJ. It is upon the EACJ to choose which instruments to use and whether venture outside the EAC Treaty regime when faced with a particular matter.<sup>123</sup> It can apply the fundamental and operation guiding principles of the EAC which integrate the African Charter and other universal principle of human rights.<sup>124</sup>

In anticipation that member states of the EAC will be willing to strengthen the EACJ as a human rights court, a draft Protocol and a draft Bill of Rights have been prepared. The discussions below examine the adequacy of these instruments if adopted as they are discussed below.

### *5.2 The Draft Protocol extending the jurisdiction of the EACJ*

#### *5.2.1 Background to the Draft Protocol*

Consultations on the draft Protocol<sup>125</sup> were to be completed by August 2006 but this was not achieved because of factors such as political manipulation, inadequate consultation with stakeholders and ambitious time frame for adoption.<sup>126</sup> The draft form of the Protocol has been in place since 2005 and has not been approved by EAC Council of Ministers, explaining the absence of an express jurisdiction for the EACJ on human rights cases. Hence, the court can only

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<sup>122</sup> Ebobrah (n. 73)58.

<sup>123</sup> Danish Institute (n. 5 above )129.

<sup>124</sup> Solomy (n.1 above )292 .

<sup>125</sup> Draft Protocol to operationalise the extended jurisdiction of the East African court of Justice (EAC Secretariat) 4 May 2005.

<sup>126</sup> Murungi (n. above) 17.

determine human rights cases for now on the basis of ‘implicit jurisdiction’, a notion we explore further in the next chapter.<sup>127</sup>

The Draft Protocol has brought to the fore salient human rights issues given especially that the Treaty does not contain the law to be applied by the EACJ save for a reference to the African Charter as guiding principles to the EAC.<sup>128</sup>

### *5.2.3 Salient provisions of the draft protocol*

The Draft Protocol grants the Court an express human rights mandate<sup>129</sup> to dispose all matters referred to it relating to human rights, disputes relating to the interpretation and application of universal instruments for the protection and promotion of human rights.<sup>130</sup>

It also permits individual access to the EACJ<sup>131</sup> which is heralded because it is in line with current international human rights practice. It is recommended that the EAC should allow access by NGOs and regional organisations for completeness.<sup>132</sup>

Access to the court is available to all parties recognised in the Treaty; that is, NGOs with observer status granted by the Court,<sup>133</sup> national human rights commissions in the member states.<sup>134</sup> Individuals, NGOs or groups of individuals claiming to be victims of a violation by a member state of its human rights obligation in any human rights instrument have audience before the court and states undertake not to interfere with this right of access in anyway.<sup>135</sup>

The Draft Protocol requires parties to any dispute to exhaust all local remedies in accordance with recognised principles of international law within a period of six months from the final decision and requires that a party should first seize the EACJ before referring the case to any other relevant regional or international court.<sup>136</sup>

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<sup>127</sup> Anton & Joseph (n.29 above) 307 referring to Katabazi & 21 Others v Secretary General of the East African community & Another (Ref No 1 of 2007-November 2007).

<sup>128</sup> Murungi (n. above) 17.

<sup>129</sup> Art. 9 Draft Protocol

<sup>130</sup> Art.10l (n.129 above).

<sup>131</sup> Art 11 (n.129 above).

<sup>132</sup> Solomy (n. 1 above) 296.

<sup>133</sup> Art. 11 (n.129 above).

<sup>134</sup> Art 12 (n.129 above).

<sup>135</sup> Art. 13 (n.129 above)

<sup>136</sup> Art.14 (n.129 above)

The proposal in the Protocol is comparatively generous as the Treaty is more restrictive in the time frame it allows for a reference which is two months from the date of the alleged breach.<sup>137</sup>

Finally, the draft Protocol guarantees the rights already protected under national laws of a member states and provides that there shall be no derogation from those standards.<sup>138</sup>

#### *5.2.4 Draft Bill of Rights for the EAC*

The proposed Bill of Rights for the EAC puts together rights guaranteed by all the constitutions of member states and draws inspirations from international human rights instruments. The rights it seeks to affirm include right to life,<sup>139</sup> right to liberty,<sup>140</sup> right to privacy,<sup>141</sup> freedom of thought and conscience.<sup>142</sup> The proposal for a regional Bill of Rights is a positive step towards the harmonisation of the human rights standard in the region with the advantage that the same standards of rights and obligations will be enjoyed by residents of the EAC.

#### *Proposal to extend the jurisdiction of the EACJ to handle international crimes to replace the International Criminal Court (ICC) in the EAC*

There have been calls to expand the jurisdiction of the EACJ to adjudicate on international crimes, a subject beyond the scope of this work. Opposing these are arguments that the calls are ill-timed and aimed at diverting the course of justice as some African suspects before the ICC (the so-called Ocampo six and now the Bensusoda four) have challenged the jurisdiction of the ICC in the Kenya situation while trying to gain leverage from the EAC member states.<sup>143</sup>

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<sup>137</sup> Art. 30(2) (n.25 above).

<sup>138</sup> Art. 18 (n. 129 above). See also JE Ruhangisa The draft protocol to operationalise the extended jurisdiction of the East African Court of Justice: progress, challenges and prospects in CP Maina The protectors human rights commissions and accountability in East Africa (Kituo cha Katiba) 300.

<sup>139</sup> Art. 14 Draft Bill of Rights.

<sup>140</sup> Art. 5 (n.139 above).

<sup>141</sup> Art. 7 (n.139 above).

<sup>142</sup> Art. 11 (n.139 above).

<sup>143</sup> Nicodemus M. Minde There is no need for expanding the ECJ's (sic) jurisdiction <http://decolanga.blogspot.com/2012/07/there-is-no-need-for-expanding-ecjs.html> (accessed 11 September 2012).

### *5.2.5 Conclusion and observations*

The above examination reveals that although as yet, no legal provision clearly conferring a human rights jurisdiction on the EACJ exists, the court in its current role of interpreting and applying the Treaty has decided on cases alleging human rights violations against member states. In the following chapter, this study investigates how the court has maneuvered through the limited legal framework to deal with human rights issues and review the emergent jurisprudence.

## CHAPTER 3

### THE EMERGING ROLE OF THE EAST AFRICAN COURT OF JUSTICE AS A HUMAN RIGHTS COURT

This chapter reviews practice and jurisprudence of the EACJ premised on the institutional and legal framework discussed in the previous chapter and which have helped to evolve its role in the promotion, protection and enforcement to the human rights in Uganda.

The discussion reviews the decisions of the court in cases against Uganda as well as those with a bearing on Uganda. Specifically, the study highlights findings of the court on to its human rights mandate, *locus standi*, *actio popularis* and limitation of causes all of which are germane to human rights promotion, protection and enforcement in the country.

The EACJ's non-judicial role in the promotion, protection and enforcement of human rights is also examined.

#### 3.1 Jurisprudence of the EACJ in relation to Uganda

The EACJ's first case involving allegations of human rights violations was the reference of *James Katabazi and 21 others v. Secretary General of the East African Community and the Attorney General of Uganda (the Katabazi case)*.<sup>144</sup> The case involved 16 claimants who sued the Secretary-General of the EAC and the Attorney General of Uganda alleging that they were charged with treason and misprision of treason for which they were remanded. Fourteen of them were granted bail by the High Court, but the processing of the bail papers was interfered with by security operatives. The applicants were re-arrested, returned to jail and later charged on the

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<sup>144</sup> Reference No. 1 of 2007 (1 November 2007)



same facts before a Military General Court Martial with the offences of unlawful possession of firearms and terrorism where upon the Court Marshal remanded them to prison.<sup>145</sup>

The applicants narrated the constitutional petition by the Uganda Law Society in respect of the events at the High Court, their own petitions, the continued detention and the concurrent prosecutions in the civil and military courts as well as the finding that the interference was unconstitutional. They contended that despite these orders, they were not released hence the reference.

The applicants further contended that ‘the rule of law obliges that decisions of the court were to be respected and upheld by all agencies of the government, and citizens’. That ‘the conduct of Uganda a Member State and its agents in failing to honour the court order[even up to the time of the reference] was in violation of the Treaty’.

They sought a declaration from the EACJ that the actions of surrounding the High Court, preventing the execution of the court’s order and their continued prosecution in the military court, the refusal to abide by the orders were an affront to the Treaty, especially articles 7(2), 8(1) (c) and 6 and the fundamental principle of peaceful settlement of disputes .

They also contended that the silence of the Secretary General [about the events happening in Uganda] was an infringement of article 29 of the EAC Treaty.<sup>146</sup> The first respondent (the Secretary General) raised preliminary points of law; that the case should be dismissed because no cause of action had been disclosed against him and in the alternative that the incidences were never brought to his attention.<sup>147</sup>

The second respondent (the Attorney General of Uganda) admitted the facts but argued that the actions taken were justified and were motivated by security and intelligence information that the applicants were going to be rescued to subsequently go into armed rebellion and subvert the

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<sup>145</sup> Page1 paras 1-2

<sup>146</sup>Page 3 para 1-5 case, Art 29 mandates the Secretary-General to supervise the compliance of members states with the EAC Treaty.

<sup>147</sup> Page 4 para 1

course of justice.<sup>148</sup> He also raised objections that the matter was *res judicata* because the issues had been the subject of litigation before the Constitutional Court of Uganda, although he conceded that the parties before that Court were different.<sup>149</sup> Further, he contended that the court did not have jurisdiction to entertain cases of human rights until its jurisdiction is extended under article 27(2) of the Treaty.<sup>150</sup>

The EACJ held the doctrine of *res judicata* did not apply because the issues and parties before it and the Constitutional Court were different. The issue in the Constitutional Court of Uganda was whether the acts complained of violated the Constitution of Uganda while the issue in the instant case was whether the acts were an infringement of the rule of law and by extension the EAC Treaty.<sup>151</sup>

As to whether it had jurisdiction to deal with human rights matters, the court was quick to answer in the negative<sup>152</sup> noting that that its human rights jurisdiction should be determined by Council through concluding a Protocol to that effect and that this had not been taken. It concluded that it was therefore precluded from determining matters touching on ‘human rights *per se*’.<sup>153</sup>

However, the court reflected on the objectives of the EAC, especially those in articles 5 and 6 of the Treaty which oblige the observance of ‘the rule of law and the promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’. It also revisited the provision of Article 8(1) (c) of the EAC Treaty which enjoins member states to refrain from prejudicing the achievements of the objectives of the EAC or the implementation of the Treaty.<sup>154</sup> It concluded based on its reflections thus:

**[w]hile the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under**

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<sup>148</sup> Page 4 para 3.

<sup>149</sup> Page 11 para 3.

<sup>150</sup> Page 12 para 2.

<sup>151</sup> Page 14 para 2.

<sup>152</sup> Page 14 para 3.

<sup>153</sup> Page 15 para 1.

<sup>154</sup> Page 16 para 2.

**Article 27(1) merely because the reference includes allegations of human rights violations.<sup>155</sup>**

No doubt, the court adopted an ‘activist’ stance to decide on the matter while warning itself of its apparent lack of jurisdiction in relation to human rights violations in the strict sense of the word.

The court also sought to clarify the definition of the rule of law and whether the rule of law is one and the same with human rights.<sup>156</sup> Quoting Justice George Kanyeihamba’s commentaries on Law, Politics and Governance the court noted that:

**[t]he rule of law is not a rule in the sense that it binds anyone. It is merely a collection of ideas and principle propagated in the so-called free societies to guide law makers, administrators, judges and law enforcement agencies.**

It emphasised that

**the overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the same law of the land.<sup>157</sup>**

From the foregoing, the definition of the rule is different from human rights and the reference was premised on the alleged infringement of the EAC principle of rule of law and not necessarily human rights as defined in this study.

### 3.2.1 Application/reference to the African Charter and the Jurisprudence of the African Commission by the EACJ in the Katabazi case

The African Commission’s decision in *Constitutional Rights Project and Civil Liberties -vs- Nigeria, Communication 143/95, 150/96-AHG/222(XXXVI)*, a case with similar facts as the

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<sup>155</sup> Page 16 para 3.

<sup>156</sup>The term ‘human rights’ is defined by F Viljoen quoting Smith, ‘as an abstract or philosophical concept showing a moral entitlement or assertion made by all humans often guaranteed under a constitutional regime’. See F Viljoen *International human rights law in Africa* (2012) 3.

<sup>157</sup> Page 19 para 1.

Katabazi case was applied by the court. In Abiola's case, the Commission found against the Federal Government of Nigeria which had detained Chief Abiola, holding its interference with the court order to be unjustified and a recipe for violence and pandemonium.<sup>158</sup>

### 3.2.2 *The role of the EACJ under the Treaty in the Katabazi case*

The Court reiterated in the Katabazi case that its role as envisaged under article 23 of the Treaty is to 'ensure adherence to law in the interpretation, application and compliance with the Treaty' concluding that the acts of the security personnel in interfering with the administration of lawful court orders constituted a contravention of the Treaty.

### 3.2.3 *The role of the Secretary General under the Treaty in the Katabazi case*

The Court found in the Katabazi case that the Secretary- General of the EAC is empowered under article 29 to carry out investigations into affairs of member states and to submit a report if they feel that a member state has not honoured any obligation under the Treaty, although the facts in the instant reference were not shown to be notorious to warrant action by the Secretary General.<sup>159</sup>

From the foregoing, it may be surmised that cases will not be entertained before the EACJ if they are *res judicata* and that the Secretary-General of the EAC has a role to play if they are of the opinion that a member state has been in breach of the Treaty.

The finding of the court in respect of the breach of the principles of the community to wit, the rule of law can be used by human rights advocates to 'call to order' a member state which is not honouring its obligation under the Treaty offers much hope for human rights promotion, protection and enforcement. Human rights advocates can also use the office of the Secretary-General by lodging complaints when violations occur in a member state.

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<sup>158</sup> Page 21 para 2.

<sup>159</sup> Page 24 para 1.

#### 4. *Other cases before the EACJ arising from Uganda*

The EACJ has adjudicated on other cases arising from Uganda ranging from the issues of elections to the EALA, the EACJ's appellate jurisdiction in relation to national courts as envisaged by the Treaty and the question of the delay in concluding the Protocol to extend the court's jurisdiction. The case of *Hon, Sitenda Sebalu vs The Secretary General of the East African Community, the Attorney General of Uganda, Hon, Sam.K. Njuba and the Electoral Commission of Uganda (the Sebalu case)* is one of the cases for consideration.<sup>160</sup>

The applicant after unsuccessfully challenging the election of the third respondent in the superior courts of Uganda seized the EACJ alleging that the delay by the Council to extend the jurisdiction of the EACJ constituted an infringement of the Treaty. He contended also that the inaction of the first respondent (the Secretary-General of the EAC) in convening the Council to deliberate and conclude the Protocol to extend the jurisdiction of the Court constituted a breach of the EAC Treaty and the fundamental principles in the Treaty of 'good governance...the adherence to the principles of democracy, rule of law...and the maintenance of universally acceptable standards of human rights'. He sought the expeditious conclusion by the EAC of the Protocol to operationalise the extended jurisdiction of the EACJ so that he and other likeminded persons or those faced with a similar situation could invoke their right of appeal to the EACJ as envisaged by the Treaty and the Rules of Procedure of the EACJ.

The first respondent denied any breach contending that he had discharged his duty as the Principle Executive Officer of the EAC through calling several meetings and consultations geared towards the conclusion of the Protocol to extend the jurisdiction of the Court.

The second respondent also contended that several meetings were held but pertinent issues were raised in these meetings, warranting further consultations and extension of time within which to submit comments to the 31 December 2010.

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<sup>160</sup> Hon,Sitenda Sebalu vs The Secretary General of the East African Community, the Attorney General of Uganda, Hon, Sam.K. Njuba and the Electoral Commission of Uganda Reference No.1 of 2010(30 June 2011).

The second and fourth Respondents supported the position of the first respondent that all efforts were explored and were still being explored to conclude the Protocol.

The third respondent denied responsibility stating that the inaction complained of is attributable to the first Respondent but conceded that the delay negatively affects ‘good governance, democracy, rule of law and human rights in the subregion’.

The issues were whether there was a cause of action disclosed by the reference and whether article 27 of the Treaty [as it is] bestows appellate jurisdiction on the EACJ on the decision of the Supreme Court of Uganda in Election Petition No. 6 of 2009, *Hon, Sitenda Sebalu –vs- Hon, Sam K. Njuba and Electoral Commission of Uganda* and whether the first and second respondents had fulfilled their obligations towards concluding the Protocol to operationalise the extended jurisdiction of the EACJ and whether this delay contravened the fundamental principles of ‘good governance, democracy, social justice and human rights’ as provided for in the EAC Treaty.

#### 4.1 *Finding of the Court in the Sebalu case*

##### 4.1.1 *Locus standi and cause of action in the Sebalu case*

Reasoning along the lines it did in the earlier case of *Prof, Peter Anyang’ Nyong’o & Others –vs- Attorney General of Kenya and Others*, (the Anyang’ Nyong’o case)<sup>161</sup> the court noted that the Sebalu case did not seek redress for a violation under common law but called for the interpretation and enforcement of the Treaty. It concluded that under article 30(1) of the Treaty ‘a claimant is not required to show a right or interest [which] was infringed or damage [which] was suffered as a consequence of the matter complained of in the reference...’ That by simply alleging that the subject matter of the complaint infringes a provision of the Treaty in a relevant manner will give rise to a cause of action. It held that the applicant had satisfied this condition especially given the fact that the third Respondent had conceded as much in his pleadings.<sup>162</sup>

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<sup>161</sup> Reference No. 1 of 2006 (EACJ case)

<sup>162</sup> Page 19 para 1. The provisions of Article 27 have been discussed in chapter 2.

#### *4.1.2 Relationship with the superior courts of Uganda by way of an appeal as discussed in the Sebalu case*

The court accepted that Article 27 of the Treaty does not confer on it appellate jurisdiction in respect of decisions of the Supreme Court of Uganda...<sup>163</sup> Thus, it was settled that the EACJ does not have an appellate jurisdiction over decisions of national (superior) courts of member states until a Protocol is adopted to allow such an arrangement.

#### *4.1.3 The responsibility of the Secretary-General and member states towards the Protocol extending the court's jurisdiction as discussed in the Sebalu case*

The court held that the first and second respondents did not fully discharge their mandate and obligation in respect of concluding the Protocol as required of them, notwithstanding the excuses rendered for the delay. It opined that the delay to extend the jurisdiction of the EACJ contravened the principles of 'good governance' as envisaged by the Treaty.<sup>164</sup>

#### *4.1.4 Consequences of ad hoc basis of the court sittings as discussed in the Sebalu case*

The court acknowledged that there was a backlog of cases because the matters were not being disposed as they are registered because the Judges serve on an ad hoc basis with their national obligations consuming their time.<sup>165</sup> It however cautioned the first and second respondents from using this ad hoc basis of the Judges to justify the delay in implementing the Protocol extending the Court's jurisdiction.

#### *4.1.4 Duty of the EACJ in the promotion, protection and enforcement of human rights as discussed in the Sebalu case*

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<sup>163</sup> Page 21 para 3.

<sup>164</sup> Page 42 para 3 & page 32 para 5.

Noting that member states are urged under the Treaty to ‘recognise, promote and protect human and people’s rights in accordance with the provisions of the African Charter on Human and People’s Rights’, the court affirmed that national courts had the first duty to promote and protect human rights. It however, observed that if violations occur on citizens with impunity and member states act indifferently to this, regional integration would be threatened. It then went on to justify that a ‘window’ should be created at a subregional level where citizen can seek redress.<sup>166</sup>

It opined that in cases where the Secretary-General does not invoke his powers under the Treaty when there is any inaction from a member state [it is] ‘a legitimate avenue through which to seek redress, even if all the court does is to make declarations on the illegality of the impugned acts whether of commission or omission’.<sup>167</sup> It emphasised its role as ‘a primary avenue through which the people [of the EAC] can secure not only proper interpretation and application of the Treaty, but also effective and expeditious compliance with it’.<sup>168</sup>

#### *4.1.5 The Role of the EACJ vis-à-vis the executive organs of the EAC as discussed in the Sebalu case*

The EACJ took issue with the submission of the first respondent that the extension of the jurisdiction of the court was a preserve of the executive not to be interfered with or questioned by the court. It observed that; ‘that era [for such an assertion] has long gone’ and that the Treaty obliged the member states to be accountable, a fundamental component of good governance. It hastened to add that ‘[p]ublic officer are to be called to account for their conduct of public affairs in an improper manner<sup>169</sup> and the applicant was therefore justified in challenging the delay through a peaceful means, to wit the EACJ.<sup>170</sup>

#### *Concluding remarks in respect of the Sebalu case*

The above discussions show that any person alleging an infringement of the Treaty can seize the court for a declaration even if their rights have not been violated *per se*.

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<sup>166</sup> Page 40 para 2.

<sup>167</sup> Page 41 para 3.

<sup>168</sup> Page 41 para 3.

<sup>169</sup> Page 42 para 2.

<sup>170</sup> Page 42 para 3.



It made clear that the EACJ cannot as yet hear appeals in matters arising from national courts of the member states. However, though it asserted that national courts should have the ‘first go’ at redressing violations, where member states and the Secretary -General are indifferent, it identified itself as the ‘second line of intervention’. Admittedly though, in the absence of the required Protocol, the court’s jurisdiction remains limited to ‘making declarations’ and it cannot hear and determine cases of alleged human rights violations. It is imperative for human rights advocates to note that the court’s jurisdiction is still limited at the moment ,and all they can do is to only ‘make declarations’ and can not hear and determine cases of alleged human rights violations.

## *6. Jurisprudence of the EACJ with implications on Uganda*

### *6.1 The East African Law Society and 3 other –vs- The Attorney General of Kenya and 3 others (The EALS case)<sup>171</sup>*

The applicants challenged the amendment of the Treaty by the Summit of the Heads of State of the founding members of the EAC (Uganda, Kenya and Tanzania) arguing that the amendments were illegal and infringed provisions of the Treaty and norms of international law.<sup>172</sup> The amendment originated after the EACJ issued an interim order in the Anyang’ Nyongo case (*Reference No 1 of 2006*)<sup>173</sup>, restraining the clerk to the EALA and the Secretary General of the EAC from recognising nine persons whose names were in the order as duly elected by the National Assembly of Kenya to the EALA or permitting them to participate in any function of the EALA until the final determination of the reference.

In an ostensible response to this court order, the Council of Ministers of the EAC then recommended that this matter should be considered by the Sectoral Council on Legal and

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<sup>171</sup> Reference 3 of 2007(EACJ 2008) 1 September 2008.

Judicial affairs with a view to recommending the way forward in respect of the court's jurisdiction.<sup>174</sup> A communiqué was issued in which it was stated that the Summit had endorsed the recommendation of the Council of Ministers to reconstruct the EACJ by creating two divisions, a court of First Instance with jurisdiction as stipulated in article 23 of the Treaty and an appellate chamber with appellate powers over the court of First Instance. The communiqué also set out that the terms and procedure for the removal of the judges from office stated in the Treaty should be reviewed with a view to including all imaginable reasons for removal in addition to those stipulated in the EAC Treaty

The court was to consider whether the amendment of the Treaty was contrary to procedure. It also considered the insertion of the grounds for removal of the EACJ Judges under the amendment which was as follows:

...

**(b) where a judge is subject to investigation by a tribunal or other relevant authority of a Member State with a view to his or her removal from office[in a Member State].<sup>175</sup>**

**Other salient amendments to the Treaty according to the court were as follows:**

**[t]o limit the court's jurisdiction so as not to apply to jurisdiction conferred by the Treaty on organs of member states.**

**[t]o provide time limit within which a reference by legal and natural persons may be instituted.**

...

**[t]o deem past decisions of the Court and existing judges to be decisions and judges of the first Instance Division respectively.<sup>176</sup>**

The applicants contended that the member states did not abide by the procedure for the amendment of the EAC Treaty, in terms of Gazetting, time frames to follow coupled with consultations with stakeholders. Respondents objected to the cause of action and locus standi of the Applicants.

*Court's decision in the EALS case on locus standi, actio popularis and participation by residents of the EAC*

In its ruling on the objection as to the cause of action and *locus standi*, court noted that the five Applicants were legal persons who had challenged the procedure of amendment of the Treaty and not the sovereign rights of the Partners to amend.<sup>177</sup>

It observed that the challenge to the process of amending the Treaty was justifiable in view of the fact that the Member States surrendered part of their sovereignty therefore the reference could not be debarred by virtue of sovereignty of the member states.<sup>178</sup>

The court also found that the applicants were asserting their entitlements under article 30 of the EAC Treaty which empowers any resident of the community (legal or natural persons).<sup>179</sup> It further stated that Treaty obligations and entitlements under international law give benefits and rights to parties or persons (legal or natural) recognised by the parties to claim rights from the Treaty and provision in article 30 was deliberately included to allow participation by East Africans in the affairs of the EAC and to protect the integrity of the EAC Treaty.<sup>180</sup>

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The court noted that the preamble to the Treaty recognises that ‘one of the main reasons that contributed to the collapse of the (previous) EAC..., was lack of strong participation of the private sector and civil society in the cooperation activities’ and expressed the resolve of member states ‘to create an enabling environment in all member states and allow the private sector and civil society to play a leading role in the socio-economic development activities’. Additionally, it noted that article 7 of the Treaty provides that one of the principles which will assist the EAC to achieve its objective is ‘being people centred...’

In the light of all the above, the Court found in favour of the applicants and stated thus:

[i]n our view therefore, it would be a negation of that deliberate intent to bar the reference on the ground that the [a]pplicants had no capacity to bring a reference challenging a sovereign function of the [m]ember [s]tates.

Court went further to state that article 30 of the EAC Treaty should be given a wide interpretation in light of the fact that the Treaty provides for three instances when the court can be seized by either a member state against another or against any institution of the EAC under article 28 and the Secretary- General under article 29. It concluded that a narrow interpretation would defeat the [intent and] purpose of (the) article 30.<sup>181</sup> As article 30 guarantees the right of residents of the EAC to participate in safeguarding the integrity of the Treaty, court noted that it would be a recipe for disaster to interpret that the Treaty permits amendments at the pleasure and leisure of the officials of the EAC. This would reverse the gains and return the situation to that which led to the disintegration of the former EAC and was regretted in the preamble [to the Treaty].’

The court also held that the failure to carry out the requisite consultations with stakeholders outside the Summit and Secretariat before amending the Treaty was an affront to articles 5(3)(g) and 7(1)(a) and 38(2) of the Treaty as envisaged by article 30. It however held that its declaration would be based on the doctrine of ‘prospective annulment’, meaning that the order will have a future application, but emphasised that all future activities of the EAC must be preceded by consultations of stakeholders.

*Court’s finding on the undue influence, duress and a threat to the independence of the EACJ judges in the EALS case*

The applicants had contended that the action of amending the Treaty was in response to the court’s issuance of an interim order in the Anyang’ Nyong’o case and it was within the knowledge of both the Summit and the Council that at the time of the amendment the court was still seized of the matter. That the grounds suggested for removal of judges was a move aimed at intimidating the judges which would be detrimental and adversely affect the resolution of the dispute.<sup>182</sup>

The Court agreed with the applicants noting that two of its members from Kenya had been victims of drastic measures carried out by the executive on the Kenyan judiciary in 2003 which saw 23 judges being suspended from office on allegations of corruption. The court considered that it could not ignore the fact that one of the two judges was, in fact, cleared without facing any tribunal of inquiry and he voluntarily retired from the judiciary.

The court thus took issue with the proposed amendments to the grounds for removal of the judges and concluded that ‘it is inevitable to infer that the amendment could apply generally, but also intended to fit the obtaining situation of the two Kenya Judges on the court’.

It concluded that given the foregoing circumstances, the stance by the Summit was capable of unduly prejudicing the pending judgment in the Anyang’ Nyong’o reference and was capable of

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being detrimental to the just determination of the matter.<sup>183</sup> The court noted that a close reading of (the original) article 26 of the Treaty indicates that it set up uniform criteria for all the judges in respect of their removal for ‘misconduct and inability to function’ but after it is established by an independent tribunal appointed by the Summit.

This position according to the court is fortified by article 43(2) which ensures that the judges are independent of the member states from where they originate. Accordingly, the initiation of the automatic removal and suspension premised on the situation obtaining in a judge’s state jeopardises the application of a uniform criteria, thereby compromising the integrity of the court.<sup>184</sup> It therefore recommended that the current position be revisited at the earliest opportunity possible when the EAC Treaty is being considered for amendments.

#### *Conclusions and observations in respect of the EALS case*

The findings in the EALS demonstrates the potential of any resident to seize the court as the EALS did, an opportunity which can be exploited by human rights advocates to enhance compliance.

#### **Lessons from the Region**

#### *The Attorney General of the Republic of Rwanda –vs-Plaxeda Rugumba (the Plaxeda case)<sup>185</sup>*

This was an appeal from a reference lodged by the respondent in the First Instance Division alleging that her younger brother Seveline Rugigana Ngabo a Lieutenant Colonel in the Military in Rwanda, a State Party to the EAC, was detained incommunicado without trial by agents of the

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<sup>185</sup> EACJ Appeal No. 1 of 2012 (29 June 2012)

Republic of Rwanda whom the Appellant represents.<sup>186</sup> She contended that his arrest and detention without trial contravened the fundamental principles of the community, especially article 6(d) and 7(2) premised on principles of good governance and universally recognised standards of human rights.<sup>187</sup>

The respondent further contended that the whereabouts of her brother was not known and that no one had been informed, including his wife, children, next of kin and his family doctors had not been allowed to visit him.<sup>188</sup> That at the time of filing the reference, the respondent's brother had not been charged before any court and that habeas corpus proceedings were being frustrated by Rwanda.<sup>189</sup> The applicant also contended that the reference was filed within time as envisaged under article 30(2) of the Treaty.<sup>190</sup>

The Secretary- General was joined during the trial but the case against him was dismissed.<sup>191</sup>

The appellant objected contending that the case was filed out of time, that the court lacked a human rights jurisdiction that the respondents had not exhausted local remedies and that Rwanda had not breached any principles under the Treaty.<sup>192</sup> The lower division had found Rwanda to be in breach and made the declarations sought by the respondent.

On appeal, the appellate division, reiterated the lower division's position in the Katabazi case holding that although the jurisdiction of the EACJ to entertain human rights disputes requires the adoption of the Protocol, 'there is a layer of inchoate human rights in the Treaty waiting for implementation and operationalisation via channels envisaged in article 27(2)'.<sup>193</sup> Thus, it upheld the decision of the lower division not to abdicate from entertaining matters merely because they contain allegations of human rights violations. In addition, it posited that it is possible to

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<sup>186</sup> (Para. 1).

<sup>187</sup> ( Para 1(a).

<sup>188</sup> (Para 3).

<sup>189</sup> Para 5

<sup>191</sup> Para 12

<sup>192</sup> Para 13

<sup>193</sup> Para 24

distinguish when the cause of action flows from the Treaty and from the violation of human rights.<sup>194</sup>

*Attorney General of the Republic of Kenya -vs- Independent Medical Legal Unit (IMLU)  
(the Medical unit case)<sup>195</sup>*

This was an appeal to the Appellate Division of the EACJ from the ruling on preliminary points of law as to the human rights jurisdiction of the EACJ and limitation. The applicant, an NGO operating in Kenya, had brought a reference in respect of executions, torture, inhuman and degrading treatment of more than 3000 Kenyans in the Mount Elgon area between 2006 and 2008.<sup>196</sup>

The applicant accused the Government of Kenya of failing to investigate these violations or holding those culpable to account either by judicial or administrative means.<sup>197</sup> The Appellate Division stated that the EACJ has jurisdiction because of ‘the responsibility of the members states towards their citizens’ and also because a reference alleges a violation of the (EAC) Treaty to which the member states have voluntarily entered into. It is not the allegation of an infringement of human rights under the Kenyan Constitution or international instruments which gave rise to the reference, but infringement of the Treaty and the principles there under for which the interpretation is sought.<sup>198</sup>

The court found that the reference was filed out of time in contravention of Article 30(2) of the Treaty noting that the events were reported to have occurred in 2006 with the latest of them occurring in 2009, which was the opportune time to seize the court.<sup>199</sup> Drawing inspiration from the European Community, the court stated that ‘their power is within the limits of powers

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<sup>194</sup> Para 24

<sup>195</sup> Appeal No. 1 of 2011(EACJ 15 March 2012).

<sup>196</sup> Page 2 Para 1 of the IMLU.

<sup>197</sup> See page 2 para 1 of the IMLU.

<sup>198</sup> Page 12 para 2 of the IMLU.

<sup>199</sup> Page 19 para 1



conferred upon it by existing treaties or subsequent conventions [Protocols] and could not enlarge time under the Treaty'.<sup>200</sup>

*Observations and conclusions in respect of the IMLU case*

It is uncertain how far the court would have gone if it had the opportunity to consider the case on its merits. However, it is clear that the EACJ applies the law relating to limitation of time strictly calling for vigilance on the part of litigants.

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<sup>200</sup> Page 16 para 3

## CHAPTER 4

### COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK OF THE ECCJ – LESSONS FOR THE EACJ

This chapter undertakes a summary comparison of the legal frameworks of the EAC and the ECOWAS CCJ examining its mandate and role in the promotion, protection and enforcement of human rights to draw out lessons for the EACJ.

The ECCJ has been chosen as a comparator because it is the only REC court with an express mandate to handle human rights cases.<sup>201</sup> The question underlying the analysis in this chapter is whether the express human rights mandate of the ECCJ has given it ‘mileage’ in terms of efficacy as a human rights court, specifically in relation to enforcement of its judgment. The ECCJ also remains the only comparator court that may be studied as the SADCT has had challenges in the recent past and has suffered the suspension of its operations since May 2011.<sup>202</sup>

#### **4.1 Historical background of the Economic Community of West African States (ECOWAS)**

The ECOWAS was founded in 1975 by a Treaty which was revised in 1993. The 1993 Treaty aimed at fostering regional integration to ensure co-operation and economic stability geared towards the development of Africa.<sup>203</sup> It is recognised by the African Union (AU) and consists of 15 member states.<sup>204</sup>

##### **Founding of the ECOWAS court**

The court was first created in 1975 by Article 4(e) of the Treaty, but was later fortified under Article 11 of the Treaty. It was substantively established in 1991 by the 1991 ECOWAS Court Protocol and strengthened by Article 15 of the 1993 Treaty.<sup>205</sup> The 1975 ECOWAS Treaty did not have human rights as one of its values or goals but the 1993 amendment provided for this.<sup>206</sup>

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<sup>201</sup> Danish Institute (n.50 above) 14.

<sup>202</sup> Ebobrah (n. 42 above) 15

<sup>203</sup> Ebobrah (n.42 above) 15

<sup>204</sup> Danish Institute (n. 50 above) 15.

<sup>205</sup> Danish Page 101).

The court however remained inactive until 2003 when the case of *Afoladi Olajide vs Federal Republic of Nigeria*<sup>207</sup> was filed by an individual. Dismissing the case, it held that litigation envisaged by [the old] article 9(3) of the Protocol was in respect of claims by member states against one another or an organ of the community on behalf of their national. In sum, it would not accept the case of an individual litigant.<sup>208</sup> The case was nevertheless important as it established as it motivated the push for a Protocol to allow individual access before the court.<sup>209</sup>

### *Human rights jurisdiction of the ECCJ*

ECOWAS was originally meant to promote economic integration therefore human rights protection was peripheral which explains why there was no reference to human rights in its founding Treaty.<sup>210</sup> At present the court has express jurisdiction over cases of alleged human rights violation by virtue of the 1991 and 2005 Protocols.<sup>211</sup>

The human rights architecture of the ECCJ can be argued to include among others, to guarantee justice, respect and the protection of human rights, hear cases of alleged human rights violations, and to ensure human rights compliance by member states in accordance with their undertakings in the ECOWAS Treaty and instruments made there under.<sup>212</sup> The human rights jurisdiction of the ECCJ is further enhanced by the fact that member states of ECOWAS agreed to recognise, promote and protect human rights as enshrined in the African Charter on Human and People's Rights and other binding instruments on member states.<sup>213</sup>

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<sup>206</sup> ST Ebobrah 2011 226

<sup>207</sup> ECW/CCJ/APP/01/03

[http://www.courtecowas.org/site2012/index.php?option=comment=com\\_content&view=article&id=157&Itemid=279](http://www.courtecowas.org/site2012/index.php?option=comment=com_content&view=article&id=157&Itemid=279) (accessed 29 October 2012).

<sup>208</sup> Para 6.

<sup>209</sup> Danish Institute (n.50 above) 103.

<sup>210</sup> Danish Institute (n.50 above) 106.

<sup>211</sup> Danish Institute (n.50 above) 104 See also Art. 11(2) of the Court Protocol.

<sup>212</sup> Danish Institute (n.50)101.

<sup>213</sup> Article 4(g) 1993 ECOWAS Treaty

The 2005 Protocol allows for complaints by individuals alleging violations of their human rights in and by member states, institutions and officials of the community.<sup>214</sup> It is notable though that the Protocol does not mention specifically any right; thus claimants of human rights violations before the court have to premise their claims on the African Charter and other human rights instruments.<sup>215</sup> It may be argued that the court has human rights jurisdiction in cases involving all instruments ratified by the ECOWAS member states.<sup>216</sup>

#### *Requirement of exhaustion of local/ domestic remedies*

The exhaustion of that local/domestic remedies is not a requirement before the ECCJ before a case can be entertained and it is argued that this makes the court more open to litigants than other regional human rights protection institutions such as the African Commissions.<sup>217</sup> This liberal stance has, however, provoked debates along the lines of its merits and demerits.

It has also been argued that what is known the effect of non-applicability of the principle in terms of improving access to justice for human rights violations across the region is unreliable. It is pointed out most cases before the court are against Nigeria which might be attributed to the fact that it hosts the court and which fact, in turn, enhances public awareness about it and make it conveniently accessible to Nigerian residents and litigants for its proximity. There are plans to increase access to the court by having *in situ* hearing of cases so that those who cannot access the court in Nigeria can have their causes heard in a particular member state. The court is, however, severely hampered in its work by inadequate funding.<sup>218</sup>

#### *Sources of legislation to be used by the ECCJ*

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<sup>214</sup> See articles 9 (4) and 10 (c) to (d) 2005 ECOWAS Court Protocol, Also see Danish Institute (n.50 above)107.

<sup>215</sup> Danish Institute (n.50 above) 107.

<sup>216</sup> Danish Institute(n.50 above) 107.

<sup>217</sup> Danish Institute (n.50 above)15.

<sup>218</sup> Danish Institute (n.50 above) 15.

The 1991 ECOWAS Treaty allows the ECCJ to apply Article 38 of the Statute of the International Court of Justice when deciding cases. It also allows the court to source its law from international conventions (whether general or particularly) recognised by the contesting state, international custom as evidence of general practice accepted law, the general principles of law recognised by civilised nations, judicial decisions and the teachings of the most qualified publicists of various nations.<sup>219</sup>

#### *Relationship with the African Commission and the African Court on human and peoples' rights*

The ECOWAS legal documents constantly mention the African Charter signifying an intention to forge a close between the REC and the African human rights system. The Charter also allows the Commission to relate with other human rights dispute handling mechanisms<sup>220</sup> However, the ECCJ does not appear to have maximized these opportunities to evolve strong institutional relationships with African and subregional mechanisms.<sup>221</sup>

#### *Persons who may seized or can be respondents before the ECCJ*

The Protocol allows individuals and non- state actors to seize the ECCJ.<sup>222</sup> Articles 9 and 10 of the Supplementary Protocol of the ECCJ suggest that the institutions of ECOWAS, its officials and member states are possible respondents.<sup>223</sup> The Supplementary Protocol also allows access to the court on the basis of obtaining situation in a member state. Member states, individuals, the President of the ECOWAS Commission, the ECOWAS Council of Ministers, staff of the Community and corporate bodies can lodge cases.<sup>224</sup>

It is not expressly stated that NGOs may seize the court but it has been suggested that the reference to 'corporate body' does not do much to help in this regard it being contended that the

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<sup>219</sup> Art. 19 of the 1991 protocol. See The International Court of Justice statute Art. 38. See also Danish Institute (n. 50 above) 107.

<sup>220</sup> Art. 45(c) of the African Charter (ACHPR)

<sup>221</sup> (Danish Institute page 112).

<sup>222</sup> See also Arts. 9 & 10 of the Protocol as amended. Also See Danish Institute (n. 50 above) 103.

<sup>223</sup> Art 9 and 10 of the 2005 Protocol.

<sup>224</sup> 2005 (Art. 10 of the Supplementary Protocol of the Court of Justice.

reference allows a corporate body to seize the court only when the violation is against it.<sup>225</sup> It has also been said that if it is argued that NGOs can bring matters before the court, the question is whether it can or should only be in respect of injuries caused against them by commissions or omissions by officials of ECOWAS.<sup>226</sup> The provision of article 10(d) is not very helpful because it appears to provide for individual cases alleging violation of human rights and not for NGOs or institutions of similar status. It may therefore be surmised that only individuals alleging violations by member states can approach the ECCJ for redress but ECCJ has, however, allowed NGOs to bring cases under Article 10(d) of the amended Protocol.<sup>227</sup>

The Court is empowered under both the 1991 and 2005 court Protocols to entertain matters relating to the interpretation and application of the ECOWAS Treaty and incidental documents of the Community. Article 9 gives a 'breadth' of jurisdiction on allegations of human rights violations in member states and other matters relating to member states failing to honour obligations under the ECOWAS Treaty.<sup>228</sup>

#### *Requirements and conditions precedent before seizing the ECCJ*

There seems to be only two conditions relevant to seizing the court. The first is that the documents should not be anonymous and that it should not be made while there is another case before another international adjudication institution.<sup>229</sup> This may mean that matters pending before institutions such as the African Court are precluded. A question which comes to mind however is whether if a matter is pending before other institutions responsible for amicable settlement such as a national court or any regional body the court can dismiss it.<sup>230</sup>

#### *Time within which to lodge a case in the ECCJ*

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<sup>225</sup> Danish Institute (n.50 above)104.

<sup>226</sup> See Art. 10(c).

<sup>227</sup> Danish Institute (n.50 above) 104.

<sup>228</sup> Danish Institute (n.50 above)105.

<sup>229</sup> Art.10(d) (i) & (ii) (n.223 above).

<sup>230</sup> (Danish Institute 105)

Interested persons can lodge their cases in the ECCJ within three years from the time of the alleged breach.<sup>231</sup>

### *Remedies and enforceability of ECCJ decisions*

The decisions of the ECCJ are final and immediately binding<sup>232</sup> and are only subject to a review.<sup>233</sup> The ECCJ is allowed to may make any provisional or interlocutory orders in matters pending before it and any other orders in final judgment<sup>234</sup>.

In an attempt to ensure compliance and respect for the court, Members states are obliged not to interfere or conduct themselves in a manner which will prejudice an amicable settlement of a case.<sup>235</sup> In the same breath, all organs of ECOWAS as well member states are to employ all means possible to ensure the execution of the orders of the court.<sup>236</sup>

### *Execution of the ECCJ judgments and orders*

The execution of the ECCJ judgments and orders is through the regular systems of enforcement of judgments in member states<sup>237</sup> although member states are additionally obliged to designate a national institution tasked with the execution of the ECCJ judgments.<sup>238</sup> Where there is no compliance, sanctions may also be imposed on defaulting state(s).<sup>239</sup>

### *The relationship between ECCJ and national courts*

No mention is made of the relationship or cooperation between the ECCJ and national courts. However, the amendment in the 2005 Protocol allows national courts to refer cases involving

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<sup>231</sup> Art. 9(3), 2005 Supplementary Protocol

<sup>232</sup> (Art. 19(2) of the 1991 ECOWAS court Protocol

<sup>233</sup> Art. 25 of the Court Protocol.

<sup>234</sup> Art. 20 of the Court Protocol. See the case of Ugokwe v Nigeria discussed in detail below.

<sup>235</sup> Art. 22(2) of the Supplementary Court Protocol.

<sup>236</sup> Art. 23(3) (n. 244 above).

<sup>237</sup> Art. 24(n.244 above).

<sup>238</sup> (Art. 24(4) (Danish Institute 111).

<sup>239</sup> Art.77(1) of the 1993 ECOWAS Treaty

interpretation or application of the ECOWAS Treaty and other incidental instruments to the ECCJ in much the same way as the EAC Treaty allows.<sup>240</sup>

### *Jurisprudence of the ECCJ*

#### *Ugokwe v Nigeria and others*<sup>241</sup>

This was an election dispute arising from elections to the House of Representatives which took place in Nigeria, a member state of ECOWAS. The election dispute was heard before several national Electoral Tribunals. The applicant, being dissatisfied with the outcomes at this level, challenged the proceeding of the Tribunals before the ECCJ alleging that his rights to a fair hearing were infringed and that the court should invalidate the proceedings of the Electoral Tribunal and the Supreme Court of Nigeria.

The applicant sought an order to restrain the Independent National Electoral Commission, an agent of the Respondent, from revoking the certificate declaring him as validly elected or from granting the certificate to another person and further not to replace him with any other person until the final outcome of the case. The same order was to restrain the Federal National Assembly from discharging him as a Member of the Assembly.

The respondent raised an objection stating that the court was incompetent to entertain the matter.

The applicant's argued that the court has jurisdiction by virtue of article 19(4) of the Supplementary Protocol since the alleged violation occurred in a member state of ECOWAS. He further contended that article 10(d) allowed access to an individual who alleges violations as was in his case. He cited provisions of the African Charter, the Universal Declaration and the Constitution of Nigeria to fortify his argument.

Court stated that article 19 of the Protocol of the Court permits its application of article 38(1) (c) of the International Court of Justice which empowers it to choose and apply different sources of laws in arriving at a decision. It held that article 4(g) of the ECOWAS Treaty obliges the

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<sup>240</sup> Art. 10(f) Danish Institute page 112).

<sup>241</sup> ECW/CCJ/APP/02/05

[http://www.courtecowas.org/site2012/index.php?option=comment=com\\_content&view=article&id=157&itemid=279](http://www.courtecowas.org/site2012/index.php?option=comment=com_content&view=article&id=157&itemid=279) (accessed 29 October 2012).



member states to recognise, promote and protect human rights in line with the African Charter notwithstanding the absence of a regional human rights catalogue. It held further that it is empowered by article 29 of the Protocol to the Court to apply the African Charter recognized in article 4 as a constituent document of the ECOWAS legal regime.

The court however decided that it had no appellate role over national courts of member states and that it is a court of first and last instance. It thus concluded that it was incompetent to annul the proceedings in the national court of Nigeria in respect of the elections. The decision in the Ugokwe case reveals a careful effort to avoid constituting itself an appellate role without precluding the opportunity of the court being a court of first instance for persons who do not want to use national courts.<sup>242</sup>

The case of Ugokwe reiterates that the requirement to exhaust local remedies is not necessary although it does not resolve how to address the conflict that might ensue from this liberalisation between the ECCJ and national courts.<sup>243</sup>

*Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Another*

The case was brought by SERAP, a Nigerian NGO against the first Respondent being a member state of ECOWAS together with and the second respondent, its Commission for Universal Basic Education.<sup>244</sup> The applicants alleged violations of the rights guaranteed under the African Charter to wit, the right to dignity<sup>245</sup>, quality education<sup>246</sup> and the right to enjoy their natural resources.<sup>247</sup>

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<sup>242</sup> (Danish Institute 106)

<sup>243</sup> (Danish Institute 105 )

<sup>244</sup> Para 1 of the SERAP main Judgment

<sup>245</sup> Art. 5 of the ACHPR

<sup>246</sup> Art. 17 ACHPR

<sup>247</sup> Art. 21 ACHPR. See facts in para 2 of the SERAP Judgment.

The second respondents raised a preliminary objection as to the jurisdiction of the court under article 9 of the Supplementary Protocol<sup>248</sup> to entertain the matter argued that the matter was premised on domestic legislation. They contended also that the applicants lacked *locus standi* to institute the action against the second respondent.

Court held that it had jurisdiction to entertain cases alleging violation of the African Charter by virtue of the fact that these rights were ‘imported’ into ECOWAS by article 4(g) of the Treaty and that the case under the African Charter was therefore properly before the court.

On the question of justiciability of the right to education, the court found that the first respondent is a party to the African Charter and has incorporated it into its body of domestic law as testimony to its commitment to the Charter rights. It further noted that Nigeria is a signatory to the Revised ECOWAS Treaty which allowed for the application of the African Charter by the court. Article 17 of the Charter guaranteeing the right to education would therefore apply to justify the litigation before the court

On the question of *locus standi* of the applicants, the court held that in human rights causes, the restrictive rules as to *locus standi* should not apply. It agreed with the applicants that *actio popularis* is to be encouraged in line with global trends. Court also stated that in a public interest case, the litigant need not show that they are direct victims or that they have personal interest thus paving way for NGO authority to seize the court.

### *Abounbacar -vs -La Banque Centrale des Etats de L’Afrique de L’Ouest*<sup>249</sup>

The applicant alleged a violation of his right to property under article 17(2) the Universal Declaration of Human Rights and articles 14 and 21 of the African Charter as well as the constitution of Niger. The case involved the withdrawal of banknotes and issuance of new notes for which the applicant could not beat the deadline. He therefore contended before the court that in refusing to change his notes, his right to property was infringed.<sup>250</sup> The ECCJ stated that it had

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<sup>248</sup> Article 9 is to the effect that the ECCJ has jurisdiction to determine cases of violation of human rights which occur in any ECOWAS member state.

<sup>249</sup> Case number

jurisdiction in matters in as long as the application alleges any violation which could have occurred in the territory a member state.<sup>251</sup>

This case showed how claims alleging the violations of the African Charter can be directly brought before the ECCJ.

### *Challenges faced by the ECCJ in the enforcement of its judgment*

The ECCJ has since the adoption of the Supplementary Protocol has clearly asserted itself as a human rights court.<sup>252</sup> This has not come without some challenges because the President of the EECJ is reported to have pointed challenges in the implementation of the court orders by the member countries.<sup>253</sup>

## **Chapter 5**

### **CONCLUSION AND RECOMMENDATIONS**

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<sup>251</sup> Para 20-21

<sup>252</sup> Ebobrah (n. 42 above) 243

<sup>253</sup> The Guardian online Newspaper

[http://guardiannewsngr.com/index.php?option=com\\_content&view=article&id=99849:ecowas-court-bemoans-non-enforcement-of-verdicts&catid=1:national&Itemid=559](http://guardiannewsngr.com/index.php?option=com_content&view=article&id=99849:ecowas-court-bemoans-non-enforcement-of-verdicts&catid=1:national&Itemid=559)(accessed 19 October 2012)

This chapter presents the conclusion and recommendations from the discussions and analyses in the previous chapters. Specifically, it summarises study findings on the prospects and challenges of the EACJ as a mechanism for the promotion, protection and enforcement of human rights, especially in Uganda.

The study has revealed that at present the EACJ does not have an express mandate to adjudicate on human rights dispute although the court has ingeniously tried to forge for itself some role and relevance for human rights protection in the sub-region. Litigation on matters before the court which are clearly human rights matters have had to be couched in the language of the ‘breach of the principles of the EAC or Treaty’ and not the infringement of human rights *per se*. The jurisprudence emerging from the court leaves no-one in doubt as to the commitment of the court to give full vent to the realisation of the hopes that the EAC Treaty offered when it ‘promised’ an effective human rights Protocol. While this is commendable, it is inadequate to do justice to the aspirations of the people in the sub-region for the promotion and protection of their human rights. This study therefore lends its voice to other voices of organisations and CSOs to the widespread calls for the urgent extension of the jurisdiction of the EACJ.<sup>254</sup> Such extension will also help to avoid the odious burden imposed on litigants as they attempt to ‘squeeze’ jurisdiction out of the court in the absence of an express provision. Having an express human rights mandate also places the EACJ on a comparable level with other subregional courts.

This study also revealed that other organs of the EAC have a role to play in strengthening the potentials of the court as a human rights court. The Summit should ‘walk the talk’ by expeditiously adopting a Protocol to extend the EACJ’s (human rights) jurisdiction. It is regrettable that the draft protocol has been in ‘limbo’ since 2005 with no signs of its adoption in the near future. CSOs, Law Societies and like minded persons should pressurise the member states to urgently adopt the Protocol and should sensitise residents of the EAC about the EACJ to improve access.

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<sup>254</sup> At the time of writing the Pan African Lawyers Union(PALU) has organised a workshop beginning the 29 October 2012 to ‘fast track’ and make calls for the expeditious extension of the EACJ’s jurisdiction. (A copy of the notice of the workshop was sent to the author by e-mail from PALU on 25 October 2012).

The important role of other organs of the EAC and member states in providing an enabling environment for the EACJ cannot be overemphasised. An express human rights mandate but that is not an end in itself or ‘a magic bullet’. There is need for political will from the member states to ensure enforcement of decisions of the RECs courts. Also, the independence of the EAC judges must be safeguarded at all times. A first step towards this that the Treaty should be amended to ensure that judges of the court are permanent.

There are lessons to be learnt from the generous limitation of time allowed by the ECOWAS Protocol. The six months proposed by the draft Protocol is still inadequate and incomparable to the three years aggrieved persons have with respect to the ECCJ. More time is needed to allow for access to litigants who may delay recourse to the EACJ because of their indigence or ignorance about its existence.

The non-requirement of exhaustion of local remedies should remain as it is to allow for access by litigants without any undue delay. It is conceded that this may flood the court with all manners of cases, but we contend that that will be the ‘price’ for human rights protection which the court and the member states must contend with.

It is established that the ECCJ has almost the same set up as the EACJ in terms of the fact that the ECCJ has no ‘catalogue’ of rights or law to apply codified in one text but it is at liberty to apply the African Charter and employ the sources of law under the International Court of Justice Statute. This gives the court more latitude to develop its own jurisprudence based on the rich source from which to draw inspiration. Need for a clear human rights catalogue? The question to ponder is whether a codification of human rights norms to be applied into one document can assist to clarify or the option of leaving many sources available to the court can assist. We subscribe to the latter view.

Legal aid provision is not included in any of the Constitutive documents of the EACJ and the EECJ. It is imperative that it should be included to assist indigent persons as we have earlier on noted that Uganda’s per capita income may not allow access for many litigants.

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