

**THE EAST AFRICAN COURT OF JUSTICE: TOWARDS EFFECTIVE
PROTECTION OF HUMAN RIGHTS IN THE EAST AFRICAN
COMMUNITY**

BY

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DECLARATION

I, the undersigned, declare that the thesis, which I hereby submit for the degree Doctor Legum (LLD) at the Centre for Human Rights, Faculty of Law, University of Pretoria, is my own work and has not previously been submitted for a degree at this or any other university.

Signed at Pretoria, on this.....day of November, 2014

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ALLY POSSI

ABSTRACT

The establishment of the East African Community (EAC) in 1999 brought with it new expectations for the citizens of the East African region. The main objective of the EAC is to bolster development in various fields such as economic, social, cultural, research, technology and legal affairs. In order to reach such an objective, the EAC member states have pledged to adhere to human rights, as one of the founding principles of the EAC. Member states are also required to respect accepted universal human rights standards when carrying out Community activities. In order to ensure that EAC values, as provided in the EAC Treaty, are preserved, member states voluntarily decided to put in place a judicial organ for the Community – the East African Court of Justice (EACJ). The Court is the main judicial organ of the EAC, with the primary responsibility for interpreting and applying EAC law. Despite the fact that human rights constitute one of the EAC norms, the EACJ has yet to be granted an explicit human rights jurisdiction. It has thus fallen on the Court to engage in judicial activism to indirectly protect human rights within the Community. Thus, this study examines the role of the EACJ in protecting human rights within the EAC, as well as the challenges it is facing at present and its prospects. This study, therefore, demonstrates that the current limitation on the human rights jurisdiction of the EACJ has rendered the Court unable to protect human rights effectively within the EAC.

Keywords: East African Court of Justice, East African Community, sub-regional courts, EAC Treaty, international courts, sub-regional organisations, human rights, protection, African regional economic communities and regional integration.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRW	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
ACRWC	African Charter on the Rights and Welfare of the Child
AEC	African Economic Community AIDS Acquired Immune Deficiency Syndrome
AMU	Arab Maghreb Union
AU	African Union
CEDAW	Convention on the Elimination of all Forms of Racial Discrimination against Women
CEN-SAD	Community of Sahel Saharan State
COMESA	Common Market for Eastern and Southern African States
CRC	Convention on the Rights of a Child
EAC	East African Community
EACA	East African Court of Appeal
EACJ	East African Court of Justice
EACSO	East African Common Services Organisation
EAHC	East Africa High Commission
EALA	East African Legislative Assembly
ECCAS	Economic Community of Central African States
ECHR	European Convention on Human Rights and Fundamental freedoms
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECRHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
FAL	Final Act of Lagos
HIV	Human Immunodeficiency Virus
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights

ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
IGAD	Intergovernmental Authority for Development
LPA	Lagos Plan of Action
NGOs	Non-Governmental Organisations
OAU	Organisation of African Unity
PTA	Preferential Trade Area
REC	Regional Economic Community
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
TEU	Treaty of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNECA	United Nations Economic commission for Africa

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African Charter on the Rights and Welfare of the Child, 1990

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CHAPTER 1

INTRODUCTION TO THE STUDY

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1.1 Background to the study

Respect for human rights has emerged to be a dominant subject in the contemporary agenda of regional integration.¹ The relevance of human rights in regional integration is evident from the number of international organisations which have made human rights one of their governing principles. Some organisations have gone further by requiring respect for human rights to be one of the prerequisites for acquiring their membership.² The presence of human rights in the founding treaties of international organisations underpins the important role that human rights have in regional integration initiatives. To ensure that member states and the institutions of an organisation adhere to the treaty norms, a judicial organ is normally established under the auspices of these

¹ See A Kaczorowska *Public international law* (2010) 532; A Catrinou 'Protection of democracy and human rights in the international legal system' (2011) 3 *Contemporary Readings in Law and Social Justice* 160; P Camino 'The human element: The impact of regional trade agreements on the human rights and the rule of law' (2011) 42 *Inter-American Law Review* 265; SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkage' (2003) 3 *African Human Rights Law Journal* 88.

² Art 49 read together with art 2 of the Treaty on the European Union (TEU), art 3(b) of the EAC Treaty, art 3 of the Statute of the Council of Europe.

organisations. Such progress in modern international law is a clear attempt to realise the rule of law beyond national borders.³

It is now accepted that human rights in Africa are under the auspices of regional and sub-regional organisations. The role of African sub-regional courts in protecting human rights within their respective organisations is gradually taking shape.⁴ Most African regional economic communities (RECs), established as building blocks in the African economic integration process, have made the promotion and protection of human rights one of the governing principles for achieving their goals.⁵ Some REC treaties refer to the African Charter on Human and Peoples' Rights (African Charter) as the normative standard for realising human rights within their respective communities.⁶

So far, the Economic Community of West African States (ECOWAS) has emerged as the most active REC in promoting and protecting human rights in Africa.⁷ The revised ECOWAS Treaty of 1993 refers to human rights as one of the fundamental principles that should be adhered to in pursuing Community objectives.⁸ In order to ensure that human rights are strongly protected, the ECOWAS Community Court of Justice (ECOWAS

³ A Nollkaemper *National courts and the international rule of law* (2011) 1.

⁴ See LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 7 *SUR-International Journal on Human Rights* 119.

⁵ Art 6(d) and 7(2) of the EAC Treaty, art 6(e) of the COMESA Treaty, art 6A(f) of the IGAD Agreement, art 4(g) of the ECOWAS Treaty and art 4(c) of the SADC Treaty.

⁶ Art 4(g) of the ECOWAS Treaty, art 6(d) of the EAC Treaty. For a discussion on the application of the in RECs see ST Ebobrah 'Application of the African Charter by African sub-regional organisations: Gains, pains and the future' (2012) 16 *Law, Democracy and Development* 49.

⁷ According to Justice Nana Daboya (the former President of the ECOWAS Court), the ECOWAS Court had received more than 100 cases from during the period 2005–2011. The majority of these cases were human rights cases. See National Daily Newspaper 'ECOWAS Community Court handled 100 cases in six years – President' at <http://nationaldailyng.com/news-extra/ecowas-community-court-handled-100-cases-in-six-years—president> (accessed on 29 September 2012). ECOWAS is an intergovernmental organisation with 15 member states, namely: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. ECOWAS was formed in 28 May 1975. For an understanding of human rights mandate of ECOWAS see ST Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Communities of West African States,' LLD thesis, Faculty of Law, University of Pretoria (2009); ST Ebobrah (2009) 'A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice' The Danish Institute for Human Rights: *Copenhagen*. Available at http://www.escri-net.org/usr_doc/S_Ebobrah.pdf (accessed on 27 June 2012)

⁸ Art 4(g) of the revised ECOWAS Treaty.

Court) is conferred with an explicit human rights jurisdiction to determine human rights disputes.⁹

The direct involvement of sub-regional organisations in protecting human rights is an encouraging development. In fact, such evolution is the best way of complementing the already existing African human rights system.¹⁰ For instance, the ECOWAS Court has addressed numerous issues, such as slavery, which are yet to be given much attention by the African Commission on Human and Peoples' Rights (African Commission) or the African Court on Human and Peoples' Rights (African Court). At the end, the ECOWAS Court has been making a telling contribution to the African human rights jurisprudence.¹¹

In East Africa, after the rebirth of the East African Community (EAC), EAC citizens seem set for improvement in their economic, social and political life, based on the nature and progress of EAC integration.¹² With the aspiration to fast-track and deepen regional integration, the EAC member states aimed at developing various programmes and policies in different areas, including the economic, social, political and legal spheres.¹³ They are also committed to observing the principles of good governance, including adherence to the principles of democracy, rule of law, social justice and human rights.¹⁴ The East African Court of Justice (EACJ) is one of the organs of the EAC with the main

⁹ Art 9(4) in art 3 of the Supplementary ECOWAS Court Protocol. Other RECs such as the Arab Maghreb Union (AMU) have not adequately integrated human rights, to the extent that their founding treaties do not refer to human rights. See the 1983 Treaty establishing the Economic Community of Central African States and the 1989 Treaty establishing the Arab Maghreb Union.

¹⁰ See ST Ebobrah 'Towards a positive application of complementarity in the African human rights system: Issues of functions and relations' (2011) *European Journal of International Law* 633.

¹¹ KJ Alter, LR Helfer & JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737, 775.

¹² The EAC is one of the African RECs consisting of Burundi, Kenya, Rwanda, Tanzania and Uganda. The new EAC was established in 1999 after the signing of the EAC Treaty that entered into force in 2000. The 1999 Treaty was signed by the original founding members of the EAC which were Kenya, Tanzania and Uganda. Burundi and Uganda acceded to the EAC treaty in 2007.

¹³ Art 5 of the EAC Treaty.

¹⁴ Art 6(d) and 7(2) of the EAC Treaty.

task of ensuring adherence to EAC law.¹⁵ Unlike the ECOWAS Court, the EACJ is yet to be given an explicit mandate to adjudicate human rights disputes.¹⁶ However, the Court is arguably protecting human rights in the EAC indirectly through judicial creativity.¹⁷

Historically, an attempt to establish an international organisation in East Africa dates back to 1967, when the former EAC was established. Unfortunately, this organisation collapsed in 1977 after existing for only ten years.¹⁸ Some of the factors that contributed to the collapse include a lack of political will to strengthen the EAC among the founding EAC leaders; a lack of strong participation by the private sector and civil society in the activities of the Community; and a lack of appropriate policies for strengthening regional integration in East Africa.¹⁹ During the time of the former EAC, human rights were not a matter of pressing concern.²⁰ The now defunct East African Court of Appeal was the highest judicial organ in the region, hearing all appeals of a civil and criminal nature but not including constitutional matters originating from the member states.²¹

When one assesses the progress of the EACJ, it is easy to discover that its functioning has to some extent been politicised. Such politicisation stalls its effectiveness and efficiency in discharging its duties. The politicisation of the EACJ was manifested for the

¹⁵ The EACJ is established under art 9 and 23 of the EAC Treaty.

¹⁶ Art 27(2) of the EAC Treaty provides that the EACJ shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council of Ministers on a future date. For extending the jurisdiction of the EACJ, the EAC member states shall conclude a protocol for extending the jurisdiction of the Court.

¹⁷ See A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' (2013) 17 *Max Planck Yearbook of United Nations Law* 173; JT Gathi 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative & International Law* 249.

¹⁸ For details of the history and reasons behind the collapse of the former EAC see: A Hazlewood 'The end of the East African Community: What are the lessons for regional integration schemes?' in RI Onwuka (ed) *The future of regionalism in Africa* (1985) 40; JS Nye *Pan-Africanism and East African integration* (1966); B Katembo 'Pan Africanism and development: The East African Community model' (2008) 2 *Journal of Pan African Studies* 107.

¹⁹ Preamble to the EAC Treaty.

²⁰ In Tanzania, for example, the Bill of Rights was not incorporated in the Constitution until 1984.

²¹ The primary goal of the former EAC was to foster economic integration. An economic integration model has been manifested in most parts of the world. In the then European Economic Community, the 1957 Treaty of Rome made little mention of human rights, merely containing a few provisions that guaranteed worker conditions in the working environment.

first time after the EACJ's ruling in *Anyang' Nyong'o and Others v Attorney General of Kenya (Anyang' Nyong'o case)*.²² The ruling prevented nine Kenyans, who were nominated as members of the East African Legislative Assembly (EALA), from taking office owing to irregularities that occurred in the election process in the Kenyan National Assembly. Consequent to the ruling, tension arose between the EAC Summit, which is the highest political organ in the Community, and the Court. Soon after the Court's ruling, the EAC Summit, at an extraordinary meeting held in November 2006, endorsed recommendations by the Council of Ministers for amending the EAC Treaty.²³

The 2007 amendments to the EAC Treaty have had an impact on the current and future functioning of the EACJ. The amendments restructured the Court by introducing a new structure comprising the First Instance Division and an Appellate Division,²⁴ limiting the Court's jurisdiction,²⁵ introducing a two-month limitation clause for individuals to lodge their complaints before the Court,²⁶ introducing additional grounds for the removal and suspension of Court judges, and increasing the control of the EAC Summit over the Court.²⁷

As a result of the manner in which the EAC Treaty was amended, civil society in the member states challenged the legality of the amendment process. In *East African Law Society and Others v Attorney General of Kenya*,²⁸ the applicants contended that the prescribed procedures under article 150 of the EAC Treaty were not complied with and, therefore, the amendments amounted to an infringement of the principles enshrined

²² *Anyang' Nyong'o & Others v Attorney General of Kenya*, Ref No 1 of 2006. For a discussion on the controversy over elections for electing members of the East African Legislative Assembly see H Onoria 'Botched-up elections, treaty amendments and judicial independence in the East African Community' (2010) 54 *Journal of African Law* 74.

²³ See the Communiqué of the EAC Summit. 30 November 2006. In 14 December 2006, the EAC Summit adopted the amendments to the EAC Treaty. The last instrument for ratification of the amendments to the EAC Treaty was deposited on 19 March 2007, making the Treaty enforceable.

²⁴ Art 23(2) of the EAC Treaty.

²⁵ Art 30(3) of the EAC Treaty.

²⁶ Art 30(2) of the EAC Treaty.

²⁷ Art 26 of the EAC Treaty.

²⁸ *East African Law Society & Others v Attorney General of Kenya*, Ref No 3 of 2007.

under the EAC Treaty.²⁹ This reference was a result of the hurried process for amending the EAC Treaty without conducting widespread consultation within the Community. In determining the reference, the EACJ held that the failure to carry out consultations before amending the EAC Treaty was contrary to the principles governing the EAC.

The politicisation of the functioning of judicial organs has also been manifested itself in other RECs. Following the decision of the Southern African Development Community (SADC) Tribunal in *Mike Campbell v Zimbabwe (Campbell case)*³⁰ and subsequent refusals to comply with the *Campbell* case related decisions of the SADC Tribunal by Zimbabwe, the operations of the Tribunal have become intensely politicised. The Tribunal has consequently been suspended since August 2010 as a result of Zimbabwe questioning the legitimacy of the Tribunal's existence.³¹ In August 2014, the SADC Summit adopted a new Protocol on the SADC Tribunal. As expected, the Protocol removes the right of individuals to access the Tribunal. It allows the Tribunal to interpret the SADC Treaty and its protocols in disputes involving states only, thus excluding

²⁹ Art 150(4) and (5) provides for the time framework of the amendment process of the EAC Treaty.

³⁰ *Mike Campbell v Zimbabwe*, SADC (T) 02/2007. On 11 October 2007, the applicants filed an application to the SADC Tribunal challenging the acquisition of their agricultural land by Zimbabwe. The applicants also filed an application asking the Tribunal to restrain the government of Zimbabwe from removing or allowing the removal of the applicants from their land, pending the determination of the matter. The interlocutory application was granted on the 13 December 2007. In the main application, the applicants claimed that the acquisition undertaken by the Zimbabwe government was based on racial discrimination and were denied access to courts to challenge the acquisition of their land.

³¹ The SADC Tribunal twice referred the matter to the SADC Summit to take further action against Zimbabwe, as provided under Art 32(5) of the SADC Treaty, for non-compliance of the Tribunal's decision. (*Mike Campbell & Another v Zimbabwe* SADC (T) 03/2009, and *Fick and Another v Zimbabwe* SADC (T) 01/2010). There were efforts of enforcing the SADC Tribunal's decision in other SADC countries see (*Louis Fick* Pretoria High Court 7781/2009). For an overview understanding of the SADC Tribunal see M Jo Nkhata 'The role of regional economic communities in protecting and promoting human rights in Africa: Reflections on the human rights mandate of the Tribunal of the Southern African Development Community' (2012) 20 *Journal of International and Comparative Law* 87; DC Ruppel & FK Bangamwabo 'The SADC Tribunal: a legal analysis of its mandate and role in regional integration' in A Bösl et al (eds) (2008) *Monitoring regional integration in Southern Africa Yearbook* 179, ST Ebobrah 'Tackling threats to the existence of the SADC Tribunal: A critique of perilously ambiguous provisions In the SADC Treaty and the Protocol on the SADC Tribunal' (2010) 4 *Malawi Law Journal* 199.

individual access.³² Civil society in the Southern Africa region and across the continent is campaigning tirelessly to restore the original jurisdiction of the SADC Tribunal. Despite efforts to engage with member states and inform them of their legal obligations toward the Tribunal, however, SADC leaders are yet to be persuaded by civil society to change their stance on the Tribunal, rendering the efforts almost futile.

Before the adoption of the current SADC Tribunal Protocol, there were a number of attempts to re-instate individual access to the Tribunal. In *Luke Tembani and Benjamin Freeth v Angola*,³³ the applicants invited the African Commission to declare that the act of the SADC member states of suspending the Tribunal was contrary to the African Charter provisions particularly article 7 and 26. The major issue of contention that transpired in the proceedings was whether the African Commission has jurisdiction to adjudicate on the matter of another sub-regional organisation that is not a party to the African Charter. The Commission observed that the case was against SADC member states in their national capacity, and not SADC, and that, therefore, the communication was declared admissible. On the merits, the African Commission dismissed the application on the basis that the provisions upon which the applicants relied (article 7 and 26 of the African Charter) impose an obligation on a member state to ensure access to justice and the judicial independence of national courts and not the SADC Tribunal. The matter was thus dismissed.³⁴

In ECOWAS, there was an unsuccessful attempt by the government of the Gambia to distort the functioning of the ECOWAS Court. The government of the Gambia proposed amendments to the ECOWAS Court protocol after being aggrieved by the ECOWAS Court's decision in *Ebrimah Manneh v The Gambia*.³⁵ The proposed amendments sought for the addition of the requirements for admissibility of cases before the ECOWAS Court

³² Para 24 of the SADC Summit Communiqué (18 August 2012).

³³ Communication 409/12.

³⁴ Communication 409/12, 146.

³⁵ Suit No. ECW/CCJ/APP/04/07.

to include the exhaustion of the local remedies rule.³⁶ The proposed amendments were nevertheless rejected, as recommended by the Committee of Legal Experts that was tasked with conducting a study on the possibility of implementing the proposed amendments.³⁷

In as far as human rights protection in the EAC is concerned, the EACJ heard the first matter relating to human rights in *James Katabazi and Others v The Secretary General of the EAC and Others (Katabazi case)*.³⁸ In that case, the applicants questioned the interference in the Court process by Ugandan security officials in refusing to implement the decision of the High Court of Uganda after they had been granted bail. The applicants contended that the re-arrest of the applicants after the High Court of Uganda had granted them bail was contrary to the principles enshrined in the EAC Treaty. The Attorney General of Uganda raised a preliminary objection asserting that the Court lacked the jurisdiction to deal with human rights matters, as the allegations against Uganda were of a human rights nature and thus the Court could not deal with such matters. The Court went on to hold that ‘while the Court will not assume jurisdiction to adjudicate human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violations’.³⁹

After the *Katabazi* case, human rights activists and civil society in the EAC called for the EACJ to be vested with an explicit human rights mandate. In *Sitenda Sebalu v Secretary General of EAC and Others*,⁴⁰ an applicant in this matter after being unsuccessful in Ugandan courts questioned the commitment of Ugandan officials in expanding the EACJ’s jurisdiction as provided in article 27(2) of the EAC Treaty. It was held that the

³⁶ See Amnesty International: public statement, West Africa: Proposed amendment to ECOWAS Court jurisdiction is a step backward, 28 September 2009, available at <http://www.amnesty.org/en/library/asset/AFR05/005/2009/en/2cff9a94-0944-4ec1-85bc599a8971f0f3/afr050052009en.pdf> (accessed on 13 June 2012).

³⁷ F Viljoen *International human rights law in Africa* (2012) 499.

³⁸ *James Katabazi & Others v The Secretary General of the EAC & Attorney General of Uganda*, Ref No 1 of 2007.

³⁹ *Katabazi* case, 16.

⁴⁰ Ref No 1 of 2010, EACJ First Instance Division.

delaying process by the government of Uganda in facilitating the adoption a protocol that would extend the EACJ's jurisdiction that would also enable the Court to adjudicate human rights disputes infringes on the founding principles enshrined in the EAC Treaty to which the EAC member states have committed themselves.⁴¹

A number of human rights related cases have been brought before the EACJ following the decision in the *Katabazi* case.⁴² Although most cases have faced preliminary objections from the respondent states challenging the jurisdiction of the Court to adjudicate what they classify as human rights cases, on a number of occasions, when determining such cases, the EACJ used the same reasoning as in the *Katabazi* case that it would not shy away from exercising its duty of interpreting the EAC Treaty, even if the matter before it is of a human rights nature.

In the past three years there has been some progress in extending the EACJ's jurisdiction. However, the current draft protocol for extending the jurisdiction of the EACJ does not extend the Court's jurisdiction to dealing with human rights disputes. On April 2012, EALA passed the EAC Human Rights Bill, which is now waiting to be assented by the EAC Summit in order to become EAC law.⁴³ It is hoped that the EAC Bill of Rights will be assented by the Summit in the near future. If this Bill is endorsed, it will be a step forward in the process of conferring the EACJ with an explicit human rights mandate. Furthermore, in what is largely perceived as a political move, the EALA passed a resolution asking the EAC Council of Ministers to 'implore' the International Criminal Court (ICC) to bring the case of the accused Kenyan officials, facing trial in the ICC as a result of the aftermath of the 2007 Kenyan general elections, before the EACJ.⁴⁴ On 28

⁴¹ Ref No 1 of 2010, 49.

⁴² See *Plaxeda Rugumba v Secretary General of the EAC & Attorney General of Rwanda*, Ref No 8 of 2010, EAC First Instance Division, *Mary Ariviza & Another v Attorney General of Kenya & Others*, Ref No 7 of 2010, EACJ First Instance Division, *Emmanuel Mjawasi & Others v Attorney General of Kenya*, Ref No 2 of 2010, EACJ First Instance Division.

⁴³ See <http://www.eala.org/oldsite041111/media-centre/press-releases.html> (accessed on 7 May 2012).

⁴⁴ See the EALA resolution adopted on 26 April 2012 available at http://www.eala.org/oldsite041111/key-documents/doc_details/266-resolution-seeking-to-try-

April 2012, the resolution was submitted to the Summit to amend article 27 of the EAC Treaty in order to confer jurisdiction on the EACJ in criminal matters and to give the intended amendments retrospective effect.⁴⁵ Citizens of the EAC are waiting to see whether the EACJ will be given jurisdiction to adjudicate cases of criminal cases which could also be used as a path to ultimately open the way for the EACJ to adjudicate human rights cases.

Following the above narration, it is evident that the operations of the REC judicial organs are under threat from the member states. The decision of the SADC Tribunal in the *Campbell* case, which had human rights elements, placed Zimbabwe under the international spotlight for all the wrong reasons. That decision led to the politicisation of the SADC Tribunal and it is deemed undesirable for such events to spill over to other RECs including the EAC.

The EAC member states are reluctant to confer the EACJ with an explicit human rights mandate. Indeed, it needs to be considered whether EAC member states fear being under international scrutiny by giving the EACJ an explicit human rights mandate. One needs to consider that human rights constitute the founding values of the EAC which are beneficial for all EAC citizens. Thus, human rights are essential for the survival of the EAC.

This study, therefore, explores ways to which the EACJ can protect human rights effectively in the EAC, taking into consideration the important role that human rights plays in the regional integration process.

kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.html (accessed on 7 May 2012).

⁴⁵ As above.

1.2 Problem statement

The EACJ is not able to protect human rights in the EAC effectively owing to the limitations imposed under article 27(2) of the EAC Treaty, together with the continuing politicisation of its functioning. Article 27(2) provides that

The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the [member states] shall conclude a protocol to operationalize the extended jurisdiction.

Article 27(2) of the EAC Treaty denies the EACJ an opportunity to protect human rights appropriately in the EAC. The article sets a future date for the adoption of a protocol for expanding the jurisdiction of the Court by the Council of Ministers when deemed necessary. As demonstrated in chapter 3 of this study, article 27(2) of the EAC Treaty has made EACJ judges cautious when adjudicating cases that touch on human rights. The EACJ has often relied on other forms of cause of action, such as an infringement of the rule of law, which is not mentioned under article 27(2) of the EAC Treaty. As a result of the continuing presence of article 27(2) of the EAC Treaty and delays in adopting the protocol that would extend the jurisdiction of the EACJ to the adjudication of human rights disputes, the progress of EAC integration will be hampered. human rights are in danger of being undermined.

Due to the hostile attacks on the Court by EAC member states in 2007, the EACJ judges will continue to be defensive and cautious when dealing with human rights disputes or any matter relating to human rights. Considering the nature of EAC integration, it is inevitable that the EACJ will continue to receive many cases with human rights elements. Issues such as the free movement of persons and the right to residence are directly linked to the common market stage of regional integration, which is where the EAC finds itself today. Thus, it is practically impossible for the EACJ to avoid hearing such cases from EAC individuals.

In cases that touch on human rights, EACJ judges have often presented considerable findings. However, it would seem that EACJ judges are reluctant to engage in any political confrontations with member states. The judges of the EACJ are well aware of the impact of the *Anyang' Nyong'o* decision, which led to the EAC Treaty being amended, in turn leading to the jurisdiction of the Court being further limited and the security of tenure of the Court judges being compromised. The EACJ judges are also aware of what is happening within the SADC Tribunal, which is currently suspended after interpreting a highly politicised case involving the land reform process in Zimbabwe from a human rights angle. It is thus likely that the EACJ will continue to be careful when receiving human rights cases or cases with human rights elements. Perhaps the current hesitation on the part of the EACJ to directly interpret human rights related cases is the correct approach and thus crucial for its survival, but it is not an ideal solution to the existing ambiguity over its human rights jurisdiction.

On the part of the politicisation, it is hard to deny that the activities of the EACJ are highly politicised by political leaders within the EAC. To date, the protocol that would extend the jurisdiction of the EACJ to the adjudication of human rights cases has not been adopted, even though the process for adopting such a protocol started back in 2004. Furthermore, the EAC Treaty amendments of 2007, which were undoubtedly a political response to the EACJ's decision regarding the election of members of the EALA from Kenya, resulted in the jurisdiction of the EACJ being limited and its independence being curtailed. The recent attempt for enabling the EACJ to receive cases of criminal nature is yet another proof of the politicisation of the Court. Even if the EACJ is to be given an explicit human rights mandate, the fact that it lacks judicial independence would also limit its ability to protect human rights.

With the continuing struggle to give the EACJ an explicit human rights mandate persisting, human rights situation in East Africa is dismal. It is a fact that in East Africa, still there are on-going restrictions on the enjoyment of civil and political rights together

with social and economic rights.⁴⁶ Acts of physical violence prevail particularly with regard to vulnerable groups; and East African citizens are to a large extent being denied justice in their domestic courts.⁴⁷ In 2007 the world witnessed human rights violations in Kenya during the violence that ensued after the national elections.⁴⁸ The region also experienced the unforgettable Rwandan genocide of 1994, during which an estimated 800 000 people lost their lives. Such a tragedy needs an appropriate transitional justice, a role that the EACJ can also be involved.⁴⁹

Despite of the lack of human rights jurisdiction, many cases brought before the EACJ have been directly linked to human rights. Applicants tend to invite the EACJ to interpret the African Charter as provided in the EAC Treaty. Seemingly, EAC citizens have developed confidence in the EACJ with regard to the administration of community justice, which includes human rights protection.

1.3 Research objective and questions

The primary objective of this study is to assess whether the EACJ can play a role in protecting human rights, as well as suggesting the ways of improving such role. The rationale behind this study is that the current approach of regional integration has shifted from concerning merely economic integration to include social, economic and political integration initiatives. As such, human rights, peace and security, development,

⁴⁶ For example, in *Christopher Mtikila v Attorney General*, Civil case No 10 of 2005, the Court of Appeal of Tanzania, the Court of Appeal of Tanzania was not bold enough to declare that citizens of Tanzania have a right to take part in the general elections without being forced to be affiliated with any political party.

⁴⁷ See the East and Horn of Africa Human Rights Defenders Project (EHAHRDP): A report on an overview of the human rights situation in the east and the horn of Africa presented to the 49th session of the African Commission on Human and Peoples in 2011, available at <http://www.defenddefenders.org/wpcontent/uploads/2011/07/49th--report-April-2011.pdf> (accessed on 12 August 2012).

⁴⁸ It is estimated about 1 200 people lost their lives as a result of the violence that broke out in response to the presidential election results. See the report by the United Nation High Commissioner for Human Rights fact-finding mission to Kenya, February 2008, available at <http://blog.ushahidi.com/wpcontent/uploads/2008/03/final-ohchr-kenya-report-19-march2008.pdf> (accessed on 12 August 2012).

⁴⁹ The UN Human Rights Council:
http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm (accessed on 12 August 2012).

HIV and AIDS, science and technology, and legal affairs have all become an integral part of regional integration. For this reason, judicial organs play a key role in ensuring that regional integration is fast-tracked and deepened in a manner envisaged by member states. This study, therefore, addresses the key question of how the EACJ can effectively protect human rights in the EAC. In responding to this question, the study seeks to answer the following related sub-questions:

- I. Are there human rights norms in the EAC? In the second chapter, this study responds to this question by highlighting the existing features that signify the existence of human rights in the EAC. It is evident from the EAC Treaty itself that the EAC has integrated human rights into its agenda.
- II. After answering the first sub-question, this study proceeds by addressing the second sub-question: What is the role of the EACJ in protecting human rights in the EAC so far? In chapter 3, this study analyses the functioning of the EACJ in its quest to protect human rights. Accordingly, the study provides some alternatives for the EACJ in its quest for the protection of human rights in the Community, as a response to the main 'how' question of this study.
- III. When assessing the functioning of a judicial organ such as the EACJ, it is crucially important to pinpoint the main challenges facing such an organ so as to identify relevant recommendations for its functioning. In doing so, this study answers the following question: What are the existing challenges currently facing the EACJ that undermine its role in protecting human rights? In responding to this question, the study recommends some solutions and approaches that could support the Court in overcoming the existing challenges.

1.4 Significance of the study

This study acknowledges the existing literature on the work of African sub-regional courts in protecting human rights. However, this study adds a new dimension to the well documented literature. The main focus of this study is on the human rights work of the EACJ. In terms of this focus, the study settles the continuing debate on whether the EACJ has a role to play in protecting human rights in the EAC. This study shows that human rights form an integral part of the EAC integration initiatives and, therefore, the EACJ has a role to play in it. For meeting its objectives, the study provides some solutions for the EACJ in order to protect human rights effectively. The recommendations given can be adopted by EAC leaders and Court judges to enable the Court to pursue its goals effectively. This study is also significant as it exposes some of the key challenges facing the EACJ; in the existing literature the drawbacks facing the EACJ are hardly addressed.

One significant feature of this study relates to chapter 4, which attempts to promote the culture of judicial independence in the EACJ, which the study finds is a prerequisite for the effective protection of human rights. To date, there is no study that has addressed the issue of judicial independence of African sub-regional courts. This study therefore, apart from adding a new contribution by promoting the culture of judicial independence of the EACJ as a way of creating the basis for effective human rights protection, also promotes the culture of judicial independence for all existing international judiciaries. This study is thus of general value and importance to all legal academics, legal practitioners and human rights defenders, not only in Africa, but also across the world.

1.5 Literature review

A number of studies have been conducted relating to recent human rights developments in RECs. In these studies, despite the fact that many scholars reflect on

how human rights are realised in RECs, few have discussed the politicisation of REC judicial organs or have dwelt specifically on the work of the EACJ.⁵⁰

In answering the question as to whether human rights should be incorporated into RECs, Ebobrah is of the view that RECs could be essential for the realisation of human rights in Africa without ‘compromising their economic objectives’. He adds that there should be a good relationship between RECs and their member states, as well as with the African Union (AU), in order for RECs to strongly adhere to human rights.⁵¹ This argument affirms the potential of RECs in promoting and protecting human rights in Africa. What should be considered is the manner in which a particular REC can discharge its duties and its relationship with other existing systems at regional and domestic level in its quest for the safeguarding of human rights.

Concerning the impact of the amendments to the EAC Treaty on the functioning of the EACJ, the independence of the EACJ is in danger of being tarnished. At times, the 2007 amendments to the EAC Treaty have been criticised for being ‘superfluous’. According to Onoria, the consequences of the amendments to the EAC Treaty are ‘far-reaching’ on the side of the EACJ. He is of the view that the amendments have weakened the

⁵⁰ AR Lamin ‘African sub-regional human rights courts: The ECOWAS Court of Justice, the SADC Tribunal and the EAC Court of Justice comparative perspective’ in J Akokpari & DS Zimber (eds) *African Human Rights Architecture* (2008); ST Ebobrah ‘Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Communities of West African States’ (2009); H Onoria ‘Locus standi of individuals and non-state entities before regional economic integration judicial bodies in Africa’ (2010) 18 *African Journal of International and Comparative Law* 143; N Nwogu ‘Regional integration as an instrument of human rights: Reconceptualising ECOWAS (2007) 6 *Journal of Human Rights* 345; Murungi & Gallinetti (2010) 7 *SUR-International Journal on Human Rights* 119; ST Ebobrah ‘Litigating human rights before sub-regional Courts in Africa: Prospects and challenges’ (2009) 17 *African Journal of International and Comparative Law* 79; SF Musungu (2003) 3 *African Human Rights Law Journal* 88; SB Bossa ‘Towards a protocol extending the jurisdiction of the East African Court of Justice’ (2006) 4 *East African Journal of Human Rights and Democracy* 31; TO Ojienda ‘Alice’s adventures in Wonderland: Preliminary reflections on the jurisdiction of the East African Court of Justice’ (2004) 2 *East African Journal of Human Rights and Democracy* 94; OC Ruppel ‘Regional economic communities and human rights in east and southern Africa’ in JA Bösl & J Diescho (eds) *Human rights in Africa* (2009).

⁵¹ Ebobrah ‘Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the economic communities of West African states’ (2009) 15.

functioning of the EACJ; as a result, the work of the Court may be fruitless owing to a lack of independence.⁵²

As regards the independence of the EACJ judges, these judges are appointed by the Summit after being nominated by the EAC member states. However, there is no uniformity in the procedures for nominating judges among the EAC countries. The functioning of the EACJ is thus in potential danger of coming under the scrutiny of political leaders.⁵³ Bartels acknowledges that ‘the removal of political involvement from the appointment process is not necessarily cost free’.⁵⁴ In stating the advantages for member states when nominating a judge, Bartels avers that having a national judge in the tribunal – by virtue of the selection and nomination process – means that the defendant state at the receiving end of the court’s decision would find it politically difficult to claim that the decision was biased.⁵⁵

In analysing the necessity of establishing a two-tier court structure in the EACJ, to some the establishment of the Appellate Division by itself is commendable, as individuals will have a forum where they can lodge their appeals. To others, the timing of establishing the Appellate Division invites more scepticism.⁵⁶ Viljoen avers that ‘although the addition of an Appellate Division seems superfluous and invites the suspicion of new appointments closely aligned to governments and their priorities, the addition of such a division in itself is not a cause for alarm’.⁵⁷

In November 2004, the decision was reached to embark on the process for adopting a protocol to extend the jurisdiction of the EACJ. However, since then the process has been delayed owing to the lack of political will on the part of EAC political leaders. A reference was subsequently filed before the EACJ declaring that the delay in adopting

⁵² Onoria (2010) 54 *Journal of African Law* 74, 84.

⁵³ Art 24(1) of the EAC Treaty.

⁵⁴ L Bartels ‘Review of the role, responsibilities and terms of reference of the SADC Tribunal (2011) 70.

⁵⁵ As above.

⁵⁶ See Onoria (2010) 54 *Journal of African Law* 74.

⁵⁷ Viljoen (2012) 500.

the protocol for extending the EACJ with human rights and appellate jurisdiction was against the principle of good governance to which the EAC member states are bound to adhere. According to Ruhangisa, the delay in adopting the Protocol that would extend the EACJ's jurisdiction to include dealing with human rights matters denies the Court an opportunity to play an important role in addressing human rights violations in the Community.⁵⁸ Ojienda is of the view that there will be delays in adopting the Protocol because EAC political leaders are the ones heavily involved in the process.⁵⁹ Furthermore, Bossa emphasises the importance of a strong EACJ in order to reach its main objective of attaining political federation.⁶⁰ In stressing the importance of regional courts to have a human rights mandate, Quashigah is of the view that for courts to be effective in their protection of human rights, the nature of their jurisdiction and the effects of their decisions matter more than their creation.⁶¹ It is evident that the mere establishment of the EACJ is not enough when there is an urgent need to promote and protect human rights in East Africa.

Generally, enforcement of the decisions of an international judicial organ is not the custom in some states. Murungi and Gallinetti highlight the importance of REC courts to have their decisions for protecting human rights enforced.⁶² There are concerns that the REC courts will suffer the same difficulties in having their decisions complied with by member states as any other international court.⁶³ This being one of the most pressing challenges facing most international courts, this study attempts to suggest one of the best practices that could be adopted by the EAC to allow the decisions of the EACJ to be enforced without facing unnecessary limitations from politicians.

⁵⁸ JE Ruhangisa (2011) 'The East African Court of Justice: Ten years of operations, achievements and challenges', available at <http://www.eacj.org/docs/EACJ-Ten-Years-of-Operation.pdf> (accessed on 12 February 2011) 26.

⁵⁹ Ojienda (2004) 2 *East African Journal of Human Rights and Democracy* 94, 96.

⁶⁰ See Bossa (2006) 4 *East African Journal of Human Rights and Democracy* 31.

⁶¹ EK Quashigah 'Human rights and integration' in R Lavergne (ed) *Regional Integration and Cooperation in West Africa: A multidimensional perspective* (1997) 261, 266.

⁶² See Murungi & Gallinetti (2010) 7 *SUR-International Journal on Human Rights* 119.

⁶³ Murungi & Gallinetti (2010) 7 *SUR-International Journal on Human Rights* 119, 128.

Little attention was given to the Court in its early days of existence.⁶⁴ Perhaps EAC member states underestimated the impact that the EACJ could have in the EAC.⁶⁵ Today, the EACJ plays an important role of guiding EAC integration process as well as contributing to the advancement of the regional jurisprudence. According to Gathii, the EACJ ‘exemplifies a new trend in African regional human rights enforcement’.⁶⁶ He is of the view that the EACJ was mainly established to deal with trade disputes, but it is able to find a space for human rights, due to the nature of the EAC integration. It is the intention of this study to narrate how the EACJ has afforded to accommodate human rights related disputes. Contrary to Gathii’s argument, the EACJ is not adjudicating human rights disputes. The Court’s findings in cases that have human rights allegations are not even placing weight in human rights. The Court is simply employing judicial activism which indirectly protects human rights.

1.6 Research methodology

This study mainly applies comparative and textual analysis methods of inquiry. The study has used a comparative method of inquiry in order to take some of the best practices from other international jurisdictions on how human rights are effectively protected by judicial organs, with respect to the judicial organs originating from an economic integration bloc. In the process, this study has adopted relevant primary and secondary sources for finding relevant information that is useful for the study. Different treaties, regulations and policy directions are used as primary sources for the study. Writings of learned scholars, reports of reputable personnel and academic articles are used as secondary sources. Along with the above-mentioned primary and secondary sources, unstructured interviews were also conducted. The interviews mainly involved the Registrar of the EACJ, the Principal Judge and the President of the Court. The information gathered for this study was up to date as at 30 June 2014.

⁶⁴ As above.

⁶⁵ J Gathii ‘Mission creep or a search for relevance: The East African Court of Justice’s human rights strategy’ (2013) 24 *Duke Journal of International and Comparative Law* 249, 250.

⁶⁶ As above.

1.7 Definition of key terms

Human rights

There is no universally accepted definition of human rights. According to *Black's Law Dictionary*, human rights consist of the freedom, immunity and benefits that, according to modern values, all human beings should be able to claim as a matter of right in the society in which they live.⁶⁷ The concept of human rights is closely allied with ethics and morality within societies. There are different theories attempting to define human rights. It is not the intention of this study to dwell in such theories. This study's approach on human rights is based within the ambit of international human rights law, that, international community is responsible to safeguard the promotion and protection of human rights, through different means including mechanisms in a regional integration.

Governments are responsible for ensuring that citizens are not deprived of their rights and freedoms. Further, human rights entail internationally guaranteed legal entitlement of individuals to the state.⁶⁸ At the 1993 World Conference on Human Rights in Vienna, it was declared that all human rights are universal and indivisible.⁶⁹ Human rights create entitlement and beneficiaries, with the beneficiaries of those rights being individuals.⁷⁰ In the past, matters concerning human rights were considered to be dealt with at national level per se, which is not the case under the modern international law approach.⁷¹ In principle, in terms of current international law practice, individuals are in a position to challenge the state when its authorities violate their rights, and they are able to channel their claims to an international organ to which their state is a party.⁷²

Regional integration, economic integration

⁶⁷ *Black's Law Dictionary* (2009) USA.

⁶⁸ W Kalin & J Kunzli *The law of International human rights protection* (2009) 32.

⁶⁹ Kalin & Kunzli (2009) 20.

⁷⁰ Kalin & Kunzli (2009) 31.

⁷¹ See RKM Smith *Textbook on international human rights* (2005) 7.

⁷² Kalin & Kunzli (2009) 17.

Regional integration is sometimes referred to as economic integration or regional economic integration. Most scholars define regional integration in terms of an economic perspective. According to Asante, economic integration is the process where two or more countries in a particular area voluntarily join together to pursue common policies and objectives, in matters of general economic development or in a particular economic fields of common interest, for the mutual advantage of all the participating states. Economic integration envisages economic ties between states which are aimed at harmonising economic and social policies for enhancing sustainable economic growth. In this study, regional integration refers to the process by which countries in a particular region agree to cooperate socially, economically, culturally and politically. The study will use the term 'regional integration' as it suits the contemporary nature of international cooperation, that is, the contemporary model of regional integration includes social, economic and political integration.

Regional economic communities, sub-regional

The terms 'region' and 'sub-region' need to be clarified. 'Region' refers to the continent; 'sub-region' refers to a sub-part of the continent. Regional economic communities exist when a group of countries in a particular region agree to form an association for the purpose of economic cooperation. In this study, the term 'regional economic communities' refers to the economic community blocs in Africa, as identified by the African Union. Regional integration can take a form of continental integration, which is integration that takes place at the continental level. Accordingly, states cooperate or adopt treaties that operate within a particular continent. 'Sub-continental cooperation' means sub-regional integration.⁷³ Sub-regional organisation means an intergovernmental or supranational organisation in a sub-part of the region or continent.

⁷³

Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Communities of West African (2009) 19.

International organisations, intergovernmental organisations and supranational organisations

Various terminologies are used when referring to international organisations, including commonly used terms such as ‘intergovernmental organisation’ and ‘supranational organisation’. International organisations are classified into different forms depending on the purpose of their establishment.

For the purpose of this study, an international organisation is referred to as a group of states or international institutions that, through a treaty agreement, have agreed to form an organisation with specified objectives. International organisations are legal persons whose objectives and functions are derived from their constitutive agreement. The powers derived from the agreement imply the intention of the founders of the organisation. The activities of the international organisations are also governed by the principles established under international law. For the purpose of the law of treaties, an international organisation is commonly defined as a non-state entity with an international legal personality separate from the state that establishes it.⁷⁴

A specific definition may have limited relevance for obtaining a meaningful understanding of international organisations.⁷⁵ The term ‘international organisation’ was widely used after the Second World War.⁷⁶ According to Schermers and Blokker, international organisations may be distinguished from other types of organisations such as international corporations and international non-governmental organisations.⁷⁷ International corporations are not established by international treaties. However, some international corporations may be created from international organisations.⁷⁸

A distinction is often made between intergovernmental and supranational organisations. Schermers and Blokker state in this regard that intergovernmental

⁷⁴ A Aust *Modern treaty law and practice* (2004) 54.

⁷⁵ C Brölmann *The institutional veil in International Law: International Organisations & the Law of Treaties* (2007) 13.

⁷⁶ Schermers & Blokker *International Institutional Law* (2011) 30.

⁷⁷ Schermers & Blokker (2011) 47.

⁷⁸ As above.

organisations consist of ‘executive branches of governments’ of the state parties.⁷⁹ The main difference between an intergovernmental organisation and a supranational organisation is that a supranational organisation has the power to make binding decisions and enforce such decisions, and they have financial autonomy in that they do not entirely depend on finance from member states.⁸⁰ By contrast, governments cannot be bound by the decisions of an intergovernmental organisation ‘against their will’.⁸¹ Binding decisions of intergovernmental organisations in most cases have to be unanimously approved by all members. Nevertheless, it is difficult to distinguish between supranational and intergovernmental organisations. As Schermers and Blocker point out, for a model of cooperation, such as that of the EU, which has its own parliament and judiciary, the term ‘supranational organisation’ is more appropriate.⁸²

Supranational organisations are best suited for protecting human rights, as they possess some important features which facilitate the placement of community legal order. As indicated above, such features includes the ability to make decisions which often become law and binding on member states;⁸³ and, as with the case of the EU, its laws have a direct effect on the legal regime of the member states.⁸⁴ Arguably, the EAC possesses most of the key features of a supranational organisation.

To avoid any kind of confusion, the terms ‘international organisations’ are used interchangeably to mean an agreement between different states or organisations, through treaty agreements, to cooperate in various economic, social and political

⁷⁹ Schermers & Blocke (2011) 55.

⁸⁰ Schermers & Blocke (2011) 56.

⁸¹ As above.

⁸² Schermers & Blocke (2011) 55.

⁸³ Under such circumstances a member state is obliged to adopt certain behaviour.

⁸⁴ J Klabbers *An Introduction to International Institutional Law* (2002) 28. Also see: R Collins & ND White (eds) *International organizations and the idea of autonomy: Institutional Independence in the International Legal Order* (2011); J Klabber & A Wallendahl (eds) *Research Handbook on the Law of International Organisations* (2011) AS Muller *International Organisations and their Host States: Aspects of their Legal Relationship* (1995); K Wellens *Remedies against International Organisations* (2002).

spheres in which the powers and functions of the organisation are governed by its founding instrument.

1.8 Chapter outline

This study consists of six chapters. The first chapter is generally an introductory one. It gives the general background to the study, the problem statement, the research objectives and the research questions together with the research methodology. The chapter also provides a review of the existing literature in relation to the study. The second chapter gives an overview of the existing human rights regime in the EAC. The chapter traces the source of human rights in the EAC. The main source of human rights in the EAC is found mainly in the existing EAC Treaty and Protocols and the work of its organs. The third chapter looks at the overall functioning of the EACJ in its mission to protect human rights. The chapter touches on the jurisdiction, admissibility, accessibility and judgments of the EACJ in relation to human rights protection. In order to give relevant recommendations and explore the extent to which the EACJ needs to improve in protecting human rights, this study dedicates chapter 4 to addressing the existing challenges facing the EACJ. The major challenge facing the EACJ is the politicisation in its functioning. Indeed, the politicisation of the Court has gone as far as endangering the independence of the Court. Consequently, chapter 5 of this study is devoted to promoting a culture of judicial independence at the EACJ. It is an important chapter owing to the fact that it exposes the issue of judicial independence of an international court which has not been strongly articulated particularly with regard to African regional courts. Finally, chapter 6 deals with the conclusion and recommendations.

CHAPTER 2

THE CURRENT HUMAN RIGHTS REGIME IN THE EAST AFRICAN COMMUNITY

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2.1 Introduction

After the Second World War, international law started to play a more meaningful role in regulating relations between states.¹ The formation of the United Nations (UN) in 1945 paved way for the creation of many other international organisations of which international law plays a key part. Different regional groupings, particularly in Europe, started to emerge, with a number of objectives that included the maintenance of peace and the observance of human rights.² The Council of Europe, established in 1949, is one of the leading examples of regional arrangements aimed at achieving greater unity and promoting peace and security, democracy, rule of law and human rights in order to enhance the economic and social progress of European citizens.³

In Africa, after the independence of most states on the continent, the Organisation of African Unity (OAU) was formed in 1963 with a number of objectives that included decolonising the continent and creating a foundation for African regionalism. During the

¹ J Dugard *International law: A South African Perspective* (2011) 1.

² P Sands & P Klein *Bowett's law of International Institutions* (2001) 170.

³ Art 1 of the Statute of the Council of Europe, 1949.

early 1960s, the OAU and its member states did not pay much attention to human rights. Human rights were treated as an unnecessary liability, with states focusing more in protecting their sovereignty. As a result, international law had little influence in most independent African states at that time.

Human rights started to be given meaningful attention within Africa in 1981, when the African Charter on Human and Peoples' Rights (African Charter) was adopted by the OAU. After transforming the OAU into the African Union (AU) in 2002,⁴ activities in connection with the promotion and protection of human rights in Africa increased. The pattern for promoting and protecting human rights in the Continent has gained further momentum after the recent involvement of African sub-regional organisations. The East African Community (EAC) has galvanised itself as a regional economic community that considers human rights as part of its integration agenda.⁵ The EAC Treaty has made the recognition, promotion and protection of human rights one of the fundamental principles governing the Community.⁶ Since the re-birth of the EAC in 1999, human rights have been given special attention compared with the defunct Community of 1967.

There is still an on-going debate as to whether sub-regional courts established in African regional economic communities (RECs) should have any role in human rights bearing in mind that member states of those RECs subscribe to numerous international and regional human rights bodies, in addition to their existing domestic mechanisms for promoting and protecting human rights. Further, there are questions as to whether sub-regional organisations have the legitimacy to promote and protect human rights. The

⁴ The AU is an intergovernmental organisation of all independent African states except for Morocco. In July 2011, Southern Sudan became the 54th state of the AU. The 1999 Sirte Declaration transformed the OAU into the AU, which led to the adoption of the Constitutive Act of the AU in 2000. The AU was officially launched in 2002 in Durban, South Africa and has inherited various objectives from its predecessor, the OAU. See T Maluwa 'From the Organisation of African Unity to the African Union: Rethinking the framework for inter-state cooperation in Africa in the era of globalisation' (2009) 8 *University of Botswana Law Journal* 49.

⁵ See ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *African Human Rights Law Journal* 225.

⁶ Art 6(d) and 7(2) of the EAC Treaty.

presence of human rights in the EAC Treaty itself is sufficient to proclaim that the EAC as a community and its member states have a duty to observe and protect human rights.

The primary aim of this chapter is to establish the basis for the existing human rights regime in the EAC. In meeting its objective, the chapter answers the question whether there are human rights values in the EAC. The chapter begins by giving a brief historical background of EAC integration and its role in promoting and protecting human rights. The chapter proceeds by discussing the legal status of the EAC under international law. Then, the chapter further discusses the legal basis that mandates the EAC to engage in activities that promote and protect human rights. Finally, the chapter ends by outlining some of the advantages of having human rights within a regional economic community.

2.2 Background to East African integration

Regional integration in East Africa has its roots in the colonial period.⁷ In 1967, the newly independent states of Kenya, Uganda and Tanzania entered into a Treaty that established the East African Cooperation. At that time, human rights were not considered to be part of the EAC integration arrangements. The three countries enjoyed strong ties of economic cooperation, and the East African Cooperation was viewed by many at the time as the best model of regional integration in Africa compared to the other regional economic blocs in existence.⁸ The establishment of the Community was seen as a major step in the right direction in addressing the economic challenges in the region.⁹

Regional integration is one of the many ways that can improve the social-economic life of the integrated societies within a geographical area. At present, there are relatively successful regional groupings around the world, attempting to improve the living

⁷ For a general reflection on the history of East African integration see A Hazlewood 'The end of the East African Community: What are the lessons for regional integration schemes?' in RI Onwuka (ed) *The Future of regionalism in Africa* (1985) 40; JS Nye *Pan-Africanism and East African integration* (1966) 1.

⁸ N Orloff 'Economic integration in East Africa: The Treaty for East-African Cooperation' (1968) 7 *Columbia Journal of Transnational Law* 302, 311.

⁹ As above.

standards of their people. The European Union (EU) provides a model in the contemporary framework for regional integration, based on the economic advancements it has made.

It is not difficult to trace the roots of African regional integration initiatives. The enterprise towards African regionalism was pioneered by the Pan-African movement during the struggle for African independence,¹⁰ and the idea was realised with the establishment of the OAU in 1963.¹¹ The road towards East African integration has never been smooth. Over-enthusiasm and differences in economic and political approaches between the leaders of East Africa had made the 1967 EAC to last for ten years only. The defunct Community derailed the viability of a strong supranational organisation in the region. Three attempts have been made so far to establish a strong supranational organisation in the region. Such attempts include the establishment of the East African Common Services Organisation (EACSO) in 1961, the East Africa Community of 1967 and the revival of the Community in 1999. This evolution reflects the on-going struggle to establish a sustainable and lasting regional organ in East Africa. It is hoped that the current EAC integration will deepen and last much longer than the former EAC, which lasted only ten years. The road towards East African integration is mirrored in three phases, namely, the colonial period, the postcolonial period and the revived EAC.

2.2.1 Colonial period

Countries in East Africa were placed under the colonial rule of the German and British empires. During the period between 1890 and 1895, Great Britain and Germany concluded various agreements to resolve disputes among colonists which resulted in Uganda and Kenya being under the domination of the British and Tanzania (by then Tanganyika) being under German rule.¹² After the First World War, Tanzania fell under

¹⁰ See AA Mazrui 'Africa and the black diaspora: The future in historical perspective' (1975) 30 *International Journal* 569.

¹¹ AMR Ramolefe & AJGM Sanders 'The structural pattern of African regionalism' (1972) 5 *Comparative and International Law Journal for Southern Africa* 155.

¹² Orloff (1968) 7 *Columbia Journal of Transnational Law* 302.

the trusteeship of Great Britain as a result of all German colonies being taken away by the League of Nations, thus establishing British control in the region.

In 1917, the colonial British government started to eradicate trade barriers in its protectorate empire by establishing a customs union between Kenya and Uganda. As a result of Tanzania being placed under British rule in 1921, a common currency was established that was used in all the three countries.¹³ In 1922, the common external tariff applicable to all three countries was expanded and, in 1927, the former EAC reached a common market stage as goods could be transported freely between Kenya, Tanzania and Uganda.¹⁴

Close cooperation between the three countries gained momentum in 1926, after the Conference of Governors of East Africa was established to meet periodically in order to discuss administrative matters of the region.¹⁵ Governors responsible for the British Protectorate in East Africa came with the proposal for the establishment of a British Colonial office for an East-African inter-territorial organisation.¹⁶ This led to the establishment of the East Africa High Commission (EAHC) in 1948.¹⁷ The EAHC had the power to issue decrees regarding the administration and supervision of common services in the region.¹⁸ It also oversaw a range of common service initiatives for the region that included a regional university (the University of East Africa), harbours, airways, railways, unions (postal and customs), and other departments (telegraph and meteorology).¹⁹

When the cooperation between the three countries at that time intensified, the idea of forming a political federation started to emerge. In 1960, Tanganyika's independence

¹³ As above.

¹⁴ Orloff (1968) 7 *Columbia Journal of Transnational Law* 302, 304.

¹⁵ GM Kakuli 'Judicial cooperation in East Africa: Its history and its future' (2004) 10 *East African Journal of Peace and Human Rights* 30, 35.

¹⁶ Orloff (1968) 7 *Columbia Journal of Transnational Law* 302, 304.

¹⁷ Kakuli (2004) 10 *East African Journal of Peace and Human Rights* 30, 35.

¹⁸ As above.

¹⁹ B Katembo 'Pan Africanism and development: The East African Community model' (2008) 2 *Journal of Pan African Studies* 107, 108.

was put on hold by the late President Nyerere, as a way of expediting the East African federation.²⁰ It can be argued that the move to an East African federation, at that time, was too ambitious because all three states were democratically immature with contrasting economic and political ideologies. Also, the constitutions of the three countries did not uphold the human rights values which are essential for a political federation. Nevertheless, attempts to establish a political federation continued even after all three countries had gained their independence.

2.2.2 Postcolonial period

On 9 December 1961, Tanganyika became the first of the three countries of the former EAC to gain its independence. As a seemingly political move, the EAHC was replaced by the East African Common Services Organisation (EACSO) on the very same day.²¹ This constituted a step towards establishing an independent organisation that belonged to the East African countries. Uganda and Kenya later attained their independence in 1962 and 1963 respectively. The move towards East African integration gained pace when the leaders of the three countries made a statement of intent to establish the East African federation by 1964.²² At that point in time, the three countries were just emerging from the shadow of colonialism, each having many socio-economic challenges, and ultimately, the political federation was never established as envisaged. However, the three states signed what was called the Kampala Agreement, reinstating their desire to establish a regional bloc and strengthen the existing common market.²³

The Treaty for East African Cooperation was eventually signed in 1967, signifying the second phase of East African integration.²⁴ Unfortunately, the initial EAC integration only lasted ten years, as it collapsed in 1977. Some of the reasons advanced for this collapse include ideological differences in economic approaches, as Tanzania advocated

²⁰ Orloff (1968) 7 *Columbia Journal of Transnational Law* 302, 310.

²¹ Katembo (2008) 2 *Journal of Pan African Studies* 107, 108.

²² Orloff (1968) 7 *Columbia Journal of Transnational Law* 302, 310.

²³ As above.

²⁴ The Treaty was signed in 6 June 1967. Enabling legislation was passed by Uganda on 24 November, Tanzania on 27 November, and Kenya on 29 November of the same year.

a socialist economic model, while Kenya advocated an open market economy.²⁵ The imbalance of trade between Kenya and Tanzania, unequal distribution of benefits from the common services, and the presence of the centralised east African industrial, commercial and financial services in Nairobi, Kenya, are also believed to be major factors in the demise of the former EAC. The dictatorship of Idi Amin from 1971 to 1979 featured massive human rights violations in Uganda and further derailed the integration progress.²⁶

2.2.3 The re-birth of the East African Community

After the collapse of the former EAC in 1977, an increasing number of other regional economic communities emerged in Eastern and Southern Africa. The Economic Community of Western African States (ECOWAS) of 1975, the Southern African Development Co-ordination Conference (SADCC) established in 1980 and later replaced by the Southern African Development Community (SADC) in 1992, the Preferential Trade Area (PTA) for Eastern and Southern Africa established in 1981 and later transformed into the Common Market for Eastern and Southern Africa (COMESA) in 1993 are some of the examples of regional arrangements which were established during the 1970s and 1980s. Regional groupings were seen as one of the ways way for improving economic development in Africa, which was lacking after the independence of most African countries. After the end of the cold war, some regional groupings had to change their policies and objectives so as to cope with the changing global economic and political environment. This led to the revision and adoption of new regional economic community treaties and protocols in the 1990s.

As a result of the increasing regional groupings in Africa from the 1970s to the 1990s, it was inevitable that the EAC integration would become a matter of urgency for East African leaders. In 1984, the member states of the former EAC 'negotiated a mediation agreement for the division of assets and liabilities' following the dissolution of the

²⁵ Katembo (2008) 2 *Journal of Pan African Studies* 107, 107.

²⁶ As above.

Community in 1977.²⁷ The official turning point came when negotiations for reviving the EAC commenced in 30 November 1993. These negotiations led to the establishment of the Permanent Tripartite Commission for East African Cooperation. This Commission was mainly mandated to identify some of the key areas for cooperation and to propose the most appropriate regional arrangement for the community.²⁸ The Commission assessed the possibility of cooperation among the three countries in economic, social, political, peace and security areas. The process of reviving the EAC gained impetus in 1997, when the East African Cooperation Development Strategy (1997–2000) was launched.²⁹

The Commission and the East African Cooperation Development Strategy laid the foundation for the establishment of the EAC. In 1997, the Heads of State of the three countries (Kenya, Tanzania and Uganda) received a report from the Permanent Tripartite Commission regarding the progress and possibilities for closer cooperation of the three countries.³⁰ The Permanent Tripartite Commission was then directed by the Heads of State to embark on the process of upgrading the agreement establishing the Permanent Tripartite Commission for East African Cooperation into a treaty.³¹ The treaty-making process involved different stakeholders from the three governments, the general public and the secretariat of the Commission for East African Cooperation. The process, which took three years to complete, involved widespread negotiations and public comment from the mass media and other forms of communication and collecting the views of East African citizens was deemed crucial for establishing a public owned integration.

The Treaty for the establishment of the new EAC was signed on 30 November 1999 and came into force on 7 July 2000, after being ratified by the original three member states

²⁷ See <http://www.eac.int> (accessed on 13 January 2013).

²⁸ Kakuli (2004) 10 *East African Journal of Peace and Human Rights* 34, 49.

²⁹ WTK Kaahwa 'The Treaty for the establishment of the new East African Community: An overview' (2001) 7 *African Yearbook of International Law* 61, 62.

³⁰ As above.

³¹ <http://www.eac.int> (accessed on 13 January 2013).

– Kenya, Tanzania and Uganda. In June 2007, Burundi and Rwanda acceded to the EAC Treaty to become members of the Community.³² The initial member states of the EAC had some characteristics in common, such as culture, history and language. These characteristics are fundamental for deeper integration as they contribute to the formation of one unified community with common values. Human rights are not stated as one of the objectives of the EAC. What is apparent is that the ultimate goal of the Community is to reach a political federation, in that the EAC Treaty envisages a step-by-step process for creating a federation.³³ The EAC is now at the common market stage which has been realised in phases as provided in the East African Common Market Protocol.

The EAC consists of organs and institutions. The organs of the EAC include the Summit, the Council, the Co-ordination Committee, sectoral committees, the East African Court of Justice (EACJ), the East African Legislative Assembly (EALA), and the Secretariat.³⁴ The institutions of the EAC consist of bodies, departments and services as may be established by the Summit.³⁵ Currently, the EAC has five institutions, namely, the Lake Victoria Basin Commission, Civil Aviation Safety and Security, the Lake Victoria Fisheries Organization, the Inter-University Council for East Africa and the East African Development Bank. The functions of the institutions and organs of the Community are subject to the powers conferred upon them by the Treaty and special rules.³⁶

In determining what constitutes an institution of the Community, in *Modern Holdings (EA) Limited v Kenya Ports Authority*³⁷ the claimant claimed compensation against the respondent for breach of contract. The issue before the EACJ was whether the respondent, a statutory body providing services within the EAC, qualifies to be an institution in the Community. This respondent was a statutory body created in terms of

³² As above. .

³³ Art 5(2), 75(2) and 76(2) of the EAC Treaty.

³⁴ Art 9 of the EAC Treaty.

³⁵ Art 9(2) of the EAC Treaty.

³⁶ Art 9(4) of the EAC Treaty.

³⁷ *Modern Holdings (EA) Limited v Kenya Ports Authority*, Ref No 1 of 2008.

the provisions of section 3 of the Kenya Ports Authority Act. The Court held that the mere fact that the respondent was providing services to members of the Community and its citizens did not make the respondent an institution of the Community. An institution of the Community must be established by the Summit.

As discussed in the following chapters, the case outlined above reflects on the limited jurisdiction that the EACJ currently has in dealing with matters relating to East African integration. In a situation where an institution and a company from two different countries within the scope of integration are in a contractual dispute, there is no other appropriate forum for dealing with such a dispute other than the Community Court. By undermining the powers of the EACJ to deal with integration concerns, the clock might as well be turned back to 1977, when an attempt to establish a supranational organ proved to be futile.

The revival of the EAC has opened a new chapter in East Africa. The current EAC is considering strong cooperation among member states. With the mention of human rights in the EAC Treaty, Community citizens are expecting improved human rights situation within the national level. The presence of the EACJ in particular provides an opportunity for checks and balance in the work of the Community organs and institutions, as well as the activities of the member states. The member states of the EAC had found the necessity of establishing the EACJ that will supervise all the Community activities. However, the established Court is much restricted in its activities. p. It is important that EAC member states do not repeat the mistakes of the former EAC, which limited the jurisdiction of the East African Court of Appeal (EACA) in the adjudication of human rights disputes from member states. Devine demonstrates ways to which an intergovernmental organisation can effectively protect human rights. He is of the view that member states should give the community court a mandate to

adjudicate human rights so as to create a peaceful society which will help in realising the community objectives.³⁸

Considering the pace of the EAC integration, it is not surprising to see that the EACJ is dealing with numerous cases with human rights elements, with more cases being expected as integration deepens. Accordingly, EAC citizens will start approaching the EACJ, seeking remedies relating to the implementation of the Protocols on Customs Union and Common Market, in situations where their rights are denied. There is a great likelihood that cases relating to non-tariff barriers will be taken to the EACJ, necessitating the expansion of the Court's jurisdiction, as its current mandate is arguably falling short of the demands of EAC citizens.³⁹

2.3 The EAC as a subject of international law and its position in realising human rights

In any legal system, certain entities possess rights and duties enforceable by law. In the past, international law regulated the relationships between states only. Shortly after the Second World War, international law began to recognise different subjects apart from states. Today, international organisations are very much subjects of international law. . These international organisations started to emerge as early as the 19th century, and included the establishment of early multilateral organisations such as the International Telegraph Union (1865) and the European Commission of the Dumbé (1856).⁴⁰ However, during that time, multilateral institutions were yet to be recognised as subjects of international law. The legal nature and status of international organisations only started to be recognised as subjects of international law after the establishment of the UN.⁴¹ Some of the activities performed by the UN were not attributed in the UN Charter, but they were held to be essential in fulfilling its objectives. It is from this

³⁸ DJ Devine 'The protection of human rights in the case of supranational economic integration' (1990) 6 *South African Journal on Human Rights* 48, 58.

³⁹ KC Kamanga 'Fast tracking East African integration and treaty Law: *Pacta sunt servanda* betrayed? (2010) 3 *Journal of African and International Law* 697, 713.

⁴⁰ J Crawford *Brownlie's principles of public international law* (2012) 166.

⁴¹ *Reparation for injuries suffered in the service of the United Nations* Advisory Opinion, ICJ Rep 149 (*Reparation* case).

juncture that international organisations started to be under the scrutiny of international law, making them subjects of international law. Therefore, the EAC, being the subject of international law, possesses certain rights and duties which are enforceable by law.

The main international legal sources governing the relationship between international organisations, or states and international organisations, include the Vienna Convention on the Law of Treaties (Vienna Convention),⁴² Draft Articles on the Responsibility of International Organizations,⁴³ Draft Articles on Responsibility of States for Internationally Wrongful Acts,⁴⁴ and the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (Vienna II Convention).⁴⁵ The main legal source governing the work of international organisations is the founding treaties and protocols for their establishment. In addition to the treaties and protocols, international organisations are governed by the rules of the organization. The rules of the organisation emanate from the resolutions, directions, decisions and internal rules adopted by its organs and institutions.⁴⁶

International organisations are established by treaties governed by international law. Generally, international organisations possess the status of an international legal personality. In addition to state parties, international organisations may include other entities that become a party in the organisation.⁴⁷ In concluding the EAC Treaty, EAC member states established an international organisation containing a number of organs and institutions with specific powers and duties.

Being the subject of international law, an international organisation such as the EAC together with its member states and institutions is obliged to adhere to international

⁴² Vienna Convention, 1969.

⁴³ Draft Articles on the Responsibility of International Organizations, 2011.

⁴⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

⁴⁵ Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations, 1986.

⁴⁶ Dugard (2011) 315.

⁴⁷ Art 22(a) of the Draft Articles on Responsibility of International Organizations defines the term 'international organization'.

legal norms that include human rights. During the time of the European Communities (EC), the European Court of Justice (EU Court) on many occasions upheld international human rights norms to establish European Community legal order. In *Stauder v City of Ulm*,⁴⁸ the EU Court stated that human rights and fundamental freedoms, as accorded under the European Convention on Human Rights of the Council of Europe, formed part of the European Community legal order as the means of complying with the general international principles of law. Although the EU is yet to become a party to the Convention, the Court nevertheless upheld the general principles enshrined in the European Convention on Human Rights. The EU Court was cognisant that the then EC was a subject of international law and therefore it had to respect the values of international law residing in the different instruments. Also, the EU Court relied on the national constitutions of the member states to uphold human rights norms of the EU Treaty.

2.3.1 International legal personality

Legal personality refers to the mandate to undertake certain duties and rights as provided by law.⁴⁹ Under international law, an entity is distinct and independent from the member states that have entered into an agreement to establish such entity. According to Kelsen, legal personality entails the capacity of 'being a subject of legal duties and legal rights', being able to undertake legal transactions and the ability to 'sue and be sued'.⁵⁰ When an entity originates from a treaty, with specific rights and duties, that entity is regarded as a legal person.⁵¹ Thus, international organisations have legal status for their existence within an international law environment. International legal status enables an organisation to function as an independent legal entity distinct from

⁴⁸ ECJ Case 29/1969, [1969] ECR 419, see also *Nold v Commission*, ECJ case 4/1973 [1974] ECR 491.

⁴⁹ PHF Bekker *The legal position of intergovernmental organizations: A functional necessity analysis of their legal status and immunities* (1994) 53.

⁵⁰ Kelsen quoted in M Rama-Montaldo 'International legal personality and implied powers of international organizations' (1970) 44 *British Yearbook of International Law* 114, 114.

⁵¹ RA Wessel 'Revisiting the international legal status of the EU' (2000) 5 *European Foreign Affairs Review* 507, 509.

its members. By having such legal status, international organisations have the capacity to enter legally binding treaties and perform other duties as provided by the law.

Although international organisations existed as early as the 19th century, the term ‘legal personality’ is relatively new.⁵² While different definitional elements exist in defining international organisations, the key element of definition is the possession of an international legal personality.⁵³ Not all international organisations in the world have legal personality. For example, institutions such as the International Union for Conservation of Nature, whose members consist of states but whose membership is provided under domestic law, lack the status of legal personality under public international law.⁵⁴ Up to the beginning of the 20th century, states were the only entities recognised as having the status of legal personality under public international law.⁵⁵

An organisation will have the status of legal personality even when it is not indicated in the founding constitution. In the *Reparation* case,⁵⁶ the International Court of Justice (ICJ) considered the rights and duties conferred on the UN by the UN Charter to imply international legal personality status for the UN, regardless of the silence of the UN Charter in as far as the status of the international legal personality is concerned.⁵⁷ According to Crawford, the criteria for the possession of a legal personality by an intergovernmental organisation includes an association of states or other organisations with lawful objectives that are performed by specific organs; distinction in terms of legal powers between the member states and the organisation; and the existence of legal powers to undertake international obligations not only with regard to the member states.⁵⁸ After the *Reparation* case, most of the newly established international

⁵² Dugard (2011) 314.

⁵³ As above.

⁵⁴ As above.

⁵⁵ HG Schermers & NM Blocker *International institutional law* (2011) 986.

⁵⁶ *Reparation case*, 179.

⁵⁷ *Reparation case*, 180.

⁵⁸ Crawford (2012) 169.

organisations unveiled their international legal status;⁵⁹ this was a way of legitimising their activities against third parties. When exercising their duties, international organisations can therefore be accountable for their breach of international law.

The EAC Treaty attributes legal status to the Community organisation. According to the Treaty, the EAC is an intergovernmental organisation with a legal personality that has the capacity and authority to enter into contracts, acquire, own or dispose of movable and immovable property and to sue and be sued in its own name.⁶⁰ The EAC functions as a body corporate with perpetual succession with its powers being derived from the provisions of the EAC Treaty.⁶¹

The Secretary General of the EAC is the person responsible to oversee Community activities. Also, the Secretary General represents the EAC in all court proceedings.⁶² Having the right to enter into contracts, the EAC is not prevented from acceding to human rights instruments which allow international organisations to be party to them.⁶³ In view of the fact that the EAC is determined to observe universal human rights standards, acceding to international human rights treaties would not be considered ultra vires.

2.3.2 Supremacy of the EAC law

The supremacy of international law over national law largely depends on the nature of the national laws in adhering to international law. By establishing the EAC, member states have ceded some of their sovereignty to EAC law and organs. Accordingly, EAC law is binding on member states, their citizens and their national courts. This is important for the EAC's legal autonomy, as it helps to ensure that EAC law will prevail when in conflict with the national laws of member states. In as far as human rights

⁵⁹ Art 3 of the EAC Treaty.

⁶⁰ Art 4 of the EAC Treaty. Art 138 of the EAC attributes the international legal personality status of the EAC.

⁶¹ Art 4(2) of the EAC Treaty.

⁶² Art 4(3) of the EAC Treaty.

⁶³ There are international conventions that allow international organisations to be a party. One such convention is the Convention on the Rights of Persons with Disabilities.

protection is concerned the primacy of EAC law presents an opportunity to establish a common human rights standard among the EAC countries.

As stated above, the EAC is a creature of international law. It was established by the EAC Treaty, consequently subjecting the EAC organs, its institutions and member states to international law. An international agreement is thus binding on the EAC parties, and it is expected that the terms of the agreement will be fulfilled in good faith, as this is a well-established principle under international law known as *pacta sunt servanda*.⁶⁴ It is the responsibility of EAC organs such as the EACJ to supervise this principle and ensure the primacy of the EAC legal order prevails. The triumph of the EU Court in establishing the supremacy and direct effect of the EU law is an inspiration for the EACJ. The two landmark cases of *Van Gend en Loos*⁶⁵ and *Flaminio Costa v ENE*,⁶⁶ reiterated the supremacy of the EC legal order. In *Van Gend en Loos*, the Court stated as follows:

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.

If a national law contravenes the values established under international law, the national law must be brought into conformity with international law values. Contrary to that, an international court or tribunal, depending on the mandate, can declare the national law to be in breach of the international norms. In *Peter Anyang' Nyong'o v Attorney General of Kenya (Anyang' Nyong'o case)*,⁶⁷ the applicants contended that the Kenyan election rules contravened article 50 of the EAC Treaty and therefore the rules

⁶⁴ Art 26 of the Vienna Convention.

⁶⁵ *Van Gend en Loos v Nederlandse Administratie der Belastingen* Case No 26/62, 12.

⁶⁶ Case No 6/64.

⁶⁷ *Anyang' Nyong'o & Others v Attorney General of Kenya*, Ref No 1 of 2006.

should be declared invalid.⁶⁸ Even though the Court did not invalidate election rules as requested by the applicant, it stated that the rules infringed article 50 of the EAC Treaty and that the Kenyan Parliament did not conduct an election as provided in the Treaty.⁶⁹ The EACJ made references to the EU Court case law which established the supremacy of the EU law,⁷⁰ but it did not emphasise the supremacy of EAC law. In similar fashion, in *Democratic Party v Attorney General of Uganda (Democratic Party case)*,⁷¹ the EACJ was called on to restrain the Parliament of Uganda from conducting any election until the rules of procedure of the Parliament of Uganda conformed to article 50 of the EAC Treaty. The EACJ was thus called on to declare that the failure by the Ugandan Parliament to amend the electoral rules in conformity with article 50 of the EAC Treaty amounted to an infringement of the Treaty. The Court, in referring to the *Anyang' Nyong'o* case, granted the pleas of the applicant and restrained the Parliament of Uganda from conducting any election.

In SADC, the SADC Tribunal used its authority appropriately to establish the supremacy of SADC legal order. In *Gondo and Others v Zimbabwe*,⁷² the issue was whether a domestic law that renders state-owned property immune from attachment contravenes articles 4(c) and 6(1) of the SADC Treaty. Article 4(c) of the SADC Treaty provides for the operation principles such as human rights, rule of law and good governance that have to be observed by member states. These principles have to be complied with in terms of article 6(1) of the SADC Treaty, which prohibits any action by a member state from any measure which would likely jeopardise the sustenance of the principles under the

⁶⁸ *Anyang' Nyong'o* case, 2.

⁶⁹ *Anyang' Nyong'o* case, 43.

⁷⁰ The EACJ made reference to *Flaminio Costa v ENEL*, Case 6/64 ECR 585 and *Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECJ Case 26/62 ECR 1.

⁷¹ *Democratic Party & Another v Attorney General of Uganda & Another*, Ref No 6 of 2011. The matter came before the EACJ after the Parliament of Uganda passed the Rules of Procedure of Uganda's Parliament of 2006, providing for the election of members of the East African Legislative Assembly. The rules were held to contravene art 50 of the EAC Treaty and some of the art in Uganda's Constitution in *Jacob Oulanyah v Attorney General*, Constitutional Petition No 28 of 2006.

⁷² *Gondo & Others v Zimbabwe*, SADC T 05/08.

Treaty. The SADC Tribunal found that section 5(2) of the Zimbabwe State Liability Act is in breach of the SADC Treaty.

It is a Treaty requirement that Community organs, institutions and laws take precedence over similar activities performed at the national level for implementing the EAC Treaty.⁷³ Member states are thus required to adopt legal instruments that would ensure Community organs, institutions and laws have precedence over similar national ones.⁷⁴

It is evident, as indicated above, sub-regional courts have attempted to make their mark in establishing primacy in their respective communities. The founding treaties of most sub-regional organisations oblige the member states to enact laws which would make their respective community laws directly applicable. . In East Africa, member states have enacted laws to make EAC Treaty to have direct application in their respective countries.⁷⁵ Constitutions of the member states still recognise the supremacy of their municipal law as opposed to any other laws. Nevertheless, the EACJ is vocal in declaring a national law to be in conflict with EAC law. The two decisions of the EACJ above referred have tried to establish the primacy of EAC law over domestic laws. Given the history and the nature of the *Anyang' Nyong'o* case, the Court commenced establishing its primacy by issuing an injunction restraining the elected members of the Kenyan Parliament from being sworn in by the EALA. Given the second opportunity to probably do similarly in the same matter in the *Democratic Party* case, the EACJ did not shy away from giving the same verdict as in the *Peter Anyang' Nyong'o* case. The primacy of the EACJ was clearly seen when the Kenyan and Ugandan Parliaments complied with the Court's decisions, by amending the rules for electing members of the EALA to be in conjunction with the EAC Treaty.

In the event that national law impugns EAC law, the EAC law should take precedence. The Treaty itself is not ambiguous in this regard; the wording of the EAC Treaty could

⁷³ Art 8(4) of the EAC Treaty.

⁷⁴ Art 8(5) of the EAC Treaty.

⁷⁵ See for example, the East African Community Act, 2002, of Uganda; the East African Community Act, 2004, of Kenya.

not be clearer in its expression of the desire of member states to establish the primacy of the EAC legal order. Thus, member states are required to enact laws which will give EAC law legal effect in their countries.⁷⁶ Hence, Community organs, institutions and law take precedence over national ones in matters pertaining to the implementation of the EAC Treaty.⁷⁷

In ensuring the primacy of the EAC legal order, member states are obliged to enact laws that attribute precedence to EAC organs, institutions and law in the Community over their national ones.⁷⁸ Although the EAC Treaty holds the principle of sovereign equality,⁷⁹ it is important for the states to cede some of their sovereignty to ensure that laws are standardised and harmonised in conformity with EAC law. For the EACJ to be able to function effectively, as well as to protect human rights, its supremacy should never be undermined. Member states have to take constitutional measures to ensure that EAC law has direct effect within their territories.

2.3.3 Interaction between domestic and EAC law

The EAC member states come from different legal system backgrounds. The legal systems of Kenya, Tanzania and Uganda emanate from the common law tradition, while Burundi and Rwanda's legal systems originate from the civil law system. Common law countries tend to draw a rigid distinction between treaty law and national law. Consequently, in the event of conflict between national and international law, precedence is given to national law.⁸⁰ The approach in which municipal law is considered to be a superior legal order over an international law is derived from the constitutional obligation for the ratification and domestication of treaties.⁸¹ A state is required to ratify an international treaty in order for that treaty to obtain legal force at a national level.

⁷⁶ Art 8(2) of the EAC Treaty.

⁷⁷ Art 8(4) of the EAC Treaty.

⁷⁸ Art 8(5) of the EAC Treaty.

⁷⁹ Art 6(a) of the EAC treaty.

⁸⁰ Kamanga (2010) 3 *Journal of African and International Law* 697, 708.

⁸¹ Kamanga (2010) 3 *Journal of African and International Law* 697, 710.

It is important to reflect how the East African Court of Appeal (EACA) fared in its quest to establish EAC legal regime. The legal primacy of the former EAC was called into question in *Oksana and Another v Republic (Okanda case)*⁸² and *EAC v Republic*.⁸³ In the former case, the issue in contention was whether the phrase ‘other laws’ in the Constitution of Kenya refers to all laws enacted by the Parliament of Kenya, including those laws aimed at giving legal force to the 1967 EAC Treaty, which were required to be in conformity with the Constitution. The Kenyan Constitution contained a provision which recognised the Constitution as the supreme law of Kenya. Although the Kenyan High Court acknowledged the challenge of reconciling the conflict between municipal law and international law, it went on to hold that, as a municipal court, it is bound by Kenyan law to the extent that if any other law is inconsistent with the Kenyan Constitution, that ‘other law’ is void.⁸⁴

In *EAC v Republic*, the EACA was of the same view as in the *Okanda’s* judgment but went on to state that ‘provisions of a Treaty entered into by the government of Kenya do not become part of the municipal law of Kenya, save in so far as they are made such by the law of Kenya’, even when such law passes through the domestication process, if such provisions of a treaty are found to impugn the constitution, the said provisions will be declared null and void. From the two cases, the Kenyan municipal court took the position that all laws enacted by the Kenyan Parliament to establish the legal force of the 1967 EAC Treaty fell into the same category of the phrase ‘other laws’ in the Kenyan Constitution and therefore they should not be contrary to it.

Within the current EAC legal order, there are few encouraging signs for the application of EAC law in the domestic courts. This might be due to the lack of awareness by most litigants on the existence of EAC jurisprudence. It might also be due to the little jurisprudence which has developed so far from the EACJ. Nevertheless, available evidence seems to suggest that aspects of EAC law are gradually finding their way into

⁸² *Okanda & Another v Republic* EALR (1970) 453.

⁸³ *EAC v Republic*, EALR (1970) 457.

⁸⁴ *Okanda case*, 457.

the jurisprudence of the national courts of the member states. Courts in Uganda seem to take recognition of EAC law.

In *Deepak Shah and Others v Manurama Ltd and Others (Deepak Shah case)*,⁸⁵ the plaintiff, a Kenyan resident, brought a civil case before the Commercial Division of the High Court of Uganda against the defendant, a corporate body in Uganda. As per Order 23 of Uganda's Civil Procedure Rules, a foreigner instituting a case in Uganda has to deposit security for costs before the court. This rule is *pari material* with the civil procedure code of Kenya and Tanzania. The Court took cognisance of the whole purpose of establishing the EAC by holding that the plaintiff was a resident of the EAC and therefore had no need to deposit security for costs. The Court was of the view that, owing to the existence of a similar provision in the civil procedure code and such other laws in EAC member states, there was a need to reconsider their laws so as to bring them in line with EAC law. The Court further elaborated on its decision by stating that

[a]rticle 104 of the Treaty provides for the free movement of persons, labour, services, and the right of establishment and residence. The Partner States are under obligation to ensure the enjoyment of these rights by their citizens within the Community. In this regard, Court is mindful of the fact that the Treaty has the force of law in each Partner State and that this Treaty law has precedence over national law.⁸⁶

Another case before the Constitutional Court of Uganda that made several references to EAC case law and EAC Treaty provisions, when assessing the constitutionality of the rules of the Parliament of Uganda for electing the members of the EALA which were held to be in breach of EAC law, is *Deepak Shah & Others v Manurama Ltd & Others*.⁸⁷

The scope of integration requires EAC member states, through their established institutions to take the necessary measures to ensure the harmonisation of all national laws pertaining to Community law.⁸⁸ Member states are supposed to 'enhance the

⁸⁵ See *Jacob Oulanyah v Attorney General*, Constitutional Petition No 28 of 2006 *Deepak Shah & Others v Manurama Ltd & Others* Misc App No 361 of 2001.

⁸⁶ *Deepak Shah case*, 5.

⁸⁷ *Jacob Oulanyah v Attorney General*, Constitutional Petition No 28 of 2006.

⁸⁸ Art 126(2)(b) of the EAC Treaty.

approximation and harmonisation of legal hearing and standardisation of judgments within the Community'.⁸⁹ In the *Anyang' Nyong'o* case, the EACJ observed that

The lack of uniformity in the application of any article of the Treaty is a matter for concern as it is bound to weaken the effectiveness of the Community law and in turn undermine the achievement of the objectives of the Community. Under article 126 of the Treaty, the partner states commit themselves to take necessary steps to inter alia 'harmonise all their national laws appertaining to the Community'. In our considered opinion this reference has demonstrated amply the urgent need for such harmonization.⁹⁰

International law is regarded as the law governing relationships between states, while national law governs the relationship between individuals and between individuals and the state. A state party to an international treaty is obliged to take measures to ensure that the treaty is enforceable in its national legal system. In the event of conflict between international and national law, states with a dualistic approach would presume that a national court will apply national law. For the monists, national and international law exist in the same sphere. In recent years, international law has been able to forge its way in the domestic courts, with judges having recently developed a tendency to apply international law at municipal level, provided that the national constitution contains progressive provisions for the applicability of international law. In most monist countries, even though international law forms part of domestic law, this is to a large extent theoretical, particularly when it comes to international human rights law.

The approach of national courts towards international law depends largely on the laws of a particular state.⁹¹ When international law confers rights which are not guaranteed under a domestic law, a conflict of law may occur before a municipal court when trying to interpret the two legal regimes. Under international law, a state cannot invoke the provisions of its domestic law as a ground for its failure to perform the obligations under a treaty to which a state is a party.⁹² Accordingly, national law cannot be used as a shield for breaching international commitments. Article 27 of the Vienna Convention does not

⁸⁹ Art 126(2)(c) of the EAC Treaty.

⁹⁰ *Anyang' Nyong'o* case, 43.

⁹¹ Crawford (2012) 57.

⁹² Art 27 of the Vienna Convention.

go further in stating how a state should remedy that breach. The provision, therefore, merely requires states to abide by international law, but it leaves it up to the states to determine the extent to which they can adhere with regard to the international treaty obligations.⁹³ However, a state is expected to fully comply with its international commitments to the extent of domesticating international treaties.⁹⁴

The dualistic approach regards international law and domestic law as being derived from different spheres, with distinct sources of law and subjects.⁹⁵ While under international law the main source of law is international treaties and international customs, in the domestic law the main source of law is the constitution and legislation of a sovereign state.⁹⁶ In most cases subjects of international law are parties to the treaty, while under domestic law subjects to the law are the citizens of a state. In countries with a dualistic approach, international agreements cannot be relied on to be applied in the national courts; this will depend on the extent to which domestic courts can interpret legislation in accordance with international law.⁹⁷

There is a gradual shift from rigorous application of dualistic approach by some African countries. The insertion of more progressive provisions in the constitution and judicial activism, in countries following a dualistic approach, has allowed international law to gain ground in the domestic sphere. The South African Constitution provides that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.⁹⁸ The South African Constitution gives more

⁹³ AP Van der Mei 'The East African Community: The bumpy road to supranationalism' (2009) Working papers: Faculty of Law, University of Maastricht at page 26, available at <http://www.maastrichtuniversity.nl/web/Faculties/FL/Theme/ResearchPortal/MaastrichtWorkingPapers/2009.htm> (accessed on 12 February 2013).

⁹⁴ As above.

⁹⁵ DM Aaron 'Reconsidering dualism: The Caribbean Court of Justice and the growing influence of unincorporated treaties in domestic law' (2007) 6 *Law and Practice of International Courts and Tribunals* 333, 239.

⁹⁶ As above.

⁹⁷ L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 16.

⁹⁸ Section 23(2) of the Constitution of the Republic of South Africa, 1996, see also *S v Basson* 2005 (1) SA 171 (CC).

weight to international law by providing that courts must ‘prefer any reasonable interpretation of the legislation’ that is in conformity with international law against any interpretation that negated international law values.⁹⁹

In Malawi, the Supreme Court of Malawi took a progressive approach in recognising international law at the domestic level in the matter of the adoption of Chifundo James.¹⁰⁰ The Supreme Court was called upon to interpret international human rights law treaties in conjunction with the Malawi statute (Children Act Chapter 26:01).¹⁰¹ The Court considered the supremacy of the Malawi Constitution and then proceeded to interpret various international human rights instrument. Having considered the Convention of the Rights of the Child (CRC) and the African Charter in determining the best interests of the child, the court stated that ‘when interpreting the Constitution, courts must have regard to current norms of public international law and comparative case law’.¹⁰²

In SADC, the application of Community law by a municipal court was not particularly encouraging. In *Ex parte Commercial Farmers Union*,¹⁰³ the Supreme Court of Zimbabwe stated that it is the final court and, therefore, its decision cannot be challenged in any other court including the SADC Tribunal.¹⁰⁴ This is just one of the many instances in which the Supreme Court of Zimbabwe has refused to uphold the decisions of the SADC

⁹⁹ Section 233 of the South African Constitution.

¹⁰⁰ *In the matter of Chifundo James*, MSCA Adoption Appeal No 29 of 2009.

¹⁰¹ The appellant going by the name Madonna Louise Ciccone applied to the High Court to adopt a three-year-old girl, Chifunda James. Chifunda’s mother had died shortly after giving birth and her father was nowhere to be found, and the family of the late mother of Chifunda James placed her in an orphanage but no one applied to adopt the child. The High Court rejected the application by the appellant on the grounds that the appellant was not a Malawian resident as stipulated in the Adoption of Children Act (Chapter (26:01) inter-country adoptions is granted as a last resort, in accordance with art 24 of the Convention on the Rights of the Child, 1989’

¹⁰² *In the matter of Chifundo James*, 6.

¹⁰³ *Ex parte Commercial Farmers Union*, Case No SC 31/10 (Supreme Court of Zimbabwe, 26 Nov 2010).

¹⁰⁴ See *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another* ZWHHC 1.

Tribunal.¹⁰⁵ The Government of Zimbabwe itself also refused to comply with the injunction that was issued in the *Campbell* case.¹⁰⁶

The constitutions of most EAC member states enjoin domestic courts to use international law for upholding international law values. On that basis, the national courts of EAC member states have often applied international law when a matter relating to international law is in question.

In Kenya, the adoption of the 2010 Constitution transformed the Kenyan legal system to a more monist system. Traditionally, Kenya was a dualist state and, therefore, international treaties and conventions had to be ratified and domesticated.¹⁰⁷ Since the adoption of the new Constitution, international law is deemed to form part of the laws of Kenya.¹⁰⁸ The new Kenyan Constitution is a reflection of a number of new constitutions in Africa with clauses pertaining to the direct application of international law in their domestic legal system. Article 2(5) of the Constitution provides that the general rules of international law form part of Kenyan laws. Similarly, article 2(6) states that any treaty or convention ratified by Kenya forms part of the law. The much celebrated Kenyan constitution is being gradually applied by Kenyan courts. In the *Matter of Zipporah Wambui Mathara (Mathara case)*,¹⁰⁹ the High Court of Kenya held that all treaties ratified by Kenya form part of the sources of Kenyan law as provided by article 2(6) of the Kenyan Constitution.¹¹⁰ *David Njoroge Macharia v Republic*¹¹¹ reaffirmed the decision in the *Mathara* case by pointing out that, although previously Kenya was applying a dualistic approach which required the incorporation of

¹⁰⁵ *Gramara & Another v Zimbabwe & Others*, Case No 5483/09 (26 January 2010) 08.

¹⁰⁶ *Mike Campbell v Zimbabwe*, SADC (T) 02/2007 (*Campbell* case).

¹⁰⁷ For a discussion on the application of international law in Kenya, see T Kabau and C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *Comparative and International Law Journal of Southern Africa* 293-310; JO Ambani 'Navigating past the dualist doctrine: The case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 25-35.

¹⁰⁸ Art 2(6) of the Constitution of Kenya.

¹⁰⁹ *The Matter of Zipporah Wambui Mathara v R* [2010] eKLR.

¹¹⁰ *Mathara* case, 4.

¹¹¹ *David Njoroge Macharia v Republic* [2011] eKLR.

international law so as to become part of national law, the position may have changed after the coming into force of the 2010 Constitution.¹¹²

The place of international law in Tanzania is still, to a large extent, determined according to a dualistic approach.¹¹³ Even as the Bill of Rights was incorporated into the Tanzanian Constitution in 1984 and became justiciable in 1988, international human rights law formed the basis for Tanzania's internal and external policies.¹¹⁴ The Universal Declaration of Human Rights (UDHR) is referred to by the Tanzanian Constitution as a model for state authorities and their agencies when directing their policies and programmes in order to ensure human rights are preserved.¹¹⁵ The signs of judicial activism in applying international law, even before the Bill of Rights was incorporated in the Tanzanian Constitution, were illustrious. In *John Byombalirwa v Regional Commissioner Bukoba and Another*,¹¹⁶ the High Court used the UDHR to enforce the right to property. The Court invoked article 9 of the Constitution which requires state authorities and agencies to take into account human dignity and human rights when performing their duties.

After the *Byombalirwa case*, a number of cases have applied international law. The introduction of the Bill of Rights in the Tanzanian Constitution resulted in courts becoming more liberal towards international law values. In *Director of Public*

¹¹² Macharia case" 16.

¹¹³ The existing scholarship on the applicability of international law in Tanzania include: CB Murungu 'The place of international law in human rights litigation in Tanzania' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 57; K Kamanga 'international human rights law as reflected in Tanzania's treaty and court practice' in W Binchy and C Finnegan *human rights, constitutionalism and the judiciary: Tanzania and Irish perspectives* (2006) 53; L Mwalusanya 'The Bill of Rights and the protection of human rights: Tanzania's court experience' in HK Bisimba & CM Peter (eds) (2005) *Justice and rule of law in Tanzania: Selected judgments and writings of justice James Mwalusanya* 624.

¹¹⁴ JK Nyerere, when addressing the UN Assembly on 14 December 1961, expressed Tanzania's political commitment to adhere to international human rights standards as provided by the UDHR. See JK Nyerere 'Independence address to the United Nations' in JK Nyerere *Freedom and unity: A selection from writings and speeches 1952-1965* (1966) 146; CB Murungu in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 58.

¹¹⁵ Art 9(a) and (f) of the Tanzanian Constitution of 1977 as amended.

¹¹⁶ *John Byombalirwa v Regional Commissioner Bukoba & Another* [1986] TLR 73.

Prosecutions v Daudi s/o Pete,¹¹⁷ the Court of Appeal emphasised the consideration of international human rights instruments such as the African Charter when courts interpret the Bill of Rights under the Tanzanian Constitution.¹¹⁸

Tanzanian courts have placed strong reliance on article 9(f) of the Constitution which provides directive policies for state authority and agents to adhere to human rights when performing their duties. The Constitution does not expressly mandate courts to apply or use international law. At present, Tanzania is in the process of adopting a new constitution, which, it is hoped, will have a more progressive attitude towards international law. Despite the existing challenges, the role played by the Tanzanian courts in applying international law, particularly international human rights law, is encouraging.

In Uganda, international law does not have automatic application in the domestic courts.¹¹⁹ Instead, a treaty has to be ratified and domesticated in order for it to be applied by Ugandan courts.¹²⁰ In contrast with the constitutions of Malawi¹²¹ and South Africa,¹²² the 1995 Ugandan Constitution does not expressly empower domestic courts to refer to international law. The Constitution of Uganda provides that the foreign policy of Uganda 'shall be based on the principles of ... respect for international law and treaty obligations'.¹²³ In addition, the Constitution provides that any treaty that Uganda affirmed before the coming in to force of the current Constitution is not affected by the

¹¹⁷ *Director of Public Prosecutions v Daudi s.o Pete* (1993) TLR 22, 34.

¹¹⁸ *Christopher Mtikila & Others v The Republic*, High Court, Civil Case No 10 of 2005; *Peter Ng'omango v Gerson Mwangwa & Attorney General* (1993) TLR 77.

¹¹⁹ For an understanding of the applicability of international law in Uganda, see B Kabumba 'The application of international law in the Ugandan judicial system: A critical enquiry' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 83.

¹²⁰ As above, 85.

¹²¹ Art 11(2)(c) of the Malawi Constitution, 1994. The Malawian Constitution allows national courts to interpret the provisions of the Constitution with regard to current norms of public international law and comparable foreign case law.

¹²² Section 39(1) of the South African Constitution.

¹²³ Objective XXVIII(b) of the National Objectives and Directive Principles of State Polity of the 1995 Uganda Constitution.

1995 Constitution.¹²⁴ The Ugandan Human Rights Commission has also been empowered to monitor government's compliance with international treaties relating to human rights.¹²⁵

It is evident from the provisions of the 1995 Constitution that international law has influence in the Ugandan legal sphere. However, the lack of express provision in the Ugandan Constitution to allow domestic courts to apply international law should not be underplayed. This lacuna provides an opportunity for an inactive bench to dismiss a genuine claim based on international law. In *Paul K Ssemwogerere and Others v Attorney General (Paul Ssemwogerere case)*,¹²⁶ the Constitutional Court held that international human rights conventions do not form part of the Ugandan law.¹²⁷ Nevertheless, courts in Uganda are extremely active in applying international law. In *Susan Kigula and Others v Attorney General*,¹²⁸ the Ugandan Supreme Court applied a number of international human rights treaties in determining the constitutionality of the death penalty in Uganda.¹²⁹ In *Uganda Law Society and Another*,¹³⁰ the Constitutional Court of Uganda stated that 'Chapter IV of the Constitution is not exhaustive of fundamental human rights and freedoms available to the people of Uganda'. The Court went further by declaring the African Charter to be 'part and parcel' of the Ugandan Constitution.

Burundi and Rwanda are the only countries in the EAC with a civil system background. On that basis, international treaties ratified by the two countries are equally directly applicable within their respective jurisdiction. Article 19 of the Constitution of Burundi

¹²⁴ Art 186 of the Constitution of Uganda, 1995.

¹²⁵ Constitution of Uganda, art 52(1)(h).

¹²⁶ *Paul Ssemwogerere & Others v Attorney General*, Constitutional Court, Petition No 5 of 2002.

¹²⁷ Paul Ssemwogerere case' 8.

¹²⁸ *Susan Kigula & Others v Attorney General*, Uganda Supreme Court, Constitutional Appeal No 3 of 2006.

¹²⁹ *Charles Onyango Obbo & Anor v Attorney General* (Constitutional Appeal No 2 of 2002; *Muwang Kivumbi v Attorney General*, Constitutional Petition No 9 of 2005; *Kizza Besigye v Electoral commission and Yoweri K Museveni*, Election Petition No 1 Of 2006.

¹³⁰ *Uganda Law Society & Another*, Constitution Petition Nos 2 & 8 (2003) (2009) UGCC1. Available at <http://www.ulii.org/ug/judgment/constitutional-court/2009/1-0> (accessed on 30 October 2014).

has incorporated a number of international human rights law treaties as an integral part of its domestic laws.¹³¹ Article 19 of the Constitution, however, merely mentions specific international human rights instruments. It is clear that the rights and duties proclaimed and guaranteed by instruments as mentioned under article 19 of the Constitution have the force of law, capable of being relied upon in domestic litigation. However, article 192 of the Constitution requires all international treaties, other than those specifically domesticated by the Constitution, to be ratified as having legal force in Burundi.

Although Rwanda had adopted its Constitution in the era of a democratic society which, to a large extent, recognises international law as part of national law, the Rwandan Constitution is silent on the status of international law in Rwanda. Accordingly, the Constitution is the supreme law in Rwanda and any law which is contrary to the Constitution is invalid.¹³² Although article 190 of its Constitution has adopted the monist approach, the Constitution reads that upon their publication in the official gazette, international treaties and agreements which are conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non-compliance by one of the parties.

This provision shows that Rwanda has adopted a monist approach, although it has reserved the right to opt out of international agreements that centre on reciprocity. This is notwithstanding the fact that, as decided in the *Barcelona Traction* case, reciprocity does not apply to human rights treaties that seek to protect citizens, and where the obligations imposed by them play out *erga omnes*, rather than those owed to particular states.

The EU Court has successfully established the direct application of EU law to the EU member states, minimising a backlash between domestic law and EU law. EU law

¹³¹ Art 19 mentions the Universal Declaration of Human Rights, the International Covenants on Human Rights, the African Charter, the Convention on the Elimination of all Forms of Racial Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), as part of national law.

¹³² Art 200 of the Constitution of Rwanda, 2003.

ascribes rights and duties directly to the EU institutions, its members and citizens including national courts.¹³³ However, recognition of the supremacy of the law of the EC legal order did not come about easily. The Federal Constitution of Germany issued two contradicting decisions in what are famously known as *Solange I*¹³⁴ and *Solange II*.¹³⁵ In the former case the Federal Constitutional Court ruled that in the event of conflict between EC law and German law, German law would prevail. This decision conflicted with the EU Court's in the 1964 decision *Costa v ENEL*. In *Solange II*, the Federal Constitutional Court of Germany stated that in so far as EC law provides substantial fundamental rights and freedoms similar to the German Constitution, the Court would not review EC law.¹³⁶

The EAC member states have committed themselves to taking reasonable measures to ensure, among other things, the harmonisation of their domestic laws pertaining to the EAC legal order.¹³⁷ In order to achieve the objectives enshrined under the EAC Treaty, member states have expressed their desire to create policies that will result in a favourable environment.¹³⁸ In doing so, member states should refrain from any acts likely to jeopardise the achievements of the objectives of the Community.¹³⁹ For member states to adhere effectively to EAC law there is no alternative to legal reform, including constitutional amendment if necessary.¹⁴⁰ . Because EAC member states have recognised and formalised human rights in the EAC Treaty, the EACJ is well suited to protect such norms.

¹³³ KD Borchardt *The ABC of the European Union law* (2010) 117.

¹³⁴ *Internationale Handelsgesellschaft* [1974] Case 11/70.

¹³⁵ *Re Wuensche Handelsgesellschaft*, BVerfG [1987] 3 CMLR 225.

¹³⁶ See J Wieland 'Germany in the European Union: The Maastricht decision of the Bundesverfassungsgericht' (1994) 5 *European Journal of International Law* 259.

¹³⁷ Art 126 of the EAC Treaty.

¹³⁸ Art 8(1)(a) of the EAC Treaty.

¹³⁹ Art 8(1)(c) of the EAC Treaty.

¹⁴⁰ TC Hartley *The foundation of the European Law* (2010) 259.

2.3.4 Liability of member states for breaching EAC law

A state may be held accountable for breach of EAC law when one of its organs or entities performing state duties contravenes EAC norms or when a national law, regulation, directive or any decision is contrary to EAC law. Under international law, the conduct of any of the organs of a state is considered as an act of a state.¹⁴¹ Also, the conduct of a person or an entity, not necessarily an organ of the state, if authorised by the law to perform government authority, is considered to be an act of a state provided that the act or omission is within the capacity authorised.¹⁴²

The EU Court has already pointed out that an EU member state is held responsible and obliged to make good the injuries suffered by individuals as a result of a breach of Community law in the event that the national legislation was responsible for the breach.¹⁴³ This means that in a scenario where a national law does not comply with the Community law, and consequently an individual suffers injuries, a state has to accept liability. The SADC Tribunal, in *Mike Campbell v Zimbabwe (Campbell case)*,¹⁴⁴ awarded damages to the applicants for the injuries they had suffered as a result of constitutional amendments in Zimbabwe, causing compulsory acquisition of their farms without being able to challenge the exercise in court.

Reference can be made to the EACJ against a state that is in breach of EAC law by another member state,¹⁴⁵ Secretary General¹⁴⁶ and legal or natural persons.¹⁴⁷ The EACJ has occasionally been called to declare an act of a state organ or its entity, and state laws breach the EAC Treaty. In *James Katabazi v Attorney General of Uganda (Katabazi case)*,¹⁴⁸ the Government of Uganda was held to be in breach of the principles enshrined

¹⁴¹ Art 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

¹⁴² Art 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

¹⁴³ See the Judgment of the Court of Justice, *Brasserie du pêcheur and Factortame*, Joined Cases C-46/93 and C-48/93 (5 March 1996).

¹⁴⁴ *Mike Campbell v Zimbabwe*, SADC (T) 02/2007.

¹⁴⁵ Art 28 of the EAC Treaty.

¹⁴⁶ Art 29 of the EAC Treaty.

¹⁴⁷ Art 30 of the EAC Treaty.

¹⁴⁸ *James Katabazi v Attorney General of Uganda*, Ref No 1 of 2007.

in the EAC Treaty after Ugandan police officers interfered with the court process of the Ugandan High Court. The *Katabazi* case is one among many cases that the EACJ has found a member state to be in breach of the EAC Treaty. It is an encouraging sign that the Court is not tolerant to any member state that contravene EAC law.

2.4 Human rights in the EAC

The EAC is an autonomous entity under international law. It has certain rights and duties, as provided in its constitutive document. One of the most overriding principles in modern international law is the recognition, promotion and protection of human rights. This study proceeds by identifying the legal basis for the promotion and protection of human rights in the EAC.

When trussing the basis for the current human rights regime of the EAC, it has been commented that the founding instruments of sub-regional organisations provide the ‘primary legal foundation’ for having a human rights mandate.¹⁴⁹ Apart from the constitutive instrument of sub-regional bodies, decisions, directives and case law within their functioning establish the foundation for a human rights mandate. The ‘statements of the objectives’ in the constitutive instruments should be the main location for finding the basis for the human rights authority of sub-regional organisations.

According to Ebobrah, the ‘common location’ for legitimising the human rights mandate of sub-regional organisations is the ‘portions of statements of objectives’, averments of the governing principles and the preamble to the treaty.¹⁵⁰ Looking closely at the constitutive instruments of sub-regional organisations, it is submitted that the founding treaties of some organisations possess some elements of constitutionalism which provides the basis for the promotion and protection of human rights.

¹⁴⁹ ST Ebobrah ‘Human rights realisation in the African sub-regional institutions’ in M Senyonjo (ed) *The African regional human rights system - 30 years after the African Charter on Human and Peoples’ Rights* (2012) 286.

¹⁵⁰ As above.

Human rights are identified as a potential component of the activities of international organisations.¹⁵¹ Regional human rights systems are complementing the existing UN system and it is believed that regional human rights systems are likely to be more successful than the global system because of their ‘political and cultural homogeneity’ and similar judicial traditions which are essential for effective implementation.¹⁵² The increasing focus in promoting and protecting human rights within regional and sub-regional organisations in Africa is a reflection of an emerging constitutionalism character within the Continent.¹⁵³ Article 56 of the UN Charter calls for all member states to take joint and separate efforts, in cooperation with the UN, to promote and respect universal human rights standards. UN member states have responded to the call by forming different intergovernmental organisations which dedicate their efforts to promoting and protecting human rights. In comparison, the EU can be seen as a model among regional economic communities in adhering to human rights. When the Treaty of Rome was established in 1957, its prominence was in economic cooperation. However, the Treaty had a Social Chapter for protecting the rights of workers.¹⁵⁴ In an attempt to establish a human rights regime in the EU, in 1996 the Council of the EU asked the EU Court to give an advisory opinion on the possibility of the EU acceding to the European Convention on Human Rights (ECHR) of the Council of Europe.¹⁵⁵ The EU Court ruled that the EU Treaty does not make room for the EU to accede to the Convention. Although the EU Court had

¹⁵¹ See AFS Russell ‘International organizations and human rights: realizing, resisting or repackaging the right to water?’ (2010) 9 *Journal of Human Rights* 1.

¹⁵² Dugard (2011) 342.

¹⁵³ See E de Wet ‘The emergence of international and regional value systems as a manifestation of the emerging international constitutional order’ (2006) 15 *Leiden Journal of International Law* 611.

¹⁵⁴ EF Defeis ‘The Treaty of Lisbon and human rights’ (2009–2010) 16 *ILSA Journal of International & Comparative Law* 41; See also EF Defeis ‘Human rights and the European Union: Who decides? Possible conflicts between the European Court of Justice and the European Court of Human Rights’ (2000–2001) 19 *Dickinson Journal of International Law* 301; ES Duquette ‘Human rights in the European Union: Internal versus external objectives’ (2001) 34 *Cornel International Law Journal* 363; JD de la Rochere ‘Challenges for the protection of fundamental rights in the EU at the time of the entry into force of the Lisbon Treaty’ (2011) 33 *Fordham International Law Journal* 1176, EC Landau ‘A new regime of human rights in the EU’ (2008) 10 *European Journal of Law Reform* 557.

¹⁵⁵ Opinion 2/94 of the Court of 28 March 1996, 1996 ECR 1-1759. Also see TC Steve ‘Protecting human rights in the European Union: An argument for treaty reform’ (1997) 20 *Fordham International Law Journal* 919.

previously used the Convention for promoting human rights values in the Community, the adoption of the EU Charter was nevertheless deemed necessary for the future of the EU.¹⁵⁶ This is largely because the European Convention on Human Rights does not contain economic, social and cultural rights; therefore, in the evolving nature of the EU, a Charter for safeguarding human rights in the EU was imminent. From a legal viewpoint, the EU was not a party to the European Convention on Human Rights and therefore not bound by its provisions. However, the European Court gradually affirmed the relevance of the ECHR in EU law. In a number of instances, the European Court has held that the rights enshrined in the ECHR constitute the values of the EU.¹⁵⁷ The ECHR was subsequently referred to in the treaties establishing the EC.¹⁵⁸ The Charter of Fundamental Rights of the European Union (EU Charter) was proclaimed in 2000 at the Nice summit.

The EU Charter had only political force, however, and it was not binding on EU member states. However, the Charter began to become influential when it came to the promotion and protection of human rights. Subsequently, the EU Charter was used by the EU Court for promoting human rights in the EU. In *European Parliament v Council of the EU*,¹⁵⁹ the EU Court reiterated the importance of the EU Charter at that time by acknowledging that it reaffirms the rights enshrined in the EU Treaty, the European Convention on Human Rights and the constitutions of the member states. After the entry into force of the Lisbon Treaty on 1 December 2009, the EU Charter had legal force in the EU and currently holds the same legal value as the EU treaties.¹⁶⁰

It can be argued that a human rights regime already existed within the EU well before the adoption of the EU Charter. It can also be suggested that the Lisbon Treaty has expanded the human rights mandate of the EU by giving the Charter the same legal status as the EU Treaties. The EU Charter has an extensive set of rights compared to the

¹⁵⁶ Defeis (2009-2010) 16 *ILSA Journal of International & Comparative Law* 413, 415.

¹⁵⁷ *Rutili v Ministre de l'Intérieur*, Case C-36/75 [1975].

¹⁵⁸ Art 6(2) of the Maastricht Treaty made reference to the ECHR for the first time.

¹⁵⁹ Case C-540/03 (2006) ECR I-5769.

¹⁶⁰ Art 6 of the Lisbon Treaty, 2009.

ECHR, which are vital for preserving human rights norms in the EU. The EU Charter contains all the three generations of rights while the ECHR is extensively made up of civil and political rights. Also, article 6(2) of the Treaty of Lisbon requires the EU to accede to the European Convention on Human Rights, which would result in the EU becoming subject to a legal body external to the EU.

Sub-regional organisations in Africa have so far been playing a significant role in promoting and protecting human rights. Although member states of sub-regional organisations are parties to various UN human rights instruments and regional human rights mechanisms, human rights have found their way into the work and functioning of sub-regional organs and institutions. When the OAU was established in 1963, the member states had a pan-African ‘focus’ – determined to liberate African states from colonialism.¹⁶¹ The desire for engaging in regional integration to ‘attain inter African economic development’ was manifested by the establishment of sub-regional organisations in Africa, aiming for closer and more concentrated economic cooperation.¹⁶²

To many, sub-regional bodies are still regarded as being mainly established for the purpose of economic advancements. The primary objective of most RECs is to bolster the economy in their respective communities. Sub-regional bodies also have social, economic and political ambitions which have to be realised. The EAC aims at developing policies and programmes for achieving viable regional integration in matters concerning political, social, economic and cultural fields, and research and technology.¹⁶³ Article 5 of the EAC Treaty also mentions that issues concerning security and judicial affairs should be included in the agenda for EAC integration. In COMESA, cooperation on promoting and protecting peace and security is one of the objectives its members.¹⁶⁴ It can therefore be said that the devotion to cooperation in socioeconomic and political

¹⁶¹ F Viljoen ‘The realization of human rights in Africa through sub-regional institutions’ (1999) 7 *African Yearbook of International Law* 185.

¹⁶² Viljoen (1999) 7 *African Yearbook of International Law* 185, 186.

¹⁶³ Art 5 of the EAC Treaty.

¹⁶⁴ Art 3(d) of the COMESA Treaty.

affairs within sub-regional bodies provides the necessity for promoting and protecting human rights in their agenda.

Sub-regional courts are yet to have their own human rights catalogue. In EAC, however, the passing of a Human Rights Bill by EALA in 2012 provided an optimism that the Bill might have allowed the EAC its own human rights catalogue. The Bill is now waiting to be passed the EAC Summit in order to become EAC law.¹⁶⁵ Most treaties of sub-regional organisations refer to the African Charter as the normative standard when exercising different activities in their respective organisations.¹⁶⁶ As it has already proven, the lack of an explicit human rights catalogue is not a barrier to sub-regional courts and tribunals upholding human rights norms in their respective regions. In the *Campbell* case,¹⁶⁷ the SADC Tribunal held that its jurisdiction on the matter cannot be circumscribed only for a reason of a lack of an explicit human rights catalogue, given the fact that the SADC Treaty provides for the governing principles to which SADC member states must adhere, and one of those principles includes human rights.¹⁶⁸

What is the scope of a human rights mandate for sub-regional bodies? Ebobrah is of the view that ‘the more obvious consequences’ of the lack of a human rights catalogue in sub-regional bodies include uncertainty on the extent of coverage available in their human rights mandate.¹⁶⁹ As member states of sub-regional organisations have committed themselves to promoting and protecting human rights in accordance with the provisions of the African Charter, the scope of coverage of the human rights mandate in their functioning should be the same as that covered in the Charter. Also, the fact that universal human rights standards form part of the governing principles of most sub-regional organs, including the EAC, there is no doubt that sub-regional organs

¹⁶⁵ See <http://www.eala.org> | (accessed on 7 May 2012).

¹⁶⁶ Art 4(g) of the 1993 revised Treaty, Art 6(d) of the EAC Treaty, Art 6€ of the COMESA Treaty.

¹⁶⁷ *Campbell* case, 30.

¹⁶⁸ *Campbell* case, 31.

¹⁶⁹ Ebobrah in M Senyonjo (ed) *The African regional human rights system - 30 years after the African Charter on Human and Peoples' Rights* (2012) 288.

should carry out their activities in line with universal human rights standards and customary international law.

The treaty objectives of international organisations determine the powers and functions to be performed by the organs and institutions of the particular organisation. In most cases, these powers and functions are provided for in the treaty. However, when pursuing their objectives, international organisations tend to carry out many activities that some may not be specifically provided for in their constitutive documents;¹⁷⁰ under international institutional law, these activities are referred to as ‘implied powers’. Implied powers allow for the exercise of the specific powers and functions despite the lack of treaty provisions allowing the undertaking of such activities.¹⁷¹ Thus, when the activities of an organisation have been carried through implied powers, the undertakings cannot be held to be ultra vires. In making sure the EAC Treaty objectives are adhered to, the Community stretches its activities to include implied powers so as to ensure the Community meets its Treaty objectives. Although human rights are not expressly provided for as one of the objectives of the EAC, it is right to say that the EAC objectives have a very close link with human rights. Therefore, the activities of the EAC that will realise human rights will certainly not be ultra vires.

Member states are required to achieve common foreign policies which would seek, among other things, to develop and strengthen the rule of law, human rights and democracy in the Community.¹⁷²

2.5 Legal source for human rights protection in the EAC

It is common for international legal scholars to distinguish between formal and material sources of law.¹⁷³ According to Ebobrah, a formal source of law refers to ‘the source of

¹⁷⁰ M Rama-Montaldo ‘International legal personality and implied powers of international organizations’ (1970) 44 *British Yearbook of International Law* 114, 122.

¹⁷¹ Rama-Montaldo (1970) 44 *British Yearbook of International Law* 114, 124.

¹⁷² Art 123(3)(c) of the EAC Treaty.

¹⁷³ I Brownlie *Principles of public international law* (2003) 1.

validity' of an international organisation.¹⁷⁴ He is of the view that the formal source of an international organisation emanates from the powers exercised by the heads of state and governments of the member states. He refers to material source as 'tangible sources from which the matter of rules can be derived'.¹⁷⁵ Brownlie also distinguishes between formal and material sources of law. Formal sources are 'legal procedures and methods for the creation of rules of general application', while a material source 'provides evidence of the rules' when proved they provide legal force.¹⁷⁶ It is not the intention of this study to dwell on the concept of the legal source of law. In general, the term 'legal source' may be referred to as the basis of origin of a particular law.

The fact that the EAC is a creature of international law means that most of its sources of rights originate from the international legal system. Human rights sources in the EAC can be classified into three categories. The first is the primary sources, which include the EAC Treaty, Protocols and instruments referred in the EAC Treaty or Protocols.¹⁷⁷ The second is secondary sources, consisting of the Acts enacted by the EALA, international agreements between the EAC and other organisations, as well as subsidiary legislation, rules, directives and decisions of the organs of the Community. The supplementary sources are the third category of rights in the EAC. They comprise international law instruments, the decisions of international courts and national courts, laws of the member states, customary international law and general principles of law. The EAC Treaty provides the primary basis for human rights protection. The EACJ has so far upheld human rights by relying on the governing principles of the Community provided for in the EAC Treaty and some international human rights instruments.

¹⁷⁴ ST Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of the Economic Communities of West African States,' LLD Thesis, Faculty of Law, University of Pretoria (2009) 103.

¹⁷⁵ ST Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: the case of the Economic Communities of West African States' (2009) 105.

¹⁷⁶ Brownlie (2012) 1.

¹⁷⁷ SB Ajulu 'Sources of law in ECOWAS' (2001) 45 *Journal of Africa Law* 73, 77.

2.5.1 Human rights norms in the EAC Treaty

One fact that becomes clear under the EAC Treaty is that human rights do not form part of the objectives of the EAC. Nevertheless, the observance of the rule of law, democracy and human rights do form part of the governing principles of the EAC, in order to achieve the objectives of the Community. Article 6 of the EAC Treaty provides for the fundamental principles that shall be adhered to by member states in order to achieve the targeted goals set by the Community. Article 6(d) obliges member states to adhere to:

[G]ood governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

The EAC member states have reiterated their commitment to promoting the rule of law, democracy and human rights by according them the status of operational principles for governing the practical achievement of the EAC. Article 7(2) of the EAC Treaty states that 'the [member states] undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'.

The question is whether the principles, as such, provided in the EAC Treaty are binding on member states. Article 38(1)(c) of the ICJ Statute mandates the ICJ to use 'general principles of law recognised by civilised states' as a source of international law.¹⁷⁸ In *Kodi v Council of the EU and Another*,¹⁷⁹ the EU Court reaffirmed the importance of fundamental principles such as the rule of law, democracy and human rights that were common to member states for protecting legal order in the EU. In addition, in interpreting a treaty, the context of interpretation includes the preamble, the main text

¹⁷⁸ L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 10.

¹⁷⁹ *Kadi v Council of the European Union and Commission of the European Communities*, Case C-402/05 P [2008] ECR I-6351.

and annexes to the treaty.¹⁸⁰ It is on such basis that the principles within the EAC Treaty have never been intended to be merely inspirational; they impose a legal obligation on member states and they are subject to interpretation by the EACJ. It is important to consider that the mention of 'human rights' in the EAC Treaty accords some level of duty on the organs of the Community and its member states, regardless of such norms being principles or not. The principles provided for under article 6(d) and 7(2) of the EAC Treaty require that the EAC integration should be governed by the standards of member states and the organisation itself through adherence to the rule of law, democracy and human rights.

The founding principles in the EAC Treaty have so far been useful in promoting human rights in the EAC and the EACJ has occasionally upheld these founding principles. In addition, the Community principles have been upheld and recognised in different resolutions and directives of the EAC organs. Although the EACJ lacks an explicit mandate to adjudicate human rights cases, the Court has exercised its mandate of interpreting the Treaty, including the provisions that refer to human rights. However, the EACJ is reluctant to directly interpret the provisions that relate to the adherence of human rights within the EAC Treaty, due to the restrictions imposed under article 27(2) of the Treaty.

The EACJ has often relied on other forms of cause of action (such as rule of law, democracy and good governance) to adjudicate human rights related cases. In *Attorney General of Kenya v Independent Medical Legal Unit*,¹⁸¹ the appellant, being aggrieved by the decision of the First Instance Division, appealed and argued that since the EACJ's human rights mandate had been put on hold by article 27(2) of the EAC Treaty, the Court could not proceed with a matter relating to human rights. The Appellate Division stated that in determining whether the Court has jurisdiction to interpret articles 6(d) and 7(2) of the EAC Treaty, the Court has to enquire as to the nature of the cause of

¹⁸⁰ Art 31(2) of the Vienna Convention.

¹⁸¹ *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal No 1 of 2011, the EACJ Appellate Division (*Independent Medical Legal Unit* case II)

action and other considerations that will provide the basis for the Court's jurisdiction, which is separate and distinct from human rights violations.¹⁸²

Articles 6(d) and 7(2) can be viewed in two positive dimensions. Firstly, the provisions have established a human rights mandate for the Community when exercising its functions and they also mandate its member states to govern their citizens in accordance with high constitutional standards that include the promotion and protection of human rights. Secondly, the provisions give an opportunity for bringing human rights related cases before the EACJ for the purpose of interpretation despite the fact that the Court lacks an explicit human rights mandate.

The fact that the Court draws a line between causes of actions in relation to human rights and other forms of causes of action, such as the rule of law, it can be argued that it is almost impossible to separate rule of law, democracy and human rights. In whatever way one wants to define rule of law, for example, there must be a human rights context in it. That is why litigants cannot stop claiming human rights violations in a rule of law allegation before the EACJ.

It can also be argued that article 6(d) and 7(2) of the EAC Treaty mandate the EAC to adjudicate human rights cases, as the interpretation of the treaty starts from the preamble. This position was applied in the *Mike Campbell case*. In this regard one may reflect on the now defunct SADC Tribunal. The SADC Tribunal had no explicit human rights mandate to determine human rights cases, but the Tribunal found that the insertion of human rights in the SADC Treaty is within the jurisdictional sphere of the Tribunal. But it should be noted that the SADC Tribunal had no similar provision as article 27(2) of the EAC Treaty, which perhaps shows the intention of member states to suspend human rights jurisdiction of the EACJ. Having article 27(2) in the EAC Treaty is discouraging when the same EAC member states who commit themselves to adhering to human rights standards, on one hand, put on hold the hearing of human rights cases by the EACJ, on the other.

¹⁸²

As above. 10.

Apart from the founding principles of the Community, there are other significant human rights related features in the EAC Treaty. Recognition and respect for human rights is among the factors to be taken into account when considering a new member of the EAC.¹⁸³ This reflects the commitment of EAC members to creating a region that respects human rights and to ridding the region of notorious states which might destabilise the integration. South Sudan has applied for membership of the EAC, but it is yet to be admitted owing to the prevailing human rights situation in the country.

The promotion of peace and security is another objective of the Community.¹⁸⁴ By maintaining peace and security there is an assurance of a stable society; thus, the lack of peace and security automatically affects human rights.¹⁸⁵ The member states agree on the importance of peace and security for social and economic development and the achievement of their objectives.¹⁸⁶ Member states also intend to strengthen cooperation in maintaining regional peace and security. This will involve more cooperation in cross-border conflicts and the establishment of regional disaster management mechanisms and common mechanisms for the management of refugees.¹⁸⁷ When there is peace and security, it creates a suitable environment for increased investments and trade which also satisfies the economic objectives of the Community.

Women's equality and gender rights have also taken centre stage in East African integration initiatives. Gender equality is recognised as being one of the fundamental principles of the Community.¹⁸⁸ Abiding by the principle of gender equality, member states have pledged to take into account the issue of gender balance when appointing staff members to the organs and institution of the Community.¹⁸⁹ In realising the role of

¹⁸³ Art 5(3)(b) of the EAC Treaty.

¹⁸⁴ Art 5(1) and 5(3)(f) of the EAC Treaty.

¹⁸⁵ OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in JA Bösl & J Diescho (eds) *Human rights in Africa* (2009) 304.

¹⁸⁶ Art 124(1) of the EAC Treaty.

¹⁸⁷ Art 124(3), (4), (5) of the EAC Treaty.

¹⁸⁸ Art 6(d) of the EAC Treaty.

¹⁸⁹ Art 9(5) of the EAC Treaty.

women in socioeconomic development, member states through appropriate legislative and other measures are obliged to promote women's empowerment, eradicate all legislation and customs that discriminate against women, and take all necessary measures that will eliminate prejudice against women.¹⁹⁰

Several measures are taken in the EAC in order to comply with the provisions of the Treaty and seek to improve the living standards of women in the region. The final draft of the Community Framework on Gender and Community Development was adopted in 2006, which sought to cater for the rights of women in the region.¹⁹¹ In 2009, the EALA adopted a resolution encouraging member states to take 'urgent and concerted action to end violence against women'.¹⁹² Significantly, it called on member states to 'enhance the mainstreaming of gender and human rights into budgets' at the national level.¹⁹³

In relation to the AIDS pandemic in Africa, EAC member states are called on to take joint action in the prevention and control of HIV and AIDS together with other communicable diseases.¹⁹⁴ HIV and AIDS are given impetus in the EAC owing to their impact on human resources. There is also the danger of the spreading of the pandemic owing to the free movement of persons in the integration process. Other human rights related features enshrined in the EAC Treaty include free movement of persons, the right to establishment and residence, labour services,¹⁹⁵ agriculture and food security,¹⁹⁶ and natural resources and environmental management.¹⁹⁷ Member states are required to develop and adopt a common approach to improving the living standards of

¹⁹⁰ Art 121 of the EAC Treaty.

¹⁹¹ Ebobrah in M Senyonjo (ed) *The African regional human rights system - 30 years after the African Charter on Human and Peoples' Rights* (2012) 289.

¹⁹² ST Ebobrah 'Human rights development in African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Law Journal* 216, 236.

¹⁹³ The EALA Resolution: Action to end violence against women in the EAC Region, Available at http://www.eala.org/key-documents/doc_details/8-resolution-action-to-end-violence-against-women-in-the-eac-region-and-particularly-partner-states.html (accessed on 12 January 2013).

¹⁹⁴ Art 118 of the EAC Treaty. Chapter 21 of the EAC Treaty is dedicated to health, cultural and social activities in the region.

¹⁹⁵ Chapter 17 of the EAC Treaty.

¹⁹⁶ Chapter 18 of the EAC Treaty.

¹⁹⁷ Chapter 19 of the EAC Treaty.

disadvantaged groups such as children, the elderly and persons with disabilities through rehabilitation and provision of, among other things, foster homes, health care, education and training.¹⁹⁸

Third generation rights such as the right to a clean and healthy environment have also been given priority within the EAC legal framework. A healthy environment is essential for human life and promotes the rights to dignity and improved health standards of people. In the EAC legal framework, Chapter nineteen of the EAC Treaty provides for the framework with respect to cooperation on environment and natural resource management.

In *Attorney General of Tanzania v African Network for Animal Welfare*,¹⁹⁹ the appellant was aggrieved by the decision of the First Instance Division which ruled that it had jurisdiction to hear a case concerning allegations that a proposed superhighway project of the Government of Tanzania would have an impact on the environment and climate of the Masai Maara National Park and the interests of the international community through UNESCO's designation of the Serengeti National Park as a World Heritage Site, and therefore infringing on EAC Treaty obligations. The Appellate Division held that the EACJ had jurisdiction to determine a case that involves environmental issues in exercising its duty of interpreting the EAC Treaty.²⁰⁰

It is clear that the EAC Treaty comprised human rights related provisions. The Treaty, to a large extent, compels the organs of the Community and member states to take necessary actions to ensure that the objectives of the Community are met. The organs and member states have responded by adopting several policies and resolutions and enacting several laws which, in one way or another, promote and protect human rights in the region.

¹⁹⁸ Art 120(2) of the EAC Treaty.

¹⁹⁹ Appeal No 3 of 2011, EAC Appellate Division.

²⁰⁰ Appeal No 3 of 2011, 14.

2.5.2 Human rights related protocols

The foundation for human rights protection in the EAC is also evident in the protocols adopted in the Community. Apart from them being economically oriented legal instruments, one of the objectives of the Protocol on the establishment of the East African Customs Union is to promote ‘economic development and diversification in industrialisation’ for the citizens of the EAC. This also has to do with the improvement of socioeconomic rights.²⁰¹ The current EAC is at the common market stage, where there is an anticipation of the free movement of goods and services within the region. Rights such as the free movement of persons and labour and the right of establishment and residence are guaranteed in the Protocol on the Establishment of the East African Community Common Market. The Protocol is guided by the principles provided under articles 6 and 7 of the EAC Treaty.²⁰² Since the common market stage involves the mobility of goods, services and persons, one of the principles governing a common market is non-discrimination against nationals and groups of other member states on the grounds of nationality.²⁰³ This is to ensure that there is free movement of goods, services and persons. One of the main objectives of the Common Market Protocol is to accelerate economic development in member states by ensuring the free movement of goods, persons and labour and guaranteeing the right to residence and establishment.²⁰⁴

In *Samuel Muhochi v Attorney General of Uganda*, the rights enshrined under the Common market Protocol were tested before the EACJ.²⁰⁵ The background of the case was that The Applicant travelled to Uganda from Kenya on 13 April 2011 on a Kenya Airways flight. He was part of a 14-member-delegation of the International Commission of Jurists-Kenya scheduled to meet the Chief Justice of Uganda, Justice Benjamin Odoki, on 14 April 2011. The whole delegation was on the same flight. On arrival at Entebbe

²⁰¹ Art 3(d) of the Protocol on the establishment of the East African Customs Union, 2004.

²⁰² Art 3(1) of the Common Market Protocol.

²⁰³ Art 3(2) of the Common Market Protocol.

²⁰⁴ See art 4, 5, 6, 7 and 13 of the Common Market Protocol.

²⁰⁵ EACJ First Instance Division, Ref. No. 5 of 2011.

International Airport, at 9.00am the Applicant was not permitted entrance beyond the Immigration checkpoint in the Airport. What happened immediately thereafter was later to be contested. The Applicant alleged that he was arrested, detained and confined by airport immigration authorities. Immigration authorities maintain that that they handed him to Kenya Airways who took him into their custody. What was not in contention is that the applicant was subsequently served with a copy of a 'Notice to Return' addressed to the Manager, Kenya Airways, bearing the Applicants names as the prohibited immigrant. It is also uncontested that that same day, at 3.00 pm, he was put on a Nairobi bound Kenya Airways flight and returned to Kenya. The immigration authorities did not inform him, verbally or in writing, why he had been denied entry as well as why he had been declared a prohibited immigrant and subsequently returned to Kenya. The immigration authorities maintain that they owed him no such duty, under the law. The Applicant contends that these actions were violations of his legal rights and Uganda's obligations under the Treaty, violation of the guarantees of free movement and non-discrimination of East African citizens under article 7 of the Protocol and The African Charter. After determining the matter, the EACJ held that:

The actions of denial of entry, detention, removal and return of the Applicant, a citizen of a [member state], to the Republic of Kenya, [member state], were illegal, unlawful and in violation of his rights under articles 104 of the Treaty and 7 of the Common Market Protocol.²⁰⁶

Further, the EAC member states have adopted a Protocol on Environment and Natural Resources, providing closer cooperation within the region between environmental and natural resource management. The member states are committed to observing the 'principle of the fundamental right of the people to live in a clean and healthy environment'.²⁰⁷ The Protocol covers various aspects of the environment such as water, wildlife, generic resources, climate change, energy and mining, biodiversity and forests. Member states have also adopted Other Protocols adopted by the EAC member states which are linked to the promotion of human rights include: Protocol on Peace and

²⁰⁶ Ref. No. 5 of 201, paragraph 130(iv).

²⁰⁷ Art 4(2)(a) of the Protocol on Environment and Natural Resources, 2005.

Security,²⁰⁸ dealing with issues of peace and conflict management. Both Protocols are yet to enter into force.

2.5.3 Human rights related legislation

Community legislation consists of Acts enacted in accordance with the EAC Treaty.²⁰⁹ Over the last decade, the EALA has been able to enact fundamental laws for safeguarding EAC activities. The passing of EAC Human Rights Bill in 2012 renewed the optimism of expanding the EACJ's jurisdiction to adjudicate human rights disputes in the near future. The Bill intends to protect human and peoples' rights in the region, and makes reference to various international instruments such as the African Charter and the UN Charter as normative standards for the protection of human rights. Community legislation takes precedence over similar national laws on matters pertaining to the implementation of the EAC Treaty.²¹⁰ When the Bill will be passed, it is likely will establish common human rights standards in the Community. The EALA had also passed the HIV and AIDS Bill in 2012. The Bill seeks to create a regional legislation that would protect the rights of people with HIV and AIDS. The Bill gives priority to measures of prevention as well as emphasising community support, care and adequate treatment. The Bill recognises the role of human rights in dealing with the pandemic and urges member states to take a rights-based approach in dealing with it.²¹¹ The two bills are yet to be assented by the Summit. It might be the Summit's fear that if it were to assent the bills, in particular the EAC Human Rights Bill, EACJ's human rights jurisdiction will be triggered.

²⁰⁸ Protocol on Peace and Security, 2013.

²⁰⁹ Section 2 of the Laws of Community (Interpretation) Act No. 6 of 2004.

²¹⁰ Art 8(4) of the EAC Treaty.

²¹¹ See http://www.eannaso.org/index.php?option=com_content&view=article&id=48%3Apress-release-eac-aids-law&catid=73%3Aeac-hiv-bill&Itemid=56&lang=en (accessed on 13 January 2013).

2.5.4 The African Charter on Human and Peoples' Rights

Reference to the African Charter in the EAC Treaty is sufficient to indicate that it is one of the sources of rights in the Community. Although the EAC is on the verge of adopting human rights legislation, the African Charter has already made its mark by promoting and protecting human rights within the Community. Some of the rights provided for in the EAC Treaty are incorporated in the constitutions of the EAC member states. This underlines the importance and influence of the African Charter in the region. In *Ugokwe v Nigeria*,²¹² the ECOWAS Court remarked that the inclusion of the African Charter in the ECOWAS Treaty obliges the Court to bring the application of rights within ECOWAS. The EACJ itself acknowledged the relevance of the African Charter in protecting human rights norms in the EAC, by stating that the insertion of the African Charter in the EAC Treaty was not a 'cosmetic' commitment.²¹³

Even the EAC Human Rights Bill draws inspiration from the African Charter, as most of the rights in the Bill are covered in the Charter. Whether it is necessary to have a human rights catalogue in the EAC or whether it is sufficient for the African Charter to be used as a human rights catalogue in the EAC, it is submitted that the EAC Treaty makes reference to the African Charter as a normative standard for promoting and protecting human rights in the Community. In addition, the intended legislation does not introduce any new rights which are not provided in the African Charter.²¹⁴ Even if the Bill had attempted to bring new rights not provided in the African Charter, the same target would have been reached by progressive interpretation and application of the

²¹² *Ugokwe v Nigeria*, ECW/CCJ/APP/02/05; *Karaou v Niger*, ECW/CCJ/JUD/06/08.

²¹³ *Plaxeda Rugumba v Secretary General of the EAC & Attorney General of Rwanda*, Ref No 8 of 2010, EACJ First Instance Division, 26.

²¹⁴ Viljoen is of the view that the African Charter, which all AU member states are party to, should serve as a common standard. He is of the view that a sub-regional human rights catalogue may mean that regional and sub-regional mechanisms treat standards differently. See F Viljoen *International human rights law in Africa* (2012) 494; SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkage' (2003) 3 *African Human Rights Law Journal* 93.

provisions by the EACJ.²¹⁵ The African Charter encompasses all three sets of rights – civil and political rights, socioeconomic rights, and group rights.

The main supervisory bodies for interpreting and applying the African Charter are the African Commission and the African Court. The African Commission was established within the African Charter, while the African Court was established by a Protocol. The African Charter is silent on the possibilities of an international organisation being a party to it. In Europe, the discussions concerning the accession of the EU to the ECHR started during the 1970s. After the Lisbon Treaty came into force in 2009, the EU was able to accede to the ECHR.²¹⁶

Article 1 of the African Charter directs member states to take all measures in ensuring that the rights in the African Charter are given effect in their respective territories. This can be a starting point for legitimising reference to the African Charter in the EAC Treaty. It is also a way of ensuring that the African Charter has effect in the territories of member states due to the primacy of EAC law over the national law of its members. Additionally, a member state may be accountable when infringing human rights norms in conflict with the provisions of the African Charter as provided under article 6(d) of the EAC Treaty.

Another argument that legitimises the use of the African Charter in the EAC is the assertions under article 30 and 58 of the Vienna Convention.²¹⁷ Under international law, it is legally acceptable for a treaty to subject itself to another treaty.²¹⁸ Article 6(d) of the EAC Treaty subjects itself to the African Charter in as far as adherence to the universally acceptable principles of human rights is concerned. Article 30(3) of the Vienna Convention proceeds by stating that in an event of the existence of two treaties, the earlier treaty will only bind the parties upon the compatibility of that treaty to the latter

²¹⁵ Viljoen (2012) 495.

²¹⁶ Art 6(2) of the Lisbon Treaty and art 59(2) of the ECHR as amended by Protocol No 14 to the ECHR which entered into force on 1 June 2010.

²¹⁷ Ebobrah (2012) 16 *Law, Democracy and Development* 49, 53.

²¹⁸ Art 30(2) of the Vienna Convention.

one. This depends on the intention of the parties to the extent that they wish to be bound by the provisions of the former treaty.

Bringing article 30(3) of the Vienna Convention into the context of the EAC, all member states of the EAC are parties to the African Charter which has also been complemented by the EAC Treaty under article 6(d). The provision mentions the African Charter as a whole and that member states should adhere to its provisions when promoting and protecting human rights. Therefore, the African Charter is compatible with the EAC Treaty as desired by the EAC member states. Article 6(d) of the EAC Treaty is not ambiguous, as it is clear that the parties intended to bring the African Charter into the activities of the Community, otherwise they would have used another option or would not have made reference to the Charter.

2.5.5 Other international human rights instruments

International human rights instruments form the source of law in the EAC. The EACJ has made reference to a number of international human rights instruments that member states are parties to.²¹⁹ The EALA makes reference to various international human rights instruments from its rules and resolutions. The UN Charter and the African Charter are mentioned in the EALA rules as a yardstick when exercising its legislative duty.²²⁰ When discussing the Bills and motions, the EALA is required to take into consideration the international human rights standards as provided in the UDHR. In addition, member states are urged to fully implement the Protocol to the African Charter on the Rights of Women in Africa (ACRW) for promoting and protecting the rights of women in the region.²²¹ The Summit adopted a declaration on children's rights and their wellbeing in the EAC, which takes cognisance of the rights included in the African Charter on the

²¹⁹ *Attorney General of Rwanda v Plaxeda Rugumba*, Appeal No 1 2012, EACJ Appellate Division; *Independent Medical Legal Unit v Attorney General of Kenya & Others*, Ref No 3 of 2010, EACJ First Instance Division.

²²⁰ Rule 63 of the EALA Rules.

²²¹ The EALA Resolution: Action to and Violence against women in the EAC Region and Particularly Partner States, 2009 available at http://www.eala.org/key-documents/doc_details/8-resolution-action-to-end-violence-against-women-in-the-eac-region-and-particularly-partner-states.html (accessed on 12 January 2013). The ACRW is commonly known as the Maputo Protocol.

Rights and Welfare of the Child (ACRWC) and the CRC.²²² The fact that international human rights standards constitute the values of the EAC, is the best source for providing universal human rights standards other than international human rights treaties.

2.5.6 Customary international law

International customary law is not mentioned in the EAC Treaty as a source of Community law. International custom, as evidence of a general practice accepted as law, is mentioned as one of the sources of international law capable of being applied by the ICJ.²²³ In general, international legal order originates from international treaties between states. However, consistent international practices which follow a sense of legal obligation can lead to international custom. In other words, customary international law results from consistent state practices together with a psychological element, commonly known as *opinio juris sive necessitatis*, in being bound by a particular legal order.²²⁴ *Opinio juris* implies that state practices must be carried out in a manner that it 'believes' to be bound by the existing legal order.²²⁵ For a custom to be regarded as law, a state must not merely exercise a certain act, it must also feel that there is an obligation to comply with the existing legal order.²²⁶

There is also an on-going debate among international law scholars as to whether human rights form part of international customary law.²²⁷ International customary law binds every state as long as a particular practice is accepted as international custom. There are some human rights values that bind every state and might arguably be considered to

²²² Bujumbura declaration on Child rights and wellbeing in the EAC, 2012 available at http://www.eac.int/news/index.php?option=com_docman&Itemid=77 (accessed on 12 January 2013).

²²³ Art 38(1)(b) of the ICJ Statute. see *Colombia v Peru*, 1950 ICJ Rep. 226, 277, *Nicaragua v USA*, ICJ Rep. 1986, 14

²²⁴ V Dimitrijevic 'Customary law as an instrument for the protection of human rights' (2006) ISPI, Istituto per gli Studi di Politica Internazionale, page 4, available at http://www.ispionline.it/it/documents/wp_7_2006.pdf (accessed on 12 February 2013).

²²⁵ See *North Sea Continental Shelf* cases, ICJ Reports, 1969,

²²⁶ See ICJ's decision on the North Sea Continental Shelf, ICJ Reports, 1969, para. 74 and 77

²²⁷ J Kammerhofer 'Uncertainty in the formal sources of international law: Customary international law and some of its problems' (2004) 15 *European Journal of International Law* 523.

attain the status of customary international law. The general acceptance of the UDHR by the international community is a factor in establishing the bond between customary international law and human rights. In *Nicaragua v USA*,²²⁸ it was observed that the attitude of states towards the UN General Assembly resolutions (such as the UDHR) reflects ‘an acceptance of the validity of the rule or set of rules declared in the resolution’.²²⁹ Some of the rights provided in the UDHR have gained the status of customary international law. In the *Barcelona Traction* case, the ICJ held as follows:

Such obligations (obligations erga omnes) derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ... others are conferred by international instruments of a universal or quasi-universal character.²³⁰

From the above narrations, the following conclusions can be drawn. International customary law include some of the resolutions adopted by the UN such as the UDHR, which is has gained universal recognition. Second, there are human rights norms which are considered as international customary norms; namely: acts against genocide, protection from slavery, and all acts against racial discrimination. . International organisations, as subjects of international law, are bound by international customary law. EAC member states have expressed their commitment to be bound by international customary law. The EAC Treaty states that member states are to be bound by universally accepted standards of human rights, as part of the governing principles and the criteria for a state to accede to the EAC Treaty.²³¹ The EACJ, therefore, can use ‘universally accepted standards’ as its source of law.

²²⁸ *Nicaragua v USA*, ICJ Rep 1986, 14.

²²⁹ ICJ Reports 1986, para 99-100.

²³⁰ *Barcelona Traction Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*. Judgment of 5th February 1970, ICJ Reports, 1970, para. 34.

²³¹ Art 3(3)(b) and 7(d) of the EAC Treaty.

2.5.7 General principles of law

General principles are another source of international law applied by international courts or tribunals. Unlike the 1991 ECOWAS Court Protocol that mandates the ECOWAS Court to apply the body of laws as provided in article 38 of the ICJ Statute,²³² the EACJ rules do not provide the source of laws to be applied by the EACJ. The ICJ is empowered to apply ‘general principles of law recognized by civilized nations’.²³³ There is still uncertainty as to what constitutes general principles of international law.²³⁴ What is commonly agreeable among international law scholars is that the general principles of international law are derived from different municipal systems and they are universally applied.²³⁵ Unlike treaties and custom, the general principles of law do not require consensual elements.²³⁶ When the rules of a treaty are silent, an international court can adopt general principles as applied in municipal legal systems and other international courts. Some of the general principles of international law include *res-judicata*, estoppel, *nemo iudex in causa sua*, good faith and *audi alteram partem*. The EAC Treaty and the EACJ rules do not provide for the use of general principles of law, nevertheless, on many occasions the EACJ has dealt with some of the general principles such as *res judicata*.

2.5.8 Judicial decisions

Stare decisis does not apply in international tribunals but they are used as evidence of an existing law or principle. Article 38(1)(d) of the ICJ Statute recognises judicial decisions as ‘subsidiary means for the determination of rule of law’. However, article 59 provides that a decision of the court ‘has no binding force except as between the parties and in respect of that particular case’. In practice, international courts use the decisions of other courts as a way of supporting their findings. The EACJ has used decisions from the

²³² Art 19(1) of the 1999 Court Protocol.

²³³ Art 38(1)(c) of the ICJ Statute.

²³⁴ VD Degan *Sources of international law* (1997) 34.

²³⁵ As above.

²³⁶ Dugard (2011) 35.

EU Court of Justice and the Inter-American Court, and even the decisions of national courts for its findings.²³⁷

2.5.9 The writings of publicists

The writings and teachings of the most highly qualified and well-known jurists form a subsidiary source of international law. Teachings of the jurists of various nations are mentioned as a subsidiary means of determining rules of law by the ICJ.²³⁸ These writings are useful for most international courts in determining international law issues. The writings of international jurists provide evidence on the existence of rule of law. They are not binding but are useful for developing legal reasoning by courts. This source of law is most often useful when interpreting or providing a legal position in international law. The EACJ has used the writings of international jurists when interpreting the EAC Treaty.²³⁹

2.6 The role of EAC organs in realising human rights

The state parties to the EAC Treaty have ceded some of their sovereignty in favour of the EAC. The work of a supranational organisation such as the EAC is generally done by specialised organs and institutions; however, there is no single organ or institution within the EAC that performs a specific human rights task. Nevertheless, human rights are accommodated through these organs' or institutions' objective functions and adherence to the governing Community principles.

²³⁷ See for example *Moiwana Community v Surnam (Inter-American Court of Human Rights: Judgment of June 15, 2005)*. Was referred in *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal No 1 of 2011, the EACJ Appellate Division. Also see *Attorney General of Uganda & Another v Omar Awath & Others*, Appeal No 2 of 2012 (Arising out of Application No 4. of 2011 in Ref No. 4 of 2011), EACJ Appellate Division.

²³⁸ Art 38(d) of the ICJ Statute.

²³⁹ For example, see the case of *Mary Ariviza and Another v Attorney General of Kenya & Others*, Ref No 7 of 2010, EACJ First Instance Division, at page 22, in which the EACJ referred to Lord Denning, in his book 'The Due Process of Law'.

There are generally two types of organs in an international organisation. The first is the primary organs created from the constituent instrument of the organisation, and the second is the subsidiary organs, formed by the decision of primary organs established by the founding constitution.²⁴⁰ The organs and institutions of an entity are competent to act only when such powers are attributed to them by the member states, unless that particular act warrants the assertion that it was appropriate for the fulfilment of its objectives. This should be the case in as far as the recognition of human rights is concerned in the EAC.

Although the EAC Treaty does not confer an explicit human rights mandate on the organs and institutions of the Community, the established principles appeal to the Community organs and institutions to conform to human rights standards. This has resulted in human rights featuring in the activities of the EAC organs, underlining the importance of human rights in the integration process. The established rules, decisions, resolutions and directions that renders feasible the involvement of the EAC organs in recognising human rights.

2.6.1 The Summit

The Summit, which is equivalent to the European Council of the EU, is the highest political organ of the Community. Its main task is to safeguard the pursuance of the objectives of the Community and is composed of the Heads of State and Government of the member states.²⁴¹ The Summit is mandated to give directions and impetus for achieving the objectives of the Community.²⁴² In supervising EAC integration, the Summit is required to consider the annual progress reports submitted to it by the Council and to review the state of peace, security and good governance in the Community, and the progress achieved for the establishment of a political federation.²⁴³ The Summit also has legislative powers which may potentially undermine the work of

²⁴⁰ HG Schermers & NM Blocker *International Institutional Law* (2011) 157.

²⁴¹ Art 10(1) of the EAC Treaty.

²⁴² Art 11(1) of the EAC Treaty.

²⁴³ Art 11(2) and (3) of the EAC Treaty.

the EALA. According to article 11(6) of the Treaty, ‘an Act of the Community may provide for the delegation of any powers, including legislative powers, conferred on the Summit by this treaty or by any Act of the Community, to the Council or to the Secretary General’. From the wording of this provision, it would seem possible for the Summit to have legislative powers which could be provided by the Treaty or an Act of the Community.

For ensuring mutual understanding between the member states, the decision of the Summit is by consensus. At times, the decision by consensus may be a barrier to deciding critical issues, as the decision has to be agreed by all the Heads of State and Government. This was evident in the signing of a Common Market Protocol where the EAC member states were not in agreement regarding the issue of land rights, resulting into discord between them. Later on, the issue was resolved by the decision that the laws and policies of the member states should govern matters concerning land use.²⁴⁴ This contradicts the commitment by member states to ensure effective rights to establishment and residence as provided in the Common Market Protocol.

The EAC Treaty does not expressly confer a human rights mandate on the Summit. The Summit’s most important function for establishing legal order in the Community is to assent to Bills passed by the EALA. Although the Summit can delegate some of its functions it cannot do so for those involving giving direction or impetus, the appointment of the EACJ judges and assent to Bills.²⁴⁵ The Summit is yet to assent to the EAC Bill of Rights and the HIV and AIDS Bill which are eagerly awaited by EAC citizens. When assented to, the two Bills will establish a strong foundation for human rights protection in the region.

The Summit may assent or withhold assent to a Bill passed by EALA. If the Bill is withheld for more than three months from the date it was passed by EALA, the Bill has to be

²⁴⁴ Art 15 of the Common Market Protocol.

²⁴⁵ Art 9(d) of the EAC Treaty.

taken back to the Assembly with reasons or for reconsideration by the Assembly.²⁴⁶ When the Bill is taken back to the Assembly, the Assembly has to reconsider it as advised by the Summit and then resubmit it to the Summit. If the Summit withholds assent to a resubmitted Bill, the Bill will lapse.²⁴⁷ The two Bills mentioned here were passed in April 2012, but as yet have not been assented to by the Summit nor referred back to the Assembly for reconsideration. The delay in assenting to the two Bills is against the spirit of good governance and rule of law to which member states have solemnly expressed their desire to adhere.

The Summit's approach to integrating human rights in the agenda of the Community is somehow inconsistent. The Heads of State and Government seem to be reluctant to integrate human rights effectively into the Community. The Summit has always made decisions which in one way or another affect the effective functioning of the EACJ and have a bearing on the human rights mandate of the Court. In 2006, the Summit upheld a proposal by the Council of Ministers to amend the provisions of the Treaty relating to the functioning of the EACJ.²⁴⁸ These amendments would have had an impact on the security of tenure of the EACJ judges, and would also have added a two-month period for individuals to lodge a case before the Court. In April 2012, however, the Summit accepted the EALA resolution to expedite the adoption of the Protocol that would extend the jurisdiction of the EACJ to deal with matters concerning crimes against humanity.²⁴⁹

The Summit has adopted human rights related protocols. It has already approved the Protocol on Environment and Natural Resources and the Peace and Security Protocol that will provide the legal foundation for the protection of peace and security and environmental preservation in the region. The steps taken by the Summit so far in promoting human rights in the EAC include the adoption of the Bujumbura Declaration

²⁴⁶ Art 63(3) of the EAC Treaty.

²⁴⁷ Art 63(2), (3) of the EAC Treaty.

²⁴⁸ Communiqué of the EAC Summit, 30 November 2006.

²⁴⁹ Communiqué of the EAC Summit, 28 April 2012.

on Child Rights and Wellbeing in the EAC.²⁵⁰ This Declaration takes cognisance of the instruments pertaining to the realisation of children's rights, such as the African Charter on the Rights and Welfare of the Child (Children's Charter) and the Convention on the Rights of a Child (CRC). It also recalls the provision under article 7(2) of the EAC Treaty, in terms of which member states have committed themselves to abide to universal human rights standards. Member states have thus ratified, adopted and domesticated all international and regional instruments which promote and protect children's rights. Generally, the Declaration seeks to foster the realisation of children's rights through the harmonisation of laws and policies. It also seeks to protect all groups of children, including children with disabilities, street children and children affected by harmful practices.

Furthermore, the Summit has a duty to ensure that member states adhere to the Community principles and objectives as provided in the Treaty. In a more compelling manner, the Summit may impose sanctions against a member state in the event of default or failure to meet Treaty obligations.²⁵¹ By the same token, the Summit has the mandate to suspend or expel member states from the activities of the Community.²⁵² There is consequently no need to reach consensus, as provided under article 12(3) of the EAC Treaty when expelling or suspending a partner state.²⁵³ This ensures that a transgressing state would not escape punishment by merely being supported by another friendly state when discussing its suspension or expulsion. Unlike the authority of Heads of State and Government of the ECOWAS, the Summit has no power to refer a case of non-compliance by the transgressing state or Community organ to the EACJ.²⁵⁴ If the Summit had had such powers, it would have helped to reduce the risk of noncompliance by member states.

²⁵⁰ Bujumbura Declaration on Child Rights and Wellbeing in the EAC, adopted on 3 September 2012.

²⁵¹ Art 143 of the EAC treaty.

²⁵² Art 146 and 147 of the EAC Treaty.

²⁵³ Art 148 of the EAC Treaty.

²⁵⁴ Art 77 of the revised Treaty.

2.6.2 The Council

Another crucial political organ of the Community is the Council. This is the main policy organ of the EAC and is mandated with the task of monitoring, initiating and ensuring effective implementation of programmes and policies for achieving the objectives of the Community. It is comprised of ministers responsible for regional cooperation affairs.²⁵⁵ In performing its duties, the Council cooperates with the Sectorial Committees and the Coordination Committee, thus cooperating in policy making, reporting and arranging different programmes and strategies in order to implement the objectives of the EAC Treaty.

As with the rest of the Community organs, the Council does not have a specific human rights mandate. However, through its activities the Council is involved in the process of promoting and protecting human rights in the region. The work of the Council that has already had an impact in human rights protection within the Community includes policy decisions for the efficient functioning of the Community, initiating and submitting Bills to the Assembly, and considering measures to be taken by the member states to ensure the effective implementation of the EAC Treaty.²⁵⁶

One of the first steps taken by the Council to promote human rights was in 2008, when it adopted the EAC Plan of Action on the Promotion and Protection of Human Rights in East Africa. The Plan of Action was a strategic framework set for a period of one year with the main aim of inculcating a culture of human rights in the region.²⁵⁷ The framework was a cardinal step in promoting human rights in the EAC. It also played a role in influencing other organs of the EAC to take similar steps in promoting human rights in the region. The framework intended to build the capacity of national human rights institutions, initiating compliance by the member states with a number of regional and international human rights treaties. The strategic framework has started to yield

²⁵⁵ Art 14 of the EAC Treaty.

²⁵⁶ Art 14(3) of the EAC Treaty.

²⁵⁷ Para 3 of the EAC Plan of Action on the Promotion and Protection of Human Rights in East Africa, 2008–2009.

results. One of the strategies of the Plan of Action was to initiate the establishment of the EAC Bill of Rights with its own mechanisms of enforcement. This Bill has already been passed by the Assembly and is waiting to be assented in order to become EAC law. Although the Plan of Action was only for one year, it was a wakeup call for the other Community organs and everyone involved in the functioning of the EAC, reminding them of the importance of recognising human rights when performing their duties.

In 2008, in its main task of initiating and making policies, the Council adopted an EAC Workplace Policy on HIV and AIDS that had led to the passing of the HIV and AIDS Bill of the EAC by the Assembly. The efforts by the Council so far to uphold fundamental human rights standards is commendable, but more efforts are needed to integrate human rights effectively in the EAC. EAC integration is fast-tracking; therefore human rights should be the prime agenda of the Council, which is the key organ for strategising and initiating different programmes and policies. The Council is therefore a vital organ for ensuring that human rights are effectively realised.

2.6.3 The Secretariat

Unlike the Summit and the Council, the Secretariat is the executive organ of the Community. It is made up of the Secretary General, Deputy Secretary General and the Council to the Community.²⁵⁸ The Secretary General, who is the chief executive officer of the Community, appointed by the Summit, heads the Secretariat. The appointment of the Secretary General occurs on a rotational basis between the member states. Although the Secretariat does not have an exclusive human rights mandate, through its administrative work it has the potential to influence the establishment of a human rights culture in the Community.

The Secretariat is in charge of all the operations of the Community. It receives and submits recommendations to the Council, and forwards Bills to the Assembly through

²⁵⁸ Art 55 of the EAC Treaty.

the Co-ordination Committee.²⁵⁹ It is also responsible for implementing the decisions of the Council. The major task of the Secretariat, which is important for the observation of human rights in East Africa, is its duty to follow up on the implementation of the EAC Treaty by member states. This task resides within the office of the Secretary General.

Nevertheless, the Secretariat has been slow in implementing the decisions of the Summit and the Council, particularly in matters relating to human rights. As a wakeup call, the Secretary General was brought before the EACJ for his inaction in convening the Council to embark on the process of extending the jurisdiction of the EACJ, as an infringement of the principles under the Treaty.²⁶⁰ One notable weakness of the Secretary General is the inability to effectively observe and follow up on non-compliance with the EAC Treaty by member states. When a member state fails to fulfil its obligations under the Treaty, the Secretary General is required to submit his observations to the defaulting State, expressing concerns about the breach. The defaulting state is then expected to send its reply to the Secretary General within four months; failure to do so can result in the Secretary General referring the state to the EACJ.²⁶¹

Owing to its failure to compel member states to fulfil EAC treaty obligations, the Secretary General has been the subject of complaints from many applicants before the EACJ. In *Democratic Party and Another*,²⁶² the applicant asserted that the failure by the Secretary General to follow up on the Government of Uganda in terms of its adoption of appropriate rules for electing members of the EALA, as provided in article 50 of the Treaty, was contrary to the principles of good governance. Accordingly, the Court did not find the Secretary General to be in breach of his treaty obligations as the process of

²⁵⁹ Art 71(1) of the EAC Treaty, The Secretariat is also responsible for conducting research and initiating different programmes and spearheading their implementation for achieving the objectives of the Community.

²⁶⁰ *Sitenda Sebalu v Secretary General of the EAC & Others*, Ref No 1 of 2010, EACJ First Instance Division.

²⁶¹ Art 29 of the EAC Treaty.

²⁶² Ref No 6 of 2011.

amending the rules had commenced. However, the Court gave its own views for the effective functioning of the Secretariat by stating the following:²⁶³

We would, therefore, encourage the Community Secretariat to establish, as a matter of administrative principle, a standard practice of following up on allegations of treaty infringements and/or violations once it receives formal communication about the same and to act as appropriate including providing feedback to the complainant. That would be, in our view, a good administrative act that would not overly tax either the Community Secretariat or the Secretary General.

The supervisory work of the office of the Secretary General renders it a potentially important entity for establishing a human rights culture in East Africa. The mechanism for following up on violations of the EAC Treaty by the Secretary General is not being effectively utilised. Although the office obtains some information about infringements of the Treaty it is generally inactive in making follow ups. This could be due to the lack of modality for its effective functioning. There is certainly a need for improvement in the office of the Secretary General if it is to foster human rights within EAC legal order.

2.6.4 The East African Legislative Assembly

The EALA is the main legislative organ of the EAC.²⁶⁴ The policy making or administrative organs of international organisations cannot fully evaluate each and every decision that has a bearing on the interests of the organisation, especially in the law-making process. It is the duty of legislative organ to evaluate and debate the policies and tabled Bills presented by the political organs. This is also the practice at the national level, where the executive presents the policies and Bills to be debated on in the national parliament before they become national law. International legislative organs guarantee public participation in the functioning of the organisation.²⁶⁵ They enable the popular

²⁶³ *Democratic Party case*, 16.

²⁶⁴ The EALA is composed of nine members elected from each member state, the ministers responsible for the EAC affairs from each member state, and the Secretary General and the Council to the Community and, in cases where the minister responsible for EAC affairs is unable to participate, the deputy minister or minister for state can take part in the parliamentary proceedings.

²⁶⁵ Art 4(h) of the revised Treaty provides for the principle of popular participation.

participation of citizens in the sense that the members of international parliamentary organs represent the community citizens of the organisation. International parliamentary organs provide a forum for mutual consultation and cooperation among member states.²⁶⁶

Wanyande states that in order for the EALA to function effectively, it needs to have ‘a strong sense of legitimacy and popular support among its constituents’.²⁶⁷ According to Wanyande, a legislative organ obtains legitimacy and popular support through the methods of electing its members, the mode of operation and, lastly, its performance.²⁶⁸ The importance of ensuring the legitimacy of the members of the EALA has also been acknowledged by the EACJ. In *Anthony Calist Komu v Attorney General of Tanzania (Komu case)*,²⁶⁹ in a reference concerning a dispute over the legality of EALA members elected by the Tanzanian National Assembly, the Court invoked its inherent powers by granting the supplications of the respondent of filling a response out of time, arguing that the reference is of importance, as it involves the legality of members of one of the arms of the organisation which is of great importance for the existence of EAC integration.²⁷⁰

2.6.4.1 Election of members of the EALA

Members of legislative bodies can either be elected through direct elections or indirect elections, through electoral colleges. The members of the EALA are elected from the national assemblies of each member state and they should represent political parties in

²⁶⁶ Schermers & Blocker (2003) 417. International legislature such as national parliaments provides a forum for discussing important government issues and concerns. They also ensure accountability by the executive branch of government and are essential for political representation. At the regional level, members of the EALA represent diverse interests in the region through elected members.

²⁶⁷ P Wanyande ‘The Role of the East African Assembly’ in R Ajulu (ed) *The making of a region: The revival of the East African Community* (2005) 67.

²⁶⁸ As above. see also AGR Oloo ‘The EALA and the National Assemblies of partner states: conflict or harmony?’ In R Ajulu (ed) *The making of a region: The revival of the East African Community* (2005) 76-110.

²⁶⁹ *Calist Komu v Attorney General of Tanzania*, Ref No 7 of 2012, EACJ First Instance Division.

²⁷⁰ *Komu case*, 6.

the national assembly, shades of opinion, gender and all other special interest groups.²⁷¹ Each member state has its own legislative framework for administering the election for members of the EALA. One of the main tasks of the EALA is to promote democratic governance in the Community; it is therefore necessary for the members of the EALA to have legitimacy in their representative capacity. Electing members of the EALA through electoral colleges (national assemblies) is not feasible and does not reflect public representation in the region. However, although it might seem ambitious, the election of EALA members through a secret ballot by the EAC citizens is possible through an effective and efficient modality.

In most regional assemblies in Africa, including the EALA, members are elected through national parliaments. However the number of EALA members elected does not consider the population size of a member state. Furthermore, EALA members are nominated by parties represented in parliament. In Tanzania and Kenya, the list of candidates to be nominated for EALA membership is drawn from political parties taking into consideration geographical representation and gender.

In the European Parliament of the EU, the number of seats from a member state is determined according to the size of the population. Accordingly, nations with a larger population get more seats in the Parliament. Up to 1979, members of the European Parliament were elected from the national assemblies and delegated to the EC Parliament.²⁷² Currently, the EU has a Direct Election Act which mandates EU states to lay down their own rules for electing members of the European parliament. These rules must apply the basic democratic rules under the EU Treaties such as proportional representation, free and secret ballot elections and direct general election.²⁷³ The fact that the members of the European parliament are directly elected, there could be a genuine claim of legitimacy and representation of universal suffrage from their part.

²⁷¹ Art 50 of the EAC Treaty.

²⁷² Borchardt (2010) 47.

²⁷³ Borchardt (2010) 448.

The election of members to the EALA has been largely overshadowed by controversy. Hence, a number of cases have been brought before the EACJ, challenging the legality of the rules and procedures of the electoral colleges for members of the EALA in the member states. The first case challenging the legitimacy of EALA members of parliament was the *Anyang' Nyong'o* case.²⁷⁴ In this case, the applicants challenged the legality of the election process by the National Assembly of Kenya for electing members of the EALA. This came about after the House Business Committee of the Kenyan National Assembly deliberated the list of names of the candidates eligible to contest the election and earn the right to be members of the EALA. The controversy arose after the submission of two different lists with five nominees from the National Rainbow Coalition (NARC). The first list was submitted by the party leader through the Clerk of the Kenyan National Assembly, the other list was presented to the Committee by the government chief whip. The latter list was subsequently approved by the Committee and rejected the first list given to it by the NARC leader, with the exception of one candidate, who had appeared on both lists. After that, the lists were forwarded to the Secretary General of the EAC as elected members of the EALA from Kenya.

The main issues before the Court were whether the Kenyan National Assembly had conducted an election, and whether the rules were in conformity with article 50 of the EAC Treaty. The Court subsequently found that the Kenyan National Assembly did not conduct an election as provided under this Treaty;²⁷⁵ the rules merely provided for nomination rather than election. The Court also found that the rules partially complied with article 50 of the Treaty by taking into consideration the proportionality of party representation. However, it was stated that the lack of provisions for gender consideration and groups of special interested amounted to a significant degree of non-compliance to the Treaty.²⁷⁶

²⁷⁴ Ref No 1 of 2006.

²⁷⁵ *Anyang' Nyong'o* case, 34.

²⁷⁶ *Anyang' Nyong'o* case, 37; H Onoria 'Botched-up elections, treaty amendments and judicial independence in the East African Community' (2010) 54 *Journal of African Law* 74, 76.

After the *Anyang' Nyong'o* decision, a number of cases were taken to the national courts and the EACJ challenging the legitimacy of the members of the EALA. In the case of *Mtikila v Attorney General of Tanzania and Others*,²⁷⁷ the applicant disputed the election of nine members of the EALA by the Tanzanian National Assembly. His main ground of contention was that the tenure of the two members elected to replace the vacated seats in 2006 did not end until 2011. According to the Treaty, the tenure for the members of the EALA is five years and they are eligible for re-election for a further term of five years.²⁷⁸ Therefore, according to the applicant, the National Assembly ought to have elected seven members only. In 2001, the Tanzania National Assembly elected nine members to the EALA. In 2005, Dr Harrison Mwakyembe and Mrs Beatrice Shelukindo contested and won seats in the Tanzanian National Assembly. According to article 51(3)(c) of the EAC Treaty, the two were required to vacate their seats in the EALA, which they did. In March 2006, the Tanzania National Assembly held a by-election to replace the two EALA members and Dr Sigalla and Mrs Kibacha were subsequently elected. However, in October the same year, when an election was conducted by the National Assembly to elect nine members to the Second Legislative Assembly, Dr Sigalla and Mrs Kibacha could not retain their seats.

The main issues before the Court were whether the Court had jurisdiction to entertain such a case and whether electing nine other members to the EALA was contrary to the required number from a member state. The Court distinguished this case from the *Anyang' Nyong'o* case, pointing out that in the *Mtikila* case the fact that there was an election was undisputed, while in the *Anyang' Nyong'o* case, the main issue was whether there was an election before the Kenyan National Assembly or not.²⁷⁹ The Court held that the matter should be brought before the High Court of Tanzania and not the EACJ in accordance with article 52 of the Treaty, as such disputes are mandated to state organs.

²⁷⁷ Ref No 1 of 2007.

²⁷⁸ Art 51(1) of the EAC Treaty.

²⁷⁹ Ref No 1 of 2007, 5.

The EAC Treaty provides for a tenure period of five years for members of the EALA, after which they can be elected for a further five-year term. The EAC Treaty is, however, silent on the tenure of a member who replaces a member after resigning. The Treaty is also silent on the life span of the Assembly; presumably it runs for five years concurrent with the elections of its members at the national level. The lack of clarity on the life span of the EALA and the tenure of members who replace other members who resign invites future legal disputes.

Taking a different route from that of their counterparts in Tanzania, the applicant in *Jacob Oulanyah v Attorney General*²⁸⁰ contended that the 2006 electoral rules of the National Assembly of Uganda were inconsistent with the Constitution of Uganda to the extent that ‘independents’ are denied the right to be elected to the EALA. Apart from interpreting the provisions in the constitution of Uganda, the Constitutional Court of Uganda also considered the requirement under article 50 of the EAC Treaty, requiring the elections of members of the EALA to take into consideration different categories of groups including ‘shades of other opinion’. The Constitutional Court found that the rules were inconsistent with the Ugandan constitution and article 50 of the EAC Treaty. What makes this case important is that it was the first time that a municipal court made reference to a decision by the EACJ.²⁸¹

After the *Oulanyah’s* case, the Parliament of Uganda was required to amend the 2006 rules so as to comply with the Constitution of Uganda and article 50 of the EAC Treaty. Owing to undue delays by the Attorney General of Uganda in amending the 2006 electoral rules for electing members to the EALA, the applicant in *Democratic Party and Another v Attorney General of Uganda and Another*²⁸² alleged that the inaction by the Parliament of Uganda to amend the 2006 rules in conformance with the EAC Treaty was contrary to the principles of good governance, the rule of law and universally acceptable standards of human rights, and therefore asked the Court to restrain the Parliament of

²⁸⁰ Constitutional Petition No 28 of 2006.

²⁸¹ The Constitutional Court of Uganda made reference to the *Anyang’ Nyong’o* case.

²⁸² *Democratic Party* case

Uganda from conducting elections for members of the EALA until the rules were amended to conform with the EAC Treaty. The Court rightly issued an interim order as requested by the applicant.²⁸³

The term of office of the members of the EALA has also been questioned. The Treaty provides that 'an elected member of the Assembly shall hold office for five years and be eligible for re-election for a further term of five years'.²⁸⁴ What is not clear is whether there is a time limit on a person's membership of the EALA from the words of the Treaty provision 'eligible for re-election for a further term of five years'. There are two views on this phrase: the first view suggests that the members of the EALA are eligible to serve for two terms of five years only, while the second view suggests that members are free to seek re-election every time a term in the EALA expires. In August 2011, the Attorney General of Uganda was asked by the Speaker of the Parliament of Uganda to seek an advisory opinion on an interpretation of article 51(1) of the Treaty. However, the Attorney General did not seek an advisory opinion, instead he gave his own opinion that the phrase 'eligible for re-election for a further term of five years' means that members are entitled to serve on the EALA for two five-year terms only.

Being aggrieved by the opinion of the Attorney General, in *Legal Brains Trust (LBT) Limited v Attorney General of Uganda*²⁸⁵ the applicant challenged the interpretation by the Attorney General of Uganda on the ground that his interpretation infringed the EAC Treaty. The EACJ First Instance Division erred in law by entertaining the application that did not match the requirements needed for a person to submit a reference before the EACJ. The Court went on to interpret the phrase 'eligible for re-election for a further term of five years' to mean that the tenure of an EALA member is limited to two terms of five years each, making a total of ten years. Not being satisfied by that interpretation

²⁸³ *Democratic Party case*, 22.

²⁸⁴ Art 51(1) of the EAC Treaty.

²⁸⁵ Ref No 10 of 2011, EACJ First Instance Division.

either, the applicant approached the Appellate Division for clarification.²⁸⁶ The matter was subsequently dismissed for, among other reasons, a lack of all the admissibility requirements for bringing a case under article 30 of the EAC Treaty, which states that

Any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

Under the provisions, a cause of action should emanate from a failure of a member state or a Community institution. The interpretation by the Attorney General was his personal opinion and not the opinion of Uganda or any institution of the Community. The applicant referred the matter to the Court, alleging an interpretation by the Attorney General and not against a state or Community institution. It was for this reason that the Court was led to dismiss the application. The decision nullifies the proceedings and the interpretation before the First Instance Division. Nevertheless, limiting the tenure of members of the EALA to two five-year terms is preferable in terms of ensuring accountability and upholding the principles of good governance and democracy. This time limit is important as it provides an opportunity to have different kinds of leaders serving the Community in different periods.

The cases discussed above provide evidence of uncertainty over the legitimacy of the members of the EALA. The differences in their elections and the unsettled issues concerning their tenure of office are alarming. There is thus the potential of having a group of members with different attitudes and approaches when debating and deciding on integration issues owing to the fact that some members may be more independent than others. Although article 50 of the EAC provides the criteria for electing members of the EALA, the discretion of the national assemblies in determining the rules for their election affords room for discrepancies in their selection. ‘Shades of opinion’ in Tanzania may not be the same as in Burundi or Rwanda; indeed as with those of ‘special interest

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Legal Brains Trust Limited v Attorney General of Uganda, Appeal No 4 of 2012, EACJ Appellate Division.

groups', it may not be the same between Kenya and Uganda. Member states should adopt clear rules for election procedures and security of tenure.

2.6.4.2 Functions

The EALA is tasked with liaising and consulting with the National Assemblies of the member states in matters of Community interest.²⁸⁷ This tries to ensure popular participation in making decisions for the Community. The EALA debates and considers all matters pertaining to the activities of the Community and makes recommendations to the Council for implementation. It also considers all annual reports concerning the activities of the Community. Unlike the ECOWAS Parliament, the EALA does not have an express mandate to consider human rights issues, as the former is tasked with considering human rights issues and making recommendations to the organs and institutions of ECOWAS.²⁸⁸

The role of the EALA in promoting human rights depends on its legislative role and adoption of resolutions. Community legislation is affected by the debating and passing of Assembly Bills. Proposals for the Bills can be initiated by the Council and members of the Assembly.²⁸⁹ Subsequently every Bill has to be passed by the Assembly and then assented to by the Heads of State in order to become an Act of the Community.²⁹⁰ As stated above, the Bill has to be assented to within three months after being passed by the Assembly or it may be referred back by the Summit for reconsideration by the Assembly. If the Summit does not assent to the re-submitted Bill, such a Bill may lapse. This may provide an opportunity for the Heads of State and government to pick and choose the Bills they want. There should thus be some mechanisms in place to force the Summit to assent to the Bills that are passed by the Assembly. However, article 8(c) of the Treaty compels member states to refrain from any action likely to jeopardise the

²⁸⁷ Art 49(2)(a) and 67 of the EAC Treaty.

²⁸⁸ Art 6 of the Protocol A/P2/8/94 on the Parliament, 1994.

²⁸⁹ Art 14(3)(b) and 59(1) of the EAC Treaty.

²⁹⁰ Art 62(1) of the EAC Treaty.

achievement of the objectives or implementation of the EAC Treaty. Therefore, the Summit is not expected to intentionally pick and choose the Bills to be assented to.

The EALA needs to be given a clear mandate and resources for it to perform its functions effectively. The EAC Treaty distinguishes between legislative measures, in the form of a Bill or Act of the Community which are jointly adopted by the EALA and the Summit, and policy measures in the form of regulations, directives and decisions adopted by the Council.²⁹¹ The Council can also initiate and submit Bills before the EALA.²⁹² The involvement of both the Council and the EALA in the legislation process was called into question in the very first case of the EACJ in *Calist Andrew Mwatela and Others v The EAC*.²⁹³ The reason that gave rise to the reference was the decision by the Council to assume responsibility for four pending Bills, which had been submitted by members of the Assembly as provided under article 59 of the Treaty. In 2004, in trying to establish its authority over the EALA, the Council decided that it should submit a policy-oriented Bill that had implications for the sovereignty of member states and the budgetary aspect of the EAC to the Assembly, as provided in article 14(3)(b) of the Treaty, rather than being submitted as private Bills.²⁹⁴ The applicant called for the Council's decision to be declared void. The Court held that the EALA is an independent representative organ of the Community, designed to adhere to the principle of people-centred cooperation and, therefore, the Treaty did not endow the Council with any power to interfere in the activities of the Assembly.²⁹⁵ This decision ensured the independence of the EALA in performing its legislative duties.

2.6.4.3 The role of the EALA in human rights

The EALA has so far been active in promoting human rights in the EAC. In its legislative process, members of the EALA are barred from discussing a Bill, motion or any

²⁹¹ AP van der Mei 'Regional Integration: The contribution of the Court of Justice of the East African Community' (2009) 69 *Heidelberg Journal for International Law* 403, 407.

²⁹² Art 14(3)(b) of the EAC Treaty.

²⁹³ Application No 1 of 2005.

²⁹⁴ Application No 1 of 2005, 2.

²⁹⁵ Application No 1 of 2005, 20.

amendment to the Bill which in the opinion of the Speaker or any member of the Assembly is likely to derogate the enjoyment of human rights.²⁹⁶ The UDHR and the UN Charter are mentioned in the EALA rules as yardsticks in standard setting for performing its legislative duties.²⁹⁷ The most significant step taken by the EALA in promoting human rights in the region is the passing of the Human Rights Bill and the HIV and AIDS Bill. When the Bills have been assented to, they will provide a common basis for human rights protection in East Africa.

In 2009, the EALA adopted a resolution encouraging member states to take ‘urgent and concerted action to end violence against women’.²⁹⁸ The resolution makes reference to a number of international human rights instruments such as the UN Charter, the UDHR and the Convention on the Elimination of all Forms of Discrimination against Women. It further calls for governments to ensure that violence against women is eradicated as it increases the number of deaths of women. Accordingly, it calls on member states to adopt comprehensive and inclusive approaches to deal with violence against women. Member states are also urged to sign and fully implement the ACRW as ratified.

Another resolution relating to human rights is the resolution of April 2012 that calls for the trial of the Kenyan accused persons of the 2007 General elections aftermath to the EACJ.²⁹⁹ The resolution was approved by the Heads of State, and directed the Council to expatiate the process of extending the jurisdiction of the EACJ to include matters relating to crimes against humanity with a retrospective effect. Other human rights related resolutions include the resolution of the Assembly urging EAC partner states to ratify the resolution of the UN General Assembly on the Convention on the Rights of

²⁹⁶ Rule 63 of the EALA Rules of Procedure, 2001.

²⁹⁷ Rule 63 of the EALA Rules.

²⁹⁸ EALA Resolution, “Action to end violence against women In the EAC region and particularly partner states” available at http://www.eala.org/key-documents/doc_details/8-resolution-action-to-end-violence-against-women-in-the-eac-region-and-particularly-partner-states.html (accessed on 12 January 2013)

²⁹⁹ EALA Resolution ‘Seeking to Try Kenya 2007 General Elections Aftermath Accused Persons at EACJ, Not ICC’ available at http://www.eala.org/key-documents/doc_details/266-resolution-seeking-to-try-kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.html (accessed on 12 January 2013)

Persons with Disabilities and a resolution seeking the appointment of an East African Peace Committee for Uganda with the mandate to bring to an end the violence in northern Uganda.³⁰⁰

The EALA, being the primary legislative organ of the EAC, is expected to play a leading role in promoting human rights, democracy and the rule of law in the region and so far the trend in its work seems to be promising. The Assembly has gradually started to adopt resolutions that have an impact on human rights in the region. It is hoped that the fast tracking of East African integration will trigger the enactment of more human rights related legislation and that the gaps in the Treaty and rules impeding effective functioning of the EALA will soon be rectified.

2.6.5 The East African Court of Justice

Compared to the former Community, the new EAC has a different dimension of integration. The current EAC Treaty contains features of a modern regional integration arrangement. Accordingly, the EAC has various organs and institutions to ensure that checks and balances are in place in Community activities. The Treaty has delegated to the EACJ the task of administering justice and ensuring adherence to the law through the proper interpretation and application of the EAC Treaty.³⁰¹ Matters can be referred to the Court by individuals, member states and the Secretary General.³⁰²

The EACJ is yet to have explicit jurisdiction to determine human rights cases. Article 27(2) of the Treaty suspends the Court's jurisdiction in human rights matters until the Council determines the adoption of a protocol that would extend the jurisdiction of the

³⁰⁰ See EALA Major achievements 2001-2009, available at <http://www.eala.org/the-assembly/achievements.html> (accessed on 12 January 2013)

³⁰¹ The EACJ was inaugurated in 30 November 2001. The Seat of the Court is temporarily in Arusha until the Summit determines a permanent seat for the Court. The Court has two divisions, the First Instance Division and the Appellate Division. It heard its first case in 2005 and disposed of it in 2006. For an introduction to the East African Community see JE Ruhangisa 'the East African Court of Justice' in R Ajulu (ed) *The making of a region: The reviving of the East African Community* (2005) 95.

³⁰² Art 28–30 of the EAC Treaty.

Court. Notwithstanding its limitations in dealing with human rights cases under article 27(2) of the EAC Treaty, the EACJ has often held that it will not relinquish its mandate of interpreting and ensuring appropriate application of the Treaty merely because the matter referred to it has elements of human rights violations.³⁰³

The process of adopting the protocol that would expand the operations of the EACJ commenced in 2004 but, to date, has yet to be adopted. The lack of political will by the EAC leaders in this regard can be said to be the main obstacle to giving the Court an explicit human rights mandate. The existing discrepancies among the Community member states in the promotion and protection of human rights requires a regional body that would establish common human rights standards, which is for creating an environment for deeper integration. The majority of cases brought before the EACJ have human rights elements and have been brought by individuals. This implies that citizens of the EAC are in urgent need of a Community court that would guarantee their rights within the integration framework.

When forming a federation, human rights have to be given some weight in the EAC. It is a fact that adherence to human rights creates an environment for a more democratic and advanced society. Thus, special attention to human rights by the Community organs and institutions is inevitable and, consequently, the EACJ needs to be given an expanded mandate to deal with human rights cases. By the time the political federation comes into effect, the EAC will be functioning as a single state entity. As such, there has to be a constitution with elements of constitutionalism for administering the federation.

The weaknesses of the former EAC can easily be identified. The 1967 Treaty for East African Cooperation established the EACA. The EACA was to ensure the observance of law by interpreting and applying the provisions under the Treaty. It was also an appellate Court for the decisions of the national courts of the three original member states. In spite of being a court of precedent to the municipal courts, the EACA was not

³⁰³ See *Katabazi case*, 39.

mandated to adjudicate human rights and constitutional law cases. After the demise of the former EAC, the functioning of the EACA came to an end. As human rights were not on the agenda of the EACA, it can be argued that the lack of human rights jurisdiction led to the existence of an unjust society and authoritarian regime, in the case of Uganda, , which contributed to the collapse of the former EAC in 1977.

The lack of an explicit human rights jurisdiction for the EACJ is a concern for realising the dream of having a deepened regional integration in East Africa. It is hoped that this is merely a transitional period and that inspiration can be drawn from the activism of the European Court of Justice, which contributed immeasurably to strengthening EU integration. When the Treaty of Rome came into force in 1957, there were only six nations — France, Germany, Italy, Belgium, Netherland and Luxembourg. To date, regardless of the economic recession encountered by some countries, the EU is a strong family of nations consisting of 27 countries. The EU Court has played a vital role in the interpretation of the Community law, dealing with issues which threatened the persistence of the Community legal order, such as equality and freedom of movement.³⁰⁴ There are views that human rights should be fully integrated in the EAC after reaching political federation and it is submitted that respect for human rights is a catalyst for establishing the East African Federation. If unstable communities and authoritarian regimes persist in the region, it will not be possible to complete the Federation journey.

2.7 Rationale for human rights integration in the EAC

One of the major functions of international human rights law is to protect individual rights against unlawful acts by states.³⁰⁵ The interplay between regional integration and human rights is no longer unique,³⁰⁶ as human rights have emerged as a phenomenon

³⁰⁴ *Stauder v City of Ulm* (1969) ECR 419, *Nold v Commission* [1974] ECR 491.

³⁰⁵ T Meron 'The Humanization of international law' as quoted in J Dugard (2011) 320.

³⁰⁶ See N Nwogu 'Regional integration as an instrument of human rights: Reconceptualising ' (2007) 6 *Journal of Human Rights* 345.

that is increasingly shaping the emergence of political integration around the world.³⁰⁷ The current trend in regional integration raises the question as to whether human rights are meaningful in the agenda of regional integration. In the past, regional arrangements preferred trade efficiency over human rights protection.³⁰⁸ Nevertheless, there are discernible international practices that tend to position human rights as part of regional integration. The Council of Europe, the EU and the developments in ECOWAS are examples of the way human rights have become part of regional integration.

There are several factors leading to the advocacy of human rights integration in the EAC. First, as already discussed in this chapter, human rights form part of the EAC integration project. Accordingly, they are featured in the Treaty and in various activities of the Community. Notwithstanding the existence of global, regional and national mechanisms for promoting and protecting human rights, the EAC and its organs still have an indispensable role in ensuring adherence to the rule of law and human rights for the betterment of their integration goals. The rationale for human rights integration in the EAC should be seen within the context of Community objectives. The EAC is having the objective of improving different aspects of mankind, of which the role of human rights cannot be underestimated.

Second, the Abuja Treaty that establishes RECs as building blocks for the establishment of African economic communities obliges member states to adhere to human rights for achieving its goals.³⁰⁹ The activities within regional integration have an impact on the realisation of human rights either at a domestic or a supranational level. Human rights have a significant influence on the economic, social and cultural development of the integration community.³¹⁰ To many, the primary goal for regional integration is to

³⁰⁷ L Scheeck 'The relationship between the European courts and integration through human rights' (2005) 65 *ZaöRV* 837, 837.

³⁰⁸ HJ Richardson 'African regional integration and human rights: Potential problems' (1995) 89 *American Society of International Law* 500, 501.

³⁰⁹ Art 4(g) of the Abuja Treaty, 1991

³¹⁰ EA Nwauche 'Regional economic communities and human rights in West Africa and the African Arabic countries' in JA Bösl & J Diescho (eds) *Human rights in Africa* (2009) 319.

bolster economic development among the integrating states.³¹¹ Regardless of the nature of the integration arrangement (whether economically oriented or socioeconomic and political integration), human rights play an important part when it comes to the realisation of integration goals. They facilitate the realisation of the socioeconomic objectives of an integration framework.

Third, when EAC integration deepens, rights such as the right to free movement and the right to residence and establishment should not be subjected to strict national laws depriving these said rights. It is the duty of the member states and the regional organ to guarantee human rights to enable the establishment of a long-lasting integration. It is also important to mention the role that human rights play in economic investment, as investors always prefer a place which respects human rights.³¹²

Fourth, the EAC has the objectives of developing policies and programmes that aim to widen and deepen cooperation among the member states in the economic, social and cultural fields, research and technology, peace and security, legal and judicial undertakings, and political affairs.³¹³ It is clear from the outset that the type of integration in the EAC is not strictly an economically oriented form of integration. Issues relating to environmental preservation and the maintenance of natural resources also form part of the EAC integral agenda.

Fifth, the EAC member states have expressed their intention to cooperate in various matters, ranging from socioeconomic and cultural aspects to political and judicial affairs. Regardless of the lack of any explicit human rights objective, the scope of the objectives in the treaty necessitates the integration of human rights in the work of the EAC. The contemporary approach to regional integration has shifted from having purely economic objectives to include socioeconomic and political ones. For example, the ultimate goal

³¹¹ See SKB Asante *The political economy of regionalism in Africa: A decade of the Economic Community of West African States* (1985) 10-15.

³¹² For a discussion on the link between economic integration and human rights see SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkage' (2003) 3 *African Human Rights Law Journal* 88.

³¹³ Art 5 of the EAC Treaty.

of the EAC is to form a political federation. However, a political federation cannot be attained if rights such as the right to vote and the right to be elected are not respected. The maintenance of peace and security also forms part of the objectives of the EAC

Sixth, prior to the twentieth century, the way in which citizens were treated by their own state was seen as an internal affair.³¹⁴ Today, however, international human rights laws allow the international community to determine the limits for a state's treatment of its citizens.³¹⁵ One of the main objectives of the UN is to achieve international cooperation for promoting and encouraging respect for human rights.³¹⁶ In achieving international cooperation for adhering to universal human rights standards as accorded by the UN Charter, the EAC member states have made human rights one of their governing principles for achieving their targeted goals. Although all EAC member states are party to various regional and international human rights treaties, integrating human rights in the EAC provides a sense of a binding obligation rather than the existing regional and international mechanisms. A state will commit itself and comply with the decisions of the organs of the EAC rather than the decisions of other international organs or institutions.

Seventh, there is a considerable difference in human rights standards among the EAC member states. Integrating human rights in the agenda of the EAC provides an opportunity for harmonising policy and legal frameworks in the promotion and protection of human rights in East Africa. The common culture and history of the member states provides the basis for having common human rights standards. EAC law provides for the legal order of the Community which has to be respected by the member states. Through the EACJ and other adopted laws and policy, there is more potential of harmonising the human rights standards in the EAC than in other existing regional and international human rights mechanisms.

³¹⁴ W Kalin & J Kunzli *The law of International human rights protection* (2009) 4.

³¹⁵ RKM Smith *Texts and materials on international human rights* (2009) 7.

³¹⁶ Art 1(3) of the UN Charter.

Eighth, the stability of the EAC requires total commitment in the observation of the rule of law, human rights, democracy and good governance. Failure to uphold international human rights values will mean that the EAC will not realise its ambitions. With political federation as the ultimate goal, this cannot be achieved if human rights are violated.

2.8 Chapter conclusion

International organisations have recently been under scrutiny from public international law. This is due to the expanded mandates found in their constitutive instruments. No longer is their sole aim economic development within their respective regions; aspects such as rule of law, human rights and democracy form an important part of their integration agenda. Although human rights was not originally construed or expressly stated as being one of the objectives of the EAC, the activities of the EAC organs have rooted human rights obligations in the EAC legal order. The pertinent features of human rights in the EAC arise from the founding principles together with objectives provided in the EAC Treaty, which necessitate the realisation of human rights by the EAC and its member states.

This chapter has established the basis for the ever-increasing human rights influence in the EAC. The existing legal framework and the expanded role of the EAC organs have resulted in human rights forming part of the EAC integration agenda. Human rights are integrated in the EAC through its legal instruments and the activities of its organs. Because the EAC member states have ceded some of their sovereign to the EAC organs, the work of these legal organs, particularly the EACJ, establishes EAC legal order, which is binding on and applicable to all the member states. EAC jurisprudence has a direct effect to its member states, which is essential for creating an avenue for establishing common laws and policies in the Community that will eventually lead to common values in the region. It is also the right direction for an organisation which is keen to observe universal human rights standards effectively.

After the independence of the three original members (Kenya, Uganda and Tanzania), the colonial integration system under the EAHC bequeathed the newly independent states with the EACSO, a regional institution that supervised common services in the three countries.³¹⁷ The establishment of EACSO was the first conscious step in setting up an organisation for East African integration. In 1967, the Treaty for the establishment of East African Cooperation was signed, marking the second attempt at establishing a regional organisation in East Africa. The revival of the 1999 Treaty was the third attempt for establishing an institutional integration, after the collapse of the former EAC in 1977. Of all three attempts, the desire and commitment to promote and protect human rights was mainly envisaged in the 1999 Treaty, which established the EAC.

The defunct EAC was regarded as one of the best models for economic integration in the continent at that time³¹⁸ and it made tremendous progress in achieving a common market among the three member states. At the time, there was also a Court of Appeal for East Africa, which had its roots in the colonial judicial system. Although this Court had the mandate to interpret the provisions of the 1967 Treaty, and it was an appellate court in civil and criminal matters originating from the member states, the Court was circumscribed from hearing constitutional and human rights cases. This was a major setback in human rights realisation at that time, as no case of a human rights nature could be brought before the Court.

The revived EAC brings new hope for EAC citizens owing to the promulgation of the Community values in the Treaty to include the respect for rule of law, democracy and the promotion and protection of human rights. A mere reference to human rights in the EAC Treaty is adequate for establishing a basis for human rights promotion and protection in the Community. Reference to human rights in the EAC Treaty as founding principles of the Community is not intended to be inspirational; member states have

³¹⁷ KC Kamanga 'Progress, prospects and challenges of the East African Community' African research and Resource Forum (2012) vi.

³¹⁸ R Ajulu 'The New EAC: linking sub regional and continental integration initiatives' in R Ajulu (ed) *The making of a region: The reviving of the East African Community* (2005) 17.

expressed their desire to observe human rights for achieving the objectives of the EAC integration.

CHAPTER 3

HUMAN RIGHTS MANDATE OF THE EAST AFRICAN COURT OF JUSTICE

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3.1 Introduction

The East African Court of Justice (EACJ) is the main judicial organ of the East African Community (EAC). The Court is a creature of the express will of the EAC member states evidenced in the EAC Treaty.¹ As such, the EACJ acquired the status of an international court responsible for supervising EAC legal norms.² The necessity to form the EACJ was driven by the EAC leaders' willingness to have a judicial body that would assist in the process of East African integration. Currently, the EACJ is mandated to interpret and apply EAC law.³ Article 27(2) of the EAC Treaty confers power upon the Council of

¹ The EACJ is established under art 9 and Chapter eight of the EAC Treaty.

² SB Bossa 'A critique of the East African Court of Justice as a Human Rights Court', Conference paper on Human Rights Institutions in Eastern Africa, presented on October 26, 2006, Arusha, available at http://www.icj.org/IMG/_Speech_BOSSA_.pdf (accessed on 12 March 2013) 9.

³ Art 23(1) and 27(1) of the EAC Treaty. For an overview of the EACJ and its role in protecting human rights see A Possi 'The East African Court of justice: Towards effective protection of human rights in the East African Community' (2013) 17 *Max Planck Yearbook of United Nations Law* 173; JE Ruhangisa 'The East African Court of Justice' in R Ajulu (ed) (2005) *The making of a region: The Reviving of the East African Community* 95; TO Ojienda 'The East African Court of Justice in the re-established East African Community: Institutional structure and function in the integration process' (2005) 11 *East African Journal of Peace and Human Right* 220, JE Ruhangisa 'The East African Court of Justice: Ten years of operations (achievements and challenges) A paper presentation during the sensitisation workshop on the role of the EACJ in the EAC integration, Kampala, 1–2 November, 2011. Available at <http://www.eacj.org/docs/EACJ-Ten>

Ministers to adopt a protocol that would extend the current jurisdiction of the EACJ to cover human rights or any other jurisdiction as deemed necessary. Although at present the EACJ does not have an explicit human rights mandate, one may nonetheless claim that through judicial creativity, the Court has so far been playing an indirect role in protecting human rights.

It is hard for one to dispute the strides made by the Court in protecting Community principles as provided in the EAC Treaty, which includes human rights.⁴ When called upon to exercise its interpretive duties in matters that touch on human rights, the EACJ has often held that it cannot abdicate the exercising of its duties even if a matter before it has human rights allegations. The EACJ has consequently relied on the cause of action premised on the rule of law for it to exercise its interpretive mandate in disputes with human rights features. In other words, the current position of the EACJ is that it has jurisdiction on matters relating to the rule of law, good governance and democracy.

⁵ The origins of modern international adjudication are believed to be subsequent to the conclusion of the Treaty of Amity, Commerce and Navigation, commonly known as the Jay Treaty, which was an agreement between the United States and Great Britain concluded in 1794.⁶ The Jay Treaty established 'mixed tribunals', which consisted of members appointed by the two countries, for determining claims by nationals of each state, 'with an impartial umpire deciding the claim in the event of disagreement'.⁷ Despite the fact that tribunals established by the Jay Treaty formed part of diplomatic exercises between the USA and Great Britain, the Jay Treaty set an important precedent

Years-of-Operation.pdf (accessed on 12 February 2013); SB Bossa 'A critique of the East African Court of Justice as a Human Rights Court'. Conference paper on Human Rights Institutions in Eastern Africa, presented on October 26, 2006, Arusha available at http://www.icj.org/IMG/_Speech_BOSSA_.pdf (accessed on 12 March 2013).

⁴ See art 6(d) and 7(2) of the EAC Treaty.

⁵ See S Spelliscy 'The proliferation of international tribunals: A chink in the armor' (2001) 40 *Columbia Journal of Transnational Law* 144.

⁶ C Brown 'The proliferation of international courts and tribunals: Finding your way through the maze' (2002) 3 *Melbourne Journal of International Law* 453.

⁷ As above.

in as far as international adjudication is concerned.⁸ The first standing mechanism to settle disputes between states on the basis of international law was the Permanent Court of Arbitration established by the Hague Convention on the Pacific Settlement of International Disputes in 1899.⁹ The Permanent Court of International Justice, established in 1922 shortly after the First World War, can be said to be the first major attempt by the international community to establish a world court that protected international law.¹⁰

As with the case of the EAC, through international and supranational organisations, states have established judicial organs with the main intention of resolving disputes and maintaining the rule of law within their organisations.¹¹ In the past, international judiciaries were mainly created to settle disputes between states only.¹² Individuals and non-state entities did not have the competence to access most international courts and states preferred diplomatic ways of settling disputes over contentious means. As a result, international courts, where they had been created, became dormant as states did not wish to take each other to court. Today, the normal rules for international diplomacy have changed. States have different alternatives for choosing the means of settling international grievances. The increase in international courts and tribunals reflects a 'profound change in international law and international relations'.¹³ The influence of international human rights law after the Second World War had occasioned a shift in international relations, causing relationships between states to be under the increasing scrutiny of the international community. After some time, international and

⁸ As above.

⁹ S Spelliscy 'The proliferation of international tribunals: A chink in the armor' (2001) 40 *Columbia Journal of Transnational Law* 144, 144.

¹⁰ See O Spiermann & J Klabbers 'International legal argument in the Permanent Court of International Justice: The rise of the international judiciary' (2007) 101 *American Journal of International Law* 246.

¹¹ P Mahoney 'The international judiciary: Independence and accountability' (2008) 7 *Law and Practice of International Courts and Tribunals* 315, 316.

¹² A Roberts & S Sivakumaran 'Law making by non-state actors: Engaging armed groups in the creation of international humanitarian law' (2012) 37 *Yale Journal of International Law* 108.

¹³ RP Alford 'The proliferation of international courts and tribunals: International adjudication in ascendance' (2000) 94 *American Society of International Law* 160, 165.

regional mechanisms for protecting human rights emerged in different parts of the world.¹⁴

At the moment, international courts and tribunals are among the most important means for the peaceful settlement of disputes around the world.¹⁵ It is said that the existence of multiple international judicial bodies contributes to a degree of ‘experimentation’ and ‘exploration’ that might result in the advancement of the international legal order.¹⁶ On one hand, the proliferation of international courts and tribunals can be seen as a sign of a movement towards a rule of law based on dispute settlement culture, while, on the other hand, the multiplication of international judicial bodies raises concerns when they arrive at ‘divergent or even conflicting rulings’ which has been the case on a number of occasions.¹⁷ The proliferation of international courts and tribunals is visible in Africa. Apart from the EACJ, there are other sub-regional organisations which have established judicial bodies specifically mandated to interpret and apply laws establishing those organisations.

With respect to human rights protection in the Continent, the African Court on Human and Peoples’ Rights (African Court) is the main regional court specifically tasked to protect human rights in Africa.¹⁸ Together with the African Court, sub-regional organisations are involved in protecting human rights. The role of sub-regional courts in protecting human rights is gradually been recognised. Some of the fledging sub-regional courts, such as the Court of Justice of the Economic Community of West African States

¹⁴ FO Vicuna ‘Individuals and non-state entities before international courts and tribunals’ (2001) 5 *Max Planck Yearbook of United Nations Law* 53, 55.

¹⁵ As above.

¹⁶ JL Charney ‘The impact on the international legal system of the growth of international courts and tribunals’ (1999) 31 *NYU Journal on International Law & Politics* 697, 701.

¹⁷ N Lavranos ‘Regulating competing jurisdictions among international courts and tribunals’ (2008) 68 *Heidelberg Journal for International Law* 576-577. For a general reflection on the conflicting jurisdiction and the proliferation of international courts and tribunals see Y Shany *The competing jurisdictions of international courts and tribunals (international courts and tribunals series)* (2003).

¹⁸ The African Court was established in 1998 after the OAU adopted the Protocol on the African Court on Human and Peoples’ Rights in June 1998. The Protocol entered into force on 25 January 2004. According to art 2 of the Protocol, the African Court complements the protective mandate of the African Commission on Human and Peoples’ Rights.

(ECOWAS Court) and the EACJ, are showing encouraging signs of human rights protection in their respective regions. The recent involvement of sub-regional courts in Africa might be due to the crawling nature of the functioning of the African Court. Like in the Economic Community of West African States (ECOWAS), individuals seem to be more comfortable claiming human rights at the ECOWAS Court than the African Court. While much progress has been made in terms of the formal recognition of human rights within the African legal system, human rights still play a limited role in the continent.¹⁹

This chapter has two main objectives. Firstly, the chapter addresses the current legal position of the EACJ and the role it plays in protecting human rights within the EAC. Secondly, this chapter delves into the potential of the EACJ to effectively protect human rights, mainly by assessing its functions to date. Thus, the chapter assesses the mandate, admissibility, accessibility and the judgments of the EACJ in order to determine its current and future role in protecting human rights in East Africa. The main question that this chapter answers is whether the EACJ can play any role in protecting human rights within East Africa. The chapter also suggests alternative means in case there are barriers facing the Court in realising human rights.

3.2 The Court of Appeal for East Africa

The establishment of the EACJ is the second attempt by political leaders of East Africa to establish a Community court for supervising Community norms. The Court of Appeal for East Africa, commonly known as the East African Court of appeal (EACA) was the main judicial organ of the former EAC. When the former EAC was dissolved in 1977, the EACA also came to an end. The EACA was an appellate court for civil and criminal cases emanating from member states, but was not given the competence to determine human rights cases in the region. The re-established EAC has advanced aspirations compared to the collapsed Community, and so has the EACJ.

¹⁹ C Heyns 'Some thoughts on challenges facing the international protection of human rights in Africa' (2009) 27 *Netherlands Quarterly of Human Rights* 447.

The EACA had its roots in the colonial era in East Africa. The Court was originally established by the East African Common Services Organisation (EACSO) Agreements of 1961 to 1966.²⁰ The Court was amongst the common services shared by the three East African countries (Kenya, Tanzania and Uganda) before and after their independence. It also played a significant role in interpreting and applying the 1967 EAC Treaty, as well as being the supreme judicial organ in the region, receiving all appeals of criminal and civil matters from the three countries, and was a court of precedent in the region.

During the colonial era, the Court was originally called 'His Britannic Majesty's Court of Appeal for Eastern Africa' when it was established in 1902 by the Order in Council.²¹ His Britannic Majesty's Court of Appeal for Eastern Africa exercised its appellate jurisdiction in accordance with the laws in relation to the courts in Uganda, the East African Protectorate (Kenya) and the British Central Africa Protectorate (Malawi).²² This Court of Appeal was replaced by His Majesty's Court of Appeal for Eastern Africa in 1909. In 1921, a new Order in Council established the EACA, which heard appeals from Kenya, Nyasaland, Tanganyika, Uganda and Zanzibar.²³

Later, in 1947, Nyasaland was excluded from the jurisdiction of the Court after the establishment of the Rhodesia and Nyasaland Court of Appeal, while the colony of Aden was included in the jurisdiction of the Court during the same year. In 1950, the jurisdiction of the Court was expanded to cover the Seychelles and the Somali Protectorate. After the attainment of independence of both Tanganyika and Uganda, the 1950 Order in Council was amended to provide for the jurisdiction of the Court as the laws of Tanzania and Uganda allowed.²⁴ The Court was an appellate court in both criminal and civil matters originating from all the member states. The members of the

²⁰ GM Kakuli 'Judicial co-operation in East Africa: Its history and its future' (2004) 10 *East African Journal of Peace and Human Rights* 34, 36.

²¹ As above.

²² As above.

²³ As above.

²⁴ Kakuli (2004) 10 *East African Journal of Peace and Human Rights* 34, 37.

Court were the Chief Justices and judges from the supreme courts of the countries over which it had jurisdiction.²⁵

After the establishment of the former EAC in 1967, the EAC member states decided to keep the EACA as an institution of the Community.²⁶ The Court continued to exist in the same form as it had been established by the EACSO, even though the agreements establishing the EACSO had been abolished.²⁷ The EACA thus became the main judicial arm of the former EAC, with its permanent seat in Nairobi and no registries were established in member states. The competence of the Court depended on the discretion of the member states. Laws had to be adopted at national level in order to accept the jurisdiction of the Court to receive appeals from the member states.²⁸ The three member states passed local legislation to allow the EACA to exercise appellate jurisdiction over cases originating from them. This reflects the commitment of the leaders of the three countries during that time to establishing one common judicial organ that would safeguard legal jurisprudence in the region.

As a result the restrictions imposed on it, the EACA was not active in promoting and protecting human rights, as the three original member states of the former EAC were not ready to cede their sovereignty to the Court to adjudicate matters concerning human rights and their Constitutions. This was the main hurdle preventing the EACA from protecting human rights and it had significant negative effects in the Community. One can easily say that this is an indication of the perception of human rights at that time. Indeed, human rights were not of great importance to most newly independent African states. For instance, Tanzania had no Bill of Rights incorporated in its Constitution since it got its independence, until 1984 when it was incorporated.

²⁵ As above.

²⁶ JW Katende & GW Kanyeihamba 'Legalism and politics in East Africa: The dilemma of the Court of Appeal for East Africa' (1973) 43. Available at <http://www.jstor.org/stable/2935148> (accessed on 27 May 2013)

²⁷ Art 80 of the EAC Treaty, 1967.

²⁸ Art 81 of the EAC Treaty, 1967.

When applying Community law and common law doctrines which were *pari materiae* to the three countries in East Africa, the EACA played an interpretive and harmonising role.²⁹ The Court's jurisprudence thrived within member states and helped to shape national civil and criminal laws. At present, the jurisprudence of the EACA is still relevant and useful in the three original EAC member states. The EACJ has, on a number of occasions, relied on case law from the EACA.

Apart from the EACA, the Common Market Tribunal of the East African Community³⁰ and the East African Industrial Court were also established.³¹ All the established judicial and quasi-judicial bodies of the former EAC were intended to safeguard adherence to the former EAC law.

The 1967 EAC Treaty was silent on human rights protection. Unlike the current EAC Treaty, the 1967 Treaty did not make any reference to human rights. This is an indication that member states of the former EAC were unwilling to make human rights reviewable at the Community level. As a result, the EACA was not able to advance human rights jurisprudence as it did in civil and criminal law. During the time of the former EAC, civil and political rights were often violated by its member states. If member states had ceded their sovereignty to the EACA to deal with human rights cases from their respective countries, the Court would have played a significant role to improving human rights in East Africa during that time.

Owing to the political dimension within the region at that time, arguably, the lack of jurisdiction to adjudicate human rights disputes distanced the Court from political interference which might have led to its dissolution.³² Linking civil rights with the then

²⁹ See *Nuridin Bandali v Lombok Tanganyika Ltd* (1963) EA 304 CA (T), *Runda Coffee Estates Ltd v Ujagah Singh* (1966) EA 564 CA (K) .

³⁰ By May 1970, the Tribunal had received two cases which could not proceed as it was not constituted. See HC Shermen and NM Blocker *international institutional law* (1995) quoted in F Viljoen 'The realization of human rights in Africa through sub-regional institutions' (1999) 7 *African Yearbook of International Law* 185, 190.

³¹ As above.

³² LL Kato 'The Court of Appeal for East Africa: From a colonial court to an international court' (1971) 7 *East African Law Journal* 1, 30.

mandate of the EACA, the Court often heard cases relating to habeas corpus.³³ The applicants for habeas corpus usually requested the Court to release the victim from unlawful detention, which violated the victim's rights to a fair trial.³⁴

The lack of human rights provisions in the former EAC Treaty was not an exception because such rights were not integrated in most regional economic community treaties at that time. The Treaty of Rome of 1957 that established the European Economic Community was also silent on matters relating to human rights and fundamental freedom, with only a few provisions containing labour rights being inserted.³⁵ Inspired by the constitutional values of some European countries and the European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention) of the Council of Europe, in the 1950s litigants started to take cases that touched on human rights before the European Court of Justice (EU Court/ECJ). This was the beginning of the establishment of a human rights legal order in the European Communities by the ECJ. When given the opportunity to uphold human rights and fundamental freedom in the European Community, the ECJ did not disappoint; the ECJ on a number of occasions stated that human rights and fundamental freedoms formed part of the Community's principles, regardless of the limited human rights provisions in the community treaties.³⁶

With the revival of the EAC, member states have committed themselves to adhere to the principles of good governance, rule of law, democracy and the promotion and protection of human rights.³⁷ The revived EAC is devoted to fully respecting, recognising and protecting human rights distinct to the former EAC. Despite displaying glimpses of human rights ambitions, the current EAC leaders are repeating some of the previous mistakes of the former EAC. As was the case with the previous Community Court, the

³³ Kato (1971) 7 *East African Law Journal* 1, 20.

³⁴ *Njuguna Kimani & 3 Others v R* (1954) 21 EACA, *Grace Stuart Ibingira & 5 Others v Uganda* (1966) EA 306.

³⁵ See the Treaty of Rome, 1957.

³⁶ *Stander v City of Ulm*, Case 29/1969, (1969) ECR 419, *Nold v Commission*, case 4/1973 (1974) ECR 491.

³⁷ Art 6 and 7 of the EAC Treaty.

EACJ is restricted in its adjudication of human rights cases. The EACA made a telling contribution to the civil and criminal laws of Kenya, Tanzania and Uganda. Nevertheless, the dissolution of the former EAC resulted in the abandonment of the EACA and subsequently member states established their own supreme courts. Undoubtedly, the EACA had a significant effect in shaping the former EAC legal order and there is no reason why the EACJ should not contribute even more than the EACA in developing Community jurisprudence. However, the EACJ can only champion the EAC legal order if there is total restraint on member states interrupting with its work and if its jurisdiction is not limited in matters necessary for accomplishing Community objectives.

3.3 The revived Community Court and its quest for human rights protection

As the primary judicial organ of the Community, the EACJ was established by the EAC Treaty of 1999 and was inaugurated on 30 November 2001.³⁸ The EACJ serves the five member states that currently make up the Community. Initially, the Court commenced its operations with a single chamber with six judges, two from each member state (at the time, Tanzania, Kenya and Uganda). The EAC Treaty was subsequently amended on 14 December 2006 and 20 August 2007 establishing, among other things, two sections of the Court: the First Instance Division and the Appellate Division.³⁹ The establishment of the two-tier court structure led to some concerns about the circumstances that led to its restructuring.⁴⁰

After Rwanda and Burundi joined the Community in 2007, the number of judges of the Court had to be increased. At present, there are ten judges; five in each Division and each member state nominates one judge for each Division. The EAC Treaty allows for a maximum of fifteen judges, with the First Instance Division should being composed of

³⁸ See the EACJ <http://www.eacj.org/establishment.php> (accessed on 23 March 2013).

³⁹ See art 23(2) of the EAC Treaty.

⁴⁰ Art 35A of the EAC Treaty states that 'an appeal from the judgment or any order of the First Instance Division of the Court shall be in the Appellate Division'. Appeal should be based on an error by the First Instance Division on the point of law, jurisdiction and procedural irregularities.

more than ten judges and the Appellate Division not more than five judges.⁴¹ So far, member states have appointed five judges to the First Instance Division. With the exception of the President of the Court and the Principal Judge, all the other EACJ judges work on an ad hoc basis. The judges serve a maximum term of seven years, which is non-renewable.⁴² The Court also has a Registrar who is responsible for the administrative activities of the Court.⁴³

Since its inception, the issue of jurisdiction of the EACJ has been at a focal point of discussion. The EAC member states seem to be not keen to fast-track the process of granting the EACJ an explicit human rights mandate. By inserting article 27(2) in the EAC Treaty, which mandates the Council to adopt a protocol for expanding the EACJ's jurisdiction at a subsequent date, the intention of member states in stretching the mandate of the Court is clearly reflected. Article 27(2) sanctions the adoption a protocol that would expand the Court's mandate to cover human rights, appellate or any other jurisdiction as determined by the Council.

Since 2004, EAC member states have started negotiating the protocol that would expand the Court's mandate with no results. Instead, after its ruling in the case of *Peter Anyang' Nyong'o and Others v Attorney General of Kenya*, the Court has experienced political attacks and public condemnation which led to the amendment of the EAC Treaty in 2007. Significantly, the amendments limited the EACJ's jurisdiction in integration affairs and the security of tenure of its judicial officers is undermined. The attempt to confer jurisdiction on international crimes on the EACJ sheds light on the continuing politicisation of the Court. This forms part of a series of efforts by Kenyan government officials to snub the International Criminal Court (ICC) cases involving the current Kenyan President and the Vice-President in order to bring the case to the EACJ. Regardless of its continuing politicisation, the EACJ is still playing a commendable role in EAC integration. Civil society and the Court Registrar are active in conducting workshops

⁴¹ Art 24(2) of the EAC Treaty.

⁴² The proviso to art 24(2) of the EAC Treaty.

⁴³ Art 45 of the EAC Treaty.

and seminars which not only helps to raise awareness on the activities of the EACJ but is also a skilful way of legitimising the Court in the eyes of the East African citizens.

Most cases submitted before the EACJ in one way or another touch on human rights. Despite the fact that litigants have expectations of the EACJ's role in human rights, the Court has not been able to effectively protect human rights due to the restrictions imposed under article 27(2) of the EAC Treaty. Judges of the Court are taking a more cautious approach when interpreting the EAC Treaty on allegations which have human rights claims. The presence of article 27(2) of the EAC Treaty and the continuing delays in adopting the protocol that would confer the EACJ with an explicit human rights mandate prevents the Court from playing a crucial role in protecting human rights within the Community.

At the national level, EAC member states are not always resolved in promoting and protecting human rights in their respective countries. For example, in 2014, Uganda enacted a controversial law against homosexuality,⁴⁴ which violates fundamental human rights. This Act provides for life imprisonment as a punishment for what is termed an 'act of aggravated homosexuality'. Meanwhile aiding and abetting homosexuality might result in a person being sentenced to up to seven years in prison.⁴⁵ In the cause of regional integration, it is common to have disagreements and disputes between states and some of the individual rights are violated. A state may behave contrary to what is agreed between parties in a treaty, to the extent of threatening the survival of the integration. Individuals when engaging in the activities of integration may be aggrieved

⁴⁴ The Anti-Homosexuality Act, No 4 of 2014.

⁴⁵ Apart from the petition in the Constitutional Court of Uganda (*Oloka-Onyango & Others v Attorney General of Uganda, Constitutional Petition No 8 of 2014*), there is also a case filed before the EACJ (*Human Rights Awareness and Promotion Forum v Attorney General of Uganda*, Ref No 6 of 2014, First Instance Division, the Reference was filed on 23rd April 2014 at the Court's Registry in Kampala), contending that the Act violates the EAC Treaty, in particular art 6(d), 7(2) and 8(1)(c), which enjoin partner states to govern their populace according to the principles of good governance, democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights which include, inter alia, the provision of equal opportunities and gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter.

as a result of an act or omission by states that is contrary to the integration laws. It is for this reason that the EACJ is an important organ for the survival of East African integration.

3.4 Jurisdiction

Jurisdiction is a term associated with the legal authority of courts to exercise certain powers.⁴⁶ A claimant seeking redress before a court of law has to establish that such court has jurisdiction. In most claims submitted before international courts or tribunals, it is expected that the court's or tribunal's jurisdiction will be questioned.⁴⁷ Ordinarily, the jurisdiction of international courts or tribunals is established in the jurisdiction clauses within the instrument which establishes them.⁴⁸ An international court or tribunal must have competence to hear and determine matters basing on material, territorial, personal, and temporal jurisdiction.⁴⁹ With respect to cases with human rights elements, the jurisdiction of the EACJ has turned out to be a recurrent subject in almost all the cases submitted before the Court.

In exercising its jurisdiction, the EACJ determines cases referred by a member state against another member state,⁵⁰ references by the Secretary General,⁵¹ references by legal and natural persons,⁵² disputes between the Community and its employees, and matters arising from an arbitration clause as agreed by parties in a contract.⁵³ Moreover, the Appellate Division has original jurisdiction in specific areas such as giving preliminary rulings on matters referred by national courts,⁵⁴ and providing advisory

⁴⁶ R Alexy *Theory of constitutional rights* (2002) 132; M Evans et al (eds) *Asserting jurisdiction: International and European legal perspectives* (2003) xix.

⁴⁷ S Rosenne *The law and practice of the international court* (2006) 505.

⁴⁸ L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 19.

⁴⁹ As above.

⁵⁰ Art 28 of the EAC Treaty.

⁵¹ Art 29 of the EAC Treaty.

⁵² Art 30 of the EAC Treaty.

⁵³ Art 32 of the EAC Treaty.

⁵⁴ Art 34 of the EAC Treaty.

opinions as requested by the organs of the Community.⁵⁵ It is important to note that the EACJ is not an appellate court with regard to decisions originating from member states.⁵⁶

3.4.1 Material jurisdiction

Material jurisdiction refers to the subject matter jurisdiction of a court. It is the court's authority to adjudicate on certain types of cases in accordance with the law. As indicated above, the EACJ is empowered to interpret and apply the EAC Treaty.⁵⁷ According to the EAC Treaty, the jurisdiction of the EACJ is expected to be extended, which will include 'such other original, appellate, human rights and other jurisdiction' as will be determined at a future date by the Council of Ministers.⁵⁸ Seemingly, according to article 27(2) of the EAC Treaty, the EACJ is restricted from receiving human rights cases until the protocol which will confer the Court with such a mandate is adopted at a time that has yet to be decided on. Regardless of the lack of an explicit human rights mandate, the EACJ is engaging in creative judicial practice to determine matters that touch on human rights.⁵⁹ It is also acknowledged by the Principle Judge of the Court that it is a challenge for the EACJ to 'escape dealing with human rights'.⁶⁰

The material jurisdiction of the EACJ in interpreting the EAC Treaty is subject to the limitations imposed in the Treaty. The EACJ's jurisdiction is delimited when such jurisdiction in interpreting and applying the EAC Treaty is conferred on the organs or institutions established in the member states.⁶¹ Matters such as those concerned with whether a person is an elected member of the East African Legislative Assembly (EALA) or whether a seat of the EALA is vacant, are to be determined by the institutions of the

⁵⁵ Art 35 of the EAC Treaty.

⁵⁶ *Mary Ariviza & Another v Attorney General of Kenya & Others*, Appeal No 3 of 2012, EACJ Appellate Division.

⁵⁷ Art 23 and 27(1) of the EAC Treaty.

⁵⁸ Art 27(2) of the EAC Treaty.

⁵⁹ ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *African Human Rights Law Journal* 225, 230.

⁶⁰ An interview with the principal judge, Jean Bosco Butasi, 4 December 2013, Arusha.

⁶¹ The proviso to art 27(1) of the EAC Treaty.

member states.⁶² The existing limitations on the EACJ's jurisdiction raise many questions as to the effectiveness of the EACJ in developing the spirit of East African integration. There are also concerns about the commitment of member states to ceding their powers to the Court in matters concerning EAC integration.

The main instruments that the EACJ uses to exercise its mandate are the EAC Treaty, various protocols and the Acts of the Community promulgated by the EALA. The EAC Treaty does not specifically provide for legal sources other than those that the EAC can apply. The founding principles of the EAC therefore provide the foundation which the EACJ can apply when establishing EAC legal order.⁶³ For example, in as far as human rights are concerned, article 6(d) of the EAC Treaty makes reference to the African Charter on Human and Peoples' Rights (African Charter) as a guiding normative framework for EAC member states in promoting and protecting human rights. The EAC Treaty obliges EAC member states to maintain 'universally accepted standards of human rights' as a means of attaining the goals of East African integration.⁶⁴

In the case of *Sitenda Sebalu v Secretary General of the EAC and Others (Sebalu case)*,⁶⁵ the applicant, after having exhausted the local courts, sought to appeal to the EACJ, only to discover that the EACJ is not an appellate court. Following a misfortune, the applicant, being displeased with the reluctance shown by the EAC member states, specifically Uganda, to adopt the protocol for conferring the EACJ with an appellate and human rights mandate, required the Court to declare that the undue delays for adopting the protocol were against the principle of good governance and the observance of the rule of law and democracy, as provided in the EAC Treaty. In acknowledging the supplications of the applicant, the EACJ stressed that regional integration would be in danger if member states were unwilling, reluctant or lacked the ability to protect human rights at the national level, while at the same time denying their citizens to access the

⁶² Art 52(1) of the EAC Treaty.

⁶³ For the legal sources of law, see chapter 2 of this study.

⁶⁴ Art 7(2) of the EAC Treaty.

⁶⁵ Ref No 1 of 2010, EACJ First Instance Division.

Community Court for redress.⁶⁶ The views expressed by the EACJ imply that the Court itself feels it has to be involved in protecting human rights in the region.

Subsequently, Mr Sebalu approached the EACJ for the second time in *Sitenda Sebalu v Secretary General of the EAC*.⁶⁷ This took place after the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs had, during its meetings held on 2 and 3 November 2011 and 12 to 14 March 2012, revised the Zero Draft Protocol and precluded the appellate and human rights jurisdiction of the EACJ as initially envisaged. Consequently, Mr Sebalu referred a matter to the EACJ, making two major claims. Firstly, the applicant was of the view that the failure by the Council of Ministers to implement the decision of the Court in Reference No 1 of 2010, which ordered the expeditious adoption of a protocol for expanding the jurisdiction of the EACJ, amounted to contempt of court. Secondly, Mr Sebalu contested that the act of precluding human rights in the present Draft Protocol that had earlier been adopted from the Zero Draft Protocol, which included a human rights and appellate jurisdiction for the EACJ, was an infringement of the fundamental principles provided in the EAC Treaty.

When determining the matter, the EACJ held that the failure by the Council of Ministers/Sectoral Committee on Legal and Judicial Affairs to implement the judgment of the Court in Reference No 1 of 2010 contravened article 38(3) of the EAC Treaty and did amount to contempt of Court.⁶⁸ With regard to whether the act of changing the Draft Protocol was an infringement of the Community principles, the EACJ was of the view that the Protocol was still being revised and therefore it could not fault the Council at that stage.⁶⁹

The calls for expanding the jurisdiction of the EACJ came not only from the EACJ itself. On 26 April 2012, the EALA passed a resolution that was welcomed by the Council of Ministers and the Summit of the Heads of States. In a Communiqué dated 28 April 2012,

⁶⁶ *Sebalu* case, 40.

⁶⁷ *Sitenda Sebalu v Secretary General of the EAC*, Ref No 8 of 2012, EACJ First Instance Division.

⁶⁸ Ref No 8 of 2012, EACJ First Instance Division, 49.

⁶⁹ Ref No 8 of 2012, EACJ First Instance Division, 67.

the Summit urged the Council of Ministers to expedite the commitment under article 27 of the EAC Treaty to extend the jurisdiction of the EACJ to include, among other things, crimes against humanity.

EAC member states are required to take all necessary measures to implement the judgments of the EACJ without any delays.⁷⁰ This requirement is in place to ensure the judgments of the EACJ are not delivered in vain. In the second *Sebalu* case the Attorney General of Uganda attempted to appeal against the decision on Reference No 1 of 2010. The fact that there is no order to stay execution from the Court's decision on the reference, the judgment of the Court in that reference remains valid and has to be complied with.

Although the EACJ is protecting human rights indirectly, it does not seem to have any intention of exceeding its powers as stipulated in the EAC Treaty.⁷¹ In view of the manner in which EACJ judges are dealing with cases that touch on human rights, one might be inclined to say that the Court judges have used the opportunity to engage in expansive judicial law-making. Despite article 27(2) of the EAC Treaty providing for the EACJ to be conferred with such other original, appellate, human rights and other jurisdiction, as will be determined by the Council in the future, none of the stated additional limbs of jurisdiction have been granted to the Court.

The long-awaited protocol has been pending since 2005, when the so called Zero Draft Protocol was adopted. Despite of the existing pressure from civil society , calling for the EACJ to be granted an explicit human rights jurisdiction, EAC leaders are unwilling to accept the calls. At the 15th Ordinary Summit of the EAC Heads of State, the Summit endorsed the Council's recommendations to expand the jurisdiction of the EACJ to cover trade and investment matters, as well as matters associated with the East African

⁷⁰ Art 38(3) of the EAC Treaty.

⁷¹ The former President of the Court, Justice Harold R Nsekela, in an interview held on 5 December 2013, Arusha.

Monetary Union.⁷² With respect to human rights, however, as well as matters concerning international crimes, the Summit ordered the Council of Ministers to liaise with the African Union.⁷³

In order to succeed in attaining the integration objectives, EAC member states have established, through relevant protocols, a customs union and common market that is applicable within the Community. The stages of customs union and common market integration have taken place according to the time frame determined by the Council and the protocols have provided a path for establishing political federation, as the ultimate goal of the EAC. During the stages of customs union and common market integration, there is always the chance of individual rights being violated by member states.

There is no doubt that the objectives of the Customs Union and Common Market Protocols include operationalising the established goals of the Community under the Treaty. It is also a fact that the two protocols accommodate a number of rights that individuals are entitled to enjoy when exercising different activities for creating a customs union and common market. In ensuring the effective administration and supervision of the two integration systems, the Council may establish institutions for administering customs union and common market activities.⁷⁴ The presence of other institutions for safeguarding the activities of the customs union and common market is seen as an attempt to limit the primacy of the EACJ.

Article 24 of the Customs Union Protocol establishes the East African Community Committee on Trade Remedies (Customs Union Committee).⁷⁵ This Committee is given

⁷² Para 16 of the Communiqué of the 15 Ordinary Summit of the EAC Heads of State, 30 November 2013.

⁷³ As above.

⁷⁴ Art 75(3) and 76(4) of the EAC Treaty. It is not mandatory for the Council to establish the institutions. Any institution that is to be established either in the Community or at the national level should adhere to the provisions of the EAC treaty in so far as they carry out customs union and common market activities. This fact gives the EACJ authority as regards the functions of these institutions.

⁷⁵ The Customs Union Committee is tasked to determine matters relating to anti-dumping measures, subsidies and countervailing measures, safeguard measures, dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism)

the task of settling disputes amicably through conciliation and mediation.⁷⁶ The decision of this Committee is final.⁷⁷ Under the Common Market Protocol, disputes between member states in matters arising from the interpretation or application of the Protocol are determined by the provisions of the EAC Treaty.⁷⁸ The member states guarantee that any person, whose rights are infringed under the Protocol, shall have the right to redress before the appropriate forum, including national courts.⁷⁹ The established mechanisms do not impede the EACJ from dealing with matters originating from the Common Market Protocol, but rather mandate states to establish domestic means for ensuring adherence to the rights enshrined in the protocol. However, it should be noted that national courts can also interpret the provision of the EAC Treaty.⁸⁰ It is also expected that in such circumstances, a national court will seek an appropriate interpretation of the EAC Treaty from the EACJ.⁸¹ The existence of such mechanisms has raised concerns about the EACJ's jurisdiction in interpreting the Protocols on Customs Union and Common Market. There is a perception that the established mechanisms ouster the Court's jurisdiction in dealing with matters originating from the two protocols.

In the other case instituted by the East African Law Society,⁸² the applicant, the premier regional lawyers' association, instituted a public interest case, questioning the legality of the mechanisms for dispute settlement established under the Customs Union and Common Market Protocols over the jurisdiction of the EACJ. The basis of the applicant's arguments was that the established mechanisms ouster the EACJ's jurisdiction to

Regulations, provided in Annex IX of the Protocol and any other matter referred to the Committee by the Council.

⁷⁶ Regulation 5 of the EAC Customs Union (Dispute Settlement Mechanism) Regulations, provided in Annex IX in the Customs Union Protocol.

⁷⁷ Art 24(5) of the Customs Union Protocol.

⁷⁸ Art 54(1) of the Common Market Protocol.

⁷⁹ Art 54(2) of the Common Market Protocol. Member states have guaranteed to ensure the adherence of the rights provided in the Protocol through their constitutions, national laws and administrative procedures.

⁸⁰ Art 33 read together with art 34 of the EAC Treaty.

⁸¹ Art 34 of the EAC Treaty.

⁸² *East African Law Society, v Secretary General of the EAC*, Ref No 1 of 2011, EACJ First Instance Division.

interpret the Protocols establishing the customs union and common market in the EAC, therefore contravening articles 23 and 27 of the EAC Treaty, which mandate the Court to ensure adherence to the law by interpreting and applying the EAC Treaty. The respondent opposed the assertion by the applicant by stating that it was the intention of the member states to ouster the jurisdiction of the Court in matters concerning the Customs Union and Common Market Protocols. The respondent argued further that, until the Court's jurisdiction is expanded, the EACJ will only be able to deal with matters concerning the customs union and the common market, and it will continue to be restricted in its interpretation of the two Protocols. One of the issues before the Court was whether the EACJ has jurisdiction over disputes originating from the Protocols. After considering the arguments of both parties, the Court stated the following:⁸³

[W]e do not find, within the Customs Union and the Common Market Protocols, a provision that confers *jurisdiction* to resolve disputes arising from the interpretation of provisions of both Protocols either to an organ of a Partner State or of the Community, save this Court ... we are inclined to conclude that this Court has jurisdiction over disputes arising out of the interpretation and application of the Treaty which, for re-emphasis, includes the Annexes and Protocols thereto.

Article 38(1) of the Treaty precludes any other method of dispute settlement for all the disputes subjected to the interpretation and application by the EACJ, unless it is provided by the Treaty. Under international law, protocols form part of the main treaty and are included as an addendum to the Treaty. However, the proviso in article 27(1) of the Treaty limits the Court's jurisdiction in interpreting and applying the Treaty when it confers such powers to the organs of the member states.⁸⁴ Such powers limiting the EACJ's jurisdiction and empowering the national organs of the member states are envisaged under article 52(1), which cedes the powers of the EACJ in determining matters concerning the legality of members of the EALA.⁸⁵

⁸³ Ref No 1 of 2011, 23.

⁸⁴ The proviso to art 27(1) of the EAC Treaty was added in the 2007 controversial amendments to the EAC Treaty.

⁸⁵ *Christopher Mtikila v Attorney General of Tanzania & Others*, Ref No 2 of 2007.

Owing to the reluctance of EAC member states to cede some of their powers to the EACJ in order to engage effectively with integration affairs, it is easy for one to conclude that they intended to preclude the EACJ from adjudicating in disputes originating from customs union and common market activities. This perception is supported by arguments from the EAC legal team. Counsel for the Community argued that the insertion of article 24(1) of the Customs Union Protocol and article 54(2) of the Common Market Protocol was intentional.⁸⁶ He also pleaded that, in an avenue where the EACJ has unlimited jurisdiction, including common market and customs union matters, there is a danger of having overlapping jurisdictions in the same matters as the national courts of the member states.⁸⁷

Based on the Court's decision in Reference No 1 of 2011 and the wording of the provisions of the Customs Union and Common Market Protocols, it can be submitted that the EACJ has jurisdiction to interpret and apply the EAC Treaty and all protocols, including the Customs Union and Common Market Protocols. The dispute settlement mechanism under the Customs Union Protocol is distinct from the contentious method of dispute settlement of the EACJ.⁸⁸ The fact that the nature of the functioning of the Customs Union Committee is to solve disputes amicably, the finality of its decision does not prevent any person from seeking the interpretation and application of the EAC Treaty and the Protocol before the EACJ. As stated above, article 54(2) of the Common Market Protocol does not establish any new institution nor does it exclude the EACJ from exercising its jurisdiction over it.

In as far as the protection of human rights is concerned, both the customs union and common market stages of regional integration contain elements of human rights which would be better protected by the EACJ than any other organ or institution within the Community. The non-abdication by the EACJ to interpret the Protocols on Customs

⁸⁶ Ref No 1 of 2011, 14.

⁸⁷ The same argument is advanced so often when discussing the possibilities of extending the jurisdiction of the EACJ to deal with human rights cases.

⁸⁸ Ref No 1 of 2011, 22.

Union and Common Market strengthens its adjudicative role in the Community, regardless of any other mechanisms being established by member states with, presumably, the intention of weakening the Court's mandate. In *Samuel Mohochi v Attorney General of Uganda*,⁸⁹ the EACJ had ruled on a matter concerning the application of the Common Market Protocol in Uganda. Accordingly, the applicant was denied entry to Uganda contrary to the right to free movement as guaranteed in the Common Market Protocol. The EACJ subsequently found Uganda to be in breach of both the EAC Treaty and the Common Market Protocol.

It would seem that, from the way in which events are unfolding, the EACJ will not be granted a human rights mandate in the near future. There is also an indication that EAC political leaders have realised the complications involved with regard to a criminal jurisdiction for the EACJ, which they were seeking. Nevertheless, human rights remain a key element in the current East African integration ambitions.

3.4.1.1 Interpreting human rights norms

Another major question relevant to this study is to what extent should the EACJ interpret human rights norms provided in the EAC Treaty? One of the enduring challenges facing international courts relates to the question of treaty interpretation.⁹⁰ A number of rules and techniques have thus been put forward to aid judicial bodies in dealing with interpretive challenges. The basic rules for interpreting a treaty are provided under article 31 of the Vienna Convention. These rules require a treaty to be interpreted in good faith.⁹¹ This principle flows directly from the principle of *pacta sunt servanda* enshrined in article 26 of the Vienna Convention.

Accordingly, under international law, there are three basic approaches to treaty interpretation. The first approach centres on the actual text of a treaty, the second looks to the intention of the parties to a treaty, and the third approach focuses on the object

⁸⁹ As above.

⁹⁰ MN Shaw *International Law* (2008) 932.

⁹¹ Art 31(1) of the Vienna Convention. Also see A Aust *Modern treaty law and practice* (2004) 187.

and purpose of the treaty when interpreting treaty provisions. By adopting the objective and purpose approach when interpreting a treaty, judge-made law might be imminent. It goes without saying that any true interpretation of a treaty under international law must take cognisance of all aspects of the agreements, 'from the words employed to the intention of the parties and the aim of the particular document'.⁹² The rules also allow that recourse may be taken to supplementary means of interpretation.⁹³ In doing so, preparatory work of the treaty and the circumstances of the treaty's conclusion become relevant. However, the preparatory work of a treaty is less authentic and may lead to unwanted conclusions.

To some extent, the interpretive mandate of the EACJ on the provisions that specifically refer to human rights in the EAC Treaty is unclear and at times confusing. As stated above article 27(2) of the EAC Treaty reflect the intention of EAC member states to suspend the jurisdiction of the EACJ to settle, among others, human rights cases until a protocol that would extend the Court's jurisdiction is adopted by the Council on a subsequent date.⁹⁴ Whether the protocol will be adopted in the near future remains to be seen. As already stated, the EAC Treaty goes as far as mentioning the African Charter as the normative framework for observing human rights standards in the EAC. Thus, regardless of the presence of the provisions in the EAC Treaty that guarantee human rights protection, member states have impeded the EACJ's effectiveness in protecting human rights by inserting article 27(2) in the EAC Treaty. This article is invoked by many respondents before the EACJ, when they dispute the competence of the Court in determining human rights related cases.

As for the EACJ's jurisprudence, the Court interprets all provisions of the EAC Treaty including those which make reference to human rights. However, the context of the Court's interpretation and its findings are not based on infringements of human rights

⁹² Shaw (2008) 933.

⁹³ Art 32 of the Vienna Convention.

⁹⁴ The process of extending the jurisdiction of the EACJ is still ongoing. Member states seem to be reluctant to give the Court an explicit human rights mandate.

values as provided in the EAC Treaty. Famously, in *Katabazi v Attorney General of Uganda (Katabazi case)*,⁹⁵ the EACJ Court held that it could not be restrained from exercising its interpretive mandate with regard to the EAC Treaty merely because a matter at hand made reference to human rights norms as provided for in the EAC Treaty.

The interpretive mandate of the EACJ in respect of the provisions which make reference to human rights can be seen from different angles. Under international law, international courts and tribunals are required to interpret treaty provisions in 'good faith' and in the light of their objectives and purposes.⁹⁶ The scope of interpretation comprises the main text of the treaty, including the preamble and the annexes to the Treaty.⁹⁷ In order to meet the objectives of the EAC Treaty, the fact that the scope of interpretation of the EACJ includes governing principles such as the observance of human rights binds the EACJ to interpret all provisions in the EAC Treaty, including those which specifically make reference to human rights.⁹⁸ The EACJ should continue to interpret all the provisions of the EAC Treaty, including those provisions which make reference to human rights. However, it is undisputed that the presence of article 27(2) in the EAC Treaty has rightly rendered the EACJ hesitant to directly interpret human rights norms in the EAC Treaty. The Court, specifically the Appellate Division, has held that the EACJ's jurisdiction is only triggered when a cause of action flowing from the EAC Treaty is different and distinct from the violation of human rights.⁹⁹

⁹⁵ *James Katabazi & Others v Attorney General of Uganda*, Ref No 1 of 2007, 39.

⁹⁶ Art 31(1) of the Vienna Convention.

⁹⁷ Art 31(2) of the Vienna Convention.

⁹⁸ According to Haule, regional integration is not complete by only having customs union and common market systems in the territories of the member states. It also has to be compromised with 'constitutional stability' and adherence of its main principles such as human rights. See R Haule 'The state of constitutionalism in East Africa: The role of the East African Community in 2009; one people, one destiny after 10 years' in R Nakayi *Annual state of constitutionalism in East Africa* (2011) 42.

⁹⁹ See *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal No 1 of 2011, the EACJ Appellate Division, 10.

Unlike the EAC Treaty, the Southern African Development Community (SADC) Tribunal was not restricted by any provision in interpreting the human rights norms found in the SADC Treaty. In *Mike Campbell and Others v Zimbabwe (Campbell case)*,¹⁰⁰ the respondent, the Attorney General of Zimbabwe, objected to the SADC Tribunal settling the case in terms of human rights standards. The respondent vigorously argued that the SADC Treaty does not provide the standards against which the actions of the member states can be determined, and therefore the fact that the SADC Tribunal evaluated the state's actions by relying on other international human rights instruments amounted to legislating on behalf of the SADC member states.¹⁰¹ In response, the SADC Tribunal held that there was no need to have a specific human rights catalogue in order for it to exercise its duty of interpreting the provisions of the SADC Treaty; thus a mere reference to human rights in the founding principles of the SADC Treaty entitles the SADC Tribunal to interpret those provisions in the SADC Treaty as including human rights protection.¹⁰² However, one should remember here that it was the *Campbell* case that caused Zimbabwe to contend that the SADC Tribunal had overstepped its authority and the case eventually led to the demise of the SADC Tribunal. Perhaps that is the reason why EACJ judges are cautious when interpreting Treaty provisions that touch on human rights.

EAC leaders have expressed their commitment to fast-tracking regional integration in East Africa on the basis of democratic values. Placing human rights in the EAC Treaty, as one of the governing principles of the Community, serves as a yardstick for monitoring the conduct of EAC member states in their activities connected with EAC integration. Observance to human rights also provides the means of achieving the socio-economic and political objectives of the Community. Being the main judicial arm of the Community, the EACJ is mandated to supervise the fast-tracking of EAC integration by interpreting and applying EAC law in good faith and within the context of the EAC

¹⁰⁰ *Mike Campbell v Zimbabwe, SADC (T) 02/2007.*

¹⁰¹ *Campbell case*, 30.

¹⁰² *Campbell case*, 31.

Treaty. In terms of its initial mandate, the Court is restricted from adjudicating human rights disputes, hence denying the Court a crucial role in establishing a democratic society that upholds human values.

The main purpose of treaty interpretation is to ascertain and give effect to the norms enshrined in a treaty. Articles 31 and 32 of the Vienna Convention provide for the basic rules of treaty interpretation. The rules provided in the two articles are not ‘an exclusive compilation of guidance on treaty interpretation,’¹⁰³ implying that there could be other factors relevant to interpreting a treaty. Article 31 of the Vienna Convention provides that a treaty should be interpreted in good faith taking into consideration the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹⁰⁴ In interpreting a treaty, the scope of interpretation should include the main text of a treaty including its preamble and annexes.¹⁰⁵

When discharging its interpretative duties, the EACJ is supposed to take into consideration the object and purpose of the EAC Treaty. According to article 5 of the EAC Treaty, the Community intends to ensure that its citizens’ socio-economic, political and cultural activities are advanced as objectives of the Community, many of which are intimately connected with human rights. Furthermore, international courts are expected to take into consideration ‘any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’.¹⁰⁶

It is clear from the EAC Treaty that member states had agreed that adherence to the rule of law and democracy and respect for human rights would be a prerequisite for a state’s membership of the EAC. As such, human rights form one of the most important norms of the Community.¹⁰⁷ According to article 3 of the EAC Treaty, the three original member states (Kenya, Uganda and Tanzania) had agreed to respect the rule of law,

¹⁰³ R Gardiner *Treaty interpretation* (2008) 36.

¹⁰⁴ Art 31(1) of the Vienna Convention.

¹⁰⁵ Art 31(2) of the Vienna Convention.

¹⁰⁶ Art 31(2)(a) of the EAC treaty.

¹⁰⁷ Art 3(3)(b) of the EAC Treaty.

human rights and democracy in their respective territories prior to the formation of the EAC Treaty and similar conditions were applicable to Burundi and Rwanda when they joined the Community. Therefore, it can be argued that adherence to the universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice should definitely be taken into consideration by the EACJ when interpreting the EAC Treaty.

The insertion of human rights principles under the EAC Treaty was not meant to be a 'cosmetic' exercise.¹⁰⁸ When discharging its interpretive duties, the EACJ is expected to take cognisance of the object and purpose of the EAC Treaty. In acknowledgement of this duty, EACJ judges have been protecting human rights in the EACJ by relying on other principles embedded in the EAC Treaty. The fact that the context of a treaty interpretation includes the whole text of the treaty together with the treaty objectives and purposes, on the one hand, may advance the argument that there is no reason for the EACJ to refrain from directly interpreting human rights provisions in the EAC Treaty, even if limitations have been imposed under article 27(2). On the other hand, the EACJ will be presumed to be adjudicating on human rights when its findings are based on human rights, a mandate currently suspended by article 27(2) of the EAC Treaty.

Even if the EACJ were to interpret the EAC Treaty on the basis of the human rights norms present in the Treaty, another unmentioned obstacle in the work of the EACJ is that the nature of its decisions is declaratory. When finding a member state to be in contravention of the EAC Treaty, the EACJ simply declares a particular act or omission of a state to be contrary to the Treaty. According to the existing provisions of the EAC Treaty and Court rules, the EACJ cannot issue any remedy for EAC Treaty violations such as compensation and restitution. However, apart from issuing declarations, the Court

¹⁰⁸ *Plaxeda Rugumba v Secretary General of the EAC & Attorney General of Rwanda*, Ref No 8 of 2010, EACJ First Instance Division, 37.

can also issue orders on the costs for running cases requested by the parties concerned.¹⁰⁹ In *Plaxeda Rugumba v Rwanda (Rugumba case)*, the EACJ stated that

[w]hen the Applicant seeks to know whether the Subject's arrest and detention was a breach of the Treaty, she is not asking the Court to interpret the enforcement of any human right available to the Subject, and that is why she withdrew her prayer for 'an order that the said Lieutenant colonel Seveline Rugigana Ngabo be released from illegal detention', because this court would obviously have no such Jurisdiction. All she is seeking are certain declarations within the mandate of the Court and we have said why such Jurisdiction to make such declarations exists.¹¹⁰

3.4.1.2 Judicial law making or purposive interpretation?

The way in which the EACJ judges are interpreting the EAC Treaty, when adjudicating human rights related cases, may lead to a presumption that the Court is trying to stretch EAC law in ways not consented to by EAC member states. In terms of the present interpretive approach, the EACJ is protecting human rights indirectly. One is reminded here of the way the EU Court judges transformed EU law. The EU Court was able to transform the Rome Treaty into 'a de facto constitution' for the EU.¹¹¹ This was possible because the EU Court promoted EU objectives such as human rights, which were not extensively provided for in the Treaty of Rome. A less bold bench could easily have refused to entertain most of the cases that were admitted before the Court on the basis of their human rights nature. Judicial creativity of the EACJ judges in determining cases with human rights elements is in line with the literal interpretation of the EAC Treaty. Article 27(2) of the Treaty specifically mentions human rights as one of the future jurisdictions of the Court. Seemingly, EACJ judges are of the view that EAC member states intended to confer an explicit human rights jurisdiction on the EACJ in the future.

¹⁰⁹ See part 3.7 of this chapter.

¹¹⁰ *Rugumba case*, 24.

¹¹¹ KJ Alter & LR Helfer 'Nature or nurture? Judicial law making in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64 *International Organization* 563, 564.

EACJ judges, like most international court judges, are supposed to ‘clarify the meaning of ambiguous international rules and apply them to unforeseen contexts’.¹¹² In doing so, International judges are more likely to become expansionist lawmakers when they are supported by interlocutors and compliance constituencies, including government officials, advocacy networks, national judges and administrative agencies.¹¹³ Given the current trend in the EACJ’s approach to cases with human rights elements, it could well be the foundation for the establishment of the Court’s human rights mandate. Thus, the current EACJ’s approach to human rights can be said to be an expansive law-making strategy.

. Indeed, the EACJ judges have not crossed the boundaries of their interpretive mandate, when adjudicating cases with human rights allegations in the premises of a breach of rule of law. With respect to litigants, it is easy to commend the EACJ’s approach and classify it as judicial activism. However, the Court’s approach is simply part of its interpretive mandate whether it being expansive or not. As Alter and Helfer put it, ‘[i]nternational judicial decision making that clarifies ambiguities and fills gaps in treaties is an inherent part of judging’.¹¹⁴ With respect to the human rights norms in the EAC Treaty and the limitations imposed under article 27(2), EACJ judges to their credit have attempted to address the abeyance concerning the Court’s human rights jurisdiction. In the process, it is undisputed that the Court has developed a human rights profile of its own.

3.4.1.3 EACJ’s articulation on human rights related cases

The first case in relation to human rights to be determined by the EACJ was the *Katabazi* case.¹¹⁵ The matter involved fourteen applicants who were arrested and charged with treason in 2005. On 16 November 2006, the High Court of Uganda was in the process of

¹¹² LR Helfer & KJ Alter ‘Legitimacy and law making: A tale of three international courts’ (2013) 14 *Theoretical Inquiries in Law* 479, 481.

¹¹³ Alter & Helfer (2010) 64 *International Organization* 563, 563.

¹¹⁴ Alter & Helfer (2010) 64 *International Organization* 563, 586.

¹¹⁵ Ref No 1 of 2007.

granting bail to the fourteen suspects; however during the process Ugandan security officials interfered with the preparation of bail documents and re-arrested the suspects, who were later charged in a military court with terrorism and unlawful possession of firearms. Subsequently, the Ugandan Law Society successfully challenged the constitutionality of the conduct by the Ugandan security officials before the Constitutional Court of Uganda, on the grounds of their interference with a lawful court process.¹¹⁶ Despite the ruling by the Constitutional Court that the applicants should be released, they were re-arrested. This resulted in the applicants turning to the EACJ for seeking justice. The applicants averred that the Ugandan security officials' interference in a lawful court process and the failure of the Ugandan government to comply with the decision of the Constitutional Court of Uganda were contrary to articles 6, 7(2), and 8(1)(c) of the EAC Treaty. In this case, one of the key issues before the Court was whether the EACJ had jurisdiction to adjudicate a human rights related issues. Both the Secretary General and the Attorney General of Uganda opposed the jurisdiction of the EACJ in dealing with human rights matters, arguing that such jurisdiction depended on the adoption of a protocol that would extend the Court's mandate as provided under article 27(2) of the EAC Treaty. The EACJ, in turn, was of the view that it could not determine matters concerning the violations of human rights, as it is clear that jurisdiction with respect to human rights requires a resolution of the Council and the conclusion of a protocol to that effect.¹¹⁷ In extensively assessing the objectives¹¹⁸ and principles¹¹⁹ of the Community, the EACJ was conscious of recognising a number of objectives of the EAC, particularly the intention of EAC member states to harmonise

¹¹⁶ *Uganda Law Society v Attorney General of Uganda*, Constitution Petition No 18 of 2005. The applicant applied for orders and reliefs as provided under art 50(1) and (2) and 137(3) of the Constitution of Uganda.

¹¹⁷ *Katabazi case*, 34.

¹¹⁸ There are views that the objective clauses within a treaty do not create independent or substantive grounds for granting reliefs. See JT Gathii 'The under-appreciated jurisprudence of Africa's regional trade judiciaries' (2010) 12 *Oregon Review of International Law* 245, 262.

¹¹⁹ The established principles under the EAC Treaty provide a platform for assessing states conducts for meeting the objectives of the Community. The attitude of the states is crucial for regional integration. It is therefore necessary for the states to abide to the established principles under the Treaty.

programmes and policies in different fields including legal and judicial matters.¹²⁰ After considering the objectives and the founding principles provided in the EAC Treaty, the Court stated that ‘while the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference includes allegation of human rights violation’.¹²¹

After holding that it had jurisdiction as provided under article 27 of the EAC Treaty, the EACJ pondered the principle of the rule of law in assessing whether the conduct of the Ugandan security officials was in breach of the EAC Treaty; a principle that is not limited in article 27(2) of the EAC Treaty. The findings of the case thus relied on the breach of the rule of law and not human rights. The position of the Court in the *Katabazi* case is emphasised by the EACJ in a number of subsequent cases: It is the position of the Court that it will interpret any allegations before it, regardless of whether such allegations contain human rights claims. In *Samuel Mohochi v Attorney General of Uganda (Mohochi case)*,¹²² the First Instance Division stated that the envisaged extension stipulated in article 27(2) of the EAC Treaty does not intend in any way to limit the Court from interpreting and applying any provision of the EAC Treaty including all provisions making reference to human rights.¹²³

After the *Katabazi* case, more cases touching on human rights violations started to flow to the EACJ. When the two-tier court structure became operational, in the first few cases that had human rights allegations the difference in terms of approaches of the two Divisions in interpreting the EAC Treaty was evident. On several occasions the First Instance Division has directly interpreted the human rights norms of the EAC Treaty, only to be overruled by the Appellate Division.

¹²⁰ Art 5(1) of the EAC Treaty.

¹²¹ *Katabazi case*, 39.

¹²² *Samuel Mohochi v Attorney General of Uganda*, Ref No 1 of 2011, EACJ First Instance Division.

¹²³ *Mohochi case*, 26.

In the *Independent Medical Legal Unit v Attorney General of Kenya (Independent Medical Legal Unit case)*,¹²⁴ the First Instance Division directly exercised its interpretive jurisdiction of the EAC Treaty even without linking the alleged cause of action to the rule of law.¹²⁵ In that case, the applicant alleged that the failure by the Kenyan government to prevent, investigate and apprehend the perpetrators of the post-2007 election violence in the Mt. Elgon District, which resulted in the death, torture, and inhumane and degrading treatment of over 3 000 civilians, was a breach of the established EAC principles as provided in articles 6(d) and 7(2) of the EAC Treaty, which provide for the founding principles governing the EAC that include human rights. The First Instance Division, apart from acknowledging that it had jurisdiction to interpret the EAC Treaty even if a case before it made reference to human rights, held that the omission by the Kenyan Government contravened not only the principles provided for in the Treaty, but also the Constitution of Kenya and a number of international human rights instruments such as the Universal Declaration of Human Rights.¹²⁶

In *Rugumba case*,¹²⁷ the applicant alleged that the act by the Government of Rwanda of arresting and detaining Seveline Rugigana Ngabo, who was a Lieutenant Colonel in the Rwanda Patriotic Front (RPF), was contrary to articles 6(d) and 7(2) of the EAC Treaty. The Court held that it would be a dereliction of its oath of office to desist from exercising its jurisdiction of interpreting the EAC Treaty even when the reference before it relied on articles 6(d) and 7(2) of the EAC Treaty.¹²⁸ The Court stressed its mandate to interpret the EAC Treaty by stating the following:

There is no doubt that the use of the words, other original, appellate, human rights and other jurisdiction is merely in addition to, and not in derogation to, existing Jurisdiction to interpret matters set out in articles 6(d) and 7(2). That would necessarily include determining whether any [member states] has promoted and protected human and peoples' rights in accordance with the

¹²⁴ *Independent Medical Legal Unit v Attorney General of Kenya & Others*, Ref No 3 of 2010, EACJ First Instance Division.

¹²⁵ In the *Katabazi case*, the EACJ had relied on the breach of rule of law by the Government of Uganda for its interpretation of human rights related provisions.

¹²⁶ *Independent Medical Legal Unit case*, 4.

¹²⁷ Ref No 8 of 2010, EACJ First Instance Division

¹²⁸ *Rugumba case*, 23.

provisions of the African Charter on Human and Peoples' Rights and the Applicant is quite within the Treaty in seeking such interpretation and the Court quite within its initial Jurisdiction in doing so and it will not be shy in embracing that initial Jurisdiction.

In the *Rugumba* case, the First Instance Division took a more progressive approach in interpreting the EAC Treaty compared to the Appellate Division. Its findings were, among other things, based on the human rights norms provided in the EAC Treaty, including the African Charter. Contrary to the Appellate Division's findings,¹²⁹ the First Instance Division did not hesitate to base its findings on human rights norms as found in the EAC Treaty nor did it rely on other forms of cause of action not restricted under article 27(2) of the EAC Treaty. By using the phrase 'in addition to, and not in derogation to', the First Instance Division would seem to consider the protocol that would extend the jurisdiction of the EACJ to deal with human rights cases to be in addition to the current interpretive jurisdiction. In other words, the Court is of the view that its current jurisdiction empowers it to interpret, analyse and reach its findings based on human rights norms, including the African Charter as provided for in the EAC Treaty.

As stated above, the decision of the First Instance Division in the *Rugumba* case flags the existing ambiguity in the interpretive mandate of the EACJ. One may conclude that, as long as the Court is empowered to interpret the EAC Treaty, taking into consideration Treaty principles and objectives, there is no reason why the EACJ should refrain from its current mandate of interpreting all the EAC Treaty provisions directly and making findings based on human rights values, even in the absence of other causes of action, as a way in which to adjudicate human rights related cases. From the experience of the SADC Tribunal, it is believed that a mere reference to human rights in a constitutive instrument of international courts is sufficient for such courts to directly interpret human rights provisions in the treaties and make findings in relation to their violation.¹³⁰

¹²⁹ See *Attorney General of Rwanda v Plaxeda Rugumba*, Appeal No 1 2012, EACJ Appellate Division.

¹³⁰ L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 10.

Nevertheless, the situations in SADC and the EACJ must be made clear. The SADC Tribunal Protocol did not contain any provision that was in any way similar to article 27(2) of the EAC Treaty. On the contrary, the Tribunal had a mandate to develop its own jurisprudence when exercising its interpretive mandate.¹³¹

The interpretive approach taken by the First instance Division both in the *Rugumba* and the *Independent Medical Legal Unit* cases is not in line with that of the Appellate Division in cases that relate to human rights. The Appellate Division has always been clear in its approach when interpreting such cases and uses other forms of cause of action such as the rule of law as an escape route when interpreting the EAC Treaty. It should be pointed out that the judgments of the First Instance Division (*Rugumba* and *Independent Medical Legal Unit*) were delivered after the amendment of the EAC Treaty which established a two-tier court structure. The case of *Katabazi* was used as a precedent by the First Instance Division in these two cases. The two cases took a more judicial activist approach than the *Katabazi* case, simply by directly exercising the Court's interpretation jurisdiction of human rights provisions without linking human rights with a violation of rule of law. The two cases also made reference to other human rights instruments not mentioned in the EAC Treaty, such as the Universal Declaration of Human Rights (UDHR).¹³²

The Appellate Division has made it clear that for the EACJ's jurisdiction to be triggered in references which relate to human rights, a cause of action alleged has to be distinct and separate from human rights. This requirement was not clearly articulated in the *Katabazi* case. In the *Independent Medical Legal Unit* case, on appeal, the Appellate Division was of the view that the First Instance Division ought to have delved into the cause of action, which was distinct from human rights violations and, thus, acquire the

¹³¹ Art 21(b) of the defunct SADC Tribunal Protocol.

¹³² The UDHR that was adopted by the UN General Assembly in 1948 is soft law, but it provides some sets of human rights standards which are accepted by the international community as international customs. The UDHR is inspirational in the constitution-making process for human rights realisation. Although there are a number of existing human rights instruments, the UDHR is still seen as the ideal instrument for interpretation by many international courts. See J Crawford *Brownlie's principles of public international law* (2012) 634.

basis and legal linkage for its jurisdiction.¹³³ This position was later affirmed by the Appellate Division in the *Rugumba* case.¹³⁴

Regardless of the limitations under article 27(2) of the EAC Treaty, the EACJ will always find itself hearing matters which are of a human rights nature. For example, on 23 April 2014, a human rights organisation in Uganda filed a case before the EACJ, questioning the legality of the Anti-Homosexuality Act,¹³⁵ which came into effect after being signed by the President of Uganda on 24 February 2014. In that case, the applicant alleges that Uganda is in violation of the EAC Treaty by enacting the Anti-Homosexuality Act of 2014, as certain provisions are inconsistent with the obligations laid down by the Treaty. The applicants posit that the Act contravenes articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty, which enjoin member states to govern their populace according to the principles of good governance, democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights, which includes the provision of equal opportunities and gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter.

Furthermore, in cases concerning EAC Common Market or Customs Union integration activities, it is highly unlikely that the EACJ will not be called upon to interpret human rights provisions. In *Mohochi* case,¹³⁶ the applicant arrived at Entebbe International Airport on 13 April 2011 and was denied entry into Uganda without being given a reason. He was then restrained, confined and detained in the offices of the Uganda Immigration Department at the airport from 9.00 am to 3.00 pm, when he boarded a flight back to Kenya. The respondents argued that the applicant was a prohibited immigrant in Uganda. Due to the nature of the case, the EACJ found itself analysing issues concerning free movement and discrimination, which are human rights related aspects.

¹³³ *Independent Medical Legal Unit* case, Appeal No 1 of 2011, the EACJ Appellate Division, 10.

¹³⁴ Appeal No 1 2012, EACJ Appellate Division

¹³⁵ *Human Rights Awareness & Promotion Forum v Attorney General of Uganda*, Ref No 6 of 2014, First Instance Division.

¹³⁶ *Mohochi* case.

During the hearing of the case, the Attorney General of Uganda defended the actions of its state officials by submitting that Uganda is an independent state and not submerged by the establishment of the EAC.¹³⁷ This submission by the Attorney General might be a reflection of lack of awareness on the legal regime of the EAC in member states, or a continuation of the attitude by member states of being reluctant to surrender some of their sovereignty to the EAC. Like all the EAC member states, Uganda has given the EAC Treaty the force of law in its territory.¹³⁸

The main issue of contention in this case was whether Uganda is entitled to deny EAC citizens entry into its territory given the provisions of sections 52 and 66(4) of Uganda's Citizenship and Immigration Control Act, and article 104 and 7 of the EAC Treaty and Common Market Protocol respectively. Article 104 of the EAC Treaty and 7 of the Protocol guarantee the free movement of persons, labour, services, and right of establishment and residence in the Community. The Court found that the actions of Ugandan immigration officials were in violation of the freedom of movement of the applicant, which constitutes part of the foundational principles of the Common Market and is a violation of article 104 of the Treaty.¹³⁹

Owing to the current EACJ's jurisprudence in relation to human rights, there is a growing drive by civil society and legal professionals to enable the Court to protect human rights effectively in the region. The EACJ has already developed a 'strong reputation' in the region as a forum where democracy, rule of law and human rights can be better protected.¹⁴⁰ The driving force for enabling the EACJ to protect human rights effectively in the Community does not emanate from the member states but from civil society, legal scholars and practitioners. The application by Mr Sebalu,¹⁴¹ alleging that the

¹³⁷ *Mohochi* case, 45.

¹³⁸ Section 3(1) of the East African Community Act of 2002 of Uganda provides that 'the Treaty as set out in the Schedule to this Act shall have force of Law in Uganda'.

¹³⁹ *Mohochi* case, 112.

¹⁴⁰ J Gathi 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2012) 19 Public Law & Legal Theory Research Paper, Loyola University Chicago School of Law, 3.

¹⁴¹ Ref No 8 of 2012, EACJ First Instance Division.

Secretary General of the EAC had failed to comply with the earlier decision of the EACJ that called upon member states to fast-track the adoption of a protocol that would extend the jurisdiction of the Court, highlights the frustration caused by the long delay in having a community court that will effectively protect human rights. However, the limitation imposed under article 27(2) of the EAC Treaty adds to the confusion about the jurisdictional mandate of the EACJ. With the continuing delays and lack of political commitment to adopting a protocol that would give the EACJ an explicit human rights mandate, article 27(2) will continue to raise the alarm over the legality of the EACJ in interpreting EAC Treaty provisions which make reference to human rights. Under these circumstances, the EACJ is currently ineffective in protecting human rights as it restricts itself in making findings based on human rights values as enshrined in the EAC Treaty.

Therefore, in early cases that had human rights allegations, the EACJ was straightforward in basing its position on the interpretation of human rights norms in the EAC Treaty; the EACJ does not base its findings directly on human rights due to the limitations imposed by article 27(2) of the EAC Treaty. In circumstances when the EACJ refrains from adjudicating a case simply because it has a close connection with human rights, even if it involves an infringement of the EAC Treaty, it will be seen as an abdication of its mandate.

Given the existence of article 27(2) of the EAC Treaty, when a matter has human rights features innovative litigation techniques are required to successfully lodge a complaint before the EACJ. Moreover, the basis of the claim should not be limited under article 27(2) of the EAC Treaty; that is, the claim should not rely on human rights violations. A well-crafted argument alleging a violation of the observance of the rule of law, good governance and democracy will help to peg the jurisdiction of the EACJ. In what is already seen as a Court's human rights mission, it is expected to continue interpreting the EAC Treaty 'in its own way as it is used to without any fear or favour'.¹⁴²

¹⁴² A response from the principal judge of the EACJ, Jean Bosco Butasi, in an interview held on 4 December 2013.

The fact that the EACJ has developed its own human rights profile through judicial activism, the question might be whether such strategy is better suited for just a transitional period than a more permanent approach to human rights; and whether it can navigate the existing obstacles imposed under article 27(2) of the EAC Treaty. Before engaging on the issue at hand, a few points should be remarked. The involvement of civil society, legal practitioners, and political actors has to some extent turned the EACJ into a forum for power struggle and the ‘vindication of rights claims.’¹⁴³ The EACJ’s involvement in human rights is not an exception. It is part of a growing trend towards a rights-based approach adopted by most supranational organisations.¹⁴⁴ East African integration is not solely established for economic integration.¹⁴⁵ EAC member states strive to ‘develop policies and programmes aimed at widening and deepening co-operation among the [member states] in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit’.¹⁴⁶

Indeed, the EACJ is not a human rights court. It is a Community court entrusted with the role interpreting and applying the EAC Treaty. Whether the EACJ is to deal with trade, human rights or being an appellate court in the region, it is at the discretion of member states to decide. Despite of the existing limitations to adjudicate human rights disputes, it is undeniable that the EACJ has adopted some kind of judicial activism when adjudicating cases with human rights allegations. In such circumstances, it is likely to invoke controversy with member states. It can also be argued that the continuing politicization of the EACJ’s human rights jurisdiction might have been caused by the Court’s activism. As a matter of fact, judicial activism can easily lead to unwanted results, particularly when a court is called to make judgments in sensitive areas which it lacks jurisdiction; when presiding judges are not conversant with the matter in question;

¹⁴³ J Gathii ‘mission creep or a search for relevance: The East African Court of Justice’s human rights strategy (2013) 24Duke Journal of Comparative & International Law 249, 231.

¹⁴⁴ As above.

¹⁴⁵ See art 5 of the EAC Treaty.

¹⁴⁶ Art 5(1) of the EAC Treaty.

and with the case of supranational courts, judicial activism may lead in to counter-response from member states when they are displeased with the kind of judicial behavior adopted by the judiciary.¹⁴⁷ While the EACJ's bravery in adjudicating cases with human rights allegations is commendable, one should also be skeptical on the Court's direct involvement in human rights. The fact that EAC member states are parties to the African Court, direct involvement of the EACJ in human rights might lead to conflicting jurisdiction, which may lead to forum shopping and jurisprudential concerns.

As already stated, when interpreting a treaty, judges are bound to take cognisance of the actual text of a treaty, the intention of the parties when forming a treaty, and lastly, on the object and purpose of the treaty. In the context of the EAC Treaty, it is clear that the first two tests (actual text and intention of the parties) do not give the EACJ the basis for adjudicating human rights cases. With respect to treaty objectives, two opposing views can emerge. On one hand, it can be argued that member states have expressed their commitment in advancing EAC integration by adhering to human rights principles; therefore, human rights are pivotal when interpreting the EAC Treaty. On the other hand, it can be demonstrated that the purpose and object is to fast-track EAC integration in phases, including expanding the EACJ's mandate in human rights, appellate or any other jurisdiction in future; thus, the Court is barred to deal with human rights.

Basing on the above narration, the present EACJ's technique of invoking the rule of law as the basis for adjudicating cases with human rights allegation is the right path that the Court should take. However, the approach is not sustainable if the Court is to effectively protect human rights in the region. It is submitted that the current judicial activism adopted by the EACJ in human rights related cases is only suitable for the current

¹⁴⁷ For a general reflection of Judicial activism of international judiciaries, see E McWhinney 'The International Court of Justice and international law-making: the judicial activism/self-restraint antinomy (2006) 5 *Chinese Journal of International Law* 3; P Kooijm 'The ICJ in the 21st century: Judicial restraint, judicial activism, or proactive judicial policy' (2007) 56 *International and Comparative Law Quarterly* 741

situation. It is hoped that the EACJ's adoption of rights-based approach is a stepping-stone towards having an explicit human rights mandate in the near future. It would be an enormous task to invite the EACJ to interpret human rights norms beyond its current stance. In an event that the EACJ attempts to adjudicate human rights dispute beyond its present approach, there would be a risk of inviting political responses from member states. One would easily conclude that the current EACJ's approach in human rights related cases is a cautious but progressive judicial law-making strategy.

3.4.2 Personal jurisdiction

Personal jurisdiction entails the power of a court to hear the parties in a dispute and it determines which parties may appear as applicants and respondents.¹⁴⁸ Access to the EACJ is granted to both natural and legal persons resident in member states.¹⁴⁹ The EACJ receives cases directly from individuals whenever there is an infringement of the EAC Treaty by a member state or an institution of the Community.¹⁵⁰ Legal and natural persons, who are subject to article 27 of the EAC Treaty, may refer a matter to the EACJ in the case of the illegality of an act, regulation, directive, decision or action by a member state or institution of the Community.¹⁵¹ Other natural persons entitled to bring a claim before the EACJ include the following: the employees of the Community

¹⁴⁸ F Viljoen *International human rights law in Africa* (2012) 435.

¹⁴⁹ Art 30 of the EAC Treaty.

¹⁵⁰ Art 30 of the EAC Treaty allows both natural and legal persons to refer cases before the Court. Subject to art 27 of the Treaty, individuals may refer cases to the Court for the determination of the legality of any 'act, regulation, directive, decision, or action' of a member state or an institution of the Community on the grounds that such act, regulation, directive, decision, or action is contrary to the EAC Treaty.

¹⁵¹ Art 30(1) does not mention whether an act of an organ of the Community can be challenged before the EACJ. However, an act of an organ of the Community constitutes an act of the Community and therefore, in an event of an illegal act or omission by an organ of the Community, an individual can bring a claim before the EACJ against the Community having the Secretary General as a respondent. *Timothy Alvin Kahoh v Secretary General of the EAC*, Ref No 1 Of 2012, EACJ First Instance Division; *Sitenda Sebalu v Secretary General of the EAC and Others*, Ref No 1 of 2010, EACJ First Instance Division.

with respect to disputes between the Community and its employees¹⁵² and the Secretary General who has standing on behalf of the Community.¹⁵³

On the basis of article 30(1) of the EAC Treaty, non-governmental organisations and civil society have been given a great opportunity to uphold EAC norms, by having direct access to the EACJ. Such an opportunity is inline people-centred integration,¹⁵⁴ at present, civil society and non-governmental organisations are playing a leading role in keeping the EAC legal order in shape. One of the factors believed to have caused the downfall of the former EAC was the lack of effective participation by civil society and non-governmental organisations in its activities, a mischief that EAC member states seem to rectify in the current EAC.

The current EAC is committed to creating an environment suitable for the involvement of the private sector and civil society in the activities of the Community.¹⁵⁵ Indeed, a number of cases of general interest to East African citizens have been taken to the EACJ by non-governmental organisations and civil society. Their role in preserving the rule of law in the EAC should not be underestimated, as they are tirelessly assisting individuals who are not able to access the justice to at least be able to access the EACJ. So far most cases that have been submitted to the EACJ by non-governmental organisations and civil society, challenging any infringement of the EAC values, have mainly represented East African citizens who are not aware of the legal aspects of EAC integration. In *East African Law Society v Attorney General of Kenya and Others (East African Law Society case)*,¹⁵⁶ the EACJ acknowledged the importance of civil society for ensuring that East

¹⁵² Art 31 of the EAC Treaty. Cases submitted by employees of the Community have to arise out of the terms and conditions of employment or the application and interpretation of the Staff Rules and Regulation and Terms and Conditions of Service of the Community.

¹⁵³ Art 29 of the EAC Treaty. The Secretary General is the Principal executive officer of the EAC.

¹⁵⁴ Art 7(1)(a) of the EAC Treaty. One of the operational principles of the EAC includes people-centred and market driven economy. It was important to recognize the role of citizens in the EAC integration as they were side lined in the former EAC.

¹⁵⁵ See Chapter 25 of the EAC Treaty.

¹⁵⁶ *East African Law Society & Others v Attorney General of Kenya & Others*, Ref No 3 of 2007.

African citizens, for whose benefit the EAC was established, are able to participate in protecting the integrity of the EAC Treaty.¹⁵⁷

When a member state considers that another member state or an organ or institution of the Community has not met its obligations under the Treaty or is breaching EAC Treaty provisions, it may refer the matter to the EACJ for determination.¹⁵⁸ Article 30(1) of the EAC Treaty renders the EACJ accessible to a wide range of stakeholders in the East African integration. By the time the jurisdiction of the EACJ is expanded to include human rights in the near future, the wider scope of accessibility by EAC stakeholders will create an environment in which the EACJ can be a suitable forum for protecting human rights.

3.4.3 Temporal jurisdiction

It is a general principle under international law that treaties do not apply retroactively.¹⁵⁹ According to the Vienna Convention, parties to a treaty are not bound by any act or omission that took place before a treaty came into force, unless a different intention appears as expressed in a treaty.¹⁶⁰ It is important to comment here that the principle of non-retroactivity is not *ius cogens*. Its applicability depends on the intention of the parties to a treaty¹⁶¹ and it is therefore possible for parties to decide to adopt a treaty with retroactive application.

The EAC Treaty does not contain any provision allowing for retroactive application. Therefore, any case taken before the EACJ must have a cause of action that occurred

¹⁵⁷ *East African Law Society case*, 14. The EACJ dismissed the objection by the respondents that the East African Law Society, the regional lawyer association, is not entitled to submit a case before the EACJ in accordance to art 30 of the EAC Treaty.

¹⁵⁸ Art 28(1) of the EAC Treaty. According to art 28(2), a member state may also refer a matter to the EACJ for questioning the legality of any act, regulation, directive, decision or action of the organs or institutions of the Community on the ground that it is 'ultra vires'.

¹⁵⁹ See art 28 of the Vienna Convention; A Buyse 'A lifeline in time: Non-retroactivity and continuing violations under the ECHR' (2006) 75 *Nordic Journal of International Law* 63; M Shaw *International Law*, 5th ed, 832-833; *Ambatielos case (Greece v UK)*, 1 July 1952, ICJ Reports (1952) 40.

¹⁶⁰ Art 28 of the Vienna Convention.

¹⁶¹ Buyse (2006) 75 *Nordic Journal of International Law* 65.

after the EAC Treaty came into force.¹⁶² For the EAC member states, the date of deposit of the instruments of ratification is the actual date the EAC Treaty was effectively enforced.¹⁶³ Thus, any claim before the EACJ falling outside these dates would be inadmissible.¹⁶⁴ The only exception under international law regarding the rule of non-retroactive application is the principle of continuing violation.¹⁶⁵ This principle allows the claimant to seek redress before a competent court in relation to a series of violations, regardless of the limited period of time established by the law to submit a case before that court. However, the current jurisprudence of the Court does not affirm the application of the doctrine of continuing violations. In *Attorney General of Uganda v Omar Awath*,¹⁶⁶ the EACJ held that the principle of continuing violations is applicable in circumstances where it is ‘all about human rights violations, governed by a particular conventions on human rights’, which is not the case with cases before the EACJ.¹⁶⁷

The EACJ has dealt with a case relating to the retroactivity of the EAC Treaty. In *Emmanuel Mwakisha and Others v Attorney General of Kenya*,¹⁶⁸ the EACJ was invited to rule on its temporal jurisdiction. The claimants were the former employees of the defunct EAC. Following the collapse of the former EAC in 1977, the three original member states in 1984 agreed to the Mediation Agreement, allowing for the division of the assets and liabilities of the defunct Community. In that agreement, each member state agreed to pay its share of the pensions and other terminal benefits of its nationals who had been employed by the former EAC. However, up to the time they submitted their claim to the EACJ, the Kenyan government had not paid the applicants their

¹⁶² The EAC Treaty entered in to force on 7 July 2000.

¹⁶³ The three original member states (Kenya, Tanzania and Uganda) ratified the EAC Treaty on 7 July 2000. Burundi and Rwanda signed the Treaty on 18 June 2007 and deposited instruments for ratification of the Treaty on 1 July 2007.

¹⁶⁴ See Viljoen (2012) 439, where he discusses the temporal jurisdiction of the African Court.

¹⁶⁵ In *Blake v Guatemala*, the Inter American Court of Human Rights found the objection of Guatemala to be of no merit in the allegations relating to the effects and actions subsequent to its acceptance of the Court’s Protocol (*Blake v Guatemala*) (ACrHR judgment of 2 July 1996).

¹⁶⁶ *Attorney General of Uganda & Another v Omar Awath & Others*, Appeal No 2 of 2012 (Arising out of Application No 4. of 2011 in Ref No 4 of 2011, EACJ Appellate Division – *Omar Awadh* case).

¹⁶⁷ *Omar Awath* case, 18.

¹⁶⁸ Ref No 2 of 2010, EACJ First Instance Division.

pensions, provident fund, severance allowances, gratuity, redundancy and all other benefits they were entitled to after the collapse of the former EAC. The applicants claimed that the neglect, failure and refusal by the Kenyan government to pay their benefits constituted a breach of article 6(d) and 7(2) of the EAC Treaty. The main issue of contention was whether the EAC Treaty has retroactive effect. The Court held that the EAC Treaty does not contain any express provision nor does it reflect any intention of the EAC member states for it to have retrospective force. Therefore, when the protocol for extending the jurisdiction of the EACJ is adopted, which is expected to enable the Court to adjudicate human rights claims, the EACJ would only receive allegations of an infringement of the EAC Treaty which occurred after the entry into force of the Treaty, or as may be otherwise provided by the protocol.

3.4.4 Territorial jurisdiction

The EACJ exercises its jurisdiction on the entire territory of its member states, but only receives complaints relating to any act, regulation, directive, decision, or action of a member state or an institution of the Community on the grounds that such act, regulation, directive, decision, or action is contrary to the EAC Treaty. The EAC Treaty does not have an extraterritorial application when a member state violates Community values beyond the borders of the EAC. However, with the intention to expand the Court's jurisdiction to include matters relating to human rights, international crimes and crimes against humanity, the extraterritorial application of the EAC Treaty might be necessary.

3.4.5 Advisory opinions

Ordinarily, advisory opinions are 'authoritative' but do not have binding force;¹⁶⁹ their main purpose is to give clarity on a particular law or legal provision. The EACJ has

¹⁶⁹ See JC Schmid 'Advisory opinions on human rights: Moving beyond a pyrrhic victory' (2006) 16 *Duke Journal of Comparative & International Law* 415, AP van der Mei 'The advisory jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 *African Human Rights Law Journal* 30.

jurisdiction to give advisory opinions on questions of law arising from the EAC Treaty. The advisory jurisdiction of the Court is explicitly with the Appellate Division.¹⁷⁰ The EACJ can only render an advisory opinion upon being requested by the Summit, Council and member states.¹⁷¹ The quest for an advisory opinion must be on a matter of law concerning the EAC Treaty that affects the Community.¹⁷² Individuals and non-governmental organisations are not entitled to ask the Court to exercise its advisory jurisdiction. Although advisory opinions are tagged with non-binding status, they are essential in providing a legal platform for getting a clear legal position from the court, a role that the EACJ has already been playing. The Council had requested the Court to give an advisory opinion regarding the application of the principle of variable geometry in the integration process as provided by the EAC Treaty.¹⁷³

The avenue for advisory jurisdiction offered by the EACJ is not much utilised.¹⁷⁴ This might be because individuals and non-governmental organisations are not entitled to seek the Court's opinion. There are many provisions in the EAC Treaty that require clarification from the Court, particularly those provisions concerning human rights and the Court's jurisdiction. However, there has to be political motivation from organs of the Community to call upon the Court to render its opinion on all provisions of the EAC Treaty that cause uncertainty. The fact is that individuals and non-governmental organisations are not entitled to seek advisory opinions from the EACJ, and there is a very slim chance that political organs and member states will do so on their behalf. It is hoped that the protocol that will extend the jurisdiction of the EACJ to cover human rights cases will also consider granting individuals and NGOs an opportunity to seek advisory opinions from the Court.

¹⁷⁰ Rule 75 of the EACJ Court Rules, 2013.

¹⁷¹ Art 36(1) of the EAC Treaty.

¹⁷² Art 36 of the EAC Treaty.

¹⁷³ Advisory Opinion by the Council of Minister, App No 1 of 2008.

¹⁷⁴ Only one instance so far that has sought the Court's advisory opinion, see *Advisory Opinion by the Council of Minister*, Application No 1 of 2008.

3.4.6 Preliminary rulings

The EACJ has jurisdiction to make preliminary rulings in any issue raised before the national courts of member states regarding the interpretation or application of the EAC Treaty or the legality of the ‘regulation, directives, decisions, or actions of the Community’.¹⁷⁵ However, it is left to the discretion of national judges to consider whether a matter before them should be referred to the EACJ for the preliminary ruling necessary for them to make decisions. National courts have wide discretion in deciding whether to refer to the EACJ for a preliminary ruling and a national judge will only do so after meeting two conditions: First, a question must have been raised for the interpretation and application of the EAC Treaty or a question on the validity of any regulation, directives, decisions, or actions of the Community. Second, the national court must satisfy itself that the question is important in order for it to render its judgment.¹⁷⁶ The EAC is silent on who can raise these questions. It is presumed that both the presiding judge and the parties to the case can raise such questions.¹⁷⁷

The question for a preliminary ruling must be referred to the Appellate Division of the Court.¹⁷⁸ To date, only one case has been referred to the EACJ for a preliminary ruling.¹⁷⁹ In such cases, the Court is required to respond to the questions that are referred to it and immediately forward its findings to the national court concerned. The EACJ will not determine the final outcome of the matter referred to it for preliminary hearing. The purpose of a preliminary ruling is to enable national courts to make proper findings in matters relating to the EAC Treaty. Preliminary rulings from the EACJ reduce the risk of

¹⁷⁵ Art 34 of the EAC Treaty.

¹⁷⁶ JE Ruhangisa ‘The East African Court of Justice: Ten years of operations [achievements and challenges]’ (2011) 19.

¹⁷⁷ Ruhangisa ‘The East African Court of Justice: Ten years of operations [achievements and challenges]’ (2011) 20.

¹⁷⁸ Rule 76 of the EACJ Rules.

¹⁷⁹ *Saida Rosemary (On behalf of Christopher Magondi) and Another v Commissioner of Police and 2 Others*, Application No 1 of 2011, EACJ Appellate Division. The matter is pending the ruling of two other matters of a similar nature in the First Instance Division.

variations in the interpretation of the EAC Treaty, bearing in mind that national courts can also interpret the EAC Treaty.¹⁸⁰

The question might arise as to whether the EACJ can exercise its jurisdiction to give a preliminary ruling on human rights disputes and this is an issue that needs to be tested. Although the EAC Treaty is silent on which matters should be referred to the EACJ for preliminary ruling, what is certain is that the matter should involve the interpretation and application of the EAC Treaty.

3.4.7 Inherent powers

In many instances, drafters of international treaties tend to omit some provisions that might be useful for fulfilling the obligations provided in a treaty.¹⁸¹ Treaties for establishing international courts tend to omit sections for enabling courts to exercise certain jurisdictional and procedural functions. Occasionally, courts have confronted such problems by acquiring and applying some powers that would enable them to function effectively. These powers are indispensable for enabling courts to dispense justice and both national and international courts are applying these powers, commonly known as inherent powers or inherent jurisdiction.¹⁸² Inherent powers are distinct from those which are clearly attributed in the text of the constitutive instruments and they are distinct from the implied powers of international organisations. These implied powers of international organisations are derived from express provisions or any

¹⁸⁰ Art 33 of the EAC Treaty.

¹⁸¹ E Gordon 'The world court and the interpretation of constitutive treaties' (1965) 59 *American Journal of International Law* 794, 804. In most circumstances, the omission is a means of compromising in reaching an agreement on the 'disputed aspect' by the founding states. Misunderstandings relating to the scope and powers of an international court are common among states when adopting the court's instrument.

¹⁸² For a general reflection on the application of inherent powers of international courts or tribunals see: C Brown 'The inherent powers of international courts and tribunals' (2005) 76 *British Yearbook of International Law* 195; L Jessica 'Inherent jurisdiction and inherent powers of International Criminal Courts and Tribunals: An appraisal of their application' (2012) 15 *New Criminal Law Review* 375.

implications flowing from their constitutive instrument, whereas inherent powers need not be justified by any express provision.¹⁸³

The origin of the doctrine of inherent powers lies almost entirely in the common law legal tradition.¹⁸⁴ Legal basis for the application of inherent powers by international courts is ‘notoriously elusive’, yet they have often been used by these courts for dispensing justice even when not explicitly provided by law.¹⁸⁵ The inherent powers of most international courts do not flow from their founding instruments, but rather from their judicial functions. Courts apply inherent powers simply because those powers are ‘inherent’. Regardless of the elusiveness of the sources of inherent powers of most international courts, Brown points out that the general principles of law, implied powers, identity of powers of courts as judicial bodies, and judicial functions provide the legal basis for international courts to apply inherent powers.¹⁸⁶ Some courts are empowered by statutes to determine the scope of their jurisdiction but generally not their inherent powers.¹⁸⁷

Many international courts are applying the doctrine of inherent powers so as to administer justice and ensure that court process is not abused.¹⁸⁸ Regional human rights courts have invoked their inherent powers for defeating any abuse of court process, remedying any justifiable breach of procedures, and determining the scope of their

¹⁸³ L Jessica ‘Inherent jurisdiction and inherent powers of international criminal courts and tribunals: An appraisal of their application’ (2012) 15 *New Criminal Law Review* 375, 383. For an overview of the implied powers of international organisations, see M Rama-Montaldo ‘International legal personality and implied powers of international organizations’ (1970) 44 *British Yearbook of International Law* 114; B Catherine ‘International Court of Justice and international organisations’ (2007) 8 *International Community Law Review* 181; M Andrew ‘Role of provisionally applied treaties in international organisations’ (2008) 39 *Comparative and International Law Journal of Southern Africa* 39.

¹⁸⁴ Brown (2005) 76 *British Yearbook of International Law* 205.

¹⁸⁵ Jessica (2012) 15: 3 *New Criminal Law Review* 375.

¹⁸⁶ Brown (2005) 76 *British Yearbook of International Law* 195, 222-229.

¹⁸⁷ Art 21(b) of the SADC Tribunal Protocol. The art provides that the SADC Tribunal can develop its own jurisprudence by taking into consideration applicable treaties, general principles and rules of public international law and any rules and principles of the law of states.

¹⁸⁸ See *Nuclear Tests (Australia v France)*, 1974 ICJ Rep 253, *Joseph Kanyabashi v Prosecutor*, Case No 96-15-A, ICTR, *African Commission on Human and Peoples’ Rights v The Great Socialist Libyan People’s Arab Jamahiriya*, App No 004 2001.

powers.¹⁸⁹ Rule 1(2) of the EACJ rules entrusts the EACJ with invoking its inherent powers.¹⁹⁰ In many instances, the EACJ has applied its inherent powers to extend the time taken for court documents to be exchanged between parties.¹⁹¹ In the *Sebalu* case,¹⁹² when called upon to determine whether the failure by the Council of Ministers to implement the order by the Court in Reference No I of 2010 amounted to contempt of Court, the EACJ stated as follows:¹⁹³

There is no specific provision under the Treaty or in the Rules of this Court that empowers the Court to deal with cases of contempt. However, we are of the considered view that the Court has inherent power to deal with such cases under Rule 1(2) of its Rules of Procedure.

In contrast, the EACJ has summarily declined to use its inherent powers to extend the time for submitting a case before the Court.¹⁹⁴ Rule 1(2) of the EACJ includes the condition that the EACJ should be certain that it does not abuse its powers; this is a breakthrough in the observance of rule of law and universal human rights standards in the EAC.

3.5 Individuals and non-state entities

3.5.1 Direct access

In the past, diplomatic negotiation among states was preferred over contentious litigation in settling international disputes.¹⁹⁵ The reason for this was that, at that time, most international courts and tribunals did not grant direct access to individuals. As a consequence, international judicial bodies became dormant because friendly nations

¹⁸⁹ See *Ivcher Bronstein v Peru*, Case No 54 of 1999, IACHR.

¹⁹⁰ Rule 9(2) of the EACJ rules states that: 'Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.'

¹⁹¹ See *Komu* case, Ref No 7 of 2012, EACJ First Instance Division.

¹⁹² Ref No 8 of 2012, EACJ First Instance Division.

¹⁹³ Ref No 8 of 2012, EACJ First Instance Division, 19.

¹⁹⁴ According to art 30(2) EAC Treaty, any reference submitted before the EACJ should be within two months from the date on which the infringement of the EAC Treaty occurred. *Independent Medical Legal Unit* case, Appeal No 1 of 2011, the EACJ Appellate Division.

¹⁹⁵ H Onoria 'Locus standi of individuals and non-state entities before regional economic integration judicial bodies in Africa' (2010) 18 *African Journal of International & Comparative Law* 143, 148.

were unilaterally unwilling to take other to court. African sub-regional courts were no exception in this regard and in the early days of their existence most of them were largely inactive. However, since the re-establishment of some sub-regional organisations during the 1990s, the role of individuals and non-state actors in litigation has become increasingly active,¹⁹⁶ and their involvement in protecting the rule of law, democracy and human rights in their respective organisations is ever increasing.¹⁹⁷ Direct access for individuals is now provided in the ECOWAS Court and the EACJ, providing individuals with an opportunity to access justice within a short period of time.

International courts and tribunals are more likely to protect the rule of law and human rights effectively when direct access to individuals and non-state entities is allowed without restriction.¹⁹⁸ Individuals are most usually the victims of human rights violations in their home states. Hence, the on-going efforts for embedding international human rights values in different jurisdictions around the world is intended to protect individuals from harmful violations by states.¹⁹⁹ The anomaly is that despite individuals being the main targeted subjects under international human rights law, most international courts restrict direct access for individuals. In Africa, where there is no good record of human rights compared to other continents, direct individual access to the African Court on Human and Peoples' Rights (African Court) is more of an 'exception' than the general

¹⁹⁶ Treaties establishing sub-regional bodies grants access to the courts. (Art 30 of the EAC Treaty, art 26 of the COMESA Treaty, and art 10(c)(d) of the 2005 ECOWAS Supplementary Protocol.

¹⁹⁷ Not all international judicial bodies grant individuals direct access to submit cases. In the European Union, the European Commission submits cases against member states to the European Court of Justice on the behalf of individuals.

¹⁹⁸ For an overview of the role of individuals in international courts see: A Clapham 'The role of the individual in the international law' (2010) 21 *The European Journal of International Law* 25; I Brownlie 'The individual before tribunals exercising international jurisdiction' (1962) 11 *The International and Comparative Law Quarterly* 701.

¹⁹⁹ MD Vargas 'Individual access to the Inter-American Court of Human rights' (1984) 16 *New York University Journal of International Law and Politics* 601, 601.

rule.²⁰⁰ Individuals can only access the African Court directly if their respective states have made a declaration to allow them to do so.²⁰¹

In respect of the East African countries, it is only Tanzania and Rwanda which have made declarations allowing their citizens direct access to the African Court. Considering the fact that individuals are the 'principal actors' in the international community law, their accessibility before an international judicial body should not be kept on the margins.²⁰² In *Democratic Party v Secretary General of the EAC and Others*,²⁰³ the First Instance Division dismissed a case against the Secretary General of the East African Community and three member states, the Republics of Burundi, Kenya and Uganda, filed by the applicant for alleged failure or refusal and delay to make respective declarations to accept the competence of the African Court. The case underpins the desire by East African citizens to have direct access to regional bodies, presumably as a result of a hostile environment in domestic courts when lodging a human rights claim.

In the ECOWAS Court, the case of *Olajide v Nigeria*²⁰⁴ was a ground-breaking moment for individual access to the ECOWAS Court. The applicant, a Nigerian businessman, submitted a case to the ECOWAS Court questioning the conduct of the Nigerian government in closing its border with Benin without any notice, contrary to the ECOWAS Treaty, the ECOWAS Protocol on Free Movement of Persons and Goods. Prior to this case, the ECOWAS Court could only receive cases between member states. The applicant asked the Court to purposively interpret the jurisdiction clause and access rules to overcome the absurdity that expects a state to be both a plaintiff and a defendant when it violates the Community Treaty. The ECOWAS Court did not, however, accept the invitation to purposely interpret the ECOWAS Treaty to allow individual

²⁰⁰ F Viljoen 'Human rights court for Africa, and Africans' (2004-2005) 30 *Brooklyn Journal of International Law* 1, 23. See also D Juma 'Access to the African Court on Human and Peoples' Rights: A Case of the poacher turned gamekeeper' (2007) 2 *Essex Human Rights Review* 1.

²⁰¹ Art 5(3) read together with art 34(6) of the African Court Protocol.

²⁰² PO Vicuna 'Individuals and non-state entities before international courts and tribunals' (2001) 5 *Max Plank Yearbook of United Nations Law* 53, 54.

²⁰³ Ref No 2 of 2012, EACJ First Instance Division.

²⁰⁴ Afolabi Olajide v Nigeria, ECW/CCJ/APP/01/03.

access and it dismissed the application, sticking to the plain wording of its mandate that only allowed disputes to be instigated by member states on behalf of their nationals against another member state.

The ECOWAS Court used the case to lobby for the expansion of jurisdiction. In 2004, the ECOWAS Court judges drafted a proposal for expanding the Court's jurisdiction that would allow individual access. At the 2004 Consultative Forum on Protecting the Rights of ECOWAS citizens through the ECOWAS Court, a number of civil society and human rights groups took part and produced a declaration calling on the ECOWAS Legal Secretariat to draft a supplementary protocol revising the Court's mandate.²⁰⁵ In 2005, the Supplementary Protocol was eventually adopted, giving individuals and non-state actors access to the ECOWAS Court.²⁰⁶ As stated above, the inactiveness of the African Court paved the way for sub-regional courts in Africa to get involved in protecting human rights. If the African Court was active from its inception, Mr Olajide would have simply gone to the African Court and such initiatives by the ECOWAS Court judges to allow individual access might have not been triggered.

The EAC Treaty allows both natural and legal persons to submit cases directly before the EACJ, provided that they are residing within the territories of the partner states.²⁰⁷ The Treaty is silent on whether one has to exhaust local remedies before reaching the EACJ, although the EACJ has held that the EAC Treaty does not require this to happen before one may submit a case before it.²⁰⁸ The Treaty is also silent on whether one must be a victim of a violation in order to submit a case to the EACJ. The flexibility of the EACJ in receiving cases brought by individuals directly is a great step forward in ensuring access to justice. Domestic courts of the EAC member states are flooded with cases and have

²⁰⁵ KJ Alter 'The global spread of European style International courts' (2012) 35 *West European Politics* 135, 149.

²⁰⁶ Art 10(c), (d) of the 2005 ECOWAS Court Supplementary Protocol.

²⁰⁷ Art 30 of the EAC Treaty.

²⁰⁸ *Anyang' Nyong'o* case, 22.

cumbersome procedures for the instigation of a human rights case.²⁰⁹ Even when litigants overcome procedural difficulties in lodging human rights claims in the domestic courts, they may have to wait for many years to get redress owing to slow process in disposing of disputes. All the cases brought before the EACJ so far have been referred by natural and legal persons, with the exception of one advisory opinion from the Council. This underlines the important role that individuals and non-state actors play in promoting justice in the EAC.

In SADC, at present, the envisaged new protocol for the reinstatement of the SADC Tribunal seems to exclude individuals from accessing the Tribunal. During the time of its existence, the SADC Tribunal was not as active as the ECOWAS Court or the EACJ, seemingly because it did not allow direct individual access. With the intention of expanding the jurisdiction of the EACJ, direct access by individuals and non-state entities, as provided under article 30(1) of the EAC Treaty, should not be discouraged.

3.5.2 Public interest litigation

Public interest litigation before international courts is effective in a situation where there are extensive human rights violations, atrocities or any breach that impugns the rights of thousands of victims who are unable to access justice. Most victims of massive human rights violations are impoverished and isolated to the extent that they cannot access justice in their own countries.²¹⁰ It is on this basis that international courts, such as the EACJ, have a crucial role to play in ensuring adherence to the rule of law by lending credence to public interest litigation.

Usually international courts do not grant locus standi to every individual and requirements relating to an applicant's residence and personal legal interest are

²⁰⁹ For example, in Tanzania one has to first satisfy the High Court that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is not frivolous or vexatious (section 8(2) of the Basic Rights and Duties Enforcement Act No 33 of 1994).

²¹⁰ WJ Aceves 'Actio popularis? The class action in international law' (2003) *University of Chicago Legal Forum* 353, 354.

common to most. The EAC Treaty does not impose any duty on the litigants before the EACJ to demonstrate any legal interest in the subject matter of the case. The Treaty only requires individuals to be residents of a partner state in order to have standing before the Court.²¹¹ Thus, the EACJ embraces an ‘open door’ approach for the locus standi of individuals.²¹² In the *Anyang’ Nyong’o* case, the EACJ was of the view that the EAC Treaty does not require the claimants to show any interest or any right that they had suffered for them to be able to bring cases before the Court.²¹³ Such flexibility would allow a wide range of accessibility. The open door policy of the EACJ enables civil society and non-governmental organisations to instigate cases on behalf of individuals who are unable to access the Court for various reasons. It is also an opportunity to submit cases of public interest. In the *Treaty amendment* case, the EACJ held that the applicant had a duty to ensure adherence to the rule of law in the EAC and therefore had an interest in the matter complained about, in this case the alleged non-observance of the EAC Treaty by the respondents.²¹⁴ The *Treaty amendment* case was of general interest to the East African citizens, taking into consideration the fact that the Treaty amendments had a wide range of effects on the Community.

Apart from the *Treaty amendment* case, another public interest case that has already been referred to the EACJ is the *Independent Medical Legal Unit* case.²¹⁵ The victims of the 2007 post-election violence in Kenya could not access justice in Kenya until the Independent Medical Legal Unit submitted a case to the EACJ on their behalf. Although the case was dismissed on technical grounds, it highlights the importance of non-state entities in ensuring adherence to the rule of law and human rights. The only setback to the wider scope of locus standi for individuals and non-state entities before the EACJ is that they have to be residents of one of the EAC member states. This might be

²¹¹ Art 30 of the EAC Treaty.

²¹² Onoria (2010) 18 *African Journal of International & Comparative Law* 143, 157.

²¹³ *Anyang’ Nyong’o* case, 16.

²¹⁴ Ref No 3 of 2007, 7.

²¹⁵ See *Independent Medical Legal Unit* case.

interesting for NGOs outside the EAC to bring cases to the EACJ on behalf of East African individuals.

Public right litigation has also been upheld in other sub-regional courts with positive impact. In *SERAP v Nigeria and Another*,²¹⁶ the ECOWAS Court held that the applicant had locus under *actio popularis* to bring the matter on behalf of the victims whose rights were violated. There was accordingly no need for the applicant to demonstrate any personal injury or any special interest. The applicant was merely required to show that a public right had been breached and was, therefore, worthy of protection.

3.5.3 Third party interventions

Another important avenue for individuals and non-state entities to have locus before the EACJ is through interventions. It is common practice for both domestic and international courts to grant access to interested parties who are not the original parties of a case to join the existing case.²¹⁷ Interventions enable courts to avoid duplication of proceedings as courts admit interveners who would otherwise be entitled to institute a similar case. Interventions also enable courts to understand the whole chain of events that led to the case.²¹⁸ More significantly, they allow a wide range of voices to be heard when administering justice in connection with a particular case.

The EAC Treaty mentions that member states, the Secretary General and any resident of a member state are entitled to make applications for intervention before the EACJ.²¹⁹

The word 'resident' should be construed to include legal persons, while the intervener should have interest in a dispute. The requirement for having an interest in a dispute is

²¹⁶ Suit No ECW/CCJ/APP/12/07.

²¹⁷ For a general reflection on interventions in international judiciaries see P Palchetti 'Opening the International Court of Justice to third party intervention and beyond' (2002) 6 *Max Planck Yearbook of the United Nations Law* 139, T Gill 'Third party intervention in contentious proceedings at the International Court within the context of litigation strategy' (1991) 85 *American Society of International Law* 41, C Chinkin *Third parties in international law* (1993) 500.

²¹⁸ CM Chinkin 'Third party intervention before the International Court of Justice' (1986) 80 *American Journal of International Law* 500.

²¹⁹ Art 40 of the EAC Treaty. Intervention is subject to the permission of the Court.

not indicated in the EAC Treaty, but the EACJ Rules require an application for intervention to state the intervener's interest in the result of the case.²²⁰ On many occasions the EACJ has received third party intervention, notably in the *Anyang' Nyong'o* case. In this case, the interveners, who were elected members of the EALA from Kenya whose election was questioned, were granted leave to intervene in the case.

The nature and scope of an intervener's interest as provided in the EACJ Rules is unclear. Often, interveners are required to have rights and obligations similar to those of the parties in the case. The phrase 'in the result of the case' as provided in the EACJ Rules can simply mean that interveners should indicate their interests in the outcome of the EACJ's findings. They should state whether a decision of the Court, in one way or another, may have an impact on them. On the basis of a broad interpretation of rule 36(2)(e) of the EACJ Rules, this implies that any person who feels that the decision of the EACJ can affect the observance of the rule of law, democracy and human rights can apply to be an intervener in the Court. The EACJ has allowed bar associations to bring cases before it on the basis that they have a duty to promote the observance of the rule of law, and therefore are 'genuinely interested in the matter complained of'.²²¹ Such an approach can also be taken in admitting applications for interventions.

3.5.4 Beyond intervention: Amicus curiae before the EACJ

An amicus curiae (or a friend of the court) is an impartial party in court proceedings that informs the court about a particular matter for determination based on expertise. An amicus curiae differs from a third party intervention, as the latter usually take sides or is partisan in a case. The main role of an amicus curiae is to inform the court and is not one of advocating.²²² Various international courts accept amicus curiae briefs for guiding

²²⁰ Rule 36(2)(e) of the EACJ Rules.

²²¹ Ref No 3 of 2007, page 7.

²²² S Williams and H Woolaver 'The role of the amicus curiae before international criminal tribunals' (2006) 6 *International Criminal Law Review* 151. Also see L Bartholomeusz 'The amicus curiae before international courts and tribunals' (2005) 5 *Non-State Actors and International Law* 209.

them in the proper administration of justice. Through an *amicus curiae*, individual and non-state entities have an opportunity to ‘shape’ the arguments and decisions of courts.²²³

As of now, the use of *amicus curiae* briefs before African human rights bodies has been ‘negligible’.²²⁴ Through *amicus curiae* briefs, individuals and NGOs are able to bring about a significant evolution in the interpretation and implementation of international human rights law. Although the rules for submitting an *amicus curiae* brief before the EACJ are not clearly stated, the fact that the Court admits such briefs establishes an environment that is conducive to human rights claims in the future.

Before the 2013 Court Rules, neither the Treaty nor the amended EACJ Rules mentions the role of *amicus curiae*. In *Calist Mwatela Others v the EAC*,²²⁵ the only opportunity for third party individuals to participate in the EACJ as *amicus curiae* was through rule 36 of the 2001 EACJ Rules and article 40 of the EAC Treaty, provisions which are specifically for interveners. Unlike an intervener, which according to the EAC Treaty must be a member state, the Secretary General or a resident of a member state who is not a party to a case before the Court²²⁶ and whose aim is to support one of the parties in the proceedings, an *amicus* is an impartial figure who seeks to assist the court in reaching the best decision.

With the 2013 EACJ Rules, the new Court rules have specifically mentioned *amicus curiae*. The EACJ will benefit from *amicus* briefs in reaching credible decisions. In the *Calist Mwatela* case, the EACJ acknowledged the role of *amicus curiae* briefs submitted by the East African Society. The Court expressed its appreciation by commending the

²²³ Onoria (2010) 18 *African Journal of International & Comparative Law* 143, 159.

²²⁴ F Viljoen & AK Abebe ‘*Amicus curiae* participation before regional human rights bodies in Africa’ (2014) 1 *Journal of African Law* 1. An *amicus curiae* intervention has the potential to improve the factual and legal findings of human rights bodies. For a general reflection on *amicus curiae* briefs before regional human rights bodies see: A Mohamed ‘Individual and NGO participation in human rights litigation before the African Court of Human and Peoples’ Rights: Lessons from the European and Inter-American Courts of Human Rights’ (1999) 43 *Journal of African Law* 201.

²²⁵ *Calist Mwatela Others v The EAC*, Application No 1 of 2005 (*Mwatela* case).

²²⁶ Art 40 of the EAC Treaty.

submissions and the impartial character shown, which guided the Court in reaching its decision. Thus, the Court stated as follows:

We would like, while commending all counsel who appeared and addressed us in this case, especially to commend the very useful and helpful submissions addressed to us by Counsel for the amicus curiae who very ably and conscientiously assisted the Court without any attempt to side with any other party in the reference. The Court, as a friend of the amicus curiae, was guided accordingly.²²⁷

3.5.5 Legal representation

Individuals can access the EACJ directly on their own or through legal representation.²²⁸

Legal representation can be by means of an agent or advocate.²²⁹ Individuals with legal disability can be represented by a guardian, advocate or any person of his choice.²³⁰

When an individual wishes to access the Court through legal representation by an advocate, and in the event that such advocate would like to appear before the Court, the advocate is required to file a certificate that confirms that he or she is entitled to appear before a superior court of a member state with the Registrar.²³¹ When a party wishes to be represented by an agent, such agent must also file a proof of appointment with the Registrar to such representation.²³² Neither the Treaty nor the EACJ Rules stipulates anything in relation to the residence of an agent to represent a party before the EACJ. On the whole, the EACJ seems to exclude foreign NGOs from playing a representative role before it. To some extent, the lack of standing of foreign NGOs before the EACJ reduces the scope of its accessibility.

²²⁷ *Mwatela* case, 24. The EACJ has also allowed an amicus curiae intervention in a number of cases. See *Avocats Frontier v Mbugua Mureithi & Others*, Application No 2 of 2013, First Instance Division.

²²⁸ According to rule 17(1) of the EACJ Rules, 'a party to any proceedings in the Court may appear in person or by an agent and may be represented by an advocate.'

²²⁹ Rule 17 of the EACJ Rules.

²³⁰ Rule 17(4) of the EACJ Rules.

²³¹ Art 37(1) of the EAC Treaty: 'Every party to a dispute or reference before the Court may be represented by an advocate entitled to appear before a superior court of any of the Partner States appointed by that party'. As per rule 17(5) of the EACJ Rules, 'the advocate for a party shall file with the Registrar a certificate that he or she is entitled to appear before a superior court of [member state]'. According to rule 2 of the EACJ Rules, an advocate means an advocate who is entitled to appear before a superior court of any of the member states.

²³² Rule 17(6) of the EACJ Rules.

3.5.6 Sub-registries: bringing justice closer to the people

In an attempt to bring justice closer to the people of East Africa, the EACJ opened sub registries for each member state after the Court's request to open sub-registries was approved by the Council in 2010.²³³ The idea of opening of sub registries dominated the Court from its inception, owing to the presence of a provision for sub-registries that was inserted in the Court's Rules of Procedure.²³⁴ The Court always had it in the back of its mind the fact that the only Registry in Arusha was too far away from its stakeholders and as a result there was unease about its accessibility. Despite the ever-increasing number of cases, the EACJ is relatively new and it is largely unknown to the ordinary citizens of the partner states who the main users of the Court are. The establishment of sub-registries is one of the ways the existence and presence of the EACJ would be better felt at national level, because through their existence in the partner states the EACJ will be able to engage more with East African people.

3.6 Admissibility of cases and the prospects of human rights litigation

3.6.1 Exhaustion of local remedies

It is common under international law for a state to be given an opportunity to redress the alleged wrongful acts within its domestic legal system, before its international responsibility can be scrutinised by international institutions.²³⁵ The requirement to exhaust domestic remedies before reaching an international court brings into conflict the interests of individuals and the respect of state sovereignty.²³⁶ Nevertheless, the rule is widely applied by different international courts. In *Hartman v Czech Republic*,²³⁷ the European Court of Human Rights (ECHR) stated that 'states are dispensed from

²³³ Ruhangisa 'The East African Court of Justice: Ten years of operations (achievements and challenges) (2011) 8.

²³⁴ Rule 6 of the EACJ Rules.

²³⁵ *World Organisation Against Torture & Others v Zaire*, Communication 25/89; *Zambian expulsion case*, Communication 71/92.

²³⁶ SD Ascoli & KM Scherr 'The rule of prior exhaustion of local remedies in the international law doctrine and its application in the specific context of human rights protection' (2007) 11, a working paper, available at <http://ssrn.com/abstract=964195> (accessed September 2012) .

²³⁷ *Hartman v Czech Republic*, ECHR, Application No 53341/99, judgment of 10 July 2003.

answering for their acts before they have an opportunity to put matters right through their own legal system'.²³⁸ The African Commission on Human and Peoples' Rights (African Commission) can only deal with matters submitted to it after all domestic remedies are exhausted.²³⁹ Similarly, the American Convention on Human Rights (American Convention) provides that individual claims before the Commission must be subject to the exhaustion of domestic remedies in accordance with the 'recognised principles of international law'.²⁴⁰

Both the European Convention and the American Convention refer to the local remedy rule as a generally recognised principle of international law. Seemingly, international courts invoke the rule of exhaustion of domestic remedy as a customary international norm.²⁴¹ This is also the case with the ICJ, which has stated that the rule is a well-established principle of customary international law.²⁴²

Not every supranational judicial body applies the exhaustion of the local remedy rule, despite the rule being largely invoked by most international courts and tribunals.²⁴³ One of the things that the EAC member states have discussed and are considering is the possibility of introducing to the EACJ, when the Court's jurisdiction is expanded, the imposition of the exhaustion of local remedy.²⁴⁴ It would seem that EAC member states

²³⁸ See also *Selmouni v France*, ECHR, Application No 25803/94, *De Wilde, Ooms and Versyp v Belgium*, ECHR, Application No 2832/66; art 35 of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1994.

²³⁹ For a discussion on the exhaustion of local remedies by the African Commission see H Onoria 'The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* 1; NJ Udombana 'So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* 1.

²⁴⁰ Art 46(1)(a) of the American Convention, 1969.

²⁴¹ AO Enabulele 'Sailing against the tide: Exhaustion of domestic remedies and the ECOWAS Community Court of Justice' (2012) 56 *Journal of Africa Law* 1.

²⁴² *Elettronica Sicula S.p.A. (ELSI) (USA v Italy)*, Judgment, ICJ Rep (1989) 15, para 50.

²⁴³ For a discussion on the applicability of the exhaustion of local remedies rule see D Ascoli & KM Scherr 'The rule of prior exhaustion of local remedies in the international law doctrine and its application in the specific context of human rights protection' (February 2007). Available at SSRN: <http://ssrn.com/abstract=964195> (accessed September 2012; CF Amerasinghe *Local remedies in international law* (2004).

²⁴⁴ Response with Wilbert Kaahwa, legal counsel to the EAC on an interview held on 12 December 2012, Arusha.

are afraid that when the EACJ is mandated to adjudicate human rights matters, the Court will undermine the supremacy of their supreme courts as provided in their constitutions. The absence of the local remedy rule, as stated above, has caused the EACJ to find that member states did not intend to establish such a rule in respect of the EACJ. The ICJ has a different perspective when a court instrument does not provide for a local remedy rule. In *Elettronica Sicula (USA v Italy)* case,²⁴⁵ the ICJ held that in the absence of a local remedy rule within the law, it should not be assumed that the rule does not apply.²⁴⁶

Access to the COMESA Court, and the now suspended SADC Tribunal when it allowed individual access, is subject to the exhaustion of domestic remedies.²⁴⁷ By contrast, the treaty instruments of the EAC and ECOWAS are silent on the fulfilment of this requirement. The EACJ and the ECOWAS Court have repeatedly waived the exhaustion of local remedy rule in their respective jurisdictions.²⁴⁸ Although the local remedy rule can be said to be a general principle of international law, the rule largely depends on the policy.²⁴⁹ If the EAC member states intend to make easier for individuals and non-state entities to access the EACJ, the local remedy rule should not be a priority. In the *Anyang' Nyong'o* case, the EACJ stated that failure to mention the local remedy rule under article

²⁴⁵ *Elettronica Sicula S.p.A. (ELSI) (USA v Italy)*, Judgment, ICJ Rep (1989) 15.

²⁴⁶ L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 29.

²⁴⁷ Art 26 of the COMESA Treaty, art 15(2) of the Protocol to the SADC Tribunal. One of the few cases determined by the COMESA Court is *Kenya & Another v Coastal Agriculture*, Ref No 3 of 2001. The matter was dismissed by the Court on the ground that the applicants did not exhaust local remedies. This was after the Attorney General of Kenya objected to the locus standi of the respondent before the COMESA Court. The respondent withdrew the case from the Kenyan Court owing to the prolonged procedures in the determination of the case for over five years. The Court concluded that the withdrawal of the case did not constitute the exhaustion of local remedy.

²⁴⁸ *Rugumba* case; *Anyang' Nyong'o* case; *Hadidjatou Karaou v Niger*, ECW/CCJ/JUD/06/08, *Essien v Gambia & Another*, ECW/CCJ/APP/05/05.

²⁴⁹ L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 29.

30 of the EAC Treaty allows citizens of East Africa to have direct access to the Court and, therefore, negates the applicability of the local remedy rule.²⁵⁰

The exhaustion of the local remedy rule, even if required in principle, is not absolute, as the rule requires domestic remedies to be available, sufficient and effective.²⁵¹ The remedies to be exhausted by the applicant are said to be available and effective when they correspond with the type of breach that the applicant had suffered. The remedies should be given by a body which acts independently and impartially.²⁵² A remedy is also said to be available when it can be pursued by an individual without any impediment. Unnecessary delays or denial of justice that renders local remedy unavailable and insufficient may amount to a waiver of the rule.

As reflected above, the local remedy rule is codified in different human rights instruments. A preference for the rule is a matter of policy and each regime has its own way of determining the treatment of its individuals in terms of making sure the rule of law is adhered to. The rule has several advantages and disadvantages.

The justification for applying the local remedy rule in any international court is to give national courts the opportunity to deal with the matter, because they are conversant with the legal issues relating to their national laws. At times, the local remedy rule helps to ensure the legitimacy of an international court on the part of member states. States would tend to denounce a decision of an international court if a victim overlooks the national judicial system in favour of an international court. At times, national courts feel they are undermined by international and supranational courts, and thus the rule reduces tension between national and international courts.

The negative side of the rule is that it is seen as a way of shielding state sovereignty under international law. Often, states use the local remedy as an escape route for being

²⁵⁰ *Anyang' Nyong'o*, case 21. See *De Jong, Baljet & Van den Brink v Netherlands*, (1984) 8 EHRR 20.

²⁵¹ *Zimbabwe expulsion case*, 11. See *Jawara v The Gambia*, Communication 147/95. *Ramirez Sanchez, v France [GC]*, No. 59450/00, ECHR 2006.

²⁵² *Constitutional Rights Project v Nigeria*, Communication 60/61.

held accountable before an international body. The rule is also a way of protecting diplomatic relations more than the individual's interests. In a legal system where case proceedings are prolonged, the local remedy rule may lead to the delay of justice. As the adage goes, justice delayed is justice denied.

The waiving of the local remedy rule in the EACJ renders it a Court of first instance if a claimant wishes to appear directly before the Court without exploring domestic mechanisms. The EACJ, being a court of first instance, will thus deny national courts the opportunity to deal with a particular matter which they might be more conversant with than the EACJ. There is also the possibility of opening a floodgate of cases for the EACJ.²⁵³ Nevertheless, direct access by individuals to the EACJ is crucial for the quick determination of disputes, taking into consideration the delay in cases at a national level.

In the case of *Kenya and Another v Coastal Agriculture*,²⁵⁴ which was heard in the COMESA Court, the respondent was a limited liability company incorporated under Kenyan laws. After spending more than three years trying to obtain an injunction order in the Kenyan High Court the company made a reference to the COMESA Court, seeking the Court to restrain the Government of Kenya, its servants, agents or officers from acquiring its land, without, among other things, first making provision for the advance payment of adequate compensation and payment of damages, complying with the relevant provisions of the Constitution of Kenya, and laws concerning land acquisition. By means of legal notices issued in November 1993, the Commissioner of Lands of Kenya had shown an intention to compulsorily acquire the land belonging to Coastal Aquaculture, in terms of the power for the compulsory acquisition of land in Kenya conferred by the Constitution. In 1996, Coastal Aquaculture filed a civil suit in the High Court of Kenya, seeking damages purportedly suffered as a result of the Government's

²⁵³ See ST Ebobrah 'A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice' The Danish Institute for Human Rights: Copenhagen Available at http://www.escri-net.org/usr_doc/S_Ebobrah.pdf (accessed 13 March 2013) at page 18.

²⁵⁴ COMESA Court, Ref No 3 of 2001.

action of acquiring its land. It did not, however, prosecute that action to finality in the High Court of Kenya, having withdrawn it just before commencing the proceedings in the COMESA Court of Justice. It was argued that the withdrawal of the case from the Kenyan High Court was as a result of the untenable situation for which the national courts were powerless to provide relief, since the government had not followed the procedures laid down in the Land Acquisition Act, despite repeated guidance from the High Court and the Court of Appeal of Kenya.

The Court stated that the withdrawal by Coastal Aquaculture of its action for damages in a civil suit did not constitute the exhaustion by it of the legal remedies in the national courts of Kenya. As such, Coastal Aquaculture did not have the *locus standi* to commence a case before the COMESA Court. The application by the government of Kenya to strike off Coastal Aquaculture's case for want of *locus standi* was upheld by the COMESA Court.

The omission of the local remedy rule in the EAC Treaty was intentional. As the drafters could have easily followed the trend in Africa and other regional courts to make the rule applicable, it is evident the EAC member states chose not to make the rule applicable. It is important to note that EAC member states are also members of other treaty bodies where the local remedy rule is firmly applicable. Therefore if they had wanted to incorporate the rule they would have done so. The EACJ itself cannot assume the applicability of the rule when the said rule is not provided for in the Treaty. In light of article 30 of the EAC Treaty and the spirit of EAC integration, the EACJ has rightly waived the local remedy rule to allow direct access of individuals to it. When the protocol to extend the jurisdiction of the EACJ is adopted, it would be appropriate not to insert the exhaustion of local remedy rule.

3.6.2 The doctrine of *res judicata*

Res judicata is a well-entrenched principle in both national and international legal systems. Under international law, the principle is considered to be one of the 'general

principles of law recognised by civilised nations’ as provided in article 38(c) of the ICJ Statute.²⁵⁵ The ICJ has held that *res judicata* ‘appears from the terms of the Statute of the Court and the Charter of the United Nations’, and therefore, it is a well-recognised principle.²⁵⁶ Courts are barred from adjudicating on a matter which is *res judicata* when a matter at hand has already been determined by another court, when the matter is ‘directly and substantially’ the same, when the matter consists of the same parties, and then the matter was finally decided in a previous case. All these situations must exist for the doctrine of *res-judicata* to be applicable. In the *Katabazi case* the EACJ was called on to apply the doctrine of *res judicata*, but it rightly rejected the request by the respondents, as the matter was distinct from the one that was before the High Court of Uganda.

The EACJ is not an appellate court for the decisions emanating from the national courts of member states. However, there are circumstances in which a case may be referred to the EACJ that has a link, in one way or another, with a decision that has already been determined by a national court, such as in the *Democratic Party* and *Katabazi* cases. It is unlikely, however, that the doctrine of *res judicata* would apply in the EACJ to cases originating from the national courts. Cases before the EACJ would have a distinct cause of action based on EAC law, in comparison to cases at national level which rely heavily on domestic laws. Also, the Secretary General of the EAC is likely to feature as a party in the EACJ, whereas at a national level, it is highly unlikely that the EAC Secretary General would feature in cases before the national courts.

²⁵⁵ R Theofanis ‘The doctrine of *res judicata* in international criminal law’ (2003) 3 *International Criminal Law Review* 195, 195. For a general reflection on the applicability of the doctrine of *res judicata* under international law see A Reinisch, ‘The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes’ (2004) 3 *Journal of Law and Practice of International Courts and Tribunals* 37.

²⁵⁶ *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ judgment of 25 February 1007, available at <http://www.icj-cij.org/docket/index.php?sum=667&code=bhy&p1=3&p2=2&case=91&k=f4&p3=5> (accessed on 12 March 2013); a M Ottolenghi and P Prows ‘*Res Judicata* in the ICJ’s genocide case: implications for other courts and tribunals’ (2009) 21 *Pace International Law Review* 37.

Circumstances that might lead to the EACJ applying the doctrine of *res judicata* include when a matter, which had already being disposed of on merit, is referred back to the Court for the second time with the same facts, same parties and the same cause of action. It is also possible for the doctrine to be applicable when a matter that was finally decided in another international court is brought before the EACJ for determination, taking into consideration the features for applying the doctrine. At times the doctrine might be seen as a procedural hurdle, but it reduces the possibility of having conflicting courts decisions. It also reduces the risk of abusing court process, as litigants would tend to go to another forum after not being satisfied by the decision of the previous forum.

3.6.3 The two-month rule

The EAC Treaty explicitly requires proceedings under article 30 of the EAC Treaty to be submitted before the EACJ within two months of the ‘enactment, publication, directive, decision or action’ that contravenes the EAC law, or of the day on which a particular breach has come to the knowledge of the complainant.²⁵⁷ In case of continuing violations such as enforced disappearances and arbitrary detention, the EACJ, on a number of occasions, has rejected requests to extend the time for submitting a claim before it as provided under Rule 4 of the EACJ Rules, or to apply the doctrine of continuing violations as a general principle of international law.²⁵⁸ On a number of occasions, the EACJ has claimed that it does not have the mandate to extend the time limit. The two-month period begins to run only after a complainant becomes aware of the alleged violations.²⁵⁹ The period for the applicant to acquire knowledge is not limited and the grace period ‘can be as long as it takes for the complainant to be possessed of the requisite knowledge’.²⁶⁰

²⁵⁷ Art 30(2) of the EAC Treaty.

²⁵⁸ *Independent Medical Legal Unit Case; Mbugua Nyambura v Attorney General of Uganda & Others*, Ref 11 of 2011, EACJ First Instance Division; *Nyamoya Francois v Attorney General of Burundi*, Ref No 8 of 2011, EACJ First Instance Division; *Hilaire Ndayizamba v Attorney General of Burundi*, Ref 3 of 2013, EACJ First Instance Division.

²⁵⁹ Ref No 4 of 2011, EACJ Appellate Division, 16.

²⁶⁰ As above.

The time limitation rule, as imposed under article 30(2) of the EAC Treaty, applies to every instance while the two-month rule is applicable only to proceedings instituted under article 30 of the EAC Treaty.²⁶¹ Other proceedings, apart from those stated under article 30(1) of the EAC Treaty, are not subjected to the two-month rule. Of the cases that the EACJ has so far determined in relation to the two-month rule, all have been concerned with the proceedings instituted under article 30 of the EAC Treaty and it is through article 30 that individuals and non-state entities get direct access to the Court. While the insertion of article 30 is seen as a progressive step towards permitting individuals to have direct access to the EACJ, the time limit imposed under article 30(2) is clearly an attempt to discourage individuals from accessing the Court.

On a number of occasions, the First Instance Division has waived the two-month rule by upholding the continuing of events principle. For instance, in *the Independent Medical Legal Unit case*,²⁶² the applicant alleged that the failure by the Government of Kenya to investigate the atrocities that took place in the Mountain Elgon District in Kenya between 2006 and 2008, and to take any administrative, judicial or other measures to prevent or punish the perpetrators was against the principles of the EAC Treaty. The applicant insisted that the allegations made were criminal in nature and concerned the rule of law, good governance and justice which is not disqualified by a statutory limit.²⁶³ The respondent disputed the admissibility of the case, arguing that the case was submitted outside the two-month limitation period as provided under article 30(2) of the Treaty. After considering the arguments of both parties, the First Instance stated the following:

It is our considered view, that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations. We find that such action or omission of a Partner State cannot be limited by mathematical computation of time.²⁶⁴

²⁶¹ *Secretary General of the EAC v Angela Amudo*, App No 15 of 2012, EACJ First Instance Division.

²⁶² Ref No 3 of 2010, EACJ First Instance Division.

²⁶³ *Independent Medical Legal Unit case*, 9.

²⁶⁴ *Independent Medical Legal Unit case*, 10.

In *Rugumba* case,²⁶⁵ the applicant accused the Government of Rwanda of impugning the founding principles provided in the EAC Treaty, by unlawfully arresting and detaining one Seveline Rugiga Ngabo from 20 August 2010 to 28 January 2011. The applicant further asserted that while the reference was filed on 8 November 2010, the detention of Seveline Rugiga Ngabo lasted up to 28 January 2011, and therefore, since the detention was continuous, the time limitation clause imposed under article 30(2) of the EAC Treaty could not be invoked.²⁶⁶ The First Instance Division upheld its previous decision in the *Independent Medical Legal Unit* case by stating that, '[w]here issues in contest are criminal in nature and the action complained of is continuous (such as detention), it would be against the principles known to the rule of law to dismiss the complaint on the basis of strict mathematical computation of time'.²⁶⁷ The Court also held that the applicant filed the application within time. The decision was later reaffirmed by the Appellate Division but not on the basis of the continuation of events rule. The Appellate Division found that the applicant had knowledge of the matter alleged within two months of the claim being brought before the Court.

Being dissatisfied with the ruling of the First Instance Division in the *Independent Medical Legal Unit* case, on appeal, the Attorney General of Kenya filed an appeal before the Appellate Division, where his main argument was that the case was time-barred as provided for under article 30(2) of the EAC Treaty. The Appellate Division overruled the previous reasoning and struck out the reference by holding:²⁶⁸

The Court below could not rule otherwise on the face of the explicit limitation in article 9(4) to the effect that the Court must act within the limits of its powers under the Treaty. It follows, therefore, in our view, that this Court is limited by article 30(2) to hear References only filed within two months from the date of action or decision complained of, or the date the Claimant became aware of it ... there is no enabling provision in the Treaty to disregard the time limit set by article 30(2). Moreover, that article does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit

²⁶⁵ Ref No 8 of 2010, EACJ First Instance Division.

²⁶⁶ *Rugumba* case, 11.

²⁶⁷ *Rugumba* case, 28.

²⁶⁸ Appeal No 1 of 2011, the EACJ Appellate Division, 16.

... The reason for this short time limit is critical – it is to ensure legal certainty among the diverse membership of the Community

In general, the Appellate Division observed that the matter was time-barred, as the respondents became aware of the violations through various widely publicised reports between 2006 and 2009, while the Reference was filed in 2010. The Court stressed that article 30(2) of the EAC Treaty should be interpreted in terms of its literal meaning and that the provision did not make any express provision for the concept of continuing violations. The Court was also of the view that it had no powers to extend the two-month period stipulated under the Treaty as its powers were limited by article 9(4).

By strictly applying the two-month rule, the EACJ disregarded its own jurisprudence in the *East Africa Law Society* case,²⁶⁹ when it called for a purposeful interpretation approach to the EAC Treaty as opposed to a restrictive and literal approach. It should be pointed out here that article 9(4) of the EAC Treaty does not prevent the Court from adopting a purposeful interpretation of the Treaty. Also, the Court could have invoked its inherent powers so as to promote justice, which it did not opt to do.

After the Appellate Division's ruling, the Independent Medical Legal Unit applied for a review of the ruling.²⁷⁰ Article 35(3) of the EAC Treaty allows the Court to review its own decisions and both Divisions of the Court have the power to review their own decisions.²⁷¹ For an applicant to apply for a review there must be new facts or evidence which were not within the knowledge of the applicant and the court at the time of the delivery of the judgment; in addition, the impugned judgment must evince some error or fraud that is manifested on the face of the record; and the judgment must lead to the miscarriage of justice.²⁷² In response of the application for review by the Independent Medical Legal Unit, the Court stated that the grounds for the application were largely limited to the area of mistakes or errors of law apparent on the face of the record; and only tangentially touched on the element of miscarriage of justice and nothing was

²⁶⁹ Ref No 3 of 2007.

²⁷⁰ Application No 2 of 2012, EACJ Appellate Division.

²⁷¹ Application No 2 of 2012, 20.

²⁷² Art 35(3) of the EAC Treaty.

argued in relation to the discovery of new facts or fraud.²⁷³ The Court went on to dismiss the application by holding that many of the grounds adduced by the applicant did not meet the requirements for review; rather they were largely for appeal which could not be entertained by the Court as there is no further appeal after the decision of the Appellate Division.

As it stands, the two-month rule prevails before the EACJ. The Appellate Division has held that it cannot uphold the principle of continuing violation simply because it is a principle which is applicable in human rights treaties.²⁷⁴ The decisions of the Appellate Division in relation to the rule may serve as precedents for future cases before the Court. Atrocities and human rights violations are usually on-going in nature and individuals also take time to get legal assistance and to realise the possibilities of claiming their rights before regional courts, such as the EACJ. The refusal by the Appellate Division to apply the continuation of events rule in order to invoke its inherent powers as provided under rule 1 of the EACJ Rules, and by not extending time limits as provided in Rule 4 of the EACJ Rules, reduces the potential of litigating before the Court. The persistence of this rule thus places victims in danger of being denied justice. A strict interpretation of article 30(2) of the EAC Treaty is not only against the Court's own spirit, which it famously pronounced in the *East African Law Society* case (*Treaty amendment* case) that the Treaty should be interpreted in a progressive manner, but it is also contrary to the contemporary jurisprudence of public international law.

3.7 Court judgments

Once a court considers that it has jurisdiction to determine a dispute and declaring a particular matter admissible, it will then proceed to decide the whole case on merit. The decision of the EACJ takes the form of a judgment. Such EACJ judgments are formally

²⁷³ Application No 2 of 2012, EACJ Appellate Division, 23.

²⁷⁴ The principle of continuing violation has in a number of occasions been applied with the Inter-American Court of Human Rights, for example see *Moiwana Village v Suriname*, IACHR, 15 June 2005.

binding on the parties. In some jurisdictions such as in the EU, the judgments of the EU Court have direct effect. Apart from the regular judgment, the EACJ has the power to issue interim measures and revise judgments on the discovery of new facts. It can also issue an advisory opinion to the other organs of the Community.

Through judgments, international courts are able to enforce international obligations. Judgments facilitate the expansion of international legal values such as respect for human rights, rule of law and democracy.²⁷⁵ Reaching a final decision is not the only daunting task that most international courts face; the enforcement of their decisions at national level is also their most intriguing challenge so far.²⁷⁶ Judgments of international courts are meant to bind the parties concerned and are expected to be complied with without any limitations. The execution of judgments of most international courts is usually left to the state or specific organs mandated to enforce international decisions. Parties are expected to implement a decision of an international court faithfully and without any unnecessary hurdles. If a judgment of an international court is not complied with by a state, further actions are expected to be taken, usually by a political organ, depending on the established rules.

Decisions of the EACJ Appellate Division are final, binding and not subjected to appeal before any other court. The Court's judgments are directly enforceable upon their

²⁷⁵ See Y Shany 'Assessing the effectiveness of international courts: A goal-based approach' (2012) 108 *American Journal of International Law* 225; See also JE Ruhangisa 'Establishing independent and effective regional courts: Lessons for the SADC region from the East African Community', a Paper presented during the SADC Regional Colloquium on the SADC Tribunal, Braamfontein, South Africa, March 2013, 9–12.

²⁷⁶ For an overview on the enforcement of international courts' decisions see C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434; WM Reisman 'The enforcement of international judgments' (1969) 63 *American Journal of International Law* 1; JS Warioba 'Monitoring compliance with and enforcement of binding decisions of international courts' (2001) 5 *Max Planck Yearbook of United Nations Law* 41; L Cafilisch 'New practice regarding the implementation of the judgments of the Strasbourg Court' (2005) 15 *Italian Yearbook of International Law* 23; D Anagnostou 'Does European human rights law matter? Implementation and domestic impact of Strasbourg Court judgments on minority-related policies' (2012) 14 *International Journal of Human Rights* 721; M Issaeva et al 'Enforcement of the judgments of the European Court of Human Rights in Russia: Recent developments and current challenges' (2011) 8 *SUR International Journal on Human Rights* 67.

delivery, subject to the established procedures for enforcing the judgments in national courts. At present, the Court's judgments are mainly declarations from the interpretation and application of EAC law. Apart from interim orders, the Court is yet to issue other orders such as compensation. The pecuniary obligations to the judgment debtors imposed by the EACJ so far are as a result of costs incurred during cases.

3.7.1 Nature of judgments and remedies

As the nature of the judgments of the EACJ is declaratory, it is clear that the EACJ can make a declaration on whether a provision of the Treaty has been violated. It would appear that a declaration is the main remedy that the Court can grant, apart from an interlocutory order. However, the enforcement of the Court's declaration and any order attached is dependent on the cooperation and political will of member states. Hence, the relevant states are under an obligation²⁷⁷ to take prompt measures to implement the judgments of the Court in accordance with their domestic rules on civil procedure.²⁷⁸ Litigants can use the EACJ's declarations as EAC law that member states should adhere to.

As currently structured, the Court has no jurisdiction in human rights matters. Therefore, the remedies which it can grant in matters touching on human rights are limited to its interpretative mandate with regard to the Treaty, meaning that the Court can only go as far as declaring whether a provision of the Treaty has been violated or not. Once the Protocol is concluded, it is expected that the Court will be able to operate as a fully-fledged human rights court, providing appropriate and sufficient remedies in terms of human rights violations. Courts are provided with remedial powers by express provisions in their respective instruments which establish them and courts with an explicit human rights mandate are designed to meet several remedial objectives aimed at protecting human rights. Even though the EACJ lacks an explicit human rights jurisdiction, through its judicial activism that the Court, litigants are still optimistic that

²⁷⁷ Art 38(3) EAC Treaty.

²⁷⁸ Art 44 EAC Treaty.

the EACJ can go beyond its current position in dealing with human rights cases. It could also be an indirect approach of persuading for the EACJ to be given an explicit human rights jurisdiction.

3.7.2 Execution of judgments

The EACJ does not have execution machinery of its own to compel the implementation of its judgments; rather responsibility for implementing the judgments of the EACJ is vested in the concerned member states or the Council. Every member state is required by the Treaty to take, without delay, the measures required implementing a judgment of the Court,²⁷⁹ but neither the EAC Treaty nor the EACJ Rules provide any ways that can be used to monitor the implementation of the Court's judgments. Effective and efficient enforcement of court judgments against states is nevertheless essential for the observance of the rule of law,²⁸⁰ and this falls within the context of a right to a fair trial.²⁸¹

According to the EAC Treaty, a judgment that imposes pecuniary obligations is enforced according to the rules of the civil procedures in place in a member state.²⁸² By using a member state's rules of civil procedures, the intention is to enforce EACJ judgments as domestic judgments and not foreign judgments. The risk of recognising a judgment of an international court as a foreign judgment is that the judgment might be denied where it would seem to be contrary to a country's public policy.²⁸³ However, a state cannot

²⁷⁹ Art 38(3) of the EAC Treaty.

²⁸⁰ K Henderson et al 'Regional best practices: Enforcement of court judgments lessons from Latin America', IFES Rule of Law White Paper Series (2004) at page 1, available at <http://www.ifes.org/Content/Publications/White-Papers/2004/Regional-Best-Practices-Enforcement-of-Court-Judgments-Lessons-Learned-from-Latin-America.asp> (accessed on 17 April 2013).

²⁸¹ In *Hornsby v Greece*, ECHR Case No 18357/91, Judgment of March 19, 1997. The European Court of Human Rights stated that the execution (enforcement) of a court judgment is an integral part of a trial and therefore falls within the context of the right to fair trial as provided by the European Convention on Human Rights.

²⁸² Art 44 of the EAC Treaty.

²⁸³ See *Ex parte Commercial Farmers Union*, Case No SC 31/10, (Supreme Court of Zimbabwe, 26 Nov 2010).

abdicate from adhering to its international obligations by merely relying on the existence of its domestic laws and policies.²⁸⁴

It is unclear whether the pecuniary obligation on 'person', as provided in article 44 of the EAC Treaty, includes either natural and legal persons or just an individual. In practice, the EACJ has imposed pecuniary obligations on member states to pay the costs of cases for the successful applicants. According to Ruhangisa, in those judgments that impose pecuniary obligations, such as the costs of a case, the Court sends the necessary documents to the High Court where execution is to take place; so far there has been no non-compliance with the orders.²⁸⁵

The EAC Treaty is silent on the procedures for enforcing Court judgments that do not have any pecuniary obligations, especially those directed to the Council or member states. The compliance of states in this regard depends largely on their political willingness and that of the Council. Nevertheless, EAC member states are legally committed to implementing the Court's decisions without any unreasonable delays, as stipulated in article 38(3) of the EAC Treaty. In order for a judgment holder to be able to execute EACJ judgments at national level, only verification of the judgment by the Registrar is needed.²⁸⁶ Such a requirement reduces any procedural hurdles that may occur in approving a foreign judgment at domestic level. Although Most EACJ judgments are in the form of a declaration, the responsibility of a member state or the Council to comply with the Court's judgment remains intact.

In *Calist Mwatela and Others*,²⁸⁷ the applicant challenged the legality of a meeting of the Sectorial Council of Legal and Judicial Affairs held between 13 and 16 September 2005, and the decision taken therein regarding pending Bills before the EALA. The meeting was also attended by the Attorneys General of member states in contrast with the

²⁸⁴ Art 27 of the Vienna Convention.

²⁸⁵ J Ruhangisa, Registrar of the EACJ, an interview conducted at the EACJ offices on 14 November 2012, Arusha.

²⁸⁶ Art 44 of the EAC Treaty and rule 74(2) of the EACJ rules.

²⁸⁷ Application No 1 of 2005.

requirements of the EAC Treaty at that time. The applicant requested the Court to declare the meeting and all the decisions reached in that meeting null and void, as the meeting was not properly constituted. The Court held in favour of the applicant. Consequently, the Council complied with this finding as it did not uphold the decisions of that meeting and took the Bills back to the EALA. The subsequent EAC Treaty amendments of 2006 made the Attorneys General members of the Council.²⁸⁸

In the *Anyang' Nyong'o* case,²⁸⁹ the EACJ declared the rules of the Kenyan National Assembly for electing members of the EALA contrary to article 50 of the EAC Treaty. Therefore, the election that was conducted was declared to be contrary to the EAC Treaty. Although the EACJ did not declare the rules of the Kenyan National Assembly invalid, the National Assembly of Kenya amended the rules and conducted the election of members of the EALA as required under article 50 of the EAC Treaty. The decision in the *Anyang' Nyong'o* case had some impact in other countries of the Community. In Uganda, the Constitutional Court relied on the *Anyang' Nyong'o* case and the EAC Treaty to nullify the election of members of parliament to the National Assembly of Uganda on the ground that they were members of the EALA.²⁹⁰ The National Assembly did not amend the electoral rules for electing members of the EALA, however, and this led to another case being filed before the EACJ, asking for the Court to declare that the act by the National Assembly of Uganda of not amending its electoral rules was contrary to the EAC Treaty. The applicant also asked the Court to prevent the National Assembly of Uganda from conducting any election for members of the EALA. The judgment was subsequently issued in favour of the applicant in respect of all appeals. The Government of Uganda complied with the judgment by not conducting any election and also amended the rules that were used to elect EALA members for the Third Assembly.

²⁸⁸ Art 13(c) of the EAC Treaty.

²⁸⁹ Ref No 1 of 2006.

²⁹⁰ *Jacob Oulanyah v Attorney General*, Constitutional Petition No 28 of 2006, Supreme Court of Uganda.

In the *Katabazi* case, after the Court's decision that the interference in the Ugandan High Court process by Ugandan security officials and the subsequent arrest, detention and charging of the applicants to the Military Court Martial were contrary to the founding principles of the EAC Treaty, the applicants were released without facing any further charges and there has been no further complaints from the applicants before the Court.²⁹¹

The EAC member states and the Council have already complied with EACJ decisions, regardless of the Court's decisions being in a declaratory form. It is encouraging to note that EAC member states have so far shown respect for the EACJ's decisions. In *the Anyang' Nyong'o* and *Katabazi* cases these decisions were characterised by tension in the political environment of the member states concerned. Nevertheless, the two decisions were fully complied with.

The fact that some of the EACJ's decisions, even those with political interest, were complied with, is a cause for great optimism in that it would seem that the Court's decisions will continue to be respected in the future, regardless of what is at stake. Despite the encouraging signs of compliance in the EAC, the relationship between national courts and the EACJ nevertheless has to be strengthened.

Although there are signs of compliance within EAC legal order, the methods of executing EACJ judgments need to be clearly addressed, particularly the ways of executing a judgment against a member state. As discussed above, judgments against member states rely on the political commitment of a defaulting state to comply with the decision. Luckily, so far, decisions against member states have been complied with. By depending on the laws of EAC member states to enforce the decisions of the EACJ, without the harmonising of their laws with the laws of the EAC, this cannot be relied on, bearing in mind the existing discrepancies in the laws and nature of legal systems. This may lead to some victims having the Court's judgment executed successfully and others being unsuccessful or taking more time to execute.

²⁹¹ J Ruhangisa, Registrar of the EACJ, an interview conducted on 14 November 2012, Arusha.

In SADC, the Zimbabwean High Court on a number of occasions declined to enforce the judgment of the SADC Tribunal in the *Campbell* case, on the basis that the Tribunal's decision would contravene the public policy and laws of Zimbabwe.²⁹² Regardless of the invalidity of the reasoning of the Zimbabwe High Court for declining to enforce a decision of an international court, it is a matter of concern that has to be taken into consideration in the EAC. The only way to avoid such abdication would be to establish and harmonise the laws to enforce EACJ judgements at a domestic level.

The SADC member states also provided the mechanisms to enforce the judgments of the SADC Tribunal in any territory of the member states.²⁹³ This method might be useful if a High Court of a defaulting state declines to enforce a community court decision. The judgment holders could then apply to a more active judiciary in a democratic state in order to have the judgment enforced. In *Fick v Zimbabwe*,²⁹⁴ the applicants successfully enforced the cost order of the SADC Tribunal in South Africa against Zimbabwe.

3.7.3 Non-compliance

Not all the decisions of an international judiciary are likely to be well received by the defaulting states. Often, non-compliance with a decision of an international court emanates from political tension. This is why the responsibility for ensuring compliance with an international writ is mandated to the political organs of the organisation upon which an international court is established. For example, in the United Nations (UN), the responsibility for ensuring compliance with ICJ decisions is not within the scope of the

²⁹² See *Gramara v Zimbabwe & Others*, HC 33/9/2010; *Ex parte Commercial Farmers Union*, Case No SC 31/10, (Supreme Court of Zimbabwe, 26 Nov 2010); *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement & Another* ZWHHC 1. For an overview on the conflict between the SADC Tribunal and Courts in Zimbabwe see ST Ebobrah and M Nkhata 'Is the SADC Tribunal under judicial siege in Zimbabwe? Reflections on *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement Another*' (2010) 43 *Comparative & International Law Journal of South Africa* 1; ST Ebobrah 'Tackling threats to the existence of the SADC Tribunal: A critique of perilously ambiguous provisions in the SADC Treaty and the Protocol on the SADC Tribunal' (2010) 4 *Malawi Law Journal* 199.

²⁹³ Art 32(3) of the SADC Tribunal Protocol.

²⁹⁴ *Fick v Zimbabwe*, Pretoria High Court, 7781/2009.

ICJ's mandate; rather the UN Security Council, upon being referred by another party, may issue recommendations or decide upon appropriate steps to be taken to give effect to the ICJ judgment.²⁹⁵

Failure to comply with the EACJ's decision amounts to a violation of articles 6(d), 7(2), 8(c) and 38(3) of the EAC Treaty.²⁹⁶ A state's act or omission that amounts to non-compliance with a court's decision would amount to a violation of the EAC Treaty. In *Gondo v Zimbabwe (Gondo case)*,²⁹⁷ the SADC Tribunal held that section 5(2) of the State Liability Act of Zimbabwe was incompatible with the founding principles of the SADC Treaty.²⁹⁸ The EACJ does not have its own mechanisms to enforce member states to comply with its decisions; however, the Summit may, on the recommendations of the Council, issue sanctions to a partner state when that particular state fails to meet the requirements of the Treaty.²⁹⁹ The Summit can also suspend a member state from taking part in the activities of the Community if that particular state fails to observe the fundamental principles and meet the objectives of the Community.³⁰⁰ The highest level of punishment that a member state may receive is expulsion from the Community. The Summit may expel a member state as a result of gross and persistent violations of the EAC Treaty.³⁰¹

²⁹⁵ Art 94(2) of the UN Charter states that 'any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'. Also see AP Llamzon 'Jurisdiction and compliance in recent decisions of the international Court of Justice' (2008) 18 *The European Journal of International Law* 821-822.

²⁹⁶ Art 8(c) obliges member states to refrain from any measures likely to hinder the achievements of the Treaty objectives. Art 38(3) requires EAC member states or the Council to all necessary measures, without any delay, to ensure the judgments of the Court are implemented.

²⁹⁷ *Gondo & Others v Zimbabwe*, SADC T 05/08, See also *Bissangou v Republic of Congo* (2006) AHRLR 80 () 2006.

²⁹⁸ *Gondo case*, 14.

²⁹⁹ Art 143 of the EAC Treaty.

³⁰⁰ Art 146(1) of the EAC Treaty.

³⁰¹ See art 147 of the EAC Treaty.

In SADC, the SADC Tribunal had jurisdiction to receive references in respect of noncompliance.³⁰² When the Tribunal established that a particular state had failed to comply with its decision, it would take its findings to the Summit to take appropriate measures.³⁰³ It is unfortunate that the Summit did not take the required steps against Zimbabwe as provided under article 33 of the SADC Treaty.³⁰⁴ There is no doubt that Zimbabwe persistently failed to comply with the Tribunal's decisions, consequently undermining the principles and objectives of SADC.

It is submitted that non-compliance with the EACJ's decisions amounts to non-observance of the principles of good governance together with the rule of law and human rights. Accordingly, the Summit and the Council are expected to take concrete actions to compel a state whenever there is non-compliance.³⁰⁵ The EAC Treaty does not however establish the means of bringing a member state to the attention of the Summit in the event of non-compliance. One particular case that the EACJ has dealt with concerning non-compliance is the second *Sebalu* case.³⁰⁶ In this case, the applicant successfully alleged that EAC member states' failure to adopt a protocol for extending the jurisdiction of the EACJ amounts to disrespect of the Court's order, since the EACJ had previously decided that EAC member states should take measures to extend the Court's mandate without delay.³⁰⁷

3.8 Chapter conclusion

This chapter has discussed the legal position that the EACJ currently holds in protecting human rights. In doing so, the chapter has assessed the legal functioning and prospects

³⁰² Art 32(4) of the SADC Tribunal Protocol.

³⁰³ The SADC Tribunal had determined that Zimbabwe had failed to comply with its decision in *Fick & Others v Zimbabwe*, Case No SADC (T) 1/2010, *Campbell v Zimbabwe*, Case No SADC (T) 11/2008 and *Campbell v Zimbabwe*, Case No SADC (T) 03/2009.

³⁰⁴ Art 32(1) of the SADC Treaty provides that 'sanctions may be imposed against any member state that (a) persistently fails, without good reason, to fulfil obligations assumed under this Treaty; (b) implements policies which undermine the principles and objectives of SADC'.

³⁰⁵ The EAC Treaty is silent on the nature of sanctions that the Summit may impose to a defaulting member state.

³⁰⁶ Ref No 8 of 2012, EACJ First Instance Division.

³⁰⁷ Ref No 1 of 2010, EACJ First Instance Division.

that the Court has in protecting human rights in the EAC when the protocol for expanding its jurisdiction is adopted. This chapter concludes that the EACJ has so far played a commanding role in protecting human rights. Although the court lacks an explicit human rights mandate due to the limitations imposed by article 27(2) of the EAC Treaty, the Court has developed its own jurisprudence in relation to cases that touch on human rights. To date, various commentators have acknowledged the role that the EACJ has been playing in protecting human rights values within the EACJ and its existing human rights mission should not be underestimated. Therefore, through judicial activism, the EACJ has commendably tried to protect human rights in the EAC; nevertheless there is room for improvement. Granting the Court an explicit human rights jurisdiction would enable the court to protect human rights values effectively in the community which is essential for the viability of the EAC integration.

The protocol that is expected to extend the jurisdiction of the EACJ to cover human rights disputes has yet to be adopted and, in fact, seems unlikely at present. The EACJ as the main judicial arm of the Community is specifically mandated to interpret and apply EAC law for supervising adherence to the rule of law and the EAC Treaty encompasses some provisions which specifically mention human rights. Despite the EAC Treaty having significant human rights norms, the EACJ is unable to effectively protect human rights under the EAC Treaty due to the limitation imposed under article 27(2) of the EAC Treaty. This article implies that member states intended to prevent the EACJ from adjudicating human rights disputes until a protocol is adopted by the Council on a subsequent date. It is on that basis that the EACJ has considerable weight in interpreting the EAC Treaty based on the existing human rights norms in the Treaty.

The First instance Division has tried to develop judicial activism by trying to interpret the EAC Treaty directly in respect of the human right norms contained in the Treaty. However, the Appellate Division, in the *Independent Medical Legal Unit*, clearly illustrated the position of the EACJ in respect of cases that touch on human rights, holding that the Court only has jurisdiction in such cases when allegations are 'distinct'

and 'different' from human rights violations. This therefore requires litigants to craft their pleas carefully when submitting human rights related cases to the EACJ.

The EACJ has great potential for playing a leading role in the protection of human rights if it is given an explicit human rights jurisdiction. However, the Court still faces some challenges with regard to being able to protect human rights effectively in the future. The biggest challenge is the politicisation on its functioning which endangers its independence and undermines its effectiveness. Moreover, the nature of its judgments is declaratory which might not be enough when given an explicit human rights jurisdiction. Also, the Court does not have its own machinery for ensuring that its judgments are complied with by member states. Therefore, jurisdiction uncertainties and all the challenges facing the EACJ outlined above need to be addressed in order for the EACJ to be able to protect human rights effectively in the EAC.

CHAPTER 4

A FRAGILE BASTION: CHALLENGES FACING THE EAST AFRICAN COURT OF JUSTICE IN ITS PROSPECTS OF PROTECTING HUMAN RIGHTS

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4.1 Introduction

More than a decade after its establishment, the East African Court of Justice (EACJ) is still struggling to establish its authority within the East African Community (EAC). In the early days of its existence, there was hope that the EACJ would be playing a commanding role in human rights protection within the region. The quest for the EACJ's human rights jurisdiction has been a myth since 2004, when the negotiations for adopting a protocol to expand the Court's jurisdiction commenced. Indeed, some of the powers that could be better exercised by the Court are still wielded by the organs or institutions of member states.

The reasons behind the existing limitations of the EACJ are thus matters of interest to be assessed. During the early days of its existence, on 27 November 2006, the EACJ issued a ruling in *Anyang' Nyong'o and Others v Attorney General of Kenya* ((*Anyang' Nyong'o* case) a matter that had political stakes in Kenyan politics.¹ This ruling interdicted a number of individuals from Kenya who were deemed to have been elected as Kenyan representatives to the East African Legislative Assembly (EALA). As a result of this ruling, the inauguration of the second EALA was delayed by three months. Shortly after the Court's ruling, EAC member states embarked on a process to amend the EAC Treaty, seemingly with the intention of weakening its

¹ *Anyang' Nyong'o & Others v Attorney General of Kenya*, EACJ Ref No 1 of 2006.

mandate and efficiency. Eventually the EAC Treaty was amended and the functioning of the EACJ has, since then, become increasingly politicised. Politics surrounding the functioning of the EACJ is and remains a major threat to the future of the EACJ. As the EACJ is expected to play a role in protecting human rights within the Community, the on-going politicisation of the Court does not provide encouraging signs.

With respect to the human rights jurisdiction of the Court, the process of adopting the protocol that would expand the jurisdiction of the EACJ to include the adjudication of human rights disputes, as provided in article 27(2) of the EAC Treaty, has also become politicised. Back in 2004 it was agreed that the protocol should be adopted to enable the EACJ to have an explicit human rights jurisdiction, as this is crucial for the development of East African integration.² However, member states are hesitant to give the EACJ such a mandate, despite the fact that expanding the EACJ's jurisdiction to adjudicate human rights would enable the Court to fully safeguard the founding Community principles, as provided for under the Treaty, when member states are engaging with the activities of the Community.³

Yet another sign of the politicisation of the EACJ is the recent futile efforts by member states to confer the EACJ with jurisdiction in international crimes. This can simply be perceived as an effort to kowtow to the current sentiments by African leaders that the International Criminal Court is biased against African leaders and that, therefore, Africans should have their own mechanisms for dealing with matters concerning international crimes. There are clear indications that the move for extending the EACJ's jurisdiction to cover matters concerning international crimes was politically driven. Apart from the concern about the politicisation of the work of the EACJ, the sovereignty syndrome among member states, the lack of effective enforcement mechanisms and the undefined relationship with the African regional institutions existing in parallel are some of the key challenges that the EACJ is facing. These concerns are now discussed.

² SB Bossa 'Towards a protocol extending the jurisdiction of the East African Court of Justice' (2006) 4 *East African Journal of Human Rights and Democracy* 31, 34.

³ Art 6(2) and 7(c) of the EAC Treaty.

Thus, this chapter answers the thesis question as to what are the existing challenges currently facing the EACJ that undermine its role in protecting human rights. In answering this question, the chapter addresses some of the challenges facing the EACJ, which have some bearing on the present and the future of the Court, particularly for its mission of protecting human rights.

4.2 Politicisation of the EACJ: A threat to its future

A major threat to the survival of the EACJ is the politicisation of its functioning. As highlighted above, signs of the politicisation were evident after the Court's ruling in the *Anyang' Nyong'o* case,⁴ which restrained nine elected members from Kenya from being sworn in as members of the EALA. Since that ruling, the functioning of the EACJ has become largely politicised.

In what seems to be a political approach, the process for extending the EACJ's jurisdiction has been unduly prolonged since 2004, when negotiations to expand its jurisdiction started. In 2013, the EAC Summit directed the Council of Ministers to expedite this process for extending the Court's jurisdiction to cover international crimes.⁵ Arguably, the move to confer the EACJ with jurisdiction to cover international crimes is unrealistic. Considering the efforts to refer the ICC case of the incumbent Kenyan President Uhuru Kenyatta and the Vice President William Ruto back to Kenyan courts or to the EACJ,⁶ such a move to give the EACJ criminal jurisdiction implies that there was a political force behind it. In 2014, in a dramatic

⁴ The case had political interest among political parties in Kenya that are contesting the right to represent that country before the EALA. The case came during a fragile political period in Kenya. Frans sees the decision taken by the EACJ as a defeat to the ruling party and a celebrated victory by the opposing parties. See F Viljoen *International Human Rights Law in Africa* (2012) 499.

⁵ The Communiqué of the EAC Summit, 20 April 2013, para 6; Communiqué of the EAC Summit, 30 November 2012, para 10. For an overview of the controversy leading to the amendment of the EAC Treaty see H Onoria 'Botched-up elections, treaty amendments and judicial independence in the East African Community' (2010) 54 *Journal of African Law* 74.

⁶ In 2012, the EALA passed a resolution calling for the EAC Summit to request the ICC to bring the case of the accused Kenyans in the aftermath of the 2007 Kenyan election to the EACJ; see EALA Resolution 'Seeking to try Kenya 2007 general elections aftermath accused persons at EACJ, not ICC', available at http://www.eala.org/key-documents/doc_details/266-resolution-seeking-to-try-kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.html (accessed on 12 May 2013).

turn of events, the Summit has directed the Council of Ministers to work on a protocol that would deal with trade disputes only.⁷ With respect to human rights and international crimes, the Council of Ministers has been directed to work closely with the African Union (AU).⁸ This latest decision suggests that EAC member states are not intending to hand the EACJ an explicit human rights jurisdiction any time soon.

Politics has an important role to play for the survival of international courts and tribunals. Political stability in a region where an international court is seated is an important condition for the court's survival. It may be recalled that the primary cause of the demise of the Court of Appeal for East Africa (COEA) was the collapse of the former EAC as a result of political instability in the region. The Common Market for Eastern and Southern Africa (COMESA) Court of Justice is still temporarily hosted in Lusaka, Zambia, owing to the political instability in Khartoum, Sudan, where the Court is statutorily supposed to be seated.

Apart from political instability, a decision of an international court with significant effect in the political sphere of a respondent state may lead to a hostile response and a defaulting state may embark on negative measures in response to an unfavourable court decision. International courts risk thus becoming fragile when being interfered with by political forces, especially when this is done with the intention of undermining the court's efficiency. States at the receiving end of unfavourable judgments by an international court tend to question the legitimacy of the court and, at times, proceed to persuade other member states to take measures which are intended to weaken the court.⁹ For instance, in the Economic Community of West African States Court Justice (ECOWAS Court), after the decision of *Manneh v the Gambia*,¹⁰ the government of the Gambia took political measures that aimed to weaken the functioning of the ECOWAS Court. Accordingly, the government of the

⁷ Communiqué of the 15 Ordinary Summit of the EAC Heads of State, 30 November 2013, para 16.

⁸ As above. .

⁹ Viljoen (2012) 499.

¹⁰ *Ebrimah Manneh v The Gambia*, ECW/CCJ/APP/04/07. The ECOWAS Court found Gambia in breach of several rights of the African Charter on Human and Peoples' Rights. The findings of the ECOWAS Court were based in ex-parte proceedings; the government of Gambia did not cooperate in the case.

Gambia proposed the introduction of the exhaustion of the local remedy rule to be applied in the ECOWAS Court.¹¹ Fortunately, the proposed amendments were rejected and the Authority of Heads of State and Government decided that the Court should be maintained in its current form.¹² Perhaps Economic Community of West African States (ECOWAS) leaders were aware that if the proposed amendments by the Government of the Gambia were to be accepted, it would be likely that in the near future a defaulting ECOWAS state displeased with the ECOWAS Court judgment would come with renewed proposals to weaken the Court.

While the EACJ continues to operate, and more is expected from it, the relevance of events that led to the suspension of the Southern African Development Community (SADC) Tribunal should not be discounted lightly. Political interference in the functioning of the SADC Tribunal has set an unwanted and unfortunate precedent with regard to the existence of international courts and tribunals in Africa, and around the world at large. Zimbabwe's condemnation of and rejection of compliance with the decision of the SADC Tribunal had resulted to the suspension of the Tribunal.¹³ The lack of political will to impose sanctions and exert political pressure on Zimbabwe gave the government of Zimbabwe the confidence to condemn and successfully challenge the legitimacy of the SADC Tribunal. A dispute advanced by Zimbabwe regarding this legitimacy consequently led to the Tribunal being suspended. The SADC member states are now considering adopting another protocol that would allow the SADC Tribunal to exercise its mandate for the interpretation of the SADC Treaty and Protocols on trade disputes between member states only.¹⁴ The

¹¹ Amnesty International 'West Africa: Proposed amendment to ECOWAS Court jurisdiction is a step backward' <http://amnesty.org/en/library/info/AFR05/005/2009/en> (accessed on 13 May 2013).

¹² Viljoen (2012) 499.

¹³ After several decisions against Zimbabwe by the SADC Tribunal, the Tribunal was de facto suspended on August 2012. See the SADC Communiqué of the Heads of State and Government, 18 August 2012, para 24.

¹⁴ An independent consultant was asked to assess the validity of the existence of the SADC Tribunal as Zimbabwe contended that the amended Protocol establishing the Tribunal had not entered into force and therefore the existence of the Tribunal was not legal. The report stated that the Tribunal was properly constituted and therefore Zimbabwe was obliged to comply with the Tribunal's decisions; see L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011). Being dissatisfied with the result, SADC political organs asked Attorneys General of the member states to come up with a report of

suspension of the SADC Tribunal was what Zimbabwe had prayed for.¹⁵ However, according to De Wet, the manner in which the Tribunal was suspended is illegal¹⁶ because neither the SADC Treaty nor the Tribunal Protocol gave the Submit a mandate to suspend the Tribunal.¹⁷

In the early days of the EAC, the EACJ was not the focus of attention by member states. It took two years after the EAC was established, in 1999, for the Judges and Registrar of the EACJ to be sworn in, marking the inauguration of the Court. As the EACJ was about to take shape and establish its authority in the region, the last thing it could have wished for was receiving a case with such high political stakes as that of the *Anyang' Nyong'o* case. Member states viewed the EACJ was trying to influence their internal national matters and the activities of other organs within the Community. Before the *Anyang' Nyong'o* case, there was no proposed intention or negotiations to amend the EAC Treaty; the ruling in the *Anyang' Nyong'o* case triggered what was seen as a politically charged response from Community leaders.¹⁸

The passion shown by EAC political leaders to amend the EAC Treaty was seen as an attempt to intimidate the EACJ, as these amendments were simply a political reaction to the EACJ's decision in the *Anyang' Nyong'o* case, which did not please the Kenyan government. In contrast to the *Mike Campbell v Zimbabwe (Campbell case)*, the *Anyang' Nyong'o* case was not the first case to be received by the EACJ. However, it was the first case before the EACJ that found a member state in breach of the EAC Treaty; a case which also damaged the relationship between member states and the EACJ.

In summary, the 2007 amendments to the EAC Treaty have left the EACJ in a precarious position in respect of discharging its mandate, which is already

their own. However, the report of the Attorneys General held the same view as the previous report.

¹⁵ E de Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' (2013) 28 *ICSID Review* 1, 14

¹⁶ As above.

¹⁷ As above.

¹⁸ AP van der Mei 'Regional Integration: The contribution of the Court of Justice of the East African Community' (2009) 69 *Heidelberg Journal for International Law* 403, 412.

extensively restricted. EAC citizens face some technical obstacles in submitting cases before the EACJ, and the security of tenure of the Court judges has to some extent been undermined. In its current form and structure, it is hard for the EACJ to be efficient in protecting human rights in the EAC. Although EACJ judges and its Registrar are active in strengthening the Court's political legitimacy by conducting a number of workshops and thematic meetings involving civil societies and legal professionals,¹⁹ some key challenges facing the Court need to be addressed in order for it to enhance its effectiveness.

4.2.1 Background of the *Anyang' Nyong'o* case

Before commenting on the hostile measures taken by EAC member states against the EACJ, it is important to reflect back on the events leading up to these acts. In order to abide by the requirements of article 50 of the EAC Treaty, the Kenyan National Assembly enacted the Treaty for the Establishment of the EAC (Election of Members of the Assembly) Rules of 2001. The first nine members of the EALA from Kenya were elected on the basis of the 2001 Rules. However, these Rules provided for what resembles a nomination process, rather than an election as stipulated in article 50 of the EAC Treaty. As for the election process under the 2001 Rules, political parties were required to submit the names of the nominated candidates to the House Business Committee of the Kenyan National Assembly, which was ultimately required to consider the nominees. Once satisfied that the requirements under article 50 of the EAC Treaty had been met, the Committee had to table before the Assembly the selected names as representatives of Kenya to the EALA.

On 26 October 2006, the Committee issued a list of names nominated by their respective political parties and seeking the approval of the Assembly to be elected as members of the EALA. During that time, the political parties consisted of the Kenya African National Union (KANU), the Forum for the Restoration of Democracy-People (FORD-P) and the National Rainbow Coalition (NARC) and five lists were submitted

¹⁹ J Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2012) 19 Public Law & Legal Theory Research Paper, Loyola University Chicago School of Law, 16.

before the Committee from each party. The controversy arose after two different lists of five nominees each from NARC were submitted to the Committee. The first list was presented to the Committee by the party leader through the Clerk to the National Assembly as required by the 2001 Rules. The other list was submitted to the Committee on 23 October 2006 by the government Chief Whip.²⁰ The Committee then decided to table the names of the nominees before the National Assembly for approval. In considering the names, the only nominated candidate from FORD–P was unanimously approved by the Committee; KANU withdrew one of its two lists and the remaining one was therefore approved. For the NARC, the Committee approved the list submitted by the government Chief Whip and not that of the party leader.²¹ On the very same day, the Kenyan National Assembly gave its approval for the list of nine names which were deemed to be duly elected as members of the EALA elected by the National Assembly of Kenya.²²

On 9 November 2006, nearly three weeks before the second EALA was to be convened, a number of applicants including Peter Anyang' Nyong'o filed a reference before the EACJ together with an interlocutory application alleging that the election was at odds with article 50 of the EAC Treaty. The interlocutory application sought an interim order to restrain the nine nominees deemed to be elected as members of the EALA from taking office. The second EALA was due to convene on 29 November 2006. On 27 November 2006, the EACJ granted an order in favour of the applicants, preventing the nine nominees from taking office in the EALA. The Court was of the view that the EAC as a whole would suffer irreparable damage in the event that one-third of the members of the EALA was illegally convened.

In the main case which followed, the major task of the Court was to ascertain whether the Kenyan electoral rules were compatible with article 50 of the EAC Treaty. On 30 March 2007, in its final judgment, the Court observed that article 50 of the EAC Treaty rendered the National Assembly of Kenya an 'electoral college' for

²⁰ *Anyang' Nyong'o case*, 4.

²¹ *Anyang' Nyong'o case*, 4.

²² Communiqué of the 15 Ordinary Summit of the EAC Heads of State, 30 November 2013, para 16.

electing Kenyan representatives to the EALA.²³ Thus, it does not vest member states or anyone else with the power to appoint or nominate representatives to the EALA.²⁴ In considering whether there was an ‘election’ before the Kenyan National Assembly, the EACJ concluded that an ‘election’ must be carried out by voting through a specified procedure.²⁵ The 2001 Rules of the Kenyan National Assembly did not contain such voting procedures; instead, the names of the nominees after being considered by the Committee are tabled before the National Assembly for its approval. The Court went on to hold that the Kenyan National Assembly failed to undertake or carry out an election within the scope of article 50 of the Treaty.²⁶

The EACJ interim order had a distinct impact on both the Kenyan and the regional political environment and the Court was seen as if it was interrupting national political affairs and activities of EAC institutions.²⁷ The ruling resulted in the second EALA only being inaugurated on 4 June 2007 – six months after the expiry of the term of office of the previous members.

The actions taken by political leaders in response to the Court’s findings are unjustifiable.²⁸ The EACJ was merely exercising its jurisdiction rather than trying to be involved in the political affairs of the region. There could thus not be any dispute that the Rules of the Kenyan National Assembly were contrary to article 50 of the EAC Treaty as appropriately determined by the EACJ. The perception that the EACJ interfered in the internal affairs of member states when legally exercising its mandate is unfounded.

²³ *Anyang’ Nyong’o* case, 29. Art 50 of the EAC Treaty is a departure from the former 1967 EAC Treaty, where by EAC member states were mandated to appoint members of the Assembly. The current provision tries to some extent to establish people-centred representatives.

²⁴ *Anyang’ Nyong’o* case, 29.

²⁵ *Anyang’ Nyong’o* case, 34. Secret ballot, show of hands or acclamation was mentioned to be one of the voting procedures in an election.

²⁶ *Anyang’ Nyong’o* case, 34.

²⁷ AP van der Mei (2009) 69 *Heidelberg Journal for International Law* 403, 412.

²⁸ As above.

4.2.2 Reactions to the *Anyang' Nyong'o* ruling

4.2.2.1 Recusal application

The Kenyan government formally showed its dissatisfaction with the ruling in *Anyang' Nyong'o* case when it asked the EACJ to set it aside. On 22 January 2007, the Attorney General of Kenya applied for an order to set aside the interim order of 27 November 2007, and further called on Kenyan Judges to recuse themselves from hearing the application further and making reference as they were perceived to be biased and lacking impartiality.²⁹ During the hearing of the application, a call for the recusal of Kasanga Mulwa was withdrawn as he had resigned from the Kenyan judiciary.³⁰ What remained was a call for the recusal of Justice Moijo Ole Keiwua.

In the application to set aside the interim order, the applicant argued that Justice Moijo Ole Keiwua had a duty to disclose his interest in the case and should disqualify himself from determining the interim application, as a common person would feel that there were some kind of bias against the government of Kenya due to the corruption allegations against him in Kenya. The basis for the applicant's argument was that the failure by Justice Moijo Ole Keiwua to disclose his interest and recuse himself from the proceedings related to the interim order was a breach of a duty under the EAC Treaty and the principle of impartiality.³¹ Thus, the Attorney General of Kenya requested the Court to set aside the interim order and requested Justice Moijo Ole Keiwua to recuse himself from the bench that was to determine the main reference.

In determining whether Justice Moijo Ole Keiwua should have recused himself from determining the interim order, the EACJ found that the applicant did not follow the appropriate procedures in requesting Justice Keiwua to recuse himself from the

²⁹ App No 5 of 2007.

³⁰ The two Kenyan judges who presided in the *Anyang' Nyong'o* case were the subject of corruption allegations back in Kenya in 2003, which saw 23 judges suspended from office. In 15 October 2003, Justice Moijo Ole Keiwua and Kasanga Mulwa were suspended from the performance of their functions as judges of the Court of Appeal, and a tribunal for determining the allegations against them was established. Justice Moijo Ole Keiwua was later cleared of all the allegations.

³¹ *Anyang' Nyong'o* case, 6.

bench. In fact, the Attorney General of Kenya had intimidated Justice Keiwua just before the hearing of the recusal application by demanding his recusal. Being inspired by the *President of the Republic of South Africa v South African Rugby Football Union and Others*,³² the EACJ was of the view that the act of calling Justice Keiwua in the morning of 22 January 2007 during the hearing of the recusal application ‘was more akin to intimidation than to an effort to discover the judge’s response to the alleged apprehension concerning his impartiality’.³³ In determining the reference, the EACJ held that Justice Keiwua had no duty to disqualify himself from the proceedings.³⁴ The Court pointed out that ‘a reasonable person would not perceive that a judge, whose conduct is under investigation, would risk conducting an unfair adjudication against the very authority investigating his conduct’.³⁵

The fact that the same judges who ruled on the interim order also presided over the recusal application may raise concerns about whether the judges were impartial as they might have been *functus officio*. The EACJ, seemingly defending itself, ensured the litigants’ right to a fair trial was observed by stating that ‘only through strict adherence to the principle of judicial impartiality can protection of the universally accepted right of every litigant to a fair trial be enforced of which the Court is not against’.³⁶

4.2.2.2 Hasty amendment to the Treaty

While the hearing of the matter in the *Anyang’ Nyong’o* case was proceeding, the EAC leaders embarked on a process of amending the EAC Treaty. The amendment process proceeded shortly after public condemnation of the EACJ by EAC political leaders. It may be recalled that shortly after the interim ruling in the *Anyang’*

³² In *President of the Republic of SA & Others v SA Rugby Football Union & Others* [1998] ZACC 21 para 50, the Court stated as follows:

[T]he usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of [the] opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.

³³ *Anyang’ Nyong’o* case, 14.

³⁴ *Anyang’ Nyong’o* case, 19.

³⁵ *Anyang’ Nyong’o* case, 25.

³⁶ *Anyang’ Nyong’o* case, 13.

Nyong'o case, the Kenyan government's first move was to attack the Kenyan judges who presided in the ruling. The then Kenyan President and the Minister for East African Affairs accused the EACJ of being biased.³⁷ Then, the Kenyan government went on to push for amendments to the EAC Treaty. Most likely, the Kenyan government looked for the support of other member states for its move to amend the EAC Treaty. The other EAC member states, in fact, showed their support for Kenya as the Summit condemned the EACJ's ruling on 30 November 2006.³⁸ This followed from an extraordinary Summit held on December 2006³⁹ that adopted the proposed amendments to the EAC Treaty, which came into force on 20 March 2007.

The endorsement of the EAC Treaty amendments by the Summit sparked a flurry of activity in the process of amending the Treaty. The first step taken was to convene a meeting of the Attorneys General of the member states, which was held on 7 December 2006, to consider the draft amendments to the Treaty in line with the Summit communiqué of 30 November 2006. The Attorneys General recommended that the proposed amendments be approved and submitted to the Summit pursuant to article 150 of the EAC Treaty for consideration and adoption. The Council went on to approve the recommendations on 8 December 2006.⁴⁰ On 9 December 2006, the proposed amendments were submitted to the member states who, within four days, had submitted their comments back to the Secretary General. On 14 December 2006, the Summit adopted the amendments and signed the instruments.

The chain of events, as discussed above, reveals hurried process undertaken by EAC leaders in amending the EAC Treaty. It is also clear that citizens of the EAC were generally not involved in the amendment process, as it took only four days for all three member states to respond to the recommendations for amending the Treaty. Such determination shown by EAC member states to amend the EAC Treaty is absent

³⁷ Onoria (2010) 54 *Journal of African Law* 74, 80.

³⁸ See the EAC Communiqué of the Summit (30 November 2006).

³⁹ See the Communiqué of the 6th Extraordinary Summit of EAC Heads of State, 20 August 2007.

⁴⁰ *The East African Law Society & Others v Attorney General of Kenya & Others*, EACJ Ref No 3 of 2007.

when it comes to the adoption of a protocol that would enable the EACJ to have explicit jurisdiction to adjudicate on human rights allegations.

4.2.2.3 Reaction from civil society

The 2007 EAC Treaty amendments were not well received by civil society in East Africa given the fact that the process for amending the Treaty did not involve EAC citizens. It was perhaps inevitable that civil society would challenge the legality of the Treaty amendments. Ordinary citizens of the EAC had not been aware of the ongoing activities of the EAC and had not been given any opportunity to express their views on the amendment. On that basis, regional bar associations took the matter into their own hands by bringing a case before the EACJ and, in *East African Law Society and Others v Attorney General of Kenya and Others* (*East African Law Society case*), the legality of the amendments to the EAC Treaty was questioned.⁴¹ The applicants mainly contended that the amendments were contrary to the EAC Treaty and international law, as East African citizens had not been consulted during the amendment process.⁴² The respondents disputed the application by arguing that the applicants have no capacity to bring the case to the Court and submitting that the applicants had ‘neither a role to play in the function nor a right to challenge the execution of the function by the contracting states’ in the activities of the EAC.⁴³ The respondents were generally of the view that article 150 of the EAC Treaty gives the Summit exclusive powers to amend the Treaty and such powers are not subjected to any questioning. Also, the respondents argued that the act of amending the Treaty was not an Act, regulation, directive, decision or action of a single member state or of an institution of the Community as provided in article 30 of the EAC Treaty. Article 30 mentions ‘institutions’ and not organs of the Community and, therefore, according to the respondents, the Summit is not an institution but an organ of the Community.

⁴¹ *East African Law Society case*.

⁴² *East African Law Society case*, 4.

⁴³ *East African Law Society case*, 9.

When determining the matter, the EACJ stated that 'it would be a negation of a deliberate intent to bar the reference on the ground that the applicants had no capacity to bring a reference challenging a sovereign function of the partner states' in carrying out the activities of the Community.⁴⁴ The Court was further of the view that the functions of the Summit as an organ of the Community are exercised by member states and therefore it was the action of the member states which amended the Treaty. Thus, the matter was in respect of the amendment process that was carried out by the member states, and not the Summit.

4.2.3 Legality of the 2007 Treaty amendments

Treaty amendment involves a formal alteration of treaty provisions, which affects all the parties to a treaty.⁴⁵ When it is deemed desirable, parties to a treaty may decide to alter some of the treaty provisions; however, the formalities for amending a treaty must be observed. Alterations to treaty provisions should take into consideration the important aspects of the formalities that took place during the original formation of a treaty.

Any treaty drafted to establish an international organisation may gradually prove to be insufficient after some time to the extent of requiring amendments. At times, a treaty may have conflicting provisions or gaps which would need to be altered. Also, unforeseeable developments may necessitate the amendment of treaties. Most treaties, therefore, contain some provisions laying down procedures for amendments.⁴⁶ The power to amend a treaty establishing an international organisation is usually given to the political organs of the organisation – depending on the procedures prescribed by the treaty. Abrupt and frequent amendment of a treaty is always open to objection, As there is always the risk of damaging the effectiveness of the activities of an organisation when its constitutive instrument is altered often. After hasty amendment of the EAC Treaty in 2007, civil society and bar

⁴⁴ *East African Law Society case*, 15.

⁴⁵ MN Shaw *International law* (2008) 930.

⁴⁶ There are some treaties that expressly provides a specified period of time for reviewing a treaty. Art 109 of the UN Charter permits a discussion after ten years for the purpose of reviewing the Charter.

associations questioned the legitimacy of the amendments in the *East African Law Society* case.

Whether the 2007 EAC Treaty amendment were in conformity with the EAC law. In responding to this issue, it is important to assess the amendment process that took place.

4.2.3.1 Procedures for amending the EAC Treaty

Under the law of treaties, unless provided otherwise, an amendment to a treaty occurs only after the mutual agreement of all the parties,⁴⁷ and all parties to a treaty must be informed of any proposal for amending a treaty.⁴⁸ During the amendment process, all parties must be involved in deciding the action to be taken regarding the proposal for amending a treaty,⁴⁹ and take part in all negotiations and decisions on the agreed amendment.⁵⁰ Except when provided otherwise, an agreement for amending a treaty is ordinarily obtained by depositing the instruments for ratification of the amendments.⁵¹ By depositing an instrument for ratification, a state expresses its consent to be bound.

A consensus of all parties in amending a treaty may reduce the risk of confrontation among parties over the disagreed amendments. When a treaty provides that an amendment is to be made by the consent of a majority of the parties rather than all the parties, such approach might not be suitable for the functioning of an organisation, as dissenting parties may be reluctant to adhere to the amended text. However, it is also possible that some parties may intentionally reject a proposal for amending a treaty because of protecting their interests which may benefit from less impetus in realising treaty objectives. In such circumstances, a party who does not agree to the proposed amendment may opt out, choosing instead not to become a

⁴⁷ Art 39 of the Vienna Convention on the Law of Treaties (Vienna Convention) 1969.

⁴⁸ Art 40(2) of the Vienna Convention.

⁴⁹ Art 40(2)(a) of the Vienna Convention.

⁵⁰ Art 40(2)(b) of the Vienna Convention.

⁵¹ Art 16 of the Vienna Convention.

party to the amended text of a treaty.⁵² However, it is expected that any disagreement to be bound by a treaty amendment should not defeat the overall purpose and objective of such treaty.

In order to amend the EAC Treaty, all EAC member states have to consent to the proposed amendments.⁵³ There is no specified period of time for amending the EAC Treaty and any process for amending the EAC Treaty must first be initiated by a proposal that may be submitted at any time by any member state or the Council.⁵⁴ Any proposal for amending the EAC Treaty also has to be submitted to the Secretary General, who supervises the amendment process⁵⁵ and he/she is required to notify all member states within 30 days after receiving the proposed amendment.⁵⁶ In responding to the proposed amendment, a member state that wishes to comment on the proposal for the amendment has to submit the comments within 90 days after receiving the proposal from the Secretary General.⁵⁷ After the expiration of the 90-day period, the Secretary General has to submit the proposal and comments from member states to the Summit through the Council in order to adopt the amendment.⁵⁸ Any amendment to the EAC Treaty is adopted by the Summit and enters into force after being ratified by its member states.⁵⁹

4.2.3.2 Encroachment of the process

The manner in which the EAC Treaty was amended invites many questions on the legality of the whole process. Shortly after the interim ruling of 27 November 2006 in the *Anyang' Nyong'o* case, a flurry of activity took place. The next day after the ruling, the Council immediately recommended that the Summit should refer the matter to the Sectoral Council on Legal and Judicial Affairs to study the EACJ's

⁵² Art 40(4) of the Vienna Convention.

⁵³ Art 150(1) of the EAC Treaty.

⁵⁴ Art 150(2) of the EAC Treaty.

⁵⁵ Art 150(3) of the EAC treaty.

⁵⁶ Art 150(3) of the EAC Treaty.

⁵⁷ Art 150(4) of the EAC Treaty.

⁵⁸ Art 150(5) of the EAC Treaty.

⁵⁹ Art 150(6) of the EAC Treaty.

jurisdiction and other related matters.⁶⁰ Shortly after receiving the recommendations, on 30 November 2006, the Summit approved the recommendations and vowed to convene a special Summit to consider amending the EAC Treaty.⁶¹ On 7 December 2006, the Attorneys General of the member states considered and agreed on the amendments, which the Council approved the following day.⁶² On 9 December 2006, the Secretary General submitted the proposed amendments to member states for comment and EAC member states responded positively to the amendments within four days,⁶³ casting serious doubts as to whether citizens had been effectively engaged. On 14 December 2006, the amendments were approved by the Summit and came into force after the last deposit of instruments for ratification on 16 March 2007.⁶⁴

Despite the fact that mutual consent from all member states was obtained for amending the EAC Treaty in 2007, this does not in itself legitimise the amendment process. In any event, it is most likely that the consent of other member states was induced by the Kenyan government. This is because some of the objections submitted by the Attorney General of Kenya in the recusal application were exactly the ones which went on to be inserted in the EAC Treaty amendments. It is also more likely than not that it was the Kenyan government which initiated the proposal for amending the EAC Treaty. Most of the amended provisions are connected with the *Anyang' Nyong'o* case, particularly the submissions by the Kenyan legal representatives.

Therefore, the process for amending the EAC Treaty was flawed. Within a month, the Summit had adopted the amendments and the EAC member states had ratified the amendments within four months, which is not generally the case with international instruments. With other international instruments, particularly human rights treaties, EAC member states have a tendency to take their time over ratification. The

⁶⁰ Van der Mei (2009) 69 *Heidelberg Journal for International Law* 403, 417.

⁶¹ See the Communiqué of the EAC Summit, 30 November 2006.

⁶² Van der Mei (2009) 69 *Heidelberg Journal for International Law* 403, 418.

⁶³ Van der Mei (2009) 69 *Heidelberg Journal for International Law* 403, 419.

⁶⁴ See *East African Law Society* case I, 2.

EAC member states were required to amend the Treaty according to prescribed procedures. Nevertheless, the EAC Treaty amendment process was rushed and did not involve consultation with EAC citizens, thus raising questions over its legitimacy. Article 150(4) and (5) of the EAC Treaty provides a timeframe for this amendment process: EAC member states are given 90 days to comment on any proposed amendments⁶⁵ and the Secretary General is supposed to submit the comments to the Summit within ninety days.⁶⁶

It is not necessary for the Secretary General to wait for the 90 days to expire after receiving all the comments from member states regarding the proposed amendments,⁶⁷ which was the case with the 2007 EAC Treaty amendments. It can be assumed that, apart from being the time frame for member states to respond to the proposed amendments, the drafters decided to impose a period of 90 days in order to enable member states to conduct consultations. However, the period of 90 days in itself is not enough for conducting widespread consultations on integration matters. In deciding whether the conduct of the Secretary General in submitting comments for the proposed amendments to the Summit before the expiration of 90 days was contrary to article 150(4) and (5) of the EAC Treaty, the EACJ held that ‘the purpose of prescribing the period of [ninety] days is to provide for the period that every partner state must spend undertaking unspecified consultations’.⁶⁸ Thus, there was no infringement of the EAC Treaty by member states after giving their comments to the Secretary General within five days of receiving them.⁶⁹

The EAC member states, through their responsible officials, made the comments within five days after the Secretary General’s communication. There was therefore little time for any widespread consultation within member states. Although article 150 does not specifically provide for engaging widespread consultation when amending the EAC Treaty, the oversight was contrary to one of the founding

⁶⁵ Art 150 (4) of the EAC Treaty.

⁶⁶ Art 150(5) of the EAC Treaty.

⁶⁷ *East African Law Society case*, 23.

⁶⁸ *East African Law Society case*, 24.

⁶⁹ *East African Law Society case*, 25.

principles of the Community that provides people-centred market-driven cooperation.⁷⁰ The fact is that the EAC Treaty does not provide for the manner in which people can be consulted; however this should not be an excuse for ignoring the opinion of Community citizens.

In respect of whether there should have been widespread consultation when amending the EAC Treaty, the EACJ was invited to take judicial notice of the widespread consultations that were carried out in the process of forming the EAC and the process of extending the jurisdiction of the Court which has so far involved widespread consultation of all stakeholders in the region. After considering all written communications from member states to the Secretary General expressing their consent to the proposed amendments, the EACJ stated that ‘no serious widespread consultations on the amendments within the Partner States were intended let alone carried out’.⁷¹ Therefore, the Court held that the failure to conduct consultation for the amendment of the EAC Treaty was contrary to the spirit of the EAC Treaty.

The Court’s findings were based on the previous practices of the EAC member states. According to the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith so as to give its ordinary meaning according to its context and in the light of its object and purpose.⁷² Apart from the object and purpose, ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties’ may be taken in to account when interpreting a treaty.⁷³ Therefore, it can be argued that the EACJ was correctly relying on previous practices which had formed the basis for EAC legal order.

Article 8(1) (c) of the EAC Treaty requires member states to refrain from any measures likely to jeopardise the intended objectives of the Treaty. Also, article 38(2) of the EAC Treaty obliges member states to abstain from any measures which

⁷⁰ Art 7(1)(a) of the EAC Treaty.

⁷¹ *East African Law Society case*, 27.

⁷² Art 31(1) of the Vienna Convention.

⁷³ Art 31(3)(b) of the Vienna Convention.

might detrimental to the settlement of a dispute when such dispute has already been referred to the EACJ. In light of articles 8(1)(c) and 38(2) of the EAC Treaty, the applicants in the *East African Law Society* case averred that the decision to amend the EAC Treaty was a response to the interim ruling of 27 November 2006 in *Anyang' Nyong'o* case, and that the additional grounds for the removal and suspension of EACJ judges, as proposed in the amendment, were calculated to intimidate the Court judges and thus would be likely to prejudice the settlement of the dispute. The applicants were referring to the Kenyan judges who were faced with allegations of misconduct in Kenya. The proposed amendments, which later were approved, gave the Summit the power to suspend and remove any EACJ judge who was subject to investigation regarding misconduct at the national level. The EACJ observed that the move for amending the EAC Treaty 'was capable of unduly influencing the pending judgment in *Anyang' Nyong'o* case and thereby be detrimental to the just resolution of the dispute'.⁷⁴

Despite the irregularity in the process, the EACJ in the *East African Law Society* case did not invalidate the 2007 amendments to the EAC Treaty.⁷⁵ The EACJ adopted a prospective annulment doctrine, whereby the Court did not invalidate the amendments, but insisted, by holding that the involvement of people in the treaty amendment process should have prospective application.⁷⁶ The doctrine of prospective annulment meant that the EACJ ruling did not have retrospective effect.⁷⁷

The EACJ has already applied the doctrine of prospective annulment in the *Calist Mwatela and Others v the EAC*.⁷⁸ In that case, the EACJ held that the decision of the Council of Ministers in 2001 to establish the Sectoral Council of Judicial and Legal Affairs was inconsistent with the Treaty, and on the basis, that the Council of

⁷⁴ *East African Law Society* case, 34.

⁷⁵ Van der Mei (2009) 69 *Heidelberg Journal for International Law* 419.

⁷⁶ *Anyang' Nyong'o* case, 42-44.

⁷⁷ Van der Mei (2009) 69 *Heidelberg Journal for International Law* 419.

⁷⁸ *Calist Mwatela & Others v EAC*, EACJ Application 1 of 2005.

Ministers did not exclusively consist of Ministers.⁷⁹ The Court's decision was not of retroactive effect, however; because the Sectoral Council had previously made a series of decisions, by having retroactive annulment the decision would have led to uncertainty in the Community.

The hurried process for amending the EAC Treaty in 2007 has weakened the functioning of the EACJ. The EACJ remarked that the amendments limiting the Court's mandate so as not to apply to jurisdiction conferred by the Treaty on organs of member states run the risk of undermining the 'overall supremacy of the Court over the interpretation and application of the Treaty'.⁸⁰ If the amendments were left unrevised, the provisions in question would be likely to lead to conflicting interpretations of the Treaty by the national courts.⁸¹ Concerning additional grounds for the removal and suspension of EACJ judges, the EACJ stated that the establishment of automatic removal and suspension on grounds raised at national level had the possibility of adopting 'un-uniform standards to judges of the same court' which as a result may 'endanger the integrity of the Court'.⁸²

4.2.4 Impact of the EAC Treaty amendments

4.2.4.1 Two-tier court structure

The amendments to the EAC Treaty introduced a two-tier court structure consisting of a First Instance Division and an Appellate Division.⁸³ Because of the changed Court structure, a decision of the First Instance Division is made subject to an appeal to the Appellate Division if and when an aggrieved party wishes to exercise the right to appeal.⁸⁴ In order to appeal, one must persuade the Appellate Division that the

⁷⁹ See art 14(3)(c)(i) of the EAC treaty.

⁸⁰ *East African Law Society* case, 45.

⁸¹ As above

⁸² As above.

⁸³ Art 23(2) of the EAC Treaty.

⁸⁴ Art 35(3) of the EACJ Treaty.

appeal is based on an error in a point of law in the case, lack of the Court's jurisdiction and procedural irregularities in the previous proceedings.⁸⁵

Events that transpired after the EACJ granted the interim order makes one sceptical about the logic behind the establishment of an Appellate Division. Worryingly, the move was aimed at making the main reference and the interim ruling in the *Anyang' Nyong'o* case appealable. During the hearing of the recusal application, the involvement of the Attorney General of Kenya in the process of amending the EAC Treaty was not concealed. The Attorney General of Kenya insinuated to the Court his involvement in the process of amending the EAC Treaty.⁸⁶ Also, as a way of intimidating the Court's judges, the Attorney General of Kenya was quick to inform the EACJ that the amendments to the EAC Treaty had already been ratified by Kenya and awaited ratification by Uganda and Tanzania to enter into force.⁸⁷ Basing on the 'exacerbated' events following the interim ruling, the EACJ held that the recusal application was a response to the 'impugned ruling of the Court',⁸⁸ a response which also intended to make both the interim ruling and the main references in *Anyang' Nyong'o* case appealable.

The reasons for the creation of the Appellate Division are unknown. There are genuine concerns that the Appellate Division was purposely established for auditing the decisions of the First Instance Division. As shown in the previous chapter, it is evident that there are some conflicting decisions between the two Divisions. In cases concerning article 30(2) of the EAC Treaty, which established the two-month rule for lodging complaints before the Court, the First Instance Division affirmed the principle of continuing violations in a number of its decisions regarding unlawful arrest and detention,⁸⁹ which later were overturned by the Appellate Division.⁹⁰

⁸⁵ Art 35(A) of the EAC Treaty.

⁸⁶ *Anyang' Nyong'o* case, 22.

⁸⁷ *Anyang' Nyong'o* case, 23.

⁸⁸ *Anyang' Nyong'o* case, 22.

⁸⁹ See *Independent Medical Legal Unit v Attorney General of Kenya & Others*, Ref No 3 of 2010, EACJ First Instance Division.

The presence of an Appellate Division in the EACJ has the potential to prolong justice. With the existence of a two-tier Court structure, an aggrieved applicant before the EACJ, apart from having the right to appeal, can also make an application for a review.⁹¹ When the EACJ is mandated to exercise jurisdiction on human rights, having an Appellate Division would mean that the Court was not the best forum for most human rights litigants in the EAC. Most litigants would probably prefer the African Court on Human and Peoples' Rights (African Court) where the verdict of the Court is not subjected to an appeal or revision which would prolong justice. It should also be recalled that there is strong support from legal professionals and other stakeholders in East Africa for enabling the EACJ to determine appeals from member states.⁹² If the EACJ were to be given an appellate jurisdiction it would be unpleasant and unfavourable to have an Appellate Division within an appellate court.⁹³

4.2.4.2 Additional grounds for the removal and suspension of judges

Another sign of the politicisation of the EACJ may be found in the additional grounds for the removal and suspension of the EACJ judges. These grounds targeted the Kenyan judges who presided in the *Anyang' Nyong'o* case. The wave of attacks against the EACJ by the Summit and by the Kenyan government resulted in the image of the Court being tarnished. The EAC Treaty amendments also reduced the Court's independence and EACJ judges have become more insecure. The functioning

⁹⁰ *Attorney General of Uganda v Omar Awadh*, Appeal No 2 of 2012 (arising out of App No 4 of 2011 in Ref No 4 of 2011), EACJ Appellate Division; *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal No 1 of 2011, the EACJ Appellate Division.

⁹¹ An application for a review before the EACJ can be made before it if there is a discovery of some new facts, fraud or error on the face of the record or because of a miscarriage of justice. See art 35(3) of the EAC Treaty; Application No 2 of 2012, EACJ Appellate Division.

⁹² In the General Meeting of African Magistrates and Judges Association during the association's Annual General held in Dar es Salaam, January 2004, the then President of the association remarked that giving the EACJ an appellate jurisdiction 'necessary and overdue step' which member states have to take and failure to do so would make the region to lack a court of 'highest resort in East Africa whose decisions bind all our national courts.' See JE Ruhangisa 'The East African Court of Justice: Ten years of operations [achievements and challenges], a paper presented during the sensitisation workshop on the role of the EACJ in the EAC integration, Kampala, November, 2011. Available at <http://www.eacj.org/docs/EACJ-Ten-Years-of-Operation.pdf> (accessed on 12 February 2013), 26.

⁹³ Art 37(2) of the EAC Treaty mandates the Council to adopt a protocol for extending the jurisdiction of the EACJ which should cover, among other things, appellate jurisdiction.

of the EACJ is largely dictated by the political organs of the Community, rather than by the Court itself, and the Summit has been given an exclusive mandate to remove and suspend EACJ judges.⁹⁴ The extensive powers of the Summit, which came about as a result of the EAC Treaty amendments, have significantly undermined the security of tenure of EACJ judges and ultimately rendered the Court's independence more questionable. Onoria views the impact of the amendments as far reaching, to the extent of weakening rather than strengthening the Court as an important organ of the Community.⁹⁵

Additional grounds for the removal and suspension of EACJ judges after the amendments of the EAC Treaty have increased doubts about the independence and impartiality of the Court. A judge who holds judicial office in the member states can be removed or suspended from that office owing to misconduct or an inability to perform the functions of the Court for 'any reason' as the Summit deems fit.⁹⁶ Also, a judge may be removed from office if convicted of an offence involving dishonesty or fraud or moral turpitude under the laws governing judicial officers in the member states.⁹⁷ If a judge is found guilty of any offence by an independent and credible tribunal it is appropriate to remove them from office. Forms of misconduct stated under article 26 are those which arise in the member states and relate to the offences that the Kenyan judges who presided in the *Anyang' Nyong'o* case were accused of in Kenya. In that respect, the insertion of article 26 in the EAC Treaty reflects the ill will of political leaders. It is easy to see that the article was purposely intended to trigger the removal or suspension of the Kenyan judges, taking into consideration that the EAC Treaty amendments became operational before the final determination of the main case.

Under article 26 of the EAC Treaty, EACJ judges may not necessarily recuse themselves in a matter which might have conflict of interest. However, the Summit is capable of removing a judge as a result of 'misconduct or for inability' to discharge

⁹⁴ Art 26(1) of the EACJ Treaty.

⁹⁵ Onoria (2010) 54 *Journal of African Law* 74, 84.

⁹⁶ Art 26(1)(b)(i) of the EAC Treaty.

⁹⁷ Art 26(1)(d) of the EAC Treaty.

the Court's duties as a result of 'infirmity of mind or body'.⁹⁸ It is not clear when a judge's condition would constitute infirmity to the Summit.. The question regarding the removal of EACJ judges based on the grounds stipulated under article 26(1)(a) of the EAC Treaty must be referred to an independent tribunal which is appointed by the Summit.⁹⁹ Such a tribunal then has to recommend that a judge be removed from office on the basis of misconduct or an inability to discharge the Court's duties due to infirmity of mind or body.¹⁰⁰

EACJ judges are appointed by the Summit from among persons nominated by the EAC member states.¹⁰¹ The EAC Summit also chooses the President and the Vice President of the Appellate Division, as well as the Principal Judge and Deputy Principle Judge of the First Instance Division – all being responsible for the supervision and administration of the activities of the Court.¹⁰² EACJ judges are removed or suspended from office by the Summit.¹⁰³ In a situation which a judge is suspended, a member state of the suspended judge is required to recommend to the Summit a qualified person to be appointed as temporary judge for the duration of the suspension.¹⁰⁴ It is argued that the appointment of temporary judges paves way for a member state to appoint a judge who is more compromising.¹⁰⁵ According to Onoria, the whole process of appointing, removing and suspending EACJ judges is under threat of being politicised starting from the national level,¹⁰⁶ as the process invites the Summit to 'handpick agreeable judges and to weed out troublesome judges'.¹⁰⁷ That is why the EACJ has urged EAC member states to revise the EAC Treaty 'at the earliest opportunity'.¹⁰⁸

⁹⁸ Art 26(1)(a) of the EAC Treaty.

⁹⁹ Proviso to art 26(1)(a) of the EAC Treaty.

¹⁰⁰ Proviso to art 26(1)(a) of the EAC Treaty.

¹⁰¹ Art 24(1) of the EAC Treaty.

¹⁰² Art 24(4) and (5) of the EAC Treaty.

¹⁰³ Art 26(1)(a) of the EAC Treaty.

¹⁰⁴ Art 26(2A) of the EAC Treaty.

¹⁰⁵ Onoria (2010) 54 *Journal of African Law* 74, 85.

¹⁰⁶ Onoria (2010) 54 *Journal of African Law* 74, 86.

¹⁰⁷ As above.

¹⁰⁸ *East African Law Society* case, 45.

The additional grounds for the removal and suspension of EACJ judges should be clearly articulated. Inserting a phrase such as ‘for any reason’ as provided in the Treaty endangers the security of tenure of EACJ judges. The provisions under article 26 of the EAC Treaty invite the Summit, when it is called to determine whether a judge should be removed or suspended from office, to abuse the powers that have been conferred on it by the Treaty. One should therefore not rule out the possibility of a member state maliciously opening misconduct proceedings against a bold judge, knowing that such a judge will be facing removal or suspension from judicial office by the Summit.

It is undisputed that there are no uniform procedures and standards for appointing and removing EACJ judges among EAC member states. In this regard, there is a risk of having double standards when disciplining EACJ judges by simply relying on the national laws of member states. In the *East African Law Society* case, the EACJ acknowledged that basing the removal and suspension of the Court’s judges on the allegations of a home country, invites the ‘possibilities of applying un-uniform standards to judges of the same Court’, which is not coherent with the preservation of the EACJ’s integrity.¹⁰⁹ The EACJ consequently suggested that such mechanisms for suspending and removing EACJ judges can be established at Community level.¹¹⁰ Apart from making the EACJ being more independent and preserving its integrity, having mechanisms which would cater for the means of appointing and removing or suspending EACJ judges at Community level would ensure uniformity in the standards for appointing and disciplining EACJ judges. The Community mechanisms would also influence the creation of an environment for judicial independence within member states.

The EAC Treaty and EACJ Rules are yet to be revised as ordered by the Court in the *East African Law Society* case¹¹¹ in order to make the security of tenure of EACJ judges more secure. The current grounds for the removal and suspension of EACJ

¹⁰⁹ *East African Law Society* case, 45.

¹¹⁰ As above.

¹¹¹ As above.

judges pose a threat to the security of tenure of current Court judges. The lack of impartiality of EACJ judges is a setback to the work of the EACJ; if the EACJ were to fully exercise jurisdiction in human rights cases, there would be some fear as to whether EACJ judges are impartial considering the fact that human rights are controversial.

Judicial independence is an essential element of any democratic government. The independence of the judiciary is linked with the doctrine of separation of powers according to which a judiciary plays a ‘checks and balances’ role within a constitutional government. The fundamental principles that govern the achievements of the objectives of the EAC are good governance, adherence of the principles of democracy, the rule of law and human rights.¹¹² With a lack of judicial independence, the rule of law in the EAC might be in danger of being undermined. Various international human rights instruments provide for the independence of the judiciary in protecting human rights.¹¹³ This shows that judicial independence is an integral factor in the process of realising human rights. Courts need to be independent from any other person or institutions in order to effectively and efficiently dispose of their duties.

4.2.4.3 Limiting the Court’s mandate

The EAC Treaty amendments of 2007 have further narrowed the EACJ’s jurisdiction. The amendments to articles 27 and 30 of the Treaty have meant that the Court does not have an exclusive jurisdiction in interpreting the EAC Treaty. In *Anyang’ Nyong’o* case, the Attorney General of Kenya persistently objected to the jurisdiction of the EACJ, suggesting that the matter ought to be submitted before Kenyan national courts. After the amendments, the EACJ’s jurisdiction in interpreting the EAC Treaty

¹¹² Art 6(d) and 7(2) of the EAC Treaty.

¹¹³ Art 14 of the International Covenant on Civil and Political rights. For a discussion on judicial independence in international courts see: PH Russel and DM O’Brien *Judicial independence in the age of democracy: critical perspectives from around the world* (2001); K Malleon and PH Russel (eds) *Appointing judges in an age of judicial power: critical perspectives from around the world* (2007).

is limited if a mandate is vested in the organs of a member state.¹¹⁴ The Court is not entitled to receive any reference where any question regarding an act, regulation, direction, decision or action is reserved by the Treaty to an institution of a member state.¹¹⁵

As stated above, restrictions imposed under articles 27 and 30 after amendments to the Treaty reflect the retaliation by political organs after the ruling in the *Anyang' Nyong'o* case. The above-stated restrictions form part of arguments advanced by the Attorney General of Kenya when objecting to the jurisdiction of the Court during both the interim and the recusal applications. The Attorney General was of the view that the applicants were required to engage internal mechanisms in disputing the appointment of members of EALA from Kenya. With the intention of shaping the decision of the EACJ in the *Anyang' Nyong'o* case to be subjected to an appeal by establishing an Appellate Division, it is also sensible to suggest that amendments intended to trigger article 52(1) of the EAC Treaty, which gives a mandate to the institutions of the member states to determine whether a person is an elected member of the EALA, and as to whether a seat of the EALA is vacant.¹¹⁶

In the *Anyang' Nyong'o* case, any inactive bench on any given day would have easily invoked article 52(1) of the EAC Treaty and dismissed the claims of the applicants for want of jurisdiction. It is commendable that the Court was not persuaded by strong objections from the Kenyan legal team to abdicate its jurisdiction in applying and interpreting the EAC Treaty. The EACJ was of the view that the gist of the reference was whether the process of electing members of the EALA from Kenya, together with the electoral law, was in accordance with article 50 of the Treaty. In other words, the case was mainly concerned with whether there was an election in the Kenyan parliament and not whether the members from the Kenyan parliament were elected members of the EALA. The latter issue would have definitely barred the

¹¹⁴ Proviso to art 27(1) of the EAC Treaty.

¹¹⁵ Art 30(3) of the EAC Treaty.

¹¹⁶ In *Christopher Mtikila v Attorney General of Tanzania and Others*, Ref No 2 of 2007, the EACJ stated that the question before it was whether the disputed members were elected members of the EALA and that is was distinct from the *Anyang' Nyong'o* case, where the main issue was whether there was an election as provided by the EAC Treaty.

Court from hearing the matter, as the Court is vested in the institutions of the member states as provided under article 52(1) of the EAC Treaty.

Giving national institutions an opportunity to interpret an international treaty is contrary to international law, as this is generally the task of an international court or tribunal.¹¹⁷ Letting a national institution determine a matter relating to the EAC Treaty as provided by article 52(1) can be said to be irrational. It is thus a sign of how eager the EAC member states were to protect their sovereignty. It is also a reflection of the way EAC member states intended to speed up the functioning of the EACJ in establishing community legal order. Although national courts are allowed to seek clarity from the EACJ when a question before them concerns interpretation or application of the EAC Treaty, the duty is simply discretionary.¹¹⁸

The EACJ invoked article 52(1) of the EAC Treaty in the *Mtikila v Attorney General of Tanzania*,¹¹⁹ where the applicant challenged the election of two of Tanzania's nine members to the EALA on the grounds that the terms of two members of the Assembly, elected in a by-election in March 2006 had not yet ended.

Having been alerted to the impact of limiting the Court's jurisdiction, the EACJ stressed that the amendments to the EAC Treaty particularly relating to the mandate of national institutions to interpret the EAC treaty, as provided by the proviso to articles 27(1) and 30(3) of the EAC Treaty, raises the prospects of undermining the 'principle of overall supremacy of the Court over the interpretation and application of the Treaty'.¹²⁰ The EACJ further added that if the provisions are left as they are, there is the likelihood of existing conflicting interpretations of the EAC Treaty by the national courts.¹²¹

¹¹⁷ Onoria (2010) 54 *Journal of African Law* 74, 87.

¹¹⁸ See art 34 of the EAC Treaty.

¹¹⁹ Ref No 2 of 2007.

¹²⁰ *East African Law Society* case, 44.

¹²¹ *East African Law Society* case, 45.

The proviso to articles 27(1) and 30(3) of the EACJ Treaty has already been disputed before the EACJ.¹²² In the *East African Centre for Trade Policy and Law v the Secretary General of the EAC (East African Centre for Trade Policy and Law case)*, the applicant alleged that the amendments to the Treaty caused the EACJ to cede its original jurisdiction to the mechanisms established by the Protocols and national institutions. The basis for litigants to contest such provisions is the concurrent existence of dispute settlement mechanisms established by the Customs Union Protocol¹²³ and Common Market Protocol.¹²⁴

The *East African Centre for Trade Policy and Law case* was decided after the East African Law Society had referred a case before the EACJ questioning the parallel existence of dispute settlement mechanisms established by the protocols with the Court in Reference No 1 of 2011.¹²⁵ In the case submitted by the East African Law Society, the EACJ held that it was vested with jurisdiction to interpret disputes arising out of the Customs Union and Common Market protocols since such protocols are annexes and therefore form an integral part of the Treaty regarding the existence of the dispute settlement mechanisms. The Court also held that the dispute settlement mechanisms created under the Customs Union Protocol and the Common Market Protocol do not exclude, oust or infringe upon its interpretative jurisdiction and that the impugned provisions of article 24 of the Customs Union Protocol and article 54 of the Common Market Protocol are not in contravention of or in contradiction with the relevant provisions of the Treaty.¹²⁶ The Court was of the view that the established mechanisms are a means of alternative dispute resolution and are not contentious cases.

In *East African Centre for Trade Policy and Law case*, regarding the established mechanism under by the two Protocols, the Court took the same view as in the *East*

¹²² See *East African Centre for Trade Policy and Law v Secretary General of the EAC*, Ref No 9 of 2012, EACJ First Instance Division. *East African Law Society v Secretary General of the EAC*, Ref No 1 of 2011, EACJ First Instance Division (*East African Law Society case II*).

¹²³ See art 24(1) of the Customs Union Protocol.

¹²⁴ Art 54(2) of the Common Market Protocol.

¹²⁵ Ref No 1 of 2011, EACJ First Instance Division.

¹²⁶ *Ref No 1 of 2011, EACJ First Instance Division*. 39.

African Law Society case. Concerning the impugned amendments, the EACJ found fault with the entire amendment process and made the following remarks:

It is in the public domain that, although, the partner states made that undertaking on 30 November 1999, when they signed the treaty, to date, the partner states have not concluded the protocol for the extended jurisdiction of the Court. Instead of that, the partner states came up with the impugned amendments, which have the contrary effect of undermining, as opposed to extending the jurisdiction of the Court, in clear breach of the objectives of the Treaty.¹²⁷

Prior to the impugned amendments to the EAC Treaty, the jurisdiction of the EACJ was clear and to a large extent unlimited. Even before the 2007 Treaty amendments, national courts had some form of jurisdiction in interpreting the EAC Treaty.¹²⁸ However, the EAC Treaty tried to ensure the primacy of the Court. Regardless of the EAC Treaty categorically stating that the decisions of the EACJ take precedence over the decisions of national courts;¹²⁹ and where a dispute before a national court is about the interpretation and application of the EAC Treaty or the legality of an act, decisions, directives and regulation of the Community, such national court is required to seek a preliminary ruling from the EACJ when it feels that it is necessary for it to make its judgment;¹³⁰ the fact that it is at the discretion of a national judge to seek a preliminary ruling before the EACJ does not do away with the risk of having conflicting jurisprudence on the EAC Treaty.

After the 2007 amendments to the EAC Treaty, the supremacy and effectiveness of the EACJ was to a great extent weakened. According to article 23 of the Treaty, the EACJ is apparently tasked with interpreting and applying the EAC Treaty for adherence to Community law. For effective adherence to Community law, the EACJ must be the only and the final authority when it comes to interpreting and applying the EAC Treaty. Prior to the amendments, the drafters of the original Treaty intended to guarantee the primacy of the EACJ, but this was later been damaged after the impugned amendments. There is a thus need to have uniformity in Treaty

¹²⁷ *East African Centre for Trade Policy and Law case*, 29.

¹²⁸ Art 33 and 34 of the EAC Treaty.

¹²⁹ Art 33(2) of the EAC Treaty.

¹³⁰ Art 34 of the EAC Treaty.

application to all member states. However, if national mechanisms are involved in interpreting the Treaty, it is almost impossible to attain such uniformity.

By having the proviso to articles 27(1) and 30(3) in the Treaty, in future when the EACJ's jurisdiction will be expanded to cover human rights cases, states might be reluctant to give exclusive powers to the EACJ. It is also likely that some of the jurisdiction of the Court may be taken away and given to organs of the member states, let alone such mandates which have already been conferred on institutions of the member states such as in article 52 of the EAC Treaty. The EAC Treaty also does not define what constitutes organs of state, thus increasing the uncertainty caused by the amendments. These amendments reflect the attitude of member states to the Court. It would seem that member states are trying to distance themselves from the supervision of the EACJ, regardless of expressing their commitment to the Court. It may be recalled that in the former Court of Appeal for East Africa (EACA), matters concerning human rights and the constitutions of member states were left to be determined by the national courts, which was a mistake because human rights records in the region deteriorated and impunity prevailed. The EACA played a significant role in civil and criminal law jurisprudence and it could have done the same in human rights if it had been given a mandate to adjudicate human rights cases. It would be no surprise if a similar approach were to be adopted at the time when the EACJ's jurisdiction is expanded.

4.2.4.4 Time limitation for lodging complaints before the Court

Apart from limiting the jurisdiction of the EACJ, the amendments also restrict accessibility to the Court. The amendments introduced by article 30(2) of the EAC Treaty restrict accessibility to the Court by establishing a two-month time limit for individuals to lodge their complaints before the Court. Citizens of the EAC are thus in danger of being deprived of their right to access justice, as any proceeding that is to be instituted before the EACJ must take place within two months of the enactment,

publication, directive, decision or action complained of, or the day on which the complainant became aware of the matter complained about.¹³¹

As highlighted in chapter 3, in the *Independent Medical Legal Unit v Attorney General of Kenya & Others (Independent Medical Legal Unit case)*,¹³² the First Instance Division held that the reference of 3 000 Kenyans resident in the Mount Elgon District who were subject to acts of torture, cruelty, inhuman and degrading treatment by Kenyan authorities could not be time barred by a 'mathematical computation of time'.¹³³ On appeal, the EACJ Appellate Division held that the applicants had knowledge of the violations since the acts were reported and widely circulated to the public and therefore the applicants were barred from an audience before the Court on the basis of the time having elapsed.¹³⁴ It is from this decision of the Appellate Division that the EACJ applied a strict interpretation of article 30(2) of the EAC Treaty. Even after the applicants applied for a revision, the Court maintained its position of not affirming the applicability of the principle of continuing violations in the EACJ.¹³⁵

In a society such as that in the EAC, where the majority of people are not aware of their rights and have little prospects of accessing justice, a time limitation of two months is unrealistic. A two-month time limitation clause for individuals to access the EACJ is therefore against the principle of rule of law which the EAC member states have committed themselves to adhering to. The ruling in the *Independent Medical Legal Unit* case has the potential of being used as a precedent to dismiss a number of pending human rights related references before the EACJ. This was evident in the *Omar Awadh Omar* case, when the EACJ Appellate Division stated that it could not uphold the principle of continuing violation since it is a human rights

¹³¹ Art 30(2) of the EAC Treaty.

¹³² *Independent Medical Legal Unit v Attorney General of Kenya & Others*, Ref No 3 of 2010, EACJ First Instance Division; *Hilaire Ndayizamba v Attorney General of Burundi*, Ref 3 of 2013, EACJ First Instance Division; *Nyamoya Francois v Attorney General of Burundi*, Ref No 8 of 2011, EACJ First Instance Division

¹³³ *Independent Medical Legal Unit case*, 10.

¹³⁴ *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal No 1 of 2011, the EACJ Appellate Division.

¹³⁵ App No 2 of 2012, EACJ Appellate Division.

principle and the Court does not have the jurisdiction to deal with human rights cases.¹³⁶ The current position of the EACJ, as it applies a strict interpretation of the two-month rule, is contrary to articles 6(c), 6(d), and 7(2) of the EAC Treaty, which call for the peaceful settlement of disputes, compliance with the African Charter on Human and Peoples' Rights (African Charter) in promoting and protecting human rights, and sustaining the rule of law and social justice as governing principles of the EAC.

4.2.5 Pending human rights jurisdiction

Another sign of the politicisation of the EACJ is the on-going process for expanding the Court's jurisdiction. Much has been said about expanding the EACJ's jurisdiction to cover matters concerning trade and human rights. The process for adopting a protocol for expanding the Court's jurisdiction has been unduly prolonged since 2004, when it was agreed that the EACJ's jurisdiction should be expanded to include a human rights mandates.¹³⁷ Article 27(2) of the EAC Treaty instructs the Council to adopt a protocol that would extend the jurisdiction of the Court to include appellate, human rights or any other jurisdiction. As of now, the protocol that would extent this has yet to be concluded.

The EAC member states are not progressive in their approach to ensuring that human rights are effectively protected at Community level and political leaders are hesitant in their approach when it comes to conferring the Court with a human rights jurisdiction. It is not surprising then to find that EAC member states are unenthusiastic with regard to giving the EACJ an explicit human rights jurisdiction,

¹³⁶ See *Omar Awath* case.

¹³⁷ JE Ruhangisa 'The East African Court of Justice: Ten years of operations, achievements and challenges' (2011) 26, A paper for presentation during the sensitisation workshop on the role of the EACJ in the EAC integration, Kampala, 1–2 November, 2011. Available at <http://www.eacj.org/docs/EACJ-Ten-Years-of-Operation.pdf> (accessed on 12 February 2013).

because they are 'reluctant, if not, sometimes hostile to judicial enforcement of human rights even within their own domestic legal system'.¹³⁸

In comparison, the EACA failed to protect human rights in the former EAC simply because it did not have jurisdiction to receive appeals from member states in human rights cases. In as much as East African lawyers are currently benefiting from the ever-expanding jurisprudence of the EACA in civil and criminal matters, the benefits could have also included human rights had the then Court had human rights jurisdiction. There is the danger that, if East African citizens do not capitalise on the presence of the EACJ, its jurisdiction will remain narrow. There is a trend among African states to be inactive when it comes to normative and institutional rehabilitation for promoting and protecting human rights at both national and regional levels. The paramount human rights instrument in Africa, the African Charter, was adopted in 1981, and it took five years for it to come into operation. The Protocol to the African Charter establishing the African Court was adopted in 1998, only to come into force in 2004. At present, 26 African states have ratified the Protocol establishing the African Court, with seven countries permitting direct individual access to the Court.¹³⁹ The African Court took more than eight years to issue its first judgment on merit, which it delivered in 2013.¹⁴⁰

The lack of jurisdiction to adjudicate human rights by the EACJ is concerning in view of the deeper integration process. It also prevents the Court from exercising an important role in the Community. In as far as human rights form part of the founding norms of the Community, it is not appropriate to deny the Court an opportunity to determine matters relating to Community principles. The Community is hoping to reach the federation stage of integration, but this can only be realised if human rights are effectively protected. In any stage of integration, human rights must be observed and effectively protected.

¹³⁸ Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2012) 3.

¹³⁹ Burkina Faso, Ivory Coast, Malawi, Mali, Tanzania, Ghana and Rwanda are the countries which have so far made a declaration to allow direct individual access as provided under art 34 of the Protocol establishing the African Court.

¹⁴⁰ *Christopher Mtikila v Tanzania*, Application No 011/2011.

The EACJ continues to receive human rights related cases. All referred cases which have human rights element face preliminary objections from the respondents, calling into question the competence of the EACJ in dealing with human rights disputes and categorising such cases as human rights cases.¹⁴¹ There is an indication that EAC citizens do not have relevant recourse to their domestic courts, or that they are unable to access credible justice and this is important in view of the fact that individuals are most often the victims of human rights violations by states.¹⁴²

It looks as if EAC member states are not content with the current position of the EACJ with respect to cases with human rights allegation, in which the EACJ states that it has jurisdiction on the rule of law, good governance and other forms of cause of action not restricted under article 27(2) of the EAC Treaty. Thus, EAC member states are satisfied with the current position of the EACJ with respect to human rights related cases, provided that they are not explicitly found in breach of human rights values provided in the EAC Treaty.

The African Court has not met the expectations of most African citizens, legal practitioners or stake holders regarding its efficiency in protecting human rights in Africa. It is only in 2013 when the African Court delivered its first judgment on merits. Most of the cases before the African Court are dismissed on the basis of its lack of jurisdiction to receive direct individual applications from states which have not made a declaration to allow direct individual access before the Court.¹⁴³ In ratifying the African Court Protocol, a state has to make a declaration accepting the competence of the Court to receive direct applications from individuals and NGOs with observer status before the African Commission on Human and Peoples' Rights.

The frustration of EAC citizens with regard to having a Community Court that lacks an appellate and human rights jurisdiction was expressed by Sitenda Sebalu, a

¹⁴¹ In *ALCON International Limited v Standard Chartered Bank of Uganda & Others*, Appeal No 2 of 2011, the EACJ Appellate Division, it was observed that preliminary objections at times retard developments in legal jurisprudence and the quick determination of disputes.

¹⁴² TF Yerima 'Comparative evaluation of the challenges of the African regional human rights courts' (2011) 4 *Journal of Politics and Law* 120, 123.

¹⁴³ See *Femi Falana v African Union*, App No 001 of 2011; *Michelot Yogogombaye v Senegal*, App No 001/2008.

Ugandan citizen who was aggrieved by the decision of the Ugandan Court, and subsequently sought to take the matter before the EACJ. Knowing that the EACJ does not have an appellate jurisdiction, Sebalu asked it to make a declaration that the delay in expanding the jurisdiction of the EACJ to appellate and human rights jurisdiction is contrary to the principles of good governance and the rule of law to which EAC member states have compelled themselves to adhere.¹⁴⁴ The Court, being aware of the delay, stated that the outcome of the process for expanding the jurisdiction of the Court has yet to take place;¹⁴⁵ therefore, the prolonged process is a breach of the Community principle of good governance as provided in the Treaty.¹⁴⁶

After member states had not complied with the decision of the first case, Mr Sebalu successfully asked the EACJ to declare that the failure by the Council of Ministers to implement the order by the Court in Reference No I of 2010 amounted to contempt of court.¹⁴⁷ In 2004, member states embarked on the Zero Draft Protocol for extending the jurisdiction of the EACJ that initially provided for a human rights and appellate mandate for the EACJ.¹⁴⁸ The so-called Zero Draft Protocol did not get far, however, as member states expressed their concerns about the EACJ having an appellate and human rights mandate. Subsequently, a new version of the protocol was prepared and presented before the Sectoral Council on Legal and Judicial Affairs. On March 2012, the Sectoral Council held a meeting to assess the latest version of the draft protocol for extending the EACJ's jurisdiction. This latest version of the protocol extends the EACJ's jurisdiction with regard to trade related matters but not a human rights and appellate jurisdiction.¹⁴⁹ When extending the EACJ's mandate,

¹⁴⁴ *Sitenda Sebalu v Secretary General of the EAC and Others*, Ref No 1 of 2010, EACJ First Instance Division.

¹⁴⁵ Ref No 1 of 2010, EACJ First Instance Division, 29.

¹⁴⁶ *Ref No 1 of 2010, EACJ First Instance Division*, 42.

¹⁴⁷ Ref No 8 of 2012, EACJ First Instance Division.

¹⁴⁸ Bossa (2006) 4 *East African Journal of Human Rights and Democracy* 31, 31.

¹⁴⁹ See the revised background paper on the 13th meeting of the Sectoral Council in legal and judicial affairs, on 12-16 March 2012, Arusha, Tanzania at page 6. The EAC Sectoral Council is of the view that: human rights and appellate jurisdiction should wait until the establishment of political union; The EAC member states' citizens already have access to the African Court; The EACJ should not have appellate jurisdiction as this would be contrary with constitutional

the relationship between national courts and the EACJ has to be clearly addressed, as there might be a need for constitutional amendment by member states so as to fully integrate the EACJ within the legal systems of EAC member states.

Article 126(2)(c) of the EAC Treaty directs member states to take all necessary means to ensure that the EACJ's decisions are judgments or are harmonised. If the EACJ's human rights mandate is still limited, EACJ judges will continue to be hesitant in interpreting the EAC Treaty to enforce human rights obligations, as they are at present. The EACJ is an ideal forum for harmonising human rights norms in the EAC, as was the former EACA in civil and criminal cases. Ultimately the decisions of the EACJ in human rights will set standards and develop human rights jurisprudence in the region.

As stated above, the process for expanding the EACJ's mandate started in 2004 and is still on-going. At the same time there are calls from member states to expand the jurisdiction of the Court to cover matters concerning international crimes. The quest for a human rights mandate in relation to the EACJ is not new. It is now becoming a trend of sub-regional courts to be involved in human rights. For EAC integration to prosper, human rights must not be negated. As Ojienda states, it is a primary duty of EAC member states to observe their international obligations in protecting human rights,¹⁵⁰ as it is hard to visualise a progressive EAC if human rights are not effectively protected. There is no other forum for dealing with EAC matters when protect human rights effectively than the EACJ. It is therefore high time that the Court be endowed with an explicit human rights jurisdiction in order to effectively protect human rights in the Community.

provisions on court hierarchies of the EAC partner states and human rights matters should be left to be dealt with national courts of member states.

¹⁵⁰ TO Ojienda 'Alice's adventures in wonderland: Preliminary reflections on the jurisdiction of the East African Court of Justice' (2004) 2 *East African Journal of Human Rights and Democracy* 94, 98.

4.2.6 Attempts to confer the EACJ with a criminal jurisdiction

Throughout 2012, there were unforeseen developments together with sentiments expressed by African government officials concerning the role of the International Criminal Court (ICC) in Africa.¹⁵¹ Accusations of bias towards Africa have been made against the ICC by African countries, largely as a result of the prosecutions on the Continent, while neglecting similar occurrences on other continents.¹⁵² The AU is on the verge of establishing a criminal chamber within the newly intended Court – the African Court of Justice and Human Rights. It is believed that one of the factors that resulted in African leaders initiating the establishment of regional mechanisms for prosecuting international crimes is the indictment and prosecution of African state officials, either by the ICC or by domestic courts in Europe.¹⁵³

To some extent, there is a feeling of a loss of trust in the ICC among Africans.¹⁵⁴ On 3 July 2009, the AU, at an AU meeting held in Sirte, Libya, adopted a resolution calling upon its members to defy the international arrest warrant issued by the ICC for the President of Sudan, Omar Al-Bashir.¹⁵⁵ At the 50th anniversary of the AU in May 2013, African leaders condemned the ICC, saying that the Court's process that is conducted in Africa is a 'flaw' and that the process 'has degenerated to some kind of race hunting'.¹⁵⁶ The AU further called on the ICC to refer back to Kenya the two cases against President Kenyatta and Vice President William Ruto, who are accused of being involved in crimes committed during the 2007 post-election violence in

¹⁵¹ The Rome Statute was adopted at a diplomatic Conference in Rome on 17 July 1998 and came into force on 1 July 2002.

¹⁵² See CS Igwe 'The ICC's favourite customer: Africa and international criminal law' (2008) 40 *Comparative and International Law Journal of Southern Africa* 294.

¹⁵³ CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067, 1068.

¹⁵⁴ Condemnation of the ICC by African leaders increased after a warrant of arrest was issued to Al-Bashir – the incumbent President of Sudan. Immediately afterwards, the AU demanded that the Security Council defer the ICC's investigation on Al-Bashir as provided in ar 16 of the Rome Statute.

¹⁵⁵ M du Plessis 'Recent cases and developments: South Africa and the International Criminal Court' (2009) 3 *South African Journal of Criminal Justice* 441, 443.

¹⁵⁶ The Ethiopian Prime Minister speaking with the press after the AU Meeting in March 2013 when the AU was marking its 50th anniversary. See Agence France Press 'Africa closes ranks to condemn "racist" ICC on Kenya cases' available at <http://www.afp.com/en/news/topstories/africa-closes-ranks-condemn-icc-kenya-cases/> (accessed on 23 July 2013).

Kenya.¹⁵⁷ Similar accusations against the ICC have been expressed by other EAC leaders. During the inauguration ceremony of President Uhuru Kenyatta, the President of Uganda accused the ICC of being ‘arrogant actors’ with ‘careless and shallow analysis’ dealing with ‘the ones they do not like’.¹⁵⁸ In similar terms, the Rwandan president Paul Kagame was quoted as saying:¹⁵⁹

[W]e cannot support an ICC that condemns crimes committed by some and not others or imposes itself on democratic processes or the will of sovereign people. Such a court cannot facilitate reconciliation which is a vital precursor to peace ... It is evident that political bias, control and flawed methodology are being deployed in the name of International Justice. Yet ICC proponents are ostensibly deaf to the increasingly vocal criticism against the court’s bias towards Africa. This is not acceptable and Africa must stand up to it and refuse to be intimidated or bribed into silence and inaction on this matter.

The sentiments of African leaders, including some from EAC member states, clearly show their disapproval of the ICC. The attempts that have now made to endow the African Court and the EACJ with criminal jurisdiction can be seen as efforts intended to snub the ICC in its work of preventing impunity.

4.2.6.1 The relationship between Kenya and the ICC

The indictment of Kenyan officials by the ICC did not go down well in Kenya or in its neighbouring countries. Shortly after the indictment of Kenyan government officials by the ICC, a number of events took place both in Kenya and at the regional level. These events attempted to undermine the work of the ICC in prosecuting the indictees from Kenya and were generally aimed at bringing the cases involving Kenyan officials back to Kenya or the EACJ. On 22 December 2010, the Kenyan Parliament passed a resolution calling for Kenya’s withdrawal from the Rome

¹⁵⁷ As above.

¹⁵⁸ *Mail & Guardian* newspaper ‘Museveni rails against the ICC during Kenyatta’s inauguration’ available at <http://mg.co.za/article/2013-04-12-00-museveni-rails-against-the-icc-during-kenyattas-inauguration> (accessed on 25 July 2013)

¹⁵⁹ See Chimpreports news ‘Kenyatta trial: Kagame roots for resistance against ICC’ available at <http://chimpreports.com/index.php/mobile/regional-news/rwanda/10298-kenyatta-trial-kagame-roots-for-resistance-against-icc.html> (accessed on 25 July 2013).

Statute.¹⁶⁰ However, before the ICC prosecutor Luis Moreno Ocampo launched his probe, the Kenyan indictees twice succeeded in preventing efforts to establish a local tribunal in Kenya, opting instead to have the matter referred to the ICC. On 31 March 2011, the Kenyan government made an application to the ICC, under article 19 of the Rome Statute, seeking the Court's dismissal of the case against the Kenyan officials.¹⁶¹ The Kenyan government argued that it was willing and able to conduct its own prosecution on those persons indicted by the ICC, because of the legal reforms that had taken place after the adoption of the new Constitution.¹⁶²

On 26 April 2012, the EALA adopted a Resolution requesting the EAC Council of Ministers to request the transfer of Kenyan cases currently before the ICC to the EACJ.¹⁶³ Two days later, on 28 April 2012 at the EAC Summit meeting, the Summit endorsed the EALA Resolution and instructed the EAC Council of Ministers to examine the possibility and expedite the extension of the EACJ's jurisdiction to cover international crimes.¹⁶⁴

Concerns over the future of the ICC should not be underestimated, considering the on-going attempts in Africa for enabling regional and sub-regional courts to have criminal jurisdiction. The African Court is on the verge of establishing a criminal chamber; similarly, the EAC political leaders have repeatedly directed the Council to expedite the process for expanding the jurisdiction of the EACJ to include a criminal jurisdiction. Perhaps more transparency in the activities of the ICC is required to rescue the Court from being on the verge of losing its credibility. The ICC also needs to have more engagement with all political actors and stakeholders in its activities to

¹⁶⁰ *Daily Nation* 'Parliament pulls Kenya from ICC Treaty' available at <http://www.nation.co.ke/News/politics/Parliament%20pulls%20Kenya%20from%20ICC%20treaty/-/1064/1077336/-/v0uyxsz/-/index.html> (accessed on 25 July 2013).

¹⁶¹ On 26 November 2009, the former ICC prosecutor Luis Moreno Ocampo invoked his proprio motu powers as provided under art 15 of the ICC Statute, to seek authorisation from the Pre-Trial Chamber II to open an investigation against Kenyan government officials and senior politicians on alleged crimes committed after the highly disputed Kenyan elections in 2007.

¹⁶² J Dugard *International law: A South African perspective* (2011) 197.

¹⁶³ See the EACJ Resolution 'seeking to try Kenya 2007 general elections aftermath accused persons at EACJ, not ICC' available at http://www.eala.org/component/docman/cat_view/45-key-documents/46-resolutions.html (accessed on 23 July 2013).

¹⁶⁴ See the Communiqué of the EAC Summit, 28 April 2012.

avoid any unnecessary condemnation. Apart from the ad hoc tribunals dealing with international criminal matters across the globe, the ICC should remain as the main and only model for protecting international criminal justice around the world.

4.2.6.2 Justification for criminal jurisdiction in the EACJ

The East African region has already experienced serious socio-political conflicts that led to massive human rights violations. The Rwandan genocide of 1994 is an unwanted and unforgettable blot on the memories of the people in the region. After the 1994 genocide, the Rwandan government requested the UN to establish a special tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda between 1 January 1994 and 31 December 1994. Through Chapter VII of the United Nations (UN) Charter, the Security Council created the International Criminal Tribunal for Rwanda (ICTRR) in 1994. The new leaders of Rwanda further realised that if genocide cases were to be submitted to the traditional justice mechanisms, the process would have taken up to 200 years to complete. The Rwandan government therefore set up the Gacaca Courts within local communities. Despite their critics, the Gacaca Court trials were successful in bringing transitional justice to Rwanda.

During most of 2013, EAC leaders expressed their desire and commitment to grant the EACJ a criminal jurisdiction and the Summit urged the Council of Ministers to expedite the process of expanding the jurisdiction of the EACJ to include matters concerning international crimes. The desire shown to grant the EACJ a criminal jurisdiction is not, however, the same as expanding the Court's jurisdiction to handle human rights cases.

As a justification for criminal jurisdiction in the EACJ, regional leaders rely on the principle of complementarity, as provided in the Rome Statute, to extend the jurisdiction of the EACJ to include a criminal jurisdiction.¹⁶⁵ However, the Rome

¹⁶⁵ Art 17 of the Rome Statute. The complementarity principle entails that the ICC is a court of last resort and will refrain from intervening in any country where such a country is either able or willing to investigate and prosecute perpetrators of grave crimes against humanity.

Statute does not anticipate the role of regional mechanisms to adjudicate on crimes that would otherwise be tried before the ICC or at the national level. According to the Rome Statute, the ICC is complementary only to the national criminal jurisdiction¹⁶⁶ and it does not mention the applicability of the complementarity principle to regional mechanisms such as the EACJ. The non-mention of the applicability of the complementarity principle to the existing regional mechanism may lead to legal uncertainties when the African Court and the EACJ are to be vested with a criminal jurisdiction. Question marks will also exist as to how the African Court and the EACJ will coexist if both are given jurisdiction in international crimes.

Meanwhile, giving the EACJ jurisdiction in international crimes would not be contrary to the EAC Treaty, because article 27(2) of the EAC Treaty mandates the Council to adopt a protocol that would extend the jurisdiction of the EACJ to include appellate, human rights or any other jurisdiction as determined by the Council. The phrase 'any other' leaves room for the Council to adopt a protocol which might give the Court jurisdiction in international crimes. Although the EAC Treaty permits the EACJ to have criminal jurisdiction, whether the EACJ has the capacity to adjudicate cases concerning international criminal law is a matter of further discussion. One could also argue whether the EACJ has, in the first place, the capacity to adjudicate human rights disputes as advocated in this study. As proven by the ECOWAS Court, a regional organisation composed of developing nations can have a successful regional court dealing with human rights. Cases involving international crimes require more financial obligation than ordinary human rights cases.

If the EACJ was to be given jurisdiction to prosecute international crimes, there would be a need to introduce a new office, specifically the office of the prosecutor, which has cost implications. There would also be an urgency to increase the number of registry, security and support staff. Judges from member states with legal knowledge of international criminal law are scarce; hence the financial implications when conducting international criminal trials are quite high. Costs include legal aid, establishing and maintaining detention facilities, setting up witness protection

¹⁶⁶ Para 10 of the Rome Statute.

mechanisms and investigative services and conducting outreach and promotional activities. The annual budget of the EACJ amounts to an estimated \$4 279 489.¹⁶⁷ The unit cost of a single trial before the ICC is estimated to be US\$20 million,¹⁶⁸ almost four times the total current budget of the EACJ. Member states will have to significantly increase the budget of the EACJ if they wish to enable the Court to prosecute international crimes effectively. Given the high cost of conducting international criminal trials, it is hard to see how EAC member states would be able to cover such expenses.

Africa has the largest number of parties to the Rome Statute compared to other continents. As of 31 June 2013, 34 states were party to the Rome Statute.¹⁶⁹ This high number of African states signifies their initial commitment to the ICC. It is also a fact that many African countries are parties to the ICC and not to the African Court.¹⁷⁰ Sub-regional organisations have the duty to fight impunity and champion justice in their respective regions. The move to give the EACJ criminal jurisdiction must be accompanied by genuine, progressive and tangible steps towards establishing criminal justice in the Community.

The EACJ's lack of capacity could result in its credibility being called into question if and when the given jurisdiction on international crimes and crimes against humanity is exercised. It also raises questions as to whether the move is feasible, desirable or credible. The on-going process can be linked to many other attempts seeking to undermine the role of the ICC in cases involving the current Kenyan president and the vice president or any other suspected indictees in the region. In view of the fact

¹⁶⁷ Report of the EALA Committee on the general purpose of the EAC budget estimates of revenue and expenditure for the financial year 2013/2014, 4 June 2013.

¹⁶⁸ See 'Implications of the African Court on Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes, Opinion by various African NGOs', 16.

¹⁶⁹ The number of state parties in the Rome Statute http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed on 9 June 2013). In other regions, 18 are Asia-Pacific states, 18 are from Eastern Europe, 27 are from Latin America and the Caribbean and 25 are from Western Europe and other states.

¹⁷⁰ As of 8 July 2013, only 26 African states out of 54 have ratified the protocol establishing the African Court.

that the EACJ currently does not have enough capacity, any attempt to confer the EACJ with criminal jurisdiction in the near future will generally be seen as an effort to derail the fight against impunity and undermine the work of the ICC. EAC member states must honour their commitment to the Rome Statute and refrain from any measures which might lead to impunity within the Community.

4.2.7 Role of the EACJ in a political environment

4.2.7.1 Judicial behaviour of international courts

Scholars such as Alter are engaged in debates with respect to the decision of states to establish and delegate authority to international courts, as well as with issues such as the subsequent autonomy and behaviour of those courts.¹⁷¹ The relationship between states, international courts and international judges is compared with the principal–agent in a trusteeship agreement.¹⁷² The existence and survival of international courts rely heavily on the political commitment of states. International courts are likely to create an atmosphere for a ‘political space where regular politics’ do not ‘shape how the law is interpreted and applied’.¹⁷³ An international court plays a key role in institutional frameworks and in advancing the various programmes and policies of an international organisation — a role that the EACJ is also expected to fulfil.

When adjudicating international disputes various theories have been developed in analysing the judicial behaviour of international courts. One of them is the attitudinal model of judicial behaviour. The attitudinal model is a pre-eminent approach in the recent political science theories on judicial behaviour.¹⁷⁴ The theory

¹⁷¹ See KJ Alter ‘Agents or trustees? International courts in their political context’ (2008) 14 *European Journal of International Relations* 391.

¹⁷² M Elsig & MA Pollack ‘Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization’ (2012) 25 *European Journal of International Relations* 1.

¹⁷³ Alter (2008) 14 *European Journal of International Relations* 391, 424.

¹⁷⁴ S Jodoin ‘understanding the behaviour of international courts: An examination of decision-making at the ad hoc international criminal tribunals’ (2010) 1 *Journal of International Law and International Relations* 8. Also see Dyevre, A ‘Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour’ (2010) 2 *European Political Science Review* 297.

suggests that the ideas, attitudes and values of international judges are key variables for understanding their basis for decision-making. In terms of the attitudinal model, international judges tend to take their decisions on the merits of the facts in the matter in combination with their personal policy preferences.¹⁷⁵ A courageous judge would thus honour the development of a strong international legal system and accord limited deference to state sovereignty. Such a luxury of a strong international legal system and limited defiance with regard to state sovereignty does not exist in the current EAC legal regime.

The second approach to the judicial behaviour of international courts is the strategic model. This model posits that judicial decision-making is rational and goal-oriented. Strategic theorists are of the view that 'whenever strategic judges choose among alternative courses of action, they think ahead to the prospective consequences and choose the course that does most to advance their goals in the long term'.¹⁷⁶ Most lawyers and legal academics may tend not to agree with this theory. However, the rational and goal-oriented approach might be ideal when dealing with cases with huge political interests.

An international judge should not decide in favour of a state simply to refrain from hostile measures. The strategic model of judicial behaviour is more useful when a judge is in a position to interpret a treaty progressively. In doing so, political considerations must be taken into account. The surrounding politics and values of the international system should be given priority when adjudicating international disputes, because international law remains under the control of states, which gives rise to inevitability in that politics cannot be wished away.

¹⁷⁵ S Jodoin (2010) 1 *Journal of International Law and International Relations* 8.

¹⁷⁶ See S Jodoin (2010) 1 *Journal of International Law and International Relations* 12. Also see G Hernández 'Impartiality and bias at the International Court of Justice' (2012) 1 *Cambridge Journal of International and Comparative Law* 200.

The major risk that international courts face, including the EACJ, is political interference from states. Even if the EACJ is an essential engine of EAC integration,¹⁷⁷ its activities remain under strain for a number of reasons. As already stated, the work of the EACJ has to a great extent been politicised. For instance, the existing means of judicial appointments of EAC judges invite political interference in the work of the Court. One cannot rule out the tension between legal and political pressure on international judges when adjudicating a sensitive matter affecting the sovereignty and interests of a respondent state. The interplay between politics and international law may result in judges and courts acting strategically to balance the two. However, the inevitability of political pressure on international Judges does not license them to anticipate how their audiences will respond to their rulings and eventually adjust the rulings accordingly.¹⁷⁸ A judge should not be swayed by political pressure or public expectations.

It is almost impossible to separate politics from international law.¹⁷⁹ Virtually everyone who comes across some features of international law does so by absorbing the existing clashes between domestic and international law, an area where politics plays a key role. The interplay between politics and international law is at times complex and difficult to ‘unravel’,¹⁸⁰ and strictly applying international law on its own cannot be an answer to resolving the dynamics of international politics. The pragmatic nature of some international disputes before international judiciaries requires more than legal solutions, and the political context of such disputes should be considered.

¹⁷⁷ A good example of the role of the judicial body in a regional economic community is the European Court of justice. See, AM Burley & W Mattli ‘Europe before the court: a political theory of legal integration’ (1993) 47 *International Organisation* 41.

¹⁷⁸ See L Epstein & J Knight, “Toward a strategic revolution in judicial politics: A look back, a look ahead” (2000) 53 *Political Research Quarterly* 625.

¹⁷⁹ See M Koskenniemi ‘The Politics of international Law’ (1990) 1 *European Journal of International Law* 4; M Koskenniemi ‘The fate of public international law: Between technique and politics’ (2007) 70 *Modern Law Review* 1.

¹⁸⁰ MN Shaw *International law* (2008) 12. See also L Henkin *International law: Politics and values* (1995); M Koskenniemi *The politics of international law* (2011).

4.2.7.2 Role of judges

A prominent feature of modern international law is the increased role of international courts.¹⁸¹ The judges of international courts have a bearing on the much acknowledged role of international judiciaries. Unlike domestic judges, international judges operate within specialised and often self-contained legal regimes and structures. Moreover, international judges and member states share a fiduciary relationship in which the latter entrust the former with exercising their expertise when interpreting international law.

The primary function of an international court is to settle international disputes. In that context, international courts may interfere significantly with national activities and interests, eventually inviting hostile measures.¹⁸² Accordingly, the survival of the EACJ depends on the political will of the member states. It should be remembered that the EAC member states established the EACJ in order to observe and maintain the rule of law within the Community. The fact that the EAC member states established the EACJ does not protect the court from political attacks from the same members who established it.

In an attempt to deal with a politicised environment, there are a number of approaches that the EACJ and its judges can adopt. First, the EACJ should encourage litigants to take some matters that involve the infringement of the EAC Treaty to their national courts. In that way, national courts will play a greater role in enforcing EAC law. A member state would find it harder to defy the order of a national court than an international decision. One of the factors that has enabled the European Union (EU) Court to successfully escape negative political responses and constant oversight from member states is the direct effect principle of EU law.¹⁸³ According to this principle, EU citizens have standing to draw on EU law before national courts. Also, national courts are forums for enforcing the supremacy of EU law with national

¹⁸¹ Ulfstein 'The international judiciary' in J Klabbbers et al (eds) *The constitutionalisation of international law* (2011) 126.

¹⁸² Ulfstein in J Klabbbers et al (eds) *The constitutionalisation of international law* (2011) 127.

¹⁸³ See KJ Alter 'The global spread of European style international courts' (2012) 35 *West European Politics* 133.

governments. The EU Court has thus enhanced national courts' involvement in the observance of EU law by introducing the direct effect principle. In the EAC, it is also possible for citizens to challenge EAC laws before a national court and the EACJ can use this platform so as to make national courts more involved in spreading Community norms at the national level. The national courts of EAC member states are given an opportunity to entertain matters where EAC law is in question. 'Except where jurisdiction is conferred on the [EACJ] by [the EAC] Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the [member states]'.¹⁸⁴

Second, EACJ judges should ensure that they undertake their responsibilities independently and always act impartially. Judicial independence aims mainly to protect judges from undue interference and influence. EACJ judges are required to make their decisions in an impartial manner. Accordingly, the Court's findings should not be as a result of bias, favour or prejudice. The EACJ needs to perform its duties judicially. Public confidence will be maintained if the Court discharges its duties without any undue influence. It is not only the responsibility of a single judge to honour the judicial office and public confidence of the EACJ; it is a collective responsibility of EACJ officials as an institution.¹⁸⁵ The EACJ should conduct itself in such a manner that it is essentially transparent in the way the adjudication process is conducted, the way the judges conduct themselves, the way the courts regulate collectively the conduct of their members, and the way in which the activities of the Court are run.

Third, EACJ has to preserve and promote its political and public legitimacy.¹⁸⁶ Extra-judicial activities such as advocating by organising meetings and workshops with national judges, practitioners, NGOs and civil society will expand the Court's profile, regardless of any political attempts to undermine it. The EACJ has to maintain its

¹⁸⁴ Art 33(1) of the EAC Treaty.

¹⁸⁵ For a discussion on the role and accountability of international judges, see P Mahoney 'The international judiciary: Independence and accountability' (2008) 7 *The Law and Practice of International Courts and Tribunals* 315.

¹⁸⁶ For a general discussion on the concept of public legitimacy see E Voeten 'Public opinion and the legitimacy of international courts' (2013) 14 *Theoretical Inquiries in Law* 411.

political legitimacy on the part of the member states and social legitimacy on the part of EAC citizens. Also, the legitimacy of the EACJ will only be strengthened when it issues consistent and high-quality decisions that are formally supported by EAC law.

Fourth, the EACJ should not interpret the EAC Treaty aggressively to the extent of crossing the boundaries inserted within the Treaty. Helfer and Alter are of the view that 'there is no inherent relationship between expansive judicial law-making and challenges to [international courts] legitimacy'.¹⁸⁷ However, expansive judicial law making might expose an international court to attract hostile counter-responses from states. A court needs to be cautious when adopting a purposive interpretation approach; it has to act in a manner that does not exceed its given jurisdiction. As with the case of the EACJ, the Court would be in danger of further political attacks if it had interpreted the African Charter as provided in the EAC Treaty when adjudicating cases that had human rights elements.

It should be acknowledged that EACJ judges alone cannot defuse a politicised atmosphere in the EACJ. A strong political foundation from member states to enable the EACJ to function effectively is vital. When no such political will is forthcoming from member states, EACJ judges should act independently when exercising their judicial activities. The EACJ should not abstain from handling any type of case, including those to which political strings are attached. With the expansion of EAC integration, more cases will be brought to the EACJ and some might be sensitive to the extent of affecting national policies. In such a scenario, the EACJ might issue a judgment that sparks political reprisals.

If the EACJ is to be given an explicit human rights mandate, the Court will be dragged into a more sensitive terrain and rights litigation will increase member states'

¹⁸⁷ See LR Helfer & KJ Alter 'Legitimacy and Lawmaking: A tale of three international courts' (2013) 14 *Theoretical Inquiries in Law* 483. At a certain point, by providing examples from the suspended SADC Tribunal, Helfer and Alter acknowledge that certain types of expansive lawmaking by international courts may trigger legitimacy challenges. See also RH Steinberg 'judicial lawmaking at the WTO: Discursive, constitutional, and political constraints' (2004) 98 *American Journal of International Law* 247.

interests. The EACJ should not overstep the boundaries placed under the EAC Treaty. On the contrary, the Court should accept the fact that it will encounter a variety of unpleasant incidents, such as the 2007 EAC Treaty amendments. As advocated by Alter, international judges are appointed entirely on the basis of their expertise and qualifications, and they perform their judicial duties in an impartial and diligent manner, according to the law without interference by governments.¹⁸⁸ However, it is difficult to maintain that international judges are trustees, and therefore, they can always perform their duties diligently when there is a politicised scene.

4.3 Proclamation of state sovereignty

The role of international law has significantly increased in respect of overseeing the actions of states within their territories.¹⁸⁹ The ever-increasing influence of international law on the internal affairs of states has created tension between state sovereignty and international law.¹⁹⁰ State sovereignty presupposes some form of autonomy which states enjoy in exercising different activities within their territories. Yet, those states wishing to have such independence make promises and eventually commit themselves to different international treaties. This in the end clashes with the whole idea of state sovereignty. When a state accepts that an international body exercises some form of authority which oversees that state's internal actions, the state eventually loses some of the autonomy it had previously.¹⁹¹ It is claimed that the establishment of different international institutions has resulted in the defence of state sovereignty losing momentum.¹⁹² International law has encroached on state territory. Even if a state has not formally expressed its commitment to a particular international obligation, the violation of international law will not be condoned by simply relying on its sovereignty.

¹⁸⁸ Alter (2008) 14 *European Journal of International Relations* 391, 422.

¹⁸⁹ OA Hathaway 'International delegation and state sovereignty' (2008) 71 *Law and Contemporary Problems* 115, 115.

¹⁹⁰ As above.

¹⁹¹ Hathaway (2008) 71 *Law and Contemporary Problems* 115, 133.

¹⁹² E de Brabandere 'The impact of supranationalism on state sovereignty from the perspective of the legitimacy of international organisations' in D French (ed) *Statehood and self-determination: Reconciling tradition and modernity in international law* (2013) 450.

According to Shaw, '[i]nternational law is based on the concept of the state'. Accordingly, it is through statehood that the concept of sovereignty comes into existence.¹⁹³ International law has facilitated cooperation by sovereign states in different forms. In as far as international human rights law is concerned, persistency in preventing state sovereignty might be an obstacle in the process of promoting and protecting international human rights law.

It is common to find a provision in the constitutive instrument of an international court or international organisation reserving some matters to be exercised by state organs. In most cases, the competence of state organs in exercising matters relating to the state's obligations within an international organisation is not effective and general creates confusion.¹⁹⁴ The notion of strictly maintaining state sovereignty in an international organisation is common but it should not be encouraged.

The UN is, for example, not supposed to intervene in matters which have essentially been conferred on the domestic jurisdiction of any state, unless the intervention is in the enforcement measures with respect to threats to peace, breach of peace, and acts of aggression.¹⁹⁵ Although state sovereignty cannot be completely ignored, placing some of the key functions of international obligations under the scrutiny of state organs may jeopardise the whole purpose and objectives of such organisations.

It is relatively uncommon to find an international organisation qualifying as a completely independent entity at 'first sight',¹⁹⁶ and it is generally impossible for a state to cede all its powers to an international organisation. States should be encouraged to give some of their powers to an international organisation to which they are parties so as to enable the organisation to prosper in its ambitions. In the EAC, member states have made significant powers in their disposal, which have a

¹⁹³ MN Shaw *International law* (2008) 487.

¹⁹⁴ J Crawford *Brownlie's principles of public international law* (2012) 453.

¹⁹⁵ Art 2(7) of the UN Charter.

¹⁹⁶ C Schreuer 'The waning of the sovereign state: Towards a new paradigm for international law?' (1993) 4 *European Journal of International Law* 447, 453.

bearing on the daily activities of the EACJ.¹⁹⁷ Political organs of the EAC comprise the Heads of State and Foreign Ministers who are heavily involved in the work of the EACJ. In as far as the supremacy of the EACJ is concerned, the constitutions of the EAC member states do not ceded any of their powers to EACJ. Therefore, in the on-going process for adopting the protocol to extend the jurisdiction of the EACJ, ensuring its supremacy should be a priority.

4.3.1 State sovereignty and contemporary international law

International law is made up of the integrated legal systems of different states¹⁹⁸ and state sovereignty is recognised as a general principle of international law.¹⁹⁹ There are three dimensions to the principle of state sovereignty: First, all sovereign states, regardless of their territorial size, possess equal rights; second, the territorial integrity and political independence of states are inviolable; and third, no other state can interfere with the internal matters of a sovereign state.²⁰⁰ The principle is recognised in a number of constitutive instruments of international organisations. The UN is founded on the principle of the sovereign equality of all the member states²⁰¹ and no member of the UN is mandated to interfere in matters that are specifically reserved to domestic jurisdictions unless the intervention is for the enforcement of measures concerning threats to peace, breaches of the peace and acts of aggression.²⁰² The EAC is governed according to the principle of sovereign equality among the members.²⁰³ Although the concept of sovereign equality is still

¹⁹⁷ The Summit, as the highest political organ of the Community, is comprised of the Heads of State of the member states primarily responsible for giving impetus and general direction to the development and achievements of EAC objectives. The Council, which is the main policy-making organ, is made up of ministers responsible to EAC affairs and the Attorneys General from member states.

¹⁹⁸ See A Ferreira-Snyman 'Sovereignty and the changing nature of public international law: Towards a world law?' (2007) 40 *Comparative and International Law Journal of Southern Africa* 395.

¹⁹⁹ Ferreira-Snyman (2007) 40 *Comparative and International Law Journal of Southern Africa* 395, 406.

²⁰⁰ The Report of the Commission on Global Governance 'Our global neighbourhood' (1995) 68, available at <http://humanbeingsfirst.files.wordpress.com/2009/10/cacheof-pdf-our-global-neighborhood-from-sovereignty-net.pdf> (accessed on 13 May 2013).

²⁰¹ Art 2(1) of the UN Charter; art 4(2) of the Treaty on the EU.

²⁰² Art 2(7) of the UN Charter.

²⁰³ Art 6(a) of the EAC Treaty.

debatable, the principle as provided in the EAC Treaty can be said to imply the same rights and same duties for the member states.²⁰⁴

States have repeatedly used the principle of state sovereignty as a shield to defy international law commitments.²⁰⁵ Universal values such as good governance, democracy and human rights have increased the influence of international law on the conduct of states.²⁰⁶ In addition, the influence of international organisations on the activities of member states has allowed the traditional notion of non-interference in the internal affairs of states lose its bearings.²⁰⁷ The existence of various international treaties which impose international obligations on states is an indication of the increasing influence of international law on state sovereignty. Furthermore, the creation of various international judiciaries implies the intention of states to have an international body that would supervise states. According to Wismer, the establishment of the ICC reflects the advancement of international law to the extent of holding individuals and states personally liable for their wrongful acts under the Rome Statute.²⁰⁸

In circumstances where an international organisation fails to play a substantial role in influencing its members to observe international norms, there is a likelihood of persistent impunity and breaches of international law by the member states. The erstwhile Organization of African Unity was unable to play any meaningful role in

²⁰⁴ Kelsen argues that according to general customary international law, states do not have the same duties and rights. See H Kelsen 'The principle of sovereign equality of states as a basis for international organizations' (1944) 53 *Yale Law Journal* 209-210.

²⁰⁵ See A Bodley 'Weakening the principle of sovereignty in international law: The international tribunal for the former Yugoslavia' (1999) 31 *New York University Journal of International Law and Politics* 420. For a discussion relating to state sovereignty and international law see L Henkin 'An agenda for the next century: The myth and mantra of state sovereignty' (1994) 35 *Virginia Journal of International Law* 115; C Schreuer 'The waning of the sovereign state: Towards a new paradigm for international law?' (1994) 4 *European Journal of International Law* 447; M Melandri 'The relationship between state sovereignty and the enforcement of international criminal law under the Rome Statute: A complex interplay' (2009) 9 *International Criminal Law Review* 531.

²⁰⁶ AY Seita 'Globalization and the convergence of values' (1997) 30 *Cornell International Law Journal* 429, 431.

²⁰⁷ Ferreira-Snyman (2007) 40 *Comparative and International Law Journal of Southern Africa* 395, 408.

²⁰⁸ See P Wismer 'Bring down the walls! On the ever-increasing dynamic between the national and international domains' (2006) 5 *Chinese Journal of International Law* 511.

preventing gross human rights violations in some African states. By contrast, the Constitutive Act of the AU tries to make amends for the failures of the organisation of African Unity (OAU). For example, the AU is now able to intervene in a member state pursuant to events such as war crimes, genocide and crimes against humanity.²⁰⁹

International human rights law stands out as an important foundation for establishing a just society. State sovereignty and international human rights laws are said to be phenomena which are 'fundamentally opposed'.²¹⁰ While state sovereignty entails a state being autonomous in performing its internal affairs, international human rights law penetrates the borders of states to make the states accountable in the international sphere. Indeed, it is the very intention of international human rights law to 'undermine and erode' state sovereignty.²¹¹ A considerable number of international human rights instruments have established monitoring bodies specifically tasked with monitoring the observation of human rights by member states. Today, international law has to a large extent been successful in diminishing state sovereignty. Apart from existing treaty obligations, states are bound by the norms of customary international law, obligations *erga omnes* and *jus cogens*, even if this is against the states' will.²¹²

Increasingly, human rights form part of the foreign policy objectives of different countries and are crucially influential in state relations. Many international organisations encourage and oblige states to develop their constitutions, laws and policies so as to safeguard the rule of law, respect for human rights, good

²⁰⁹ Art 4(h) of the Constitutive Act of the AU. For a discussion on the intervention mandate of the AU see B Kioko 'The right of intervention under the African Union's Constitutive Act: from non-interference to nonintervention' (2003) 85 *International Review of the Red Cross* 812.

²¹⁰ J Donnelly 'State sovereignty and human rights', working paper University of Denver, (2004) 1, available at <http://www.du.edu/korbel/hrhw/workingpapers/2004/21-donnelly-2004.pdf> (accessed on 12 May 2013).

²¹¹ J Donnelly 'State sovereignty and human rights', working paper University of Denver, (2004) 11.

²¹² J Donnelly 'State sovereignty and human rights', working paper University of Denver, (2004) 15.

governance and democracy.²¹³ Looking at the EAC Treaty, it would seem that member states still wish to maintain full sovereignty while simultaneously committing themselves to the integration objectives that necessitate them ceding some of their sovereignty to the EAC in order to realise Community objectives.²¹⁴

Developments in human rights law have nevertheless led to the reconceptualisation of the principle of state sovereignty.²¹⁵ When a state commits itself to adhering to international legal norms, relying heavily on state sovereignty becomes meaningless. Thus the EAC member states decided to form an international organisation that enhances international legal norms. More specifically, the EAC member states are committed to respecting and maintaining good governance, the rule of law, democracy and universally accepted human rights standards as guiding principles when discharging the activities of the Community.²¹⁶

Like its predecessor, the EACJ is still being restricted in its determination of human rights disputes. Human rights in the EAC are monitored through organs and institutions of member states. So far the EACJ is playing a leading role in realising human rights within the EAC on the basis of protecting the rule of law. However, article 27(2) of the EACJ Treaty is used by member states as a shield for ensuring that the EACJ does not adjudicate human rights disputes. Notwithstanding this existing limitation on the EACJ to adjudicate human rights disputes, the Court is mandated to uphold Community general principles that include respect for human rights and other international law principles. However, , the EACJ judges are reluctant to directly interpret the human rights provisions in the EAC Treaty due to the restrictions imposed under article 27(2) of the EAC Treaty.

EAC member states have to ensure that the EAC is independent and able to perform its duties efficiently. The EACJ will be effective if some of its jurisdiction is not in

²¹³ A Rosas 'State sovereignty and human rights: Towards a global constitutional project' (1995) 43 *Political Studies* 61, 70.

²¹⁴ Ruhangisa 'The East African Court of Justice: Ten years of operations, achievements and challenges' (2011) 33.

²¹⁵ See K Mills 'Reconstructing sovereignty: A human rights perspective' (1997) 15 *Netherlands Quarterly of Human Rights* 267.

²¹⁶ Art 6(d) and 7(2) of the EAC Treaty.

competition with that of national institutions. Compliance with EAC law and EACJ decisions might also be a great measure of the extent to which member states are ceding their powers to the EAC. It should be acknowledged that total abolition of state sovereignty is not possible; however, the impossibility of negating state sovereignty should not distort EAC integration objectives and principles. Therefore, EAC member states have to ensure that EAC organs perform their duties without any limitations based on state sovereignty. It is on this basis the call to the member states to cede some all their to ensure the EAC perform its duties effectively is lauded.

4.3.2 Evidence of the sovereignty syndrome in the EAC

Sovereignty concerns may affect the design and operation of an international judiciary.²¹⁷ In many instances, EAC member states have conducted themselves in a manner which implies their unwillingness to cede some of their powers to the EAC. Moreover, the lack of political will to support the activities of the Community will have far-reaching effects on the progress of EAC integration. The EACJ is not fully supported by member states and it has become almost customary for Attorneys General of EAC member states to challenge the jurisdiction of the EACJ. When a member state is alleged to infringe the EAC Treaty before the EACJ, Attorneys General often challenge the jurisdiction of the Court unnecessarily.

In disputes involving allegations concerning violations of articles 6(d) and 7(2) of the EAC Treaty, which make reference to human rights, member states tend to classify such disputes as human rights disputes and call on the EACJ to dismiss them as the Court lacks human rights jurisdiction. There is a feeling that, at times, preliminary objections are intentionally used to impede the Court's process in administering justice. In *Samuel Mohochi v Attorney General of Uganda*, the respondent objected to the jurisdiction of the EACJ by stating that Uganda is a sovereign state and is not submerged by EAC law when it comes to the right of denying entry to unwanted persons in the country, even if such persons are East African citizens who are

²¹⁷ Alter (2012) 35 *West European Politics* 135, 137.

guaranteed the right to free movement under the Common Market Protocol.²¹⁸ The EACJ dismissed the objection and found that Uganda contravened the EAC Treaty and the Common Market Protocol by denying the applicant his right to free movement within the Community.

With regard to the EAC Treaty, there are some provisions that provide proof of the existence of the sovereignty syndrome in EAC member states. After the ruling in the *Anyang' Nyong'o* case,²¹⁹ which led to the amendment of the EAC Treaty, member states inserted, among others, the proviso under articles 27(1) and 30(3) which subject the Court's jurisdiction to the organs of the member states. The proviso to article 27(1) of the EAC Treaty recognises that the interpretation of the Treaty can be vested in the organs or institutions of a member state, while article 30(3) restricts the Court from exercising jurisdiction on an Act, regulation, directive, decision or action that is reserved to an institution of member states. The EACJ did however invoke article 30(3) of the EAC Treaty in a case concerning the legality of members of the EALA elected by the Tanzanian Parliament.²²⁰

The EACJ is an international judiciary purposely established to safeguard EAC integration. To ensure that the EACJ effectively discharges its duties in supervising the progress of EAC integration, member states are obliged to abstain from any measures likely to curb the implementation of the EAC Treaty.²²¹ By conferring some of the jurisdiction on the organs of the member states in matters concerning EAC integration, member states diminish the ability of the EACJ to strengthen this integration, thus defeating the whole purpose of establishing the Court. As has already been established, Community organs and institutions take precedence in all activities concerned with the implementation of the EAC Treaty that are also performed at the national level.²²² Member states are required to enact laws for

²¹⁸ See *Samuel Mohochi v Attorney General of Uganda*, Ref No 1 of 2011, EACJ First Instance Division, 45.

²¹⁹ Application No 1 of 2006.

²²⁰ Ref No 2 of 2007.

²²¹ Art 8(1)(c) of the EAC Treaty.

²²² Art 8(4) of the EAC Treaty.

conferring precedence to Community organs, institutions and laws over national ones when implementing the EAC Treaty.²²³

In the *East African Centre for Trade Policy and Law* case,²²⁴ the applicant contended that the amendments to the EAC Treaty that introduced the proviso to articles 27(1) and 30(3) and the established dispute settlement mechanisms for supervising the customs union and common market in the EAC infringes articles 5, 6, 8(1),(4) and (5), 23, 33(2) and 126 of the EAC Treaty. The main argument of the applicant was that the amendments to the EAC Treaty and the supervisory mechanisms established in the Common Market and Customs Union Protocols deny the EACJ an important opportunity to strengthen EAC integration.²²⁵ The Court observed that, prior to the Treaty amendments in 2007, the scope of the Court's jurisdiction was 'wide and unlimited'.²²⁶ The EACJ went on to fault the EAC Treaty amendments and stated that the proviso to articles 27(1) and 30(3) of the EAC Treaty, which oust the jurisdiction of the Court in favour of organs within member states undermines the supremacy of the Court.²²⁷

When an organ of an EAC member state interprets the EAC Treaty, there is a likelihood of a conflicting and confusing interpretation. The unwillingness by EAC member states to cede some of their powers to the EAC does not augur well for EAC integration aspirations. EAC member states seem to have abandoned their own commitments as well as the desire to establish a viable form of East African integration. Such aspirations will not be met if the EACJ's mandate continues to be restricted. In *the Anyang' Nyong'o* case, the EACJ remarked the following:²²⁸

While the Treaty upholds the principles of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role.

²²³ Art 8(5) of the EAC treaty.

²²⁴ Ref No 9 of 2012, EACJ First Instance Division.

²²⁵ *East African Centre for Trade Policy and Law* case, 10.

²²⁶ *East African Centre for Trade Policy and Law* case, 55.

²²⁷ See *East African Centre for Trade Policy and Law* case, 56-68.

²²⁸ *Anyang' Nyong'o* case, 44.

4.4 Lack of effective enforcement mechanisms

The EACJ is essential for the survival of the EAC and the efficiency of the EAC Treaty depends on the effectiveness of the EACJ in preserving the legal order in the Community. Without effective enforcement mechanisms, the EACJ will have little impact in the Community. The challenges encountered when enforcing the decisions of the EACJ might be caused by problems that involve some of the most delicate aspects of international law. When attempting to find an effective means for enforcing a judgment of an international court the influence of politics cannot be underestimated. On the one hand, a political foundation can accelerate compliance with international law, while on the other it can easily tarnish the image of a court to the extent that it loses its legitimacy.

Enforcement of a judgment of a court is an important stage in any litigation process. When a court judgment is enforced, it marks the end of a dispute. A dispute does not end merely with a court judgment; it is only when a court judgment is finally executed, the execution saves the court from merely issuing a written judgment. Successful execution of a judgment is the result that any litigant would seek and, in respect of the judgments that the EACJ has delivered so far, there has been only one complaint of non-compliance.²²⁹ This case²³⁰ concerns the EAC member states' lack of political commitment to extend the jurisdiction of the EACJ, as directed by the Court in *Sitenda Sebalu v Secretary General of the EAC & Others*.²³¹ The available evidence seems to suggest that there is now a readiness by EAC member states and political organs of the Community to respect the EACJ's decisions.²³² This promising trend does not reflect the existing gaps in the EAC Treaty for enforcing the decisions of the EACJ. When the Court's mandate is expanded to adjudicate human rights disputes, it is obvious that it will be dealing with more controversial and highly politicised cases. The existing gaps in the EAC Treaty may thus dent the effective execution of the EACJ judgments in the near future.

²²⁹ JE Ruhangisa, EACJ Registrar in an interview conducted on 14 December 2012 at the EACJ, at Arusha.

²³⁰ Ref No 8 of 2012, EACJ First Instance Division

²³¹ Ref No 1 of 2010, EACJ First Instance Division.

²³² See chapter 3 of this study.

Given the nature of East African integration, it is quite correct to expect the EACJ to receive more cases involving allegations of the breach of integration principles. In some circumstances, states would be likely to refrain from complying with the Court's decisions. It is also expected that the EACJ will enter more judgments that might not be acceptable to member states, leading to non-compliance. It is on these premises that prompt measures for effective enforcement mechanisms for the EACJ should be addressed.

It is without doubt that the issue of enforcement of a decision of an international court or tribunal depends on the commitment of a respondent state. At times it might be intriguing to compel non-complying states to abide by a decision of an international court, regardless of the presence of laws specifically directing compliance. It is accordingly important to lay the foundations for establishing mechanisms that would create an environment for compliance with decisions of international courts or tribunals. Mechanisms for compliance with the judgments of international courts or tribunals need not be legal measures only; political engagement should also be strongly encouraged.

4.4.1 Lessons from other jurisdictions

4.4.1.1 The International Court of Justice

Ordinarily, enforcement of a decision of an international court or tribunal is done within the national jurisdiction. A state is bound by the judgment of any international court of which it has accepted the jurisdiction. States are thus obliged to establish mechanisms that would facilitate the effective execution of an international judgment. In international organisations, political organs are generally involved in ensuring the effective realisation of international judicial decisions. Other mechanisms such as follow-up through state reporting and reference for non-compliance to a judicial body are also commonly employed for aiding compliance.

Any judicial proceeding before a court of law aims at reaching a concrete solution. One of the challenges facing international courts is the means of enforcing their

decisions. International institutions are said to be ‘plugged by too many expectations’ with few powers at their disposal.²³³ Perhaps this assertion could also be advanced when assessing the EACJ. In the UN, states are obliged to comply with the decisions of the International Court of Justice (ICJ) in any case to which they are a party.²³⁴ This obligation is stated in the UN Charter and not in the ICJ Statute. The Security Council, the principal political organ of the UN, is assigned the duty of assisting compliance with the decisions of the ICJ.²³⁵ Article 94(2) of the UN Charter establishes an important relationship between the ICJ and the Security Council; while the ICJ is mainly tasked with giving the rights and obligations between parties in a dispute, the Security Council guarantees the ends of justice by taking measures which would compel the enforcement of the ICJ’s decisions, should the defaulting state fail to comply.

Enforcement mechanisms for ICJ decisions entail political involvement.²³⁶ The ICJ is not involved in ensuring compliance with its own decisions; that task has been delegated solely to the Security Council. According to Llamzon, article 94(2) of the UN Charter gives the Security Council the discretion to act in the event of non-compliance with ICJ judgments.²³⁷ The phrase ‘if it deems necessary’, as provided in article 94(2) of the UN Charter, grants the Security Council the discretion to decide whether or not to respond to any allegations of non-compliance.

There is a danger of treating non-compliance as a political issue alone without involving legal measures. When the task to ensure enforcement of the decisions of international courts rests exclusively with political organs, there is a risk of such a

²³³ See AP Llamzon ‘Jurisdiction and compliance in recent decisions of the international Court of Justice’ (2008) 18 *The European Journal of International Law* 815.

²³⁴ Art 94(1) of the UN Charter.

²³⁵ Art 94(2) of the UN Charter provides that ‘if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment’. See A Tanzi ‘Problems of enforcement of decisions of the ICJ and the law of the United Nations’ (1995) 6 *European Journal of International Law* 540-542.

²³⁶ See C Bratic ‘Democratic compliance with decisions of the International Court of Justice’ (2010) 4 *Washington Undergraduate Law Review* 5.

²³⁷ Llamzon (2008) 18 *The European Journal of International Law* 815, 822.

mandate being undermined. This is evidenced by the fact that the Security Council has so far failed to play a significant role in enforcing ICJ judgments even when there is unequivocal non-compliance. Moreover, states that have had judgments in their favour are reluctant to seek the Security Council's assistance in compelling the enforcement of the judgments even when there is on-going non-compliance.²³⁸ Incidences where the Security Council has invoked article 94(2) of the UN Charter are rare²³⁹ and this inaction in ensuring effective enforcement of judgments could be due to the discretionary mandate it has under article 94(2) of the UN Charter.²⁴⁰ Accordingly, the ICJ depends heavily on political compromise between members of the Security Council. The possibility of the Security Council acting on non-compliance might even be more unlikely if one of its permanent members is involved.

The scope of measures required to be taken by the Security Council, as provided in article 94(2) of the UN Charter, is far from clear. One might be tempted to suggest that the kind of measures that the Security Council might take in respect of non-compliance with the decisions of the ICJ are those enshrined in article 41 of the UN Charter. The Security Council may choose the nature of measures it deems fit to effect its decisions, with the exception of the use of armed force. These measures may include calling upon UN members to issue economic sanctions and the severance of diplomatic relations.²⁴¹ However, it should be remembered that the scope of measures provided in article 41 of the UN Charter is for collective response to conduct that amount to threats to the peace, breaches of the peace, and acts of aggression.²⁴² This may be why the measures provided for in article 41 of the UN Charter are not conducive to ensuring compliance with the decisions of the ICJ.²⁴³

²³⁸ A Tanzi 'Problems of enforcement of decisions of the ICJ and the law of the United Nations' (1995) 6 *European Journal of International Law* 540.

²³⁹ Tanzi (1995) 6 *European Journal of International Law* 339-545. Incidences in which the Security Council was called upon to act according to art 94(2) include *Anglo-Iranian Oil Co (UK v Iran)* 1951 ICJ Reports 89; *Nicaragua v USA*, 1986 ICJ Rep 14. In both cases, the Council took no measures against the defaulting states.

²⁴⁰ WM Reisman 'The enforcement of international judgments' (1969) 63 *American Journal of International Law* 1, 13.

²⁴¹ Art 41 of the UN Charter.

²⁴² See Chapter VII of the UN Charter.

²⁴³ Tanzi (1995) 6 *European Journal of International Law* 539, 561.

Regardless of the uncertainty on the scope of measures that can be adopted by the Security Council to ensure the enforcement of the ICJ judgments, the Security Council is not prevented from taking appropriate actions. UN members are obliged to assist the UN in any action it takes in accordance with the powers prescribed in the UN Charter and 'shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action'.²⁴⁴ Also, member states have pledged their agreement to carry out of the decisions of the Security Council.²⁴⁵ UN member states are also required to 'join in affording mutual assistance in carrying out the measures decided upon by the Security Council'.²⁴⁶ It is on this basis that measures such as 'partial interruption of economic relations' and 'severance of diplomatic relations' might be more useful if adopted by the Security Council when invoking article 94(2) of the UN Charter.

4.4.1.2 The European Court of Human Rights

In the European system, the European Court of Human Rights (ECRHR) considers the execution of its judgments as a human rights aspect which is derived from the principle of rule of law²⁴⁷ and the right to fair trial.²⁴⁸ Similar to most international courts, the ECRHR leaves state parties to dictate ways of enforcing its judgments.²⁴⁹ In *Papamichalopoulos and Others v Greece*,²⁵⁰ the ECRHR stated that the respondent state, when being found in violation, is required to put to an end and make reparation for any breach in a manner that it restores, as far as possible, the situation existing before the breach.²⁵¹ In *Hornsby v Greece*, the ECRHR stated as follows:

²⁴⁴ Art 2(5) of the UN Charter.

²⁴⁵ Art 23 of the UN Charter.

²⁴⁶ Art 49 of the UN Charter.

²⁴⁷ See App No 18357/91, *Hornsby v Greece* judgment of 19 March 1997, para 40.

²⁴⁸ *Hornsby v Greece*, App No 18357/91, judgment of 19 March 1997. The Inter-American Court considered failure to comply with its decision by the defaulting state amounted to the breach of the right to judicial protection as provided in the American Convention on Human Rights; see *Cinco Pensionistas v Peru*, Judgment of February 28 2003, Series C No. 98/2003.

²⁴⁹ See *Belilos v Switzerland*, App No 10328/83, ECRHR 4, Judgement of 29 April 1988.

²⁵⁰ *Papamichalopoulos & Others v. Greece*, App No 14556/89, Judgement of 24 June 1993.

²⁵¹ *Papamichalopoulos and & Others v Greece*, para 34.

It would be illusory if a contracting state's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party, execution of a judgment given by any court must therefore be regarded as an integral part of the trial for the purposes of article 6.²⁵²

The judgments of the ECRHR are binding upon the parties.²⁵³ Contrary to the EU legal regime, the European Convention does not provide for direct applicability to its member states. However, this is not a barrier to national courts applying the European Convention on Human Rights (European Convention) and in being bound by the Court's decisions. In ensuring effective compliance, the Committee of Ministers is tasked to supervise the execution of the decisions of the ECRHR.²⁵⁴ When the Court delivers its final judgment, the judgment is handed to the Committee of Ministers for supervising of its execution.²⁵⁵ In a situation where the Committee of Ministers considers that compliance with the Court judgment could be hindered by a problem of interpretation, it may refer the judgment back to the Court for clarity.²⁵⁶

The Committee of Ministers plays a diplomatic role in ensuring that the judgments of the ECRHR are complied with.²⁵⁷ Ordinarily, the Committee of Ministers applies political pressure to non-complying states in order to persuade them to comply with the Court's decision. Before the adoption of Protocol No 14 to the European Convention, the Committee of Ministers, in the course of supervising the execution of the ECRHR's judgments, generally adopted three types of resolution: (1) a resolution stating the non-compliance and inviting the state to abide by the judgment; (2) a resolution noting certain progress and encouraging the state to adopt specific measures in the future; and (3) in the case of complete failure to comply with the Court's judgment, the Committee of Ministers issued a resolution

²⁵² *Hornsby v Greece*, App No 18357/91, judgment of 19 March 1997, 40.

²⁵³ Art 46(1) of the European Convention.

²⁵⁴ Art 46(2) of the European Convention.

²⁵⁵ Art 46(2) of the European Convention.

²⁵⁶ Art 46(3) of the European Convention

²⁵⁷ The Committee of Ministers is made up of the ministers of foreign affairs of the member states of the Council of Europe.

stating the refusal to execute the judgment and calling upon the defaulting member state to take such action as deemed appropriate.²⁵⁸

A major test for compliance with the judgments of the ECHR was when Turkey refused to comply with the Court's judgment in the *Loizidou* case.²⁵⁹ This led to a number of heated discussions concerning the power of the ECHR to the extent that the Committee of Ministers declared that the non-compliance by Turkey was unprecedented.²⁶⁰ As a result of political pressure and Turkey's desire to join the EU, the *Loizidou* case was fully complied with in 2003.²⁶¹ Despite the *Loizidou* case being fully executed, it caused considerable damage to the image of the ECHR.²⁶²

After the adoption of Protocol No 14 to the European Convention, the position was that the Committee of Ministers could refer the defaulting state to the Court for determining whether that state had failed to fulfil its obligations to abide by the Court's decisions.²⁶³ When the Court finds a state to be in breach of the European Convention due to non-compliance, it will refer the matter to the Committee of Ministers for taking the required measures.²⁶⁴ The Committee of Ministers may suspend the defaulting state from its rights of representation; or in circumstances of extreme violations a defaulting state may be expelled from the Council of Europe.²⁶⁵ The Committee of Ministers completes each case by adopting a final resolution.²⁶⁶ Apart from referral to the Committee of Ministers, the Council of Europe has adopted other measures such as the forming of a Group of Wise Persons. The Group

²⁵⁸ LB Winter 'The implementation of the ECHR's case-law and the execution procedure after Protocol No 14' (2010) 45 *Lex ET Scientia International Journal* 9, 18.

²⁵⁹ *Loizidou v Turkey*, App No 15318/89, Judgment of 23 February 1995; *Mamatkulov and Askarov v Turkey* 46951/99 ECHR (2005).

²⁶⁰ M Marmo 'The execution of judgments of the European Court of Human Rights: A political battle' (2008) 15 *Maastricht Journal of European and Comparative Law* 225, 227.

²⁶¹ Marmo (2008) 15 *Maastricht Journal of European and Comparative Law* 225, 239.

²⁶² The three forms of resolution stated above were adopted against Turkey in the *Loizidou* case.

²⁶³ Art 46(4) of the European Convention.

²⁶⁴ Art 46(2) of the European Convention.

²⁶⁵ See art 8 of the statute of the Council of Europe.

²⁶⁶ Rule of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, as adopted by the Committee of Ministers on 10 May 2006.

of Wise Persons discusses long-term solutions for better ways of implementing the ECHR's judgments.²⁶⁷

Mechanisms for enforcing the decisions of the ECHR depend on the discretion of the member states. As stated above, the role of the ECHR in enforcing its own judgments ends when it determines whether a state is in breach of the European Convention by not complying with its decision only after receiving a complaint of non-compliance from the Committee of Ministers. This is yet another reflection of political involvement in enforcing the judgments of international courts. Despite the lack of specified procedures for executing the ECHR's judgments, the Court has for some time issued direct orders as to the measures to be taken to stop a violation or grant adequate redress.²⁶⁸

The diplomatic role played by the Committee of Ministers has so far seemed to have improved compliance in the Council of Europe. The Committee of Ministers has gone as far as stating that respecting the judgments of the ECHR is one of the prerequisites for membership of the Council of Europe.²⁶⁹ This assertion of the Committee of Ministers means that expulsion from the Council of Europe can be recommended for a state in cases of extreme violations of the European Convention, such as non-compliance with the ECHR's decisions. In supervising the execution of judgments, the Committee of Ministers takes into consideration on the measures taken to comply the Court's decision.²⁷⁰ The Committee of Ministers has recently engaged in identifying common dysfunction and structural problems at the national level as another tool for supervising the effective execution of the ECHR's

²⁶⁷ Marmo (2008) 15 *Maastricht Journal of European and Comparative Law* 225, 253.

²⁶⁸ LB Winter 'The implementation of the ECHR's case-law and the execution procedure after Protocol No 14' (2010) *Lex ET Scientia International Journal* 12; E L Abdelgawad 'The execution of the judgments of the European Court of Human Rights' (2002) 25, available at <http://www.echr.coe.int/NR/rdonlyres/5BDDF858-F85B-4523-BD58-27243CB2F03C/0/DG2ENHRFILES192002.pdf> (accessed on 20 May 2013); also see *Assanidze v Georgia*, App No 71503/01, Judgment of 08 April 2004 and *Papamichalopoulos & Others v Greece*, App No 14556/89, Judgment of 24 June 1993.

²⁶⁹ Winter (2010) 45 *Lex ET Scientia International Journal* 9, 11.

²⁷⁰ Rule 6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, as adopted by the Committee of Ministers on 10 May 2006.

judgments. The identification of structural barriers causing the occurrence of recurring cases against many countries and imposing an obligation on states to address those barriers is known as pilot judgment procedures.²⁷¹

The pilot judgment procedure enables the judgments of the ECHR to have an impact on all members with common dysfunctions. Where the ECHR receives several applications that share a root cause, it can select one or more cases for priority consideration under the pilot judgment procedure.²⁷² In delivering its judgment, the ECHR, apart from determining the violation in terms of the European Convention, may identify the systemic problem and give the defaulting state clear indications of the type of remedial measures needed to resolve the problem.²⁷³ It is from this basis that the Committee of Ministers acts as a supervisory body under the pilot judgments procedure. Where the Court issues a pilot judgment procedure, it may adjourn or freeze cases for a given period of time on condition that the defaulting state acts promptly in adopting the required measures to satisfy the judgment.²⁷⁴ Current statistics indicate that there is a substantial decrease in the number of recurring cases before the ECHR.²⁷⁵

²⁷¹ The ECHR 'Fact sheet-pilot judgment' (2013) 1, available at http://www.echr.coe.int/NR/rdonlyres/61CA1D79-DB68-4EF3-A8F8-FF6F5D3B3BB0/0/FS_Pilot_judgments_ENG.pdf (accessed on 22 May 2013). For a reflection on the pilot procedures of the ECHR see M Fyrnys 'Expanding competences by judicial lawmaking: the pilot judgment procedure of the European Court of Human Rights' (2011) 12 *German Law Journal* 1231. It is estimated that over 150 000 cases are recurring cases pending before the ECHR which derive from common dysfunction at the national level.

²⁷² The ECHR 'Fact sheet-pilot judgment' (2013) 1, available at http://www.echr.coe.int/NR/rdonlyres/61CA1D79-DB68-4EF3-A8F8-FF6F5D3B3BB0/0/FS_Pilot_judgments_ENG.pdf (accessed on 22 May 2013).

²⁷³ See *Broniowski v Poland*, App No 31443/96, Judgment of 22 June 2004; *Ananyev and Others v Russia*, App No 42525/07, Judgment of 10 January 2012; *Yuriy Nikolayevich Ivanov v Ukraine*, App No 40450/04, Judgment of 15 October 2009; M Fyrnys 'Expanding competences by judicial lawmaking: The pilot judgment procedure of the European Court of Human Rights' (2011) 12 *German Law Journal* 1234.

²⁷⁴ The ECHR 'Fact sheet-pilot judgment' (2013) 1, available at http://www.echr.coe.int/NR/rdonlyres/61CA1D79-DB68-4EF3-A8F8-FF6F5D3B3BB0/0/FS_Pilot_judgments_ENG.pdf (accessed on 22 May 2013).

²⁷⁵ Committee of Ministers, 6th Annual Report on the supervision of the judgments of the European court of human rights (2012) 11, available at http://www.coe.int/t/dghl/monitoring/execution/default_en.asp (accessed on 23 May 2013).

It is revealed that the rate of complying with the ECHR's decision has largely been improving to the extent that non-compliance with the jurisprudence of the Council of Europe is perceived as 'uncommon'.²⁷⁶ However, there are cases of persistent refusal to comply with the decision of the ECHR, particularly by countries from Eastern Europe. Protocol No 14, which entered into force in 2010, has added two mandates to the Committee of Ministers in the supervision of the ECHR's judgments: the right to seek the Court's interpretation of a judgment in order to facilitate its execution; and the right to bring infringement proceedings. Other means for improving the execution of ECHR's judgments include the establishment of pilot judgment procedures, publishing records of non-executed decisions, publication of an annual report on the supervision of the execution of judgments, and the evaluation of the execution of judgments look set to improve the rate of compliance with the decisions of the ECHR in the Council of Europe.

4.4.1.3 The Court of Justice of the EU

The decisions of the EU Court are binding and enforceable along with the order of enforcement which is appended to the judgment.²⁷⁷ Although the judgments of the EU Court are accompanied by the order of enforcement, the EU Treaty does not provide any further formal procedures for their enforcement. As a result, the Court's decisions are enforced according to the rules of civil procedure of member states.²⁷⁸ The EU Court has established the principle of direct effect, according to which certain provisions of EU law may confer certain rights and obligations on individuals that national courts are required to recognise and enforce.²⁷⁹ The direct effect principle has to a great extent helped the EU Court in the course of establishing EU legal order.

The EU member states are required to take prompt measures for achieving the obligations arising from the EU treaties or action taken by the institutions of the

²⁷⁶ Winter (2010) 45 *Lex ET Scientia International Journal* 9, 20.

²⁷⁷ Art 244 of the EU Treaty.

²⁷⁸ Art 256 of the EU Treaty.

²⁷⁹ See *Van Gend en Loos* case 26/62 (1963) ECR; *Yvonne van Duyn v Home Office*, Case 42/74, judgment of 4 December 1974.

Union. They must create an environment that would not jeopardise the attainment of the treaty objectives. Where any EU member state neglects to take any measures to comply with the judgment of the EU Court, the Commission or any member state may refer the matter to the Court for determining non-compliance.²⁸⁰ When the reference is referred by the Commission for non-compliance, it will usually be accompanied by a proposal for a penalty or lump-sum payment.²⁸¹ However, before the referral to the EU Court, there is a pre-litigation stage, during which the Commission asks the defaulting state to present its observations regarding the assessment.

4.4.2 EACJ enforcement mechanisms

The EACJ does not have its own mechanisms for enforcing its decisions. It can be conceded that the current mechanisms for enforcing the decisions of the EACJ can still work effectively within democratic societies where the rule of law is observed. The mechanisms for enforcing the EACJ's decisions are very similar to those of the EU Court. When the EACJ's jurisdiction is broadened, the current mechanisms for enforcing its decisions will not be sufficient, taking into consideration that the Court is expected to have an explicit human rights mandate. The current Court mechanisms essentially depend on the goodwill of national courts and political commitment from member states to implement its decisions.

The continuing politicisation on the work of the EACJ does not help in shaping the course of the Court's future. Like many international courts, lack of political will to implement EACJ judgments is likely to be present. Nevertheless, member states' political commitment is crucial in complying with an international court's decision. In a situation where a state within an international organisation refuses to comply with the regional court, it may be difficult, although not impossible, to compel the defaulting state to implement the Court's decision.

²⁸⁰ Art 58 and 59 of the Treaty on the Functioning of the EU.

²⁸¹ Art 260 of the Treaty on the Functioning of the EU.

Both the EAC Treaty and the EACJ Rules require that a judgment of the EACJ be executed according to the civil rules of the member state involved. The EACJ has two forms of judgments: judgments that impose pecuniary obligations and those which do not impose any pecuniary liability. The EAC Treaty specifically mentions that where the EACJ imposes pecuniary obligations on a person, the rules of civil procedure enforced in a member states govern the execution of the judgment.²⁸² Furthermore, the EAC Treaty is silent on ways of executing the Court's judgment when it is in the form of a declaration, particularly those delivered against a member state.²⁸³

The EAC member states are prohibited from taking any measures that will likely jeopardise the resolution of a dispute or aggravate it.²⁸⁴ There are no mechanisms for compelling a defaulting state to comply with the decisions of the EACJ in cases where a state defies the Court's judgment. The lack of effective mechanisms for enforcing EACJ judgments may result in the authenticity of the Court being in danger of being abused. There is also the risk that the Court's independence will be undermined.

4.4.2.1 Determining non-compliance

In respect of the EU, the Commission may first engage in pre-litigation procedures in an attempt to compel a state to comply with the EU Court decisions. Where there is persistent non-compliance, the Commission can refer the matter to the EU Court with a proposal to impose financial penalties. In the Council of Europe, the Committee of Ministers can make referrals before the ECRHR when a state neglects to comply with the Court's decision. In the suspended SADC Tribunal, in any case of a failure by a state to comply with the decision of the SADC Tribunal, any person concerned was entitled to refer such failure to the SADC Tribunal for determination.²⁸⁵ Where the SADC Tribunal found such failures by a state, it was

²⁸² Art 44 of the EAC Treaty and Rules 74(2) of the EACJ Rules of Procedures.

²⁸³ See rule 74 of the EACJ Rules.

²⁸⁴ Art 38(2) of the EAC Treaty.

²⁸⁵ Art 32(4) of the SADC Tribunal Protocol.

required to report its findings to the Summit for appropriate action to be taken in accordance with the SADC Treaty.²⁸⁶

The EAC Treaty does not engage the EACJ in ensuring that its decisions are effectively enforced. Unlike other jurisdictions such as the suspended SADC Tribunal, the EACJ does not have the luxury of determining whether a state has failed to fulfil its obligations under the Treaty as a result of non-compliance. In the UN, EU and the Council of Europe, their judicial bodies are to some extent involved in enforcing the decisions of their respective judicial organs. In most international jurisdictions, follow-up mechanisms and political pressure is applied by political organs to ensure compliance – the Committee of Ministers of the Council of Europe and the European Commissions of the EU are two examples.

4.4.2.2 Consequences of non-compliance

EAC member states are obliged to comply with the EAC Treaty. Any act that would derail the established purposes of the EAC Treaty is a breach of that Treaty. The actions taken where there is a continuous refusal by a state to comply with a decision of an international court are usually carried out by political organs.

The act of refusing to comply with the EACJ's decisions amounts to a breach of the EAC Treaty, which might result to some measures being taken by EAC political organs. The Council or the Summit may recommend imposing sanctions against a member state if it is in breach of the obligations of the EAC Treaty.²⁸⁷ The Summit can also suspend or expel a member state if it fails to meet the objectives and principles of the Community.²⁸⁸ The EAC Treaty does not, however, specify the gravity of a breach that would amount to the imposition of sanctions. It can be assumed that persistence in the failure to comply with EACJ decisions may lead to such actions being taken by the Summit as stipulated in the EAC Treaty. However,

²⁸⁶ Art 32(5) of the SADC Tribunal Protocol.

²⁸⁷ Art 143 of the EAC Treaty.

²⁸⁸ Art 146 and 147 of the EAC Treaty.

there is lack of clarity on the nature of the sanctions which might be taken against a state.²⁸⁹

4.5 Undefined relationship with parallel regional mechanisms involved in the protection of human rights

Africa as a continent is made up of sub-regional organisations established as regional economic communities (RECs). These are aimed at forming one corridor for the African Economic Community. In seeking socioeconomic and political cooperation, most African countries have found themselves joining more than one regional bloc. Therefore, the existence of a number of RECs has led to overlapping membership of member states, which in turn has resulted in a complex relationship among the established blocs. Such a troubling relationship cannot be helped due to the fact that sub-regional organisations are ‘non-hierarchical regimes with overlapping membership and jurisdiction’.²⁹⁰

Most RECs have established judicial organs for supervising and ensuring adherence to the law provided in their founding treaties. There is no clear relationship between sub-regional judicial organs and the existing AU judicial mechanism, however, and there is also a lack of clarity on the relationship among judicial organs of RECs. The fact is that RECs are active in promoting and protecting human rights within their respective communities, and their relationship with the AU mechanisms has yet to be defined. There is thus an urgent need to obtain a clear roadmap on the way sub-regional judicial bodies can cooperate with those under the AU.

²⁸⁹ For example, in the EU, under art 354 of the Treaty on the Functioning of the EU, a state can be suspended from enjoying the rights of free movement of persons, services, goods and capital. Also under art 7 of the Treaty on the EU, there could be a suspension of certain rights of members such as the right to vote. However, it should be noted that the nature of sanctions depends on the gravity of a particular breach.

²⁹⁰ RF Oppong ‘Redefining the relations between the African Union and regional economic communities in Africa’ (2009) 9 *Monitoring Regional Integration in Southern Africa Yearbook* 1, 6.

The quest for human rights did not feature prominently in the OAU,²⁹¹ as the OAU Charter was established on the basis of the principles of non-interference, state sovereignty and decolonisation of the Continent.²⁹² The provisions of the OAU Charter highlight the main concerns of the continent at that time. These include the founding principles of the OAU intended to assist in the decolonisation of some of the remaining states which were under the colonial rule,²⁹³ protecting the newly independent states by emphasising the sovereign equality of states,²⁹⁴ and the observance of the principle of non-interference in the internal affairs of the states²⁹⁵ to mention but a few. Thus, the focus of the Charter was largely on the protection of states rather than individual rights.²⁹⁶ With regard to human rights, the Charter places emphasis on the right to self-determination of people in the context of state independence.²⁹⁷

Two decades after its establishment, the OAU Assembly of Heads and States in 1981 adopted a human rights catalogue for the Continent, the African Charter, that entered in to force in 1986.²⁹⁸ Subsequently, in seeing the necessity of having a regional body that would supervise the Charter, the African Charter established the African Commission. The African Charter was inspired by other international human

²⁹¹ G Naldi 'Future trends in human rights in Africa: The increased role of the OAU ?' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1985-2000* (2002) 1.

²⁹² The OAU was established on 25 May 1963, after the adoption of the OAU Charter in Addis Ababa, Ethiopia. The OAU was replaced by the AU on 09 July 2002. For a general discussion on the OAU, see Z Cervenka *Organisation of african unity and its charter* (1969); K Mathews 'The organization of African Unity' in D Mazzeo (ed) *African regional organization* (1984) 49.

²⁹³ Art III(3) of the OAU Charter.

²⁹⁴ Art III(1) of the OAU Charter.

²⁹⁵ Art III(1) and (2) of the OAU Charter.

²⁹⁶ R Murray *Human Rights in Africa: From the OAU to the African Union* (2004) 7.

²⁹⁷ As above.

²⁹⁸ The African Charter was drafted in Banjul, the Gambia. For a general understanding of the history and the process of adopting the African Charter, see O Umzurike *The African Charter on Human and Peoples' Rights* Hague: Kluwer Law International (1997); F Viljoen 'The African Charter on Human and Peoples' Rights: The travaux préparatoires in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 313; K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261; F Ougergouz *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights* (2003); M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice* (2002).

rights instruments that existed. However, it was thought that Africa as a continent has its own peculiarities that necessitated the adoption of an African document on human rights.

In the 1990s, there was a feeling that the then objectives of the OAU could not sustain the existed situation in Africa. It was observed that the focus should be on promoting democracy and the observance of the rule of law as well as peace and security in the continent. The OAU was thus transformed into the AU after the adoption of the Constitutive Act on 11 July 2000²⁹⁹ and was formally inaugurated on 11 July 2002 in Durban, South Africa.

Apparently, human rights play a significant role in the work of the AU³⁰⁰ and the AU recognises the African Charter as one of the normative instruments that provides the means of promoting and protecting human rights in the continent.³⁰¹ The AU is committed to ‘promote and protecting human and peoples’ rights in accordance with the African Charter together with other relevant human rights instruments.³⁰² The AU further recognises the need for international cooperation by taking ‘due account of the UN Charter and the Universal Declaration of Human Rights’.³⁰³ AU member states have pledged to ‘promote democratic principles and institutions, popular participation and good governance’.³⁰⁴ Generally, the Constitutive Act of the AU recognises individual rights and tries to limit the sovereignty of member states so as to encourage international cooperation. Human rights protection should not be left to states alone, however; the international community has a central role to play in ensuring that global human values are protected.

²⁹⁹ For a general discussion on the transformation of the OAU to AU, see KD Magliveras & GJ Naldi ‘The African Union: A new dawn for Africa?’ (2002) 51 *The International and Comparative Law Quarterly* 415.

³⁰⁰ See generally A Lloyd & R Murray ‘institutions with responsibility for human rights protection under the African Union’ (2004) 48 *Journal of African Law* 165.

³⁰¹ Art 3(e) and (h) of the Constitutive.

³⁰² Art 3(h) of the Constitutive Act.

³⁰³ Art 3(e) of the Constitutive Act.

³⁰⁴ Art 3(g) and 4(m) of the Constitutive Act.

The African human rights system is considered to be the youngest of the three systems (Africa, Europe and the Americas).³⁰⁵ It is made up of norms and institutions evolving from the framework of the OAU/AU,³⁰⁶ while also extending beyond it.³⁰⁷ All institutions and the normative framework established for promoting and protecting human rights in Africa form part of the human rights regime in the continent.³⁰⁸ Moreover, RECs established as regional blocs for the African Economic Community (AEC) can be said to be part of the institutional framework of the AU. Although the intended AEC is mostly concerned with economic developments in the continent, one of the objectives of the AEC is to promote cooperation in all fields of human endeavour.³⁰⁹

More significantly, the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter form one of the founding principles of the AEC.³¹⁰ Although most RECs were initially established with economic ambitions, they gradually increased their objectives to encompass a socioeconomic, cultural and political agenda. The EAC has extensive objectives covering all aspects of human life which can easily be linked to human rights.³¹¹

In as far as judicial bodies are concerned, in addition to the African Court, the African Commission on Human and Peoples' Rights (African Commission) and the Committee of Experts on the Rights and Welfare of the Child (Children's Committee) are the main judicial and quasi-judicial bodies that have been established by the OAU/AU specifically for promoting and protecting human rights in Africa. The fact that the

³⁰⁵ C Heyns and M Killander 'Africa in international human rights textbooks' (2007) 15 *African Journal of International and Comparative Law* 130.

³⁰⁶ ST Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Communities of West African States' (2009) 143; D Shelton 'The promise of regional human rights system' in BH Weston & SP Marks (eds) *The Future of International Human Rights (1999)* 353; OC Okafor *The African Human Rights System* (2007) 65.

³⁰⁷ Ebobrah 'Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Communities of West African States' (2009) 143.

³⁰⁸ As above.

³⁰⁹ Art 4(c) of the AEC Treaty, adopted in 1991 and entered in to force in 1994.

³¹⁰ Art 3(g) of the AEC Treaty.

³¹¹ See art 5 of the EAC Treaty.

EACJ is anticipating its role as a protector of human rights, raises the need for the relationship between the EACJ and parallel existing mechanisms of the AU and other sub-regional organisations to be clearly defined.

The existence of multiple judicial organs engaged in protecting human rights in Africa should not be seen as a contradiction; together, they provide a perfect scenario for protecting human and peoples' rights in the continent. All existing institutions need to share judicial decisions, best practices, reports and even expertise in order to enrich and develop an all-encompassing African jurisprudence. In order to facilitate effective means of exchanging information, a proper system that would facilitate a coherent human rights mechanism in the continent has to be put in place. For this purpose, a common database, communication portal, reports and websites for sharing information could be established. The initiatives for establishing a coordinated regional human rights mechanism started in 2010 when a colloquium of legal experts met in Arusha on October 2010.

The uncertainty about parallel existing mechanisms is also observed in the European system, where two judicial bodies exist side by side. On the one hand there is the ECHR with jurisdiction over all cases relating to the European Convention, and on the other there is the EU Court which has jurisdiction over EU law in which the European Convention is referred to as one of the norms governing EU law.³¹² After the entry into force of the Lisbon Treaty on December 2009, mechanisms for promoting and protecting human rights have become more complex, brought about by the binding nature of the Charter of Fundamental Rights of the EU and the establishment of the Fundamental Rights Agency, which is mandated to monitor the

³¹² See B de Witte 'The use of the ECHR and Convention case law by the European Court of Justice' in P Popelier et al (eds) *Human Rights Protection in the European Legal Order: The Interaction between the European and National Courts* (2011) 17; A Rosas 'The European Union and the international human rights instruments' in V Kronenberger (ed) *The European Union and the International Legal Order: Discord or Harmony?* (2003) 53; Y Doğan 'The fundamental rights jurisprudence of the European Court of Justice: Protection for human rights within the European Union legal order' (2009) *Ankara Law Review* 53; LR Eizaga 'Human rights in the European Union: Conflict between the Luxembourg and Strasbourg Courts regarding interpretation of art 8 of the European Convention on Human Rights' (2008) 11 *International Law Review* 119; EF Defeis 'Dual system of human rights: The European Union' (2007-2008) 14 *ILSA Journal of International & Comparative Law* 1.

implementation of human rights obligations in the EU.³¹³ There are on-going negotiations for the EU to accede to the European Convention; once an agreement is reached, a solution to the jurisdictional challenges between Strasbourg and the Luxembourg courts might be found.

4.5.1 The African Court on Human and Peoples' Rights

The OAU adopted the Protocol that established the African Court in 1998 and the Protocol entered in to force on 25 January 2004, after meeting the ratification requirement. The relationship between the African Court and REC courts is yet to be defined. According to the Court Protocol, the African Court is established to complement the protective mandate of the African Commission.³¹⁴ It therefore goes without saying that the African Court Protocol explicitly recognises the African Commission. The primary mandate of the African Court is to determine all cases that require the interpretation and application of the African Charter, the Court Protocol and all other relevant human rights instruments ratified by the states concerned.³¹⁵ Because the EAC Treaty empowers the EACJ to interpret and apply human rights standards in accordance with the African Charter, there is the possibility of having conflicting interpretation of the Charter. Conflicting interpretations potentially risk reducing the credibility of the two Courts.

The African Court can receive cases from the African Commission, a state party or an African intergovernmental organisation.³¹⁶ In exceptional circumstances, the African Court can receive complaints from individuals or NGOs, without passing through the African Commission.³¹⁷ Direct access necessitates that a state party to the Court Protocol make a declaration pursuant to article 34(6) of the Protocol. Among the members of the EAC, only Rwanda and Tanzania have made a declaration to allow its citizens and NGOs direct access to the Court. Should the EACJ be given an explicit

³¹³ See JD de la Rochere 'Challenges for the protection of fundamental rights in the EU at the time of the entry into force of the Lisbon Treaty' (2009-2010) 33 *Fordham International Law Journal* 1776.

³¹⁴ Art 2 of the African Court Protocol.

³¹⁵ Art 4 of the African Court Protocol.

³¹⁶ Art 5(1) of the African Court Protocol.

³¹⁷ Art 5(3) read with art 36(4) of the African Court protocol.

human rights jurisdiction, there is the possibility of EAC citizens being faced with forum shopping. Therefore, in as much as the current role of the REC courts in protecting human rights is celebrated, conflicting jurisdiction and the likelihood of having contradicting interpretations and applications of the African Charter are issues that need to be addressed.

4.5.2 The African Commission on Human and Peoples' Rights

The African Commission is an important quasi-judicial body established in Africa for the realisation of human rights.³¹⁸ It is the main supervisory body of the African Charter together with the African Court. The main task of the Commission is to monitor the implementation of the African Charter. It also monitors the human rights situation in all African countries.³¹⁹ In the process of supervising human rights values in the continent, the Commission disseminates information with regard to human rights, undertakes studies and organises seminars, establishing soft law principles, issuing recommendations to governments and cooperating with other regional and international human rights institutions.³²⁰

As stipulated above, unlike the REC courts, the Commission and the African Court have a close and codified relationship. The Commission can refer a matter before the African Court; however, such matters should be against a state that has ratified the Court Protocol. Under its Rules of Procedure, the Commission may refer a communication which indicates serious human rights violations to the African Court without first considering the case itself.³²¹

³¹⁸ The Commission held its first meeting on 2 November 1987. For a general understanding of the African Commission, see E Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996); R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000); M Killander 'The African Commission on Human and Peoples' Rights' in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 years after the African Charter on Human and Peoples' Rights* (2012) 235-282.

³¹⁹ The Commission is comprised of 11 members who are serving in their personal capacity. The commissioners are elected for a six-year term.

³²⁰ See art 45 of the African Charter.

³²¹ Rule 84(2) and rule 118(2) of the rules and procedure of the African Commission.

The Commission has a quasi-judicial feature in that it deals with communications from individuals or NGOs.³²² The admissibility requirements before the Commission are provided by article 56 of the African Charter³²³ and authors of communications to the Commission may not be anonymous; should not contain disparaging language; should not rely exclusively on the news media; local remedies must have been exhausted; the communications must be submitted within a reasonable time; and the matter must not have already been settled before another international body.

In exercising its mandate, the Commission also receives inter-state communications.³²⁴ However, *DRC v Burundi, Rwanda and Uganda*³²⁵ is the only inter-state communication that has so far been decided before the Commission. This case involved three EAC member states.³²⁶

The Commission is faced with two major challenges: the slowness of its procedures and the nature of its findings; the Commission may take more than five years to issue its findings. Significantly, the Commission issues recommendations which are not legally binding. However, the Commission has stated on many occasions that its decisions are authoritative, thus compelling states to give effect to them.³²⁷ The extent to which the Commission's recommendations are binding in practice depends on the political goodwill of states.³²⁸ Viljoen and Louw argue that, when the AU Assembly considers and adopts the Commission's annual activity report, the

³²² Art 55-59 of the African Charter deals with 'other communications' which are non-state communications. See AC Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20 *Human Rights Quarterly* 235.

³²³ See F Viljoen 'Admissibility under the African Charter' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice* (2002) 61.

³²⁴ See art 47-54 of the African Charter.

³²⁵ Communication No 227/99 (2004) AHRLR 19 (2003).

³²⁶ The matter was also dealt by the ICJ.

³²⁷ R Murray *Human Rights in Africa: From the OAU to the African Union* (2004) 54.

³²⁸ See F Viljoen & L Louw 'Status of the findings of the African Commission on Human and Peoples' Rights' (2004) 48 *Journal of African Law* 1; F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1993-2004' (2007) 101 *American Journal of International Law* 1

adoption means the Assembly has taken legal responsibility for the findings of the Commission, and states are bound to observe them.³²⁹

4.5.3 NEPAD, APRM and human rights

The New Partnership for Africa's development (NEPAD) is an on-going programme of the AU that seeks to improve Africa's economy,³³⁰ 'NEPAD is a vision and a strategic framework for Africa's renewal'.³³¹ The main objective of NEPAD is to eradicate poverty, to place African countries both individually and collectively on a path of sustainable growth and development.³³² NEPAD aims to address Africa's marginalisation and underdevelopment through the protection and promotion of human rights,³³³ which is one condition for the attainment of sustainable development in the current world.³³⁴ African leaders have pledged themselves in favour of cooperation in the process of promoting and protecting human rights at regional level. They have also pledged to facilitate the development of civil society organisations, including strengthening human rights institutions at the national, sub-regional and regional levels, and supporting the African Charter, African Commission and the African Court as important instruments for ensuring the promotion, protection and observance of human rights in Africa.

³²⁹ Viljoen & Louw (2004) 48 *Journal of African Law* 1, 6.

³³⁰ See generally C Stals 'The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 130.

³³¹ NEPAD available at www.nepad.org (Accessed on 3 April 2014).

³³² NEPAD available at www.nepad.org *NEPAD has its roots from the Millennium Africa Recovery plan, (MAP) led by the former South African President Mbeki, which was merged with the OMEGA plan developed by president Wade of Senegal, to form the New Africa Initiative, which in 2001 was changed to be NEPAD.*

³³³ E Baimu 'Human rights in NEPAD and its implication for the African human rights system' 2002 2 *African Human Rights Law Journal* 301, 305.

³³⁴ Paragraph 71 of the NEPAD document that states 'African leaders have learned from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development. They are making a pledge to work, both individually and collectively, to promote these principles in their countries and sub regions and on the continent'. Available at NEPAD website www.nepad.org (accessed on 3 April 2014).

The APRM is one of the 'spin-offs' of the NEPAD.³³⁵ It is simply an African self-monitoring mechanism. On 9 March 2003, the Heads of State and Government Implementation Committee (HSGIC) of the NEPAD adopted some key documents that provide for the operational arrangements for the APRM.³³⁶ Such documents included the Memorandum of Understanding (i.e. the accession document) for the APRM; the Declaration on Democracy, Political, Economic and Corporate Governance (Declaration on Democracy), the APRM Base Document and the APRM Organisation and Processes.³³⁷ These instruments form the primary source of the APRM governing principles.³³⁸

The main objective of the APRM is to 'ensure policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy'.³³⁹ The APRM is also relevant to the work of sub-regional organisations. The APRM Base Document states that:

The primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity building.³⁴⁰

Through the APRM, progress made by individual countries with the implementation of the NEPAD programme should be assessed from time to time. All EAC member states, with the

³³⁵ See M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41.

³³⁶ See M Hansungule 'Malawi and the African Peer Review Mechanism: A bold step towards good governance?' (2008) 2 *Malawi Law Journal* 6; C Stals 'The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 133.

³³⁷ As above.

³³⁸ C Stals 'The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 130, 133.

³³⁹ Para 2 of the New Partnership for Africa's Development (NEPAD) The African Peer Review Mechanism, AHG/235 (XXXVIII) Annex II. An APRM Base Document was attached to the Declaration on democracy.

³⁴⁰ Para 3 of the New Partnership for Africa's Development (NEPAD) The African Peer Review Mechanism, AHG/235 (XXXVIII) Annex II.

exception of Burundi, have acceded to the APRM mechanism.³⁴¹ Only Kenya and Rwanda have so far completed the whole review process.

4.6 Chapter conclusion

This chapter has addressed some of the major challenges that the EACJ is currently encountering and may well experience in future when discharging its mandate. This chapter concludes that the political setting within member states has affected the work of the EACJ because member states see the EACJ as a threat to their political status to the extent that they have restricted its jurisdiction in matters which might be politically sensitive. Member states are often more keen to preserve their state sovereignty than to adhere to the EAC Treaty, and are yet to be convinced that human rights should be protected at the Community level, regardless of the EAC Treaty allowing for the respect, promotion and protection of human rights.

Despite of the on-going pressure from civil society and various human rights groups, the EACJ lacks an explicit human rights jurisdiction. Litigants before the EACJ have so far relied on other causes of action as provided in the EAC Treaty such as a breach on the rule of law, good governance and democracy to lodge human rights related claims. Unlike human rights, causes of action such as the rule of law, good governance and democracy are not restricted under article 27(2) of the EAC Treaty.

The EACJ's jurisdiction with respect to human rights principles is far from being clear. Its mandate is politicised and member states have yet to be sure as to what role the EACJ should play in safeguarding East African integration. The Court's jurisdiction is expected to be expanded in the future and it is hoped that the member states will endow the Court with explicit human rights jurisdiction. Article 27(2) of the EAC Treaty has made EACJ judges hesitant in interpreting human rights norms enshrined in the EAC Treaty. The process for adopting a protocol which would extend the Court's mandate is still on-going, but EAC political leaders had voiced their intention to give the EACJ jurisdiction in international crimes which is seen by many as a

³⁴¹ M Hansungule 'The Role of the APRM in strengthening governance in Africa: opportunities & constraints in implementation' (2014) 3 *International Journal of Arts and Commerce* 88, 88.

political agenda. However, the current position of the EAC Summit is that the Council of Ministers should look at the options of expanding the EACJ's jurisdiction on trade matters, and with respect to human rights, the Council of Ministers should engage with the existing regional mechanisms for future cooperation.

In anticipating that the EACJ's jurisdiction will be expanded at some stage, enforcement mechanisms need to be made more effective. Current mechanisms for enforcing EACJ judgments depend heavily on the political will of member states to comply with the Court's decisions. Although compliance with a decision of an international court or tribunal rests on the state's will, measures such as follow-up and political pressure from other states improve compliance. With the proliferation of international courts and tribunals in Africa with almost similar role, the expected expanded jurisdiction of the EACJ should take into consideration its relationship with other regional courts.

CHAPTER 5

JUDICIAL INDEPENDENCE OF THE EAST AFRICAN COURT OF JUSTICE: A PREREQUISITE FOR EFFECTIVE HUMAN RIGHTS PROTECTION

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5.1 Introduction

Judicial independence is considered to be one of the fundamental elements of a successful constitutional democracy.¹ As a result, establishing the culture of judicial independence has turned out to be the focus of both national and international initiative.² With the proliferation of International courts across the globe, advocacy for their independence has gradually increased.³ However, efforts to establish a culture of judicial independence of international courts are still at infancy. The assessment on the independence of the East African Court of Justice (EACJ) in this chapter is one of many ongoing attempts to advocate for the independence of International courts.

Most International courts are vulnerable to coercive attitudes from states. They are delicate when it comes to their autonomy, taking into account that their relationship

¹ See T Meron 'Judicial independence in international criminal tribunals' (2005) 99 *American Journal of International Law* 359, 369.

² S Shetreet 'The normative cycle of shaping judicial independence in domestic and international law: The mutual impact of national and international jurisprudence and contemporary practical and conceptual challenges' (2009) 10 *Chicago Journal of International Law* 275.

³ EA Posnert & JC Yoot 'Judicial independence in international tribunals' (2005) 93 *California Law Review* 12.

with states is a replica of principal-agent relationship. States are operating as principals, by establishing these courts, appointing judges and laying down laws that judges ought to interpret. In light of the delicate nature of this relationship, international judges are conscious of the tenuous nature of their tenure. Some of them might be concerned of being removed from office due to egregious acts unbecoming to the judiciary. Others might be considering as to whether they can have a second chance of being re-appointed to the office. These are just few of many issues facing international judges. One would ponder whether principles governing international judicial independence are distinct from those found at the domestic level. It is stated that principles codifying judicial independence of International courts are relatively the same with those found within national constitutions.⁴

It is commonly, but not universally accepted that judicial independence is one of the attributes of an effective judiciary.⁵ Thus, there is a close link between judicial independence and the effectiveness of a court. The more dependent a court is, the more ineffective it is likely to become. It is easy to contrast the effectiveness of domestic courts in a democratic state from those in undemocratic ones. Independent national courts mostly function in a successful market-based liberal democracy, whereas, dependent courts operate under authoritarian regimes and failed democracies.⁶ It has been demonstrated that judicial independence can create

⁴ J Crawford & J McIntyre 'The independence and the impartiality of the international judiciary' in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 191.

⁵ LR Heifer & A Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273; A Nollkaemper 'The independence of the domestic judiciary in international law' (2006) 17 *Finnish Yearbook of International Law* 17; Y Shany 'Judicial independence as an indicator of international court effectiveness' in S Shetreet & C Forsyth (eds) (2012) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 251; G Guillaume 'Some thoughts on the independence of international judges vis-a-vis states' (2003) 2 *Law and Practice of International Courts and Tribunals* 163. Eric Posner and John Yoo have an opposite opinion regarding the impact of judicial independence and the effectiveness of a court. In their provocative article, they argue that there is no evidence supporting that an independent international judiciary is more effective than the one which is not independent. See EA Posner and JC Yoo (2005) 93 *California Law Review* 1.

⁶ R la Porta et al 'Judicial checks and balances' (2004) 102 *Journal of Political Economy* 445; LB Tiede 'Judicial independence: Often cited, rarely understood' (2006) 15 *Journal of Contemporary Legal Issues* 129.

an environment for the observance of the rule of law and human rights protection.⁷ EACJ, like any other court, must be independent and impartial in order to function effectively. An independent and impartial EACJ would contribute immensely to establish a democratic society in the East African Community (EAC).

Judicial independence of international courts is guaranteed by their founding instrument. Some provisions in the EAC Treaty attempt to guarantee the independence of EACJ judges. However, the EAC Treaty makes no specific mention of the EACJ's status of independence as such. Rather, it requires the process of appointing the Court's judges to take into consideration the proven integrity, impartiality and independence of candidates.⁸ Political organs of the EAC have vast control over the EACJ, as the Summit has exclusive powers in appointing, removing or suspending Court judges. This position runs contrary to the contemporary approach adopted by newly emerging international courts, which allows an independent body to play such a role. Since its establishment, the EACJ's independence has been questionable. The amendments to the EAC Treaty in 2007, following the EACJ's interim ruling in the case of *Anyang' Nyong'o and Others v Attorney General of Kenya* ((*Anyang' Nyong'o case*),⁹ undermined further the Court's independence, by introducing suspicious grounds for the removal and suspension of EACJ judges. The current nature of judicial appointments and the security of tenure of EACJ judges raise genuine concerns about the independence of the Court. As the EACJ is anticipating playing a commanding role in promoting democracy, rule of law, good governance and human rights in the region, its current set-up does not create an atmosphere for an independent judiciary, which is vital for fulfilling Community

⁷ CM Larkins 'Judicial independence and democratization: A theoretical and conceptual analysis' (1996) 44 *American Journal of Comparative Law* 608, 608; S Shetreet (2009) 10 *Chicago Journal of International Law* 275, 277.

⁸ Art 24(1) of the EAC Treaty.

⁹ *Anyang' Nyong'o & Others v Attorney General of Kenya*, EACJ Ref No 1 of 2006, Ruling of 27 November 2006.

ambitions. It is a fact that all judges, in both national and international judiciaries, must be independent and impartial in order to discharge their duties appropriately.¹⁰

If a court is influenced by its political actors when discharging its operations, such a court is likely to be regarded as a political tool, consequently losing its legitimacy.¹¹ It is the duty of political actors to establish a judiciary that is free from any political influence.¹² International courts will be effective when regular politics do not determine how they are to interpret and apply the law.¹³ As with domestic courts, the legitimacy of International courts rests on the extent of their independence.¹⁴ The political setting for the formation and functioning of domestic courts and of international courts differs considerably. Political goodwill is more necessary for enabling international courts to function than national courts.

The primary objective of this study is to explore the means through which the EACJ can effectively protect human rights in the EAC. One of the aspects which has been given minimum attention is the independence of international courts, such as the EACJ. This study has found a space for this discourse, and it is a genuine fact that the EACJ's independence is a matter that needs to be addressed. There are two main issues that one needs to ponder when narrating on the discourse of judicial independence of the EACJ: the first issue is whether the current normative and institution framework in the EAC provides a good foundation for the EACJ's independence. The second issue is whether there are exiting models at international level that guarantee judicial independence of international courts. It is the argument

¹⁰ P Mackenzie & P Sands 'International courts and tribunals and the independence of the international judge' (2003) 44 *Harvard International Law Journal* 275; LT Dung 'Judicial independence in transitional countries' (2003) 11, available at <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan018253.pdf> (accessed on 8 August 2013).

¹¹ B Kingsbury 'Neo-madisonian global constitutionalism: Thomas M Franck's democratic cosmopolitan prospectus for managing diversity and world order in the twenty-first century' (2003) 35 *New York University Journal of International Law and Politics* 291, 296.

¹² S Shetreet 'Creating a culture of judicial independence: The practical challenge and the conceptual and constitutional infrastructure' in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 20.

¹³ KJ Alter 'Agents or trustees? International courts in their political context' (2008) 14 *European Journal of International Relations* 391, 425.

¹⁴ See M. Bühlmann & R Kunz 'Confidence in the judiciary: Comparing the independence and legitimacy of judicial systems' (2011) 34 *West European Politics* 317.

of this chapter that judicial independence is a prerequisite for effective human rights protection. For the EACJ to function effectively, its current set-up and composition have to be re-designed so as to create an institutional culture that would guarantee the independence and impartiality judges. Since the EACJ is expected to uphold EAC principles which are crucial for the Community survival, aspects concerning its independence should not be given priority. The above outlined issues provide for the roadmap in leading the discussion of this chapter.

5.2 The concept of judicial independence and impartiality

Before dwelling on the main discourse of this chapter, it is important to define what constitute judicial independence and impartiality. It should be pointed out from the outset that in this study, judicial independence and impartiality are used interchangeably, despite of their differences in meaning.

It is already established that no one should bear any kind of role that affects the autonomy of the judiciary.¹⁵ From that end, any judiciary must free from both internal and external independence.¹⁶ External independence requires that judiciary must be free and independent from outside influence such as the executive branch of government, the legislature, civil society or any other entity/person.¹⁷ The adjudication process includes the administration, procedure and substance relating to the dispute before a court of law, all of which require maximum liberty.¹⁸ Thus, internal independence involves the conduct of judicial officers in ensuring the independence of judges through the internal activities of the judiciary.¹⁹ A judge should remain independent from directives or pressures from peers or superior

¹⁵ Russell in PH Russell & DM O'Brien *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) 8.

¹⁶ See PH Russell 'Toward a general theory of judicial independence' in PH Russell & DM O'Brien *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) 6.

¹⁷ LT Dung 'Judicial independence in transitional countries' (2003) 11, available at <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan018253.pdf> (accessed on 8 August 2013).

¹⁸ Shetreet (2009) 10 *Chicago Journal of International Law* 275, 286.

¹⁹ Russell in PH Russell & DM O'Brien *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) 11.

judges during the adjudication process.²⁰ Yet, it is habitual for judges to consult one another on relevant legal issues. In such circumstances, the sharing of information among judges should be treated as an 'advisory and never as authoritarian instruction'.²¹

What elements constitute judicial independence? The answer to this question might not be straightforward, owing to a variety of approaches adopted when demonstrating attributes of independent judiciary. According to Russell, judicial independence may entail two elements. The first element relates to the autonomy of judges; accordingly, a judge has to be independent from any other individual including fellow judges and any organisation or institution. The second element relates to perceptions about the judiciary. A court has to be seen in the context of judicial behaviour that can reflect judicial autonomy, particularly the way it functions.²² Russell concludes that when ascertaining what constitutes judicial independence, the focus has to be more on the 'relational' context rather than on the behavioural context.²³ In order to enhance the culture of judicial independence in the EACJ, this chapter identifies a variety of approaches adopted by different international courts for promoting the culture of judicial independence which might could be a model to the EACJ.

The question of judicial independence should not be construed only as to whether judges are free and independent from other individuals or any institution. The concept should extend to cover everyone involved in the court activities, including court registrars and other officials. The concept should thus extend to all individuals involved in the administration of justice. It should also be pointed out that the independence of judges is guaranteed not only by the statutory requirements for their appointment and tenure of office, but also by their solemn declaration that

²⁰ Shetreet (2009) 10 *Chicago Journal of International Law* 275, 286.

²¹ Dung 'Judicial independence in transitional countries' (2003) 12.

²² Russell in PH Russell & DM O'Brien *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) 6.

²³ Russell (2001) 8.

they will discharge their duties impartially and conscientiously.²⁴ For that reason, the manner in which the court in question is organised and functions is also a key element for guaranteeing judicial independence.²⁵ A fair trial in judicial proceedings does not start during the trial nor does it end after the delivery of a court judgment. A fair trial begins immediately after instituting a case and ends when a judgment holder is appropriately remedied. Judges are involved in all these stages, as are other judicial officers. This is why it is important to emphasise that judicial independence is an aspect that involves everyone involved the adjudication process. It should also be pointed out that the independence of judges is guaranteed not only by the statutory requirements for their appointment and tenure of office, but also by their solemn declaration that they will discharge their duties impartially and conscientiously.²⁶

In respect of impartiality, it is the bedrock of a democratic judicial system.²⁷ A sitting judge must be free from any kind of bias, animosity or sympathy towards either of the parties in a dispute. A judge should not have interest or stake in a particular dispute and should not have a pre-formed opinion about it or the parties involved in a dispute. Disputes should be determined ‘on the basis of facts and in accordance with the law without any restriction’.²⁸ The EAC Treaty tries to promote the judicial impartiality of the EACJ and prohibits the Court’s judges from holding office or being involved in politics in their home country, or from engaging in trade or any professional activity which may be likely to cause a conflict of interest when discharging their duties at the Court.²⁹

Parties to a dispute are not expected to intimidate a presiding judge. In the *Anyang’ Nyong’o* case, Just before the scheduling conference of the main case, the Kenyan Attorney General called the then President of the Court, the late Moijo Ole Keiwua, to his chambers, to inform him that unless he and Justice Kasanga Mulwa

²⁴ Art 21 of the ICJ Statute.

²⁵ G Guillaume ‘Some thoughts on the independence of international judges vis-à-vis states’ (2003) 2 *Law and Practice of International Courts and Tribunals* 163, 165.

²⁶ Art 21 of the ICJ Statute.

²⁷ *Anyang’ Nyong’o*, case, the ruling of 27 November 2006, 15.

²⁸ UN Basic Principles on the Independence of the Judiciary, Principle 2.

²⁹ Art 43(2) of the EAC Treaty.

disqualified themselves from the hearing of the reference, the Attorney General would, in line with his instructions, file a recusal application imputing bias.³⁰ Later on, the Attorney General of Kenya applied to the EACJ asking the Kenyan judges who were on the bench at the interim ruling in the *Anyang' Nyong'o* case to recuse themselves. The main argument of the Attorney General of Kenya was that, owing to the fact that the Kenyan judges were under investigation on corruption charges, there was a public perception of possible 'animosity' by the Kenyan judges in the case towards the Kenyan government, and, therefore, that they ought to recuse themselves.³¹ The Attorney General further argued that the Kenyan judges had a duty to disclose their interest in the matter. The Attorney General was accordingly trying to impute bias on the Kenyan judges before the EACJ against the Kenyan government. The EACJ, however, held that the Kenyan judges did not have any obligation to recuse themselves from hearing the matter on the ground that the failure of a judge to disclose facts that are in the public domain cannot be a ground on which a reasonable member of public would apprehend bias.³² The Attorney General of Kenya also revealed that he had been involved in the EAC Treaty amendment process. Neglecting to state the relevance of his involvement in the EAC Treaty amendment process during the hearing of the recusal application, was simply another way of the Attorney General of Kenya attempting to intimidate the Court judges into deciding the application in Kenya's favour. The Court stood its ground and proceeded on to hear the substantive reference on nominations to the East African Legislative Assembly (EALA) and declared that Kenya was in breach of article 50 of the EAC Treaty. The case is one of many instances in which international judges are encountering threats from member states. The action of the Attorney General of Kenya was a way of preventing Kenyan judges from freely exercising their judicial duties.

³⁰ *Anyang' Nyong'o* case, the ruling of 27 November 2006, 8.

³¹ *Anyang' Nyong'o* case, the ruling of 27 November 2006, 19.

³² As above.

Judicial impartiality requires a judge to discharge judicial duties strictly according to the facts, law and conscience.³³ While exercising judicial authority, a judge is impartial when facts, laws and final verdict are determined without any influence. Judicial impartiality refers to a 'state of mind of a judge towards a case and the parties to it'.³⁴ The Human Rights Committee has observed that in accordance to article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), and in order to ensure a court's impartiality, 'judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties'.³⁵ Literally, judicial impartiality reflects the attitude of a court judge, that is, there is an absence of bias, animosity or sympathy towards either of the parties in a dispute.³⁶ There are slight differences between judicial independence and impartiality. While judicial independence connotes the requirement that external forces should not interfere with the work of the judiciary, judicial impartiality imposes a duty on the judiciary not to be influenced by any source or circumstances.

In order for the EACJ to operate and function effectively, its independence and impartiality should not be compromised. The intended objectives of the EACJ cannot be attained if its functioning is influenced by internal and external forces that undermine the Court's functioning. Apart from ensuring the observance of the rule of law, democracy and human rights, judicial independence is also essential for the developments in a society to the extent of being able to create an environment conducive to economic growth.³⁷ By establishing the EACJ, member states of the EAC have agreed to cede some of their sovereign powers to the EACJ so that it can pursue integration ambitions by establishing Community legal order. Judicial

³³ Principle 2 of the UN Basic Principles on the Independence of the Judiciary; Principle 1.2.d. of the Council of Europe, Recommendation No R(94).

³⁴ JZ Federico *International principles on the independence and accountability of judges, lawyers and prosecutors: A practitioners' guide* (2004) International Commission of Jurists, page 20, available at <http://www.mafhoum.com/press7/230S24.pdf> (accessed on 12 August 2013)

³⁵ Communication 387/1989, *Arvo Karttunen v Finland*, 7.2.

³⁶ Federico *International principles on the independence and accountability of judges, lawyers and prosecutors: A practitioners' guide* (2004) 27.

³⁷ S Gloppen *The accountability function of the courts in new democracies* (2004) 1.

independence is a cardinal principle, commonly provided for in national constitutions, that characterises the relationship between the judiciary and other branches of government.³⁸ In addition, the doctrine of judicial independence is intertwined with the constitutional principle of separation of powers.³⁹ In EAC integration, the EACJ plays a significant role in the process of checks and balances; a role that demands unequivocal independence from the executive and legislative branches of governance.⁴⁰

The political institutions establishing international courts should lay a foundation for an independent and impartial judiciary. However, an environment for judicial independence alone is not adequate to secure public confidence. Judicial accountability adds weight to public confidence in the work of judiciaries.⁴¹ International courts will only succeed in meeting the desired objectives of their respective organisations when being conferred with ‘a certain degree of legitimacy’.⁴² Creating an environment for judicial autonomy is one of the factors that preserve a court’s legitimacy.

In the human rights context, impartiality and independence of judges guarantees the right to a fair trial. Judicial impartiality establishes a correlative duty for judges to step down from determining a case in which they realise that they would be unable to impart justice impartially or when their actual impartiality may be compromised. In these cases, they should not expect or wait for the parties to a case to challenge their impartiality, but should recuse themselves from hearing the case. Courts generally enforce impartiality through a recusal application or on the basis of a

³⁸ OM Fiss ‘The limits of judicial independence’ (1993) 25 *University of Miami Law Review* 57, 57; S Shetreet ‘Creating a culture of judicial independence: The practical challenge and the conceptual and constitutional infrastructure’ in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 18.

³⁹ J Harrison ‘International adjudicators and judicial independence’ (2006) 30 *Harvard Journal of Law and Public Policy* 127, 130.

⁴⁰ A Gordon & D Bruce ‘Transformation and the independence of the judiciary in South Africa’ (2007) Centre for the Study of Violence and Reconciliation at page 7, available at <http://www.eldis.org/go/country-profiles&id=34448&type=Document#.UgTFLtlyZTI> (accessed on 12 August 2013).

⁴¹ Dung ‘Judicial independence in transitional countries’ (2003) 3.

⁴² Shany in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenge* (2012) 260.

judge's own motion, whereby a sitting judge will not determine a matter if there are circumstances likely to undermine, or that appear to be likely to undermine, judicial impartiality.

5.3 International standards on judicial independence

The principle of judicial independence is extensively in black letter law of most countries' constitutions. At the same time, the principle is gradually finding its way into the international law scene. Calls for the independence of international judiciary are ever increasing. As revealed already in this chapter, the manner of establishing judicial independence of international courts does not vary much from that of domestic courts. In supranational organisations, it is common for political organs to be involved in the work of international courts.

It is merely impossible to completely ignore the role of politics in the establishment and viability of international courts. After all, all international courts are established as a result of a political process involving the political organs of an organisation. However, it is critically important not to vest full powers in the political organs in the functioning of an international judiciary. International courts are established for different objectives, functions and varying motivation and states have an important role to play in formulating the basis for the independence of an international judiciary to which they are parties.

A number of declarations of international standards for promoting judicial autonomy have been drafted by the United Nations (UN) Special Rapporteur on Judicial Independence and were subsequently endorsed in UN General Assembly resolutions. These declarations do not have binding legal effect, but form authoritative statements which are recognised and accepted principles. With the proliferation of international courts, there is no international binding instrument that specifically guarantees international judicial independence. Despite the lack of such instrument, there are minimum standards for the performance of international courts which

endeavours to promote the independence of international judges.⁴³ There are influential international standards which accord for judicial independence of international judiciaries. One of the recent examples is the Mt. Scopus International Standards on Judicial Independence of 2008 (Mt. Scopus Standards).⁴⁴ The adoption of the Mt. Scopus Standards was necessitated by the absence of modern standards for both national and international judges for guaranteeing judicial independence.

In the absence of an international binding instrument, the judicial independence of most international courts is guaranteed by the statutes establishing them. Also, there are international associations which have adopted reports and statements that advocate for the adherence to judicial independence. Such statements include the International Bar Association's IBA Minimum Standards of Judicial Independence, adopted in 1982. There is also the UN Basic Principles of the Independence of the Judiciary of 1985 that sets out some attributes for the independence of national judiciary which UN member states are encouraged to adhere to.⁴⁵ Such sentiments impose a number of obligations on UN member states to adhere to the independence of the judiciary at the domestic level. They also impose an obligation on all governmental and other institutions to respect and observe the independence of the judiciary.⁴⁶ The duty imposed on governments and other institutions by the UN Basic Principles of the Independence of the Judiciary of 1985 recognises that the independence of the judiciary should also extend to the governments of EAC member states, as members of the UN.

⁴³ Crawford & McIntyre in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 189.

⁴⁴ The document for Mt Scopus Standards was conceived in 2007 when an international group of legal academics and professionals met and developed the vision of revised minimum standards for the independence of both national and international judges. The document was approved on 29 March 2008. In formulating Mt Scopus Standards, due regard was given to the IBA Minimum Standards on Judicial independence of 1982 and the UN Basic Principles of Judicial Independence of 1985, the Bangalore Principles of Judicial Conduct of 2002 and the Burgh House Principles on the Independence of the International Judiciary of 2004.

⁴⁵ The UN Basic Principles on the Independence of the Judiciary of 1985, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See also the African Commission on Human and Peoples' Rights Resolution on the respect and the strengthening on the independence of the judiciary of 1996.

⁴⁶ Principle 1 of the UN Basic Principles on the Independence of the Judiciary of 1985.

It is understood that principles codifying judicial independence have a strong foundation in some domestic legal systems compared with the international one.⁴⁷ Most international standards on judicial independence have centred on similar approaches adopted by domestic judiciaries. Although all EAC member states, within their national constitutions, accord adherence of judicial independence, at the EAC level, this is not the case. Although it is difficult to completely divorce politics from the operations of the judicial organ established by intergovernmental organizations such as the EACJ, a high degree of respect and observance of judicial independence is invaluable for organ to properly function. It is indispensable that an international judiciary, as applied to the domestic courts, must be independent and impartial when discharging its functions.⁴⁸ It is expected that judicial independence is to be a culture that is guaranteed, respected and promoted by EAC member states in order to lay the foundation for the effective functioning of the EACJ.

At the supranational level, the Council of Europe is the benchmark in promoting international judicial independence.⁴⁹ Adherence to the principles of judicial independence is advocated through various recommendations and principle statements within the Council of Europe.⁵⁰ These have largely mirrored judicial independence in the context of security of tenure, autonomy when making judicial decisions and the management of the judiciary.

⁴⁷ R Mackenzie & P Sands 'International courts and tribunals and the independence of the international judge' (2003) 44 *Harvard International Law Journal* 271.

⁴⁸ Crawford & McIntyre in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 191.

⁴⁹ Crawford & McIntyre in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 194.

⁵⁰ See Opinion no 5 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the law and practice of judicial appointments to the ECHR of 2003; the Consultative Council of European Judges (CCJE) Magna Carta of Judges of 2010; Opinion No 3 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, 2002; The ECHR, 1950. Opinion No 2 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to art 6 of the ECHR of 2001; Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: Independence, efficiency and responsibilities; Recommendation no R (94) 12 of the Committee of Ministers to member states on independence, efficiency and role of judges and Explanatory Memorandum of 1994.

As a political system aimed at assisting in EAC integration, the EACJ needs a strong political foundation for guaranteeing its independence. Owing to the fragility of its work, the EACJ needs strong political support from member states for ensuring its autonomy. A political foundation for the EACJ's independence should thus focus on institutional and legal assurances. As the impact of the decisions of the EACJ penetrates the everyday lives of East African citizens, the need for it to be legitimate in the eyes of all those it serves increases. Accordingly, judicial independence is one of the factors that have a bearing on the credibility and legitimacy of international courts.⁵¹

5.4 Judicial independence and its relationship with human rights

Judicial independence is one of the fundamental attributes of a democratic society in which human rights are strongly observed. Under international law, states are obliged to establish independent and impartial judicial organs for guaranteeing fair trial and observing the rule of law.⁵² The most common link between judicial independence and human rights is the right to a fair trial. It is obvious that an independent court has the potential to adjudicate a matter in an impartial and diligent manner. An independent court with human rights jurisdiction is more likely to protect victims or potential victims of human rights violations effectively than a dependent court. Effective human rights protection goes hand in hand with the strict observance of the rule of law and the proper administration of justice. It has already been pointed out that the right to a fair trial before an independent and impartial tribunal is 'an absolute right that may suffer no exception'.⁵³ The Inter-American Commission on Human Rights (Inter-American Commission) has pointed out the

⁵¹ Mackenzie & Sands (2003) 44 *Harvard International Law Journal* 271.

⁵² Office of the High Commissioner for Human Rights & International Bar Association, 'Human rights in the administration of justice: a manual on human rights for judges, prosecutors and lawyers', available at <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf> (accessed 20 August 2012) 118.

⁵³ See the views of the Human Rights Committee under art 5, para 4, of the Optional Protocol to the ICCPR, Communication 263/1987, para 5.2, concerning the case of *Miguel González del Río v Peru*, IACtHR judgment of 30 May 1999, Series C No. 52.

importance of an independent judicial body for protecting human rights⁵⁴ and the same view has been expressed by the Inter-American Court of Human Rights (IACHR) as follows:

Guaranteeing rights involves the existence of suitable legal means to define and protect them, with intervention by a competent, independent, and impartial judicial body, which must strictly adhere to the law, where the scope of the regulated authority of discretionary powers will be set in accordance with criteria of opportunity, legitimacy, and rationality.⁵⁵

A number of international human rights instruments provide for the establishment of an independent and impartial body for settling international human rights disputes. The instruments categorically link judicial independence and human rights as aspects that ensure the right to a fair trial. The Universal Declaration of Human Rights (UDHR) guarantees the entitlement and equality of a fair and public hearing before an independent and impartial tribunal in the determination of a person's rights and obligations or in the case of a criminal charge.⁵⁶

The principle of equality before the law and equal protection as provided in the UDHR⁵⁷ is directly linked to the principle of judicial independence. A similar provision to that of the UDHR appears in the ICCPR: 'all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.⁵⁸ The African Charter on Human and Peoples' Rights (African Charter), which is referred to in the EAC Treaty, obliges state parties to guarantee the independence of

⁵⁴ The Inter-American Commission stated that 'the independence of the judiciary is an essential requisite for the practical observance of human rights'. See *The Situation of Human Rights in Cuba: Seventh Report*, OAS document, 1983, Chapter IV para 2.

⁵⁵ *Legal status and human rights of the child*, Advisory Opinion of the IACtHR OC-17/2002, 28 August 2002, 120.

⁵⁶ Art 10 of the UDHR.

⁵⁷ Art 7 of the UDHR.

⁵⁸ Art 14 of the ICCPR.

the courts and improve national institutions entrusted with the duty of promoting and protecting human rights as provided for in the Charter.⁵⁹

As the EACJ jurisdiction is projected to be expanded to have an explicit human rights jurisdiction, more sensitive cases are expected to be received by the Court. If the EACJ is not guaranteed its independence, as is the case at the moment, it is uncertain whether the Court will be able to protect human rights effectively. As member states appoint EACJ judges, there is the possibility of member states appointing judges who are more likely to be deferential to states in their determination of human rights cases.

Individuals are generally the victims of human rights violations in their countries. Hence, international courts have emerged as being preferable forums for remedying the victims of massive human rights violations. State governments tend to denounce their culpability in human rights violations and at times may be tempted to interfere with the independence of the judiciary to prove their innocence. It is in such circumstances that international courts need to adjudicate human rights disputes without fear or favour. Without an impartial and independent judiciary, there would be no substantial protection of human rights.

5.5 Factors determining judicial independence

There are no universally accepted attributes in determining judicial independence. However, elements that affect judicial functioning are vital in determining whether a judiciary is independent or not. It is common ground to consider factors such as institutional arrangements, methods of appointing judges, terms of office and financial autonomy, as yardsticks for judicial independence. Such factors are used in this chapter to assess the independence of the EACJ. Needless to say, the above mentioned attributes are not the only determining factor for judicial independence. The way in which a court is organised and functions are also key features when

⁵⁹ Art 26 of the African Charter. Also see art 18 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; art 8(1) of the American Convention on Human Rights; art 6(1) of the ECHR.

assessing judicial independence.⁶⁰ Aspects such as the secrecy of deliberations regarding a judgment should also not be taken for granted when considering factors for guaranteeing judicial independence.⁶¹ However, this chapter focuses on attributes which are closely linked with the EACJ.

5.5.1 Institutional arrangement

Political setting of a supranational organisation is a determinant factor when assessing the independence of international courts. Organs and institutions within such organisations tend to cooperate or even competing with each other in performing different activities.⁶² In this chapter, institutional arrangement is regarded in the context of the application of the doctrine of separation of powers in international organisations.⁶³ The doctrine of separation of powers envisages a separation in the functioning of the three branches of government, namely: the executive, legislature and judiciary. The way in which the organs of most international organisations are established and carry out their activities tends to adhere to the principle of separation of powers.⁶⁴

International organisations, as is the case with constitutional governments, have organs which perform the executive, judicial and legislative functions of those organisations.⁶⁵ In promoting the concept of internal and external independence in as far as institutional arrangements are concerned, the judiciary and other branches of government have to conduct themselves in a manner that enhances judicial

⁶⁰ G Guillaume 'Some thoughts on the independence of international judges vis-à-vis states' (2003) 2 *Law and Practice of International Courts and Tribunals* 163, 165.

⁶¹ As above.

⁶² HG Schermers & NM Blocker *International institutional law* (2003) 386;

⁶³ Institutional arrangement can also be analysed in the context of the relationship among judges themselves and other officials in the judiciary, as well as the manner in which the court in question is organized and functions See G Guillaume 'Some thoughts on the independence of international judges vis-a-vis states' (2004) 2 *Law and Practice of International Courts and Tribunals* 163.

⁶⁴ Shetreet in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 51.

⁶⁵ PQC Sands & P Klein *Bowett's law of international institutions* (2009); HG Schermers & NM Blocker *International institutional law* (2003) R Collins & ND White (eds) *International organisations and the use of autonomy: Institutional independence in the international legal order* (2011).

independence. Moreover, any court has to be independent from the other branches of government, especially the executive and the legislature.⁶⁶

As with national courts, the judicial organs of supranational organisation must be independent from any interference by other political and legislative organs. Apart from being independent from other organs, courts must have a variety of sustainable internal mechanisms for filtering any potential bias among judicial officers.⁶⁷ As indicated above, it is not the intention of this sub-section to narrate on the internal mechanism of a court for guaranteeing judicial independence.

As a result of the political nature of their formation, international courts are often vulnerable to the political organs of international organisations, of which they form part. A classic example of the vulnerability of international courts is seen in Southern Africa Development Community (SADC), where the SADC Tribunal has been suspended as a result of its judgment against Zimbabwe in which the political reputation of the Zimbabwean government was damaged. Another example relates to the EAC, where political organs rushed to amend the EAC Treaty in 2007. This has affected the functioning of the EACJ and has undermined the independence of the EACJ.

Ordinarily, international courts are established by the founding constitutions of international organisations.⁶⁸ Such organs or institutions within international organisations, commonly referred to as treaty organs, cooperate with each other in facilitating the working of a supranational organisation.⁶⁹ Their founding instruments provide for their founding principles, objects and functions to be undertaken and achieved by their organs and institutions.⁷⁰ Most international organisations' institutional structure consists of administrative and policy-making organs, legislature, and judicial organs. Judicial autonomy is guaranteed by institutional set-

⁶⁶ Federico 'International principles on the independence and accountability of judges, lawyers and prosecutors: A practitioners' guide' (2004) 20.

⁶⁷ T Meron (2005) 99 *American Journal of International Law* 359, 361.

⁶⁸ See title III of the TEU and art 9 of the EAC Treaty.

⁶⁹ HG Schermers & NM Blocker *International institutional law* (2003) 386.

⁷⁰ PQC Sands & P Klein (2009) *Bowett's law of international institutions* (2009) 448.

ups or rules that affect the behaviour of political actors within the judiciary.⁷¹ These political actors often crystallise the process of appointing and removing judges, and also resource international courts. In addition, the organs and institutions of a supranational organisation have different roles to play and, at times, their activities may interfere with each other.

It is common to find the various organs and institutions of an international organisation exercising administrative and policy-making functions, supervisory and adjudicative functions, and legislative functions. In having these three distinctive governmental functions, each organ needs to be separate and, in order to bring about an effective system of governance, should not interfere with the other organs. The manner in which the organs of most international organisations are established and carry out their activities tends to adhere to the principle of separation of powers.⁷² This doctrine of separation of powers envisages a total separation in the functioning of the three branches of government. It should be conceded that it is difficult to have a total separation of powers among the organs of a supranational organisation, because there are a few administrative functions that tend to be performed by the judicial officers and there are 'semi adjudicative powers' which at times are performed by the legislature.⁷³ Although it is practically impossible to have complete separate powers among the branches of the government, it is nevertheless agreed that the powers of the government should be subject to control and review by other organs without any kind of interference.⁷⁴

The doctrine of separation of powers is given a reasonable space in discussions about judicial independence at the domestic level. Many scholarly writings have analysed in detail the status of the domestic courts in relation to other branches of government. Little has been said about the doctrine of separation of powers in international organisations. Advocacy for the doctrine of separation of powers in

⁷¹ LB Tiede 'Judicial independence: Often cited, rarely understood' (2006) 15 *Journal of Contemporary Legal Issues* 129, 136.

⁷² Shetreet in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 51.

⁷³ As above.

⁷⁴ As above.

international organisations in order to promote the independence of an international judiciary is at a 'tender growth' stage.⁷⁵

In examining how institutional arrangements facilitate the independence of international judiciaries, it is important to illustrate the role that different organs play in a supranational organisation. These established organs play a role in creating checks and balances with regard to the work of the organisation by having both political and legal control.⁷⁶ Supranational organisations which target closer socioeconomic and political integration among their member states have the power to adopt norms which have legally binding effects on their members. By having such powers, supranational organisations establish specialised organs and institutions specifically mandated to run organisational activities.

As reflected above, political organs in international organisations are heavily involved in the structuring and functioning of the judicial organs of most supranational organisations. In the EAC, political organs are extensively involved in the functioning of the EACJ, to the extent of endangering its autonomy. In assessing institutional arrangements for determining the EACJ's independence, it is vital to reflect on how EAC organs fashion the EACJ's independence.

Each organ of the EAC performs its functions within the limit of its powers as provided by the EAC Treaty.⁷⁷ The executive and administrative functions of the EAC are generally performed by the Summit, the Council and the Secretariat. Firstly, the Summit is the highest political organ in the EAC and consists of the heads of state and government of the member states.⁷⁸ Apart from other functions as provided by the EAC Treaty, the Summit gives general direction and impetus to the development and achievement of the objectives of the EAC.⁷⁹ Secondly, the EAC Council is comprised of ministers responsible for EAC affairs and the Attorney General of each

⁷⁵ M Bohlander 'Separation of powers and the international judiciary: A vision of institutional judicial independence in international law' in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 272.

⁷⁶ Sands & Klein (2009) 18.

⁷⁷ Art 9(4) of the EAC Treaty.

⁷⁸ Art 10(1) of the EAC treaty.

⁷⁹ Art 11(1) of the EAC Treaty.

member state.⁸⁰ The EAC Council makes policies for achieving the objectives of the Community; that is, it is the policy organ of the EAC. It also initiates and submits Bills to the EALA.⁸¹ Thirdly, the Secretariat is the main executive organ of the EAC.⁸² The head of the Secretariat is the Secretary General who is appointed by the Summit.⁸³ The Secretariat is generally responsible for coordinating all the activities of the EAC and it largely discharges the administrative duties of the Community. It is also involved in planning, managing, coordinating and monitoring the implementation of the EAC Treaty.⁸⁴

During the early days of the existence of the EAC, a power struggle among the Community organs was evident. In *Calist Mwatela v the EAC*,⁸⁵ which was the first case that the EACJ decided, the Council of Ministers assumed the responsibility of initiating the legislative process of policy oriented Bills. As it turned out, members of the EALA felt that the Council was trying to grab their legislative powers provided for in the EAC Treaty. The EACJ later found that the Council does not have exclusive legislative initiative in the introduction of Bills in the EALA. In that ruling, the EACJ stated as follows:

We also see that under Article 59 (1) of the Treaty any Member of the Assembly may introduce a Bill. This shows that the Council does not have exclusive legislative initiative in the introduction of Bills in the Assembly. In that connection, we appreciate the difficulty faced by the Assembly upon receipt of the letter by the Secretary General which made it quite clear that the matter in controversy between the Assembly and the Council had reached an impasse and had to come to Court for the opposing views on the interpretations of the Treaty to be resolved.⁸⁶

Against this background, the *Mwatela* case has the following relevance. First, it was the first case that caused the EACJ to 'emerge from invisibility'.⁸⁷ Second, the decision to resort to the EACJ in order to decide on the power struggle between the

⁸⁰ Art 13 of the EAC Treaty.

⁸¹ Art 14(b) of the EAC Treaty.

⁸² Art 66 of the EAC Treaty.

⁸³ Art 67(1) of the EAC Treaty.

⁸⁴ Art 71 of the EAC Treaty.

⁸⁵ *Calist Mwatela & Others v The EAC*, App 1 of 2005.

⁸⁶ *Calist Mwatela & Others v The EAC*, App 1 of 2005, page 17.

⁸⁷ J Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative & International Law* 249,265.

key organs in the Community signified the recognition of the role of the Court in the integration process. Third, the case had a say in the power struggle between the two organs of the Community. However, the case was not by any means the best test for the EACJ's independence. What is clear is that the outcome of the case was contrary to the wishes of the Council, which is the second most important political organ in the EAC.

The amount of power that the EAC political leaders have over the EACJ results into questions over the Court's autonomy. For a deeper and fast-tracking integration, there is a need for a strong and independent EACJ. Domestically, most of the constitutions agree on an independent and impartial judiciary,⁸⁸ as in the same manner as the EAC member states. There is no reason why EAC member states cannot implement established national principles at the Community level. The EACJ is facing a daunting set of challenges to its functioning, the main being political interference in its work. As East African integration continues to deepen, the EACJ is expected to handle sensitive cases that may have some impact in the domestic political situation of member state. With the expected expansion of the EACJ mandate to include human rights, it is inevitable that the Court will receive even more cases that are politically sensitive. It is feared that, as witnessed in the SADC Tribunal, the EACJ may meet a variety of unpleasant obstacles in the future taking into consideration the deepening of EAC integration. If member states see that the EACJ is overstepping its boundaries, against their political wishes, fears over the Court's survival are a reality.

Although there are differences in terms of history and objectives, the Caribbean Court of Justice (Caribbean Court) provides one of the best models that can be adopted by the EACJ. The Caribbean Court has an independent Commission and a trust fund for facilitating financial expenses. Clearly these measures attempt to strengthen the independence of the Court on a long-term basis. However, it should be acknowledged that the establishment of an independent commission alone does

⁸⁸ Shany in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 258.

not suffice. Members of an independent commission have to be independent and of high moral integrity. An independent commission should also have a balance of all stakeholders, that is, it should involve government, the judiciary, legal practitioners, academics and civil society. The appointment of members of the commission has to be transparent and on a short-term basis, as this will reduce the possibility of such members having close ties with the judiciary and other branches of government.

The main objective of international courts is to facilitate compliance and applicability of the constitutive laws of their attached organisations.⁸⁹ The EACJ has jurisdiction to ensure there is effective adherence and applicability of the EAC Treaty.⁹⁰ The Court is a primary forum for settling disputes originating from the violation of the EAC Treaty.⁹¹ Thus having a more independent and impartial EACJ would raise hopes of having a successful regional integration in East Africa. The presence of independent courts is essential in establishing stable regimes.⁹² Indeed, an independent court has a can effectively utilise and develop the established normative and institutional framework for the benefit of the citizens in the regime.

As already stated, independence enhances the effectiveness of a judiciary. According to Helfer and Slaughter, the success of international courts depends on their relationship with states and their domestic institutions.⁹³ International standards of judicial independence have helped to strengthen national rules, particularly in Europe, and this is reinforced by international jurisprudence.⁹⁴ Although the rules for the formulation and practice of the judicial independence of international courts vary, they clearly demonstrate a general commitment to ensuring independence and impartiality for international court judges.⁹⁵ In some cases, international courts have

⁸⁹ The primary function of the EACJ is to ensure the adherence to EAC law by interpreting and applying the EAC Treaty.

⁹⁰ Art 23(1) of the EAC Treaty.

⁹¹ See art 28, 30 and 31 of the EAC Treaty.

⁹² Shany in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 260.

⁹³ Helfer & Slaughter (1997) 107 *Yale Law Journal* 273, 328.

⁹⁴ Shetreet (2009) 10 *Chicago Journal of International Law* 275, 276.

⁹⁵ Mackenzie & Sands (2003) 44 *Harvard International Law Journal* 271, 275.

strict rules for guaranteeing judicial independence. In other cases, the rules are more flexible and compromising.

International courts are increasingly significant and are key tools for establishing the rule of law, protecting human rights, influencing democratic society and transforming the economy. The ability of international courts to enforce the rule of law does not come automatically. International courts need to be enhanced by providing an environment which would enable them to exercise their functions without any kind of influence. As with national judiciaries, public confidence in the independence and impartiality of the international judiciary is equally important.

Much has been said about ways of appointing and removing international judges; however, adequate respect and support from political organs and adequate budgets are vital for establishing an independent international judiciary. International courts will only succeed in meeting the objectives of their respective organisations when being conferred with ‘a certain degree of legitimacy’.⁹⁶ According to Shany, judicial independence symbolises ‘procedural fairness and connoting a professional and unbiased decision making process, increase the legitimacy of the legal norms that international courts apply and strengthening the image of the institution they monitor’.⁹⁷

It is difficult for most international courts to secure the confidence of the general public concerning their independence.⁹⁸ According to Malleson, ‘public confidence in the courts at international level cannot be assumed and must be actively championed’.⁹⁹ A new wave of regional integration in Africa has necessitated the proliferation of sub-regional courts within the continent. Such integration courts need public support in order to meet their integration objectives. In doing so, the importance of judicial autonomy should never be underestimated.

⁹⁶ Shany in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 260.

⁹⁷ Shany in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 261.

⁹⁸ K Malleson ‘Promoting judicial independence in the international courts: Lessons from the Caribbean’ (2009) *International and Comparative Law Quarterly* 671, 687.

⁹⁹ As above.

5.5.2 Appointment of judges

Appointment of judges is the most debated aspect of judicial independence. It is considered to be the most significant component for securing judicial independence. For this reason, it is important to have a transparent and credible means of appointing international judges. With respect to International courts, if the manner of appointing judges is not transparent, states have the prospect of hand-picking judges who could easily be influenced. It is easy to observe that there is more screening in judicial appointments of national judges compared to the international ones, making International courts to be in more danger of being politicised.¹⁰⁰ Nevertheless, in a political environment where International courts operate, they easily attract attention from the general public.¹⁰¹ For instance, the public is always inquisitorial on the methods adopted to appoint judges, as well as their qualifications.

Be it domestic or International courts, there is no common approach in appointing international judges. They are often appointed either by selection or election. It should be emphasised that the methods of appointing judges is of the great importance in the administration of justice.¹⁰² The type of an institution involved in the appointment process is also a key factor in determining judicial independence. There is evidence in the past that some International courts failed due to the lack of independence and impartiality of their judicial officers.¹⁰³ In any judicial system, it is important to have competent and independent judges.

The overarching goal of any judicial appointment process is to find qualified and competent judges who will uphold the rule of law.¹⁰⁴ By having competent and qualified judicial officers, the public will attribute some level of credibility to the

¹⁰⁰ KJ Alter 'Delegation to international courts and the limits of re-contracting political power' In: DG Hawkins et al (eds.) *Delegation and Agency in International Organizations* (2006) 319.

¹⁰¹ T Meron (2005) 99 *American Journal of International Law* 359, 361.

¹⁰² L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 56.

¹⁰³ As above. Bartels gives an example of the Central American Court of Justice which was established in 1907 and dissolved in 1918.

¹⁰⁴ As above.

judiciary. Contemporary mechanisms modern as indicated in this article have the potential of conferring legitimacy on any judiciary.¹⁰⁵ In general, judges appointed to hold judicial office have to be individuals of high integrity and have to have appropriate training and a relevant legal education.¹⁰⁶

The EAC Summit has exclusive powers to appoint the EACJ judges.¹⁰⁷ It also appoints the President and the Principal Judge of the Court, who play an important role in the administration of the Court. It is important to note that the Office of the President and the Principal Judge of the EACJ were created after the controversial 2007 EAC Treaty amendments which introduced the two chambers in the Court. The President and the Principal Judge administers the Appellate Division and First Instance Division, respectively.¹⁰⁸ It is relatively unusual for a political organ such as the Summit to be involved in appointing a top judge of an international court. Normally, judges of International courts choose their own leaders to supervise administrative duties.¹⁰⁹ Moreover, the Summit can appoint a temporary judge, in an event where the presiding judge decided to excuse him or herself due to conflict of interest in a matter.¹¹⁰ This gives the Summit an opportunity to replace independent judges with the ones of their liking.

Each EAC member state seems to have its own means of choosing the EACJ judges. With this variance, there is always a risk of having judges with double standards. The Caribbean Court of Justice (Caribbean Court) provides some lessons to the EACJ. The Caribbean Court has an Independent Commission responsible for recruiting judges. However, it should be acknowledged that the establishment of an independent commission alone does not suffice. Members of an independent commission have to be independent and of high moral integrity. As stated above, they should be individuals from government, the judiciary, legal practitioners, academics and civil

¹⁰⁵ As above.

¹⁰⁶ See art 10 of the UN Basic Principles.

¹⁰⁷ Art 24 and 26 of the EAC Treaty.

¹⁰⁸ Art 4-8 of the EAC Treaty.

¹⁰⁹ According to art 21(1) of the African Court Protocol, For example, judges of the African Court on Human and Peoples' rights (African Court) choose their own President and the Vice-President.

¹¹⁰ Art 6 of the EAC Treaty.

society. The appointment of members of the commission has to be transparent and on a short-term basis, as this will reduce the possibility of such members having close ties with the judiciary and other branches of government.

There are other best practices which could be of relevance to the EACJ. Appointment to the International Court of Justice (ICJ) requires a majority of votes from the UN General Assembly and the Security Council.¹¹¹ With the European Court of Human Rights (ECRHR), judges are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates nominated by each party to the European Convention for the Protection of Human Rights and Fundamental freedoms (European Convention).¹¹² In order to guarantee the independence judiciary, there should be strict criteria and transparent mechanisms for appointing international judges. In as far as the criteria for appointing judges is concerned, the Council of Europe has recommended that:

All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.¹¹³

Appointing international judges through elections in the legislative assembly of an international organisation might be preferable. However, at times, the process itself is politicised. In the case of the ICJ, the Security Council and the UN General Assembly are responsible for appointing the Court judges.¹¹⁴ Candidates with less support from influential states have relatively 'slim' prospects of being elected as ICJ

¹¹¹ See art 4, 8, 10, 11 and 12 of the ICJ Statute. For the elections and qualifications for being elected as ICJ judge see CF Amerasinghe 'Judges of the International Court of Justice: Election and qualifications' (2001) 14 *Leiden Journal of International Law* 235.

¹¹² Art 22 of the ECHR. See also E De Wet 'The present control machinery under the European Convention on Human Rights: Its future reforms and possible implications for the African Court on Human and Peoples' Rights' (1996) 26 *CILSA* 357.

¹¹³ Principle I.2.c of the Council of Europe, Recommendation No R (94)12.

¹¹⁴ Art 4 of the ICJ Statute.

judges.¹¹⁵ The election process is usually carried after formal and informal meetings between the candidates and diplomatic representatives of UN members.¹¹⁶ States may use such forums to lobby for their preferred candidates to be elected as judges to the ICJ. The new emerging International courts such as the Caribbean Court have gone as far as establishing an Independent Commission mandated with the task of appointing and removing judicial officers. An independent body responsible to recruit judges is commonly found at the national level, where judges are appointed through competitive means. In such, vacancies for judicial office are normally advertised.

The appointment of ECOWAS Court judges is on rotational basis among member states.¹¹⁷ The Authority of Heads of State and Government collectively decide which country is in line for its national judge to be appointed. The process commences through the Legal Affairs Directorate which advertises the vacant posts and thereafter collects submissions from eligible applicants.¹¹⁸ The submissions are then forwarded to the Judicial Council which considers all applications and then interviews the shortlisted candidates. The Council then recommends three candidates and forwards their names, together with point-grades obtained, to the ECOWAS Authority of Heads of State which will decide on the applicants to be appointed as judicial officers of the ECOWAS Court.

The Burgh House Principles on the Independence of the International Judiciary (Burgh House Principles) provides that there should be transparent procedures for the nomination, election and appointment of judges.¹¹⁹ This further advocates having appropriate guidelines for the nomination, election and appointment

¹¹⁵ Mackenzie & Sands (2003) 44 *Harvard International Law Journal* 271, 278.

¹¹⁶ As above.

¹¹⁷ KJ Alter et al 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5546&context=faculty_scholarship (accessed on 12 August 2013) 26.

¹¹⁸ As above.

¹¹⁹ Principle 2.3 of the Burgh House Principles on the Independence of the International Judiciary of 2004.

processes.¹²⁰ The Mt Scopus approved revised international standards of Judicial Independence (Mt Scopus Standards) further provides that the methods of judicial appointment should not threaten judicial independence.¹²¹

Means that member states use to appoint EACJ judges are unknown. This is a reflection of the reality of national judiciaries in East Africa: there has never been a strong culture of judicial independence in East Africa. It is not a surprise that EAC political organs have vested themselves exclusive powers in appointing EACJ judges. The current methods of appointing EACJ judges are not preferable. The methods of employed in the ECOWAS Court and the Caribbean Court are arguably clear and transparent compared to the EACJ. Lack of transparency in appointing EACJ judges weakens the integrity of the Court. The EACJ is expected to have its jurisdiction expanded in future that would require it to be independent. Criteria such as personal qualifications, nationality and gender balance are often used in appointing international judges. These criteria are discussed below under this sub-section.

5.5.2.1 Qualifications

In principle, judges need to meet certain qualifications in order to be appointed as judicial officers. Different criteria are applied when appointing international judges. In some jurisdictions, it is not a prerequisite that one should have legal expertise to be appointed as a judicial officer.¹²² In most cases, however, only lawyers qualify to be appointed as judges of an international judiciary. Some International courts require that one needs to hold the highest judicial office in the national judiciary, or be a jurisconsult of recognised competence.¹²³ Others go as far as mentioning competence in a specialised area of law, as a prerequisite for judicial appointment. The requirement for judicial officers to possess knowledge in a particular area of law is relevant to International courts with specific mandate. For example, judges of the African Court on Human and Peoples' Rights (African Court) are elected among

¹²⁰ As above.

¹²¹ Principle 4.1 of Mt. Scopus Standards.

¹²² L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 56.

¹²³ Art 21 of the ECHR, art 2 of the ICJ Statute, art 36(3)(a), art 253 of the TFEU.

jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.¹²⁴ In the International Criminal Court (ICC), judges need to have competence and a profound understanding of criminal law and procedure or a relevant area of international law such as human rights and international humanitarian law.¹²⁵ The Agreement establishing the Caribbean Court provides that at least three of the appointed judges must possess expertise in international law including international trade law.¹²⁶ The ICJ meanwhile specifies that the potential candidate should have competence in international law.¹²⁷ The Economic Community of West African States (ECOWAS) Court Protocol specifically mentions international law as one of the prerequisites for appointment as a judge of the ECOWAS Court.¹²⁸

Judges of the EACJ are required to be persons of 'proven integrity, impartiality, independence and who fulfil the conditions required in their own countries', or should be 'jurists of recognised competence'.¹²⁹ The EACJ is handling cases of which international law is at stake. However, the EAC Treaty does not require judges to have knowledge of international law. One can argue that because the EACJ is an international court dealing with international relations, competence in international law should be mandatory.

Age and experience are often qualifying factors when appointing judges. The EAC Treaty expressly contain age limit for one to qualify to be a judge of the EACJ.¹³⁰ It is worth mentioning that experience is one of the most relevant qualifications for one to be considered as a judge of an international court. Most judges of International courts have passed the age of compulsory domestic retirement.¹³¹ By placing the age

¹²⁴ Art 11 of the Protocol to the African Charter on the Establishment of the African Court.

¹²⁵ Art 36(3)(b) of the ICC Statute.

¹²⁶ Art IV.1 of the Agreement establishing the CCJ.

¹²⁷ Art 2 of the ICJ Statute.

¹²⁸ Art 3(1) of the ECIWAS Protocol of 1991.

¹²⁹ Art 24(1) of the EAC treaty.

¹³⁰ Art 25(2) of the EAC Treaty.

¹³¹ There are instances where the age limit of ICJ judges had come into question. See CF Amerasinghe 'Judges of the International Court of Justice – elections and qualifications' (2001) 14 *Leiden Journal of International Law* 335.

limit of EACJ judges, there is a risk of reducing the pool of available experienced candidates.

In the Caribbean Court, apart from being a person of 'high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society',¹³² one must have no fewer than five years' experience before the bench in the member states or any Commonwealth country or in a country exercising civil jurisdiction common to its member states.¹³³ Also a person has to have teaching experience in law for not less than fifteen years in civil law or common law countries.¹³⁴

The fact that there are no similar approaches among member states in appointing EACJ judges, there is a risk of having judges with different levels of integrity and independence, let alone levels of competence. For judges to undertake their functions appropriately, they must be properly qualified. The hierarchical relationship between international and national courts, due to the kind of jurisprudence and leadership offered by International courts, is crucial for the legitimacy of the system.¹³⁵

Properly qualified judges need to be appointed before the EACJ. Although the EAC Treaty does not require a judge to hold the highest judicial office at the national judiciary, this requirement is important. It would enable the EACJ to get best judges who are considered to be the cream of the judiciary at the domestic level. At the moment, Justice Aaron Ringera is the only judge in the EACJ who has served the highest office in the national judiciary.¹³⁶ Justice James Ogoola briefly presided the Supreme Court of Uganda in particular cases from 2004 to 2009.

¹³² Art IV(11) of the Agreement establishing the CCJ of 2001.

¹³³ Art IV(10)(a) of the Agreement establishing the CCJ of 2001.

¹³⁴ Art IV(10)(b) of the Agreement establishing the CCJ of 2001.

¹³⁵ As above.

¹³⁶ Justice Aaron Ringera was a judge of the High Court and Court of Appeal of Kenya (1994-2004);

5.5.2.2 Nationality of judges

The composition of International courts is of paramount importance. Nationality of judges is another aspect taken into account when determining judicial independence of International courts.¹³⁷ International courts are normally composed with members of various geographical locations, legal traditions, gender, languages and at times ethnic background.¹³⁸ Some International courts prohibit a judge to hear a matter involving a home country.¹³⁹ Taking into account of the reasons advanced for such prohibitions, it should be stated that it is unfounded to be sceptical of a judge presiding on a matter involving a home country, provided that transparent and credible means of judicial appointment were adopted.

All EAC member states are represented in the EACJ. According to the EAC Treaty, the EACJ should be composed of fifteen judges, whereby not more than ten judges should be appointed at the First Instance Division, and five judges in the Appellate Division.¹⁴⁰ There is a ratio of two judges per each EAC member state in the First Instance Division, and one each at the Appellate Division.¹⁴¹ In practice, member states have only appointed five judges in the First Instance Division, and not ten as stipulated by the EAC Treaty.

It is argued that nationality of members of an international court may boost the confidence of each member state on the judiciary.¹⁴² It also provides a balance between the legal principles of the member states and those which the court can advance.¹⁴³ Neither the EAC Treaty nor the Court Rules prohibit a judge from hearing a case that involves a home country. It is indeed desirable that a judge should not sit on the bench in a matter that involves a home nation. This is because there is always

¹³⁷ Art 3 of the ICJ Statute.

¹³⁸ L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal' (2011) 59.

¹³⁹ See T Dannenbaum 'Nationality and the international judges: The nationalist presumption governing the international judiciary and why it must be reversed' (2012) 45 *Cornell International Law Journal* 78.

¹⁴⁰ Art 24(2) of the EAC Treaty.

¹⁴¹ See art 24(1)(a) and (b) of the EAC Treaty.

¹⁴² Schermers & Blocker (2011) 481.

¹⁴³ Schermers & Blocker (2003) 675.

a presumption that a judge might to be a delegate of the home country. In contrast, a national judge is more conversant with the legal tradition of the nation involved in a dispute, thus, could assist the court to reach a credible decision. The African Court is one of the examples of which a judge cannot be involved in the adjudicating process when a home nation is involved in a dispute. Perhaps non-involvement of a national judge in a dispute involving a home country reflects the 'African political reality'.¹⁴⁴ However, there are International courts with a different approach. For instance, ERCHR, the IACHR, and the ICJ, allow judges to take part in a matter even if a home country is involved.¹⁴⁵

There is no evidence of EACJ judges favouring their home countries. In fact, in the *Anyang' Nyong'o* case, it was the Kenyan government which was sceptical on the impartiality of the Kenyan judges involved in the matter.¹⁴⁶ EACJ judges express their commitment to be independent and impartial, when sworn into the office. With such assurance, together with transparent methods of appointing judges, it is unnecessary to restrict a judge to hear a case involving a home country. Nationality is not a sufficient cause of anxiety about the independence of international judges.¹⁴⁷

5.5.2.3 Gender balance

Gender balance brings about greater social legitimacy. It is inevitable for a court to be faced with a matter that would require both male and female social approaches, particularly in diverse communities. However, it should be noted that the role of female judges is mostly emphasised in courts dealing with criminal and human rights issues, which both are aspects in respect of which the EACJ is envisaged to play a role. the National Alliance of Women's Organizations, a British umbrella organization

¹⁴⁴ F Viljoen *International human rights law in Africa* (2012) 424.

¹⁴⁵ As above.

¹⁴⁶ The Kenyan judges were facing corruption allegations back in Kenya. The Attorney general of Kenya thus argued that the judges will be biased against the Kenyan government.

¹⁴⁷ See T Dannenbaum 'Nationality and the international judge: The nationalist presumption governing the international judiciary and why it must be reversed (2012) 45 *Cornell International Law Journal* 77; M Lachs 'Some Reflections on the Nationality of Judges of the International Court of Justice' (1992) 4 *Pace International Law Review* 49.

dealing with gender equality, viewed the presence of female judges in the International Criminal Tribunal for the Former Yugoslavia is an opportunity to ‘assure full justice to women in the former Yugoslavia who have been and continue to be brutalized in sex specific ways, but also to correct the historic trivialization of the abuse of women in war’.¹⁴⁸ Also, a bench with both male and female judges is likely to bring unique insights in cases involving life experiences.¹⁴⁹ There are a relatively low number of female judges in most International courts.¹⁵⁰ The reasons for having few female judges in international courts might be historical.¹⁵¹ Some international courts have made specific provisions for ensuring equal representation between female and male judges.¹⁵² The suspended SADC Tribunal Protocol for example required member states to consider gender equality when appointing members of the Tribunal.¹⁵³

Gender equality is one of the fundamental principles governing the activities of the EAC.¹⁵⁴ The EAC Treaty does not recognise gender balance as a factor to consider when appointing EACJ judges. As a result, at present, the EACJ has only one female judge, Justice Monica Mugenyi,¹⁵⁵ presiding in the First Instance Division. This is indeed also a reflection of women’s (under)representation in domestic judiciaries in East Africa. Although gender balance is not the primary determinant factor of judicial independence, a reasonable number of female judges in the judiciary is arguably necessary to achieve inclusion and social legitimacy.

¹⁴⁸ V Morris and MP Scharf *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A documentary history and analysis* (1995) 399.

¹⁴⁹ N Grossman ‘Sex Representation on the Bench and the Legitimacy of International Criminal Courts’ (2011) 11 *International Criminal Law Review* 643, 647.

¹⁵⁰ R Mackenzie & P Sands ‘International courts and tribunals and the independence of the international judge’ (2003) 44 *Harvard International Law Journal* 271, 278.

¹⁵¹ As above.

¹⁵² See the African Court Protocol, art 12(2); the ICC Statute art 36(8)(a)(iii).

¹⁵³ Art 4(2) of the defunct SADC Tribunal Protocol.

¹⁵⁴ Art 6(d) of the EAC Treaty.

¹⁵⁵ She is currently a High Court judge, Land Division, in Uganda.

5.5.3 Term of appointment

Judges are usually appointed for a specified period of time. There are different approaches adopted by International courts when it comes to the length of tenure of judges. The term of office can be on either a renewable or non-renewable basis. Most International courts seem to have renewable terms of office. The ICJ, for example, is composed of fifteen judges elected to a renewable term of nine years.¹⁵⁶ The newly emerging International courts tend to provide for a single maximum term of office.¹⁵⁷ It should also be noted that the renewal of term of office is not automatic.

It is prudent for judges to be appointed for long but non-renewable term. A non-renewable term reduces the risk of judges exercising their duties in a manner that allows them to negotiate for re-appointment. Also, judges holding office for long terms are likely to build a strong doctrinal body and enhance the continuity of jurisprudence in the judiciary. Judges are not expected to be permanent officials of a judiciary. Limitation of term of service is therefore essential for maintaining judicial integrity. In practice, the length of tenure of most international judges is not less than seven years, just as the time limit imposed in the EACJ.¹⁵⁸

EACJ judges are appointed for a single period of maximally seven years.¹⁵⁹ Their tenure end when they reach the retirement age of seventy years, or by resignation.¹⁶⁰ The term of service for the EAC judges is divided into three periods: the first term is five years, and the second and third term is one year each.¹⁶¹ A judge whose term ends in any of the three phases 'shall be chosen by lot to be drawn by the Summit immediately after their first appointment'.¹⁶² Senior judges play an important role in the continued well-being of the judiciary, by sharing their wisdom and experience to the junior judges.

¹⁵⁶ Art 13 of the ICJ Statute. In every three years, one-third of the term expires.

¹⁵⁷ The Caribbean Court provides for a non-renewable term of seven years.

¹⁵⁸ See for example art 13(1) of the ICJ Statute & art 5(1) of the UNCLOS.

¹⁵⁹ Art 35(1) of the EAC treaty.

¹⁶⁰ Art 25(2) of the EAC Treaty.

¹⁶¹ Art 24(2) of the EAC Treaty.

¹⁶² Art 25(3) of the EAC Treaty.

5.5.4 Removal and suspension of judges

Grounds for the removal or suspension of court judges should be clearly articulated. Most published international standards of judicial independence provides that the removal of judges should take its course in cases of gross criminal misconduct and serious physical or mental incapacity of a judicial officer in discharging judicial functions.¹⁶³ An independent institution should be in place and be vested with the authority to conduct disciplinary proceedings against judges. It is recommended that such institutions should be permanent and be composed predominantly of members of the judiciary.¹⁶⁴ Some statutes and court rules provide that international judges can only be removed by the court itself.¹⁶⁵ Before being removed from office, the judge in question is usually suspended in order to allow for a credible investigation by an independent and impartial body.

Before the 2007 amendments, the EAC Treaty did not contain grounds for the removal and suspension of judges. With the established grounds, the Summit has extensive powers over the removal and suspension of judges.¹⁶⁶ Under article 26(1) of the EAC Treaty, a judge can be removed from office on the grounds of misconduct or inability to perform judicial functions. The Summit is able to remove a judge on such grounds after receiving recommendations from an independent ad hoc tribunal that has determined the misconduct or inability to perform judicial functions. Such an independent ad hoc tribunal is appointed by the Summit during the course of investigation.

¹⁶³ IDA Minimum Standards of Judicial Independence, adopted in 1982, principle 30. Beijing statement of principles of the independence of the judiciary in the law Asia region, para 24. The Beijing statement of principles of the independence of the judiciary adopted at the 6th Conference of Chief Justices of Asia and the Pacific, held in Beijing, China in conjunction with the 14th Conference of LAWASIA on 19 August 1995.

¹⁶⁴ IDA Minimum Standards of Judicial Independence, adopted in 1982, principle 31.

¹⁶⁵ Art 18 of the ICJ Statute; R Mackenzie & P Sands 'International courts and tribunals and the independence of the international judge' (2003) 44 *Harvard International Law Journal* 279.

¹⁶⁶ Art 26(1)(a) of the EAC Treaty. For a discussion on the grounds for the removal of the EAC judges see H Onoria 'Botched up elections, treaty amendments and judicial independence in the East African Community' (2010) 54 *Journal of Africa Law* 85.

The EAC Treaty does not provide for circumstances that may lead to a conclusion that a judge is unable to discharge judicial functions. Furthermore, A judge who holds judicial or public office in a home country can be removed from the office for misconduct or the inability to perform the functions of the Court for ‘any reason’.¹⁶⁷ As stipulated in various international standards, judges should be removed from office on the basis of clearly established grounds. With the phrase ‘for any reason’, a judge can be maliciously removed or suspended by the displeasing state. In such circumstances, the tenure of EACJ judges is also threatened by the fact that a judge holding judicial office in a national judiciary can be automatically removed or suspended from office on the basis of misconduct and infirmity without any recourse to an independent tribunal.¹⁶⁸ There is no need of an independent tribunal to determine the suspension of a judge in such circumstances, as the Summit has exclusive powers in this regard. It also means that judges’ own recusal is unnecessary as the onus is not on the judges to excuse themselves from a matter. In addition, the Summit can appoint temporary judges to replace those who have been suspended.¹⁶⁹ As indicated above, such an authority can be used for ill-will intentions.

The grounds for the removal and suspension of EACJ judges in themselves are not clearly provided in the EAC Treaty. Also, the procedures and the composition of an ad hoc independent tribunal that would determine misconduct or inability to discharge judicial functions, as provided under article 24(a) of the EAC Treaty, are unclear. Clearly, the existing grounds for the removal and suspension of EACJ judges provide the possibility of politicking the process of removing or suspending Court judges. Being concerned with the existing grounds for the removal and suspension of judges, the EACJ had suggested that member states should amend article 24 of the EAC Treaty ‘at the earliest opportunity of reviewing the Treaty’.¹⁷⁰

¹⁶⁷ Art 26(b) of the EAC Treaty.

¹⁶⁸ See art 26(2) of the EAC Treaty.

¹⁶⁹ Art 24(2A) of the EAC Treaty.

¹⁷⁰ Ref No 3 of 2007, page 45.

It is therefore preferable that EACJ judges should be removed by the court itself, through established rules and procedures, or by an independent tribunal.¹⁷¹ The Caribbean Court and the ECOWAS Court provide a model for EACJ in respect of the mechanisms for removing or suspending judges. In the ECOWAS, as seen above, the duty for disciplining judges falls to the Community Judicial Council. In the event of misconduct or inability to exercise judicial functions, members of the Council will meet to discuss and make recommendations to the ECOWAS Heads of State on the situation. In the Caribbean Court, it is the independent Commission that conducts disciplinary enquiry into the misconduct of judges or their inability to perform.¹⁷²

5.5.5 Adequate remuneration

Adequate remuneration for judicial officers protects the integrity of the judiciary against corruption or any form of influence that might threaten the ends of justice.¹⁷³ Judges' remuneration should be guaranteed by law,¹⁷⁴ and should provide adequate pension arrangements when they retire.¹⁷⁵ Any changes that might occur concerning judges' remuneration should not be altered against judges' interests.¹⁷⁶ It is also recommended that judges' salaries should not be decreased when they are in service 'except as a coherent part of an overall public economic measure'.¹⁷⁷ Where there are different levels of remuneration among judges, factors such as length of service, the nature of the duties which they are assigned to discharge and the importance of the tasks which are imposed on them should be taken in to consideration. There should not be any adverse changes introduced with regard to judges' remuneration and other essential conditions of service during their term of office.

¹⁷¹ R Mackenzie & P Sands 'International courts and tribunals and the independence of the international judge' (2003) 44 *Harvard International Law Journal* 271, 279.

¹⁷² Art V(3)(2) of the C CJ Agreement.

¹⁷³ P Langseth & O Stolpe 'Strengthening judicial integrity against corruption' (2001) available at <http://www.unodc.org/pdf/crime/gpacpublications/cicp10.pdf> (accessed on 25 September 2013).

¹⁷⁴ Principle 15(a) of the IBA Minimum Standards of Judicial Independence.

¹⁷⁵ Principle 4.4 of the Burgh House Principles on the Independence of the International Judiciary.

¹⁷⁶ Burgh House Principles, principles 4.1 and 4.2.

¹⁷⁷ Principle 15(b) of the IBA Minimum Standards of Judicial Independence

The EAC Treaty indicates that the salary and other conditions of service of the EACJ judges are fixed by the Summit, based on recommendations from the Council. It is unclear as to how the EAC Council and the Summit determine the basic conditions and benefits of the EACJ judges. Because there is no independent commission to determine such terms, as with the Caribbean Community, the benchmark to liaise the remuneration and other benefits of EACJ judges should be based on the current regional standards. In fixing the salaries and benefits of EACJ judges, a regional benchmark should be taken into consideration, although this should not be to the disadvantage of judges. As indicated above, the Caribbean Court is progressive in securing the tenure of its judicial officers. The independent Commission is responsible for setting the terms and conditions of Caribbean Court judges including salaries.¹⁷⁸

5.5.6 Financial autonomy of the Court

Budgets of International courts are allocated from the general budget of the supranational organisation in which they are established. International courts are at risk of being subjected to the overall control of the political organs that determine the regular budget of the organisation.¹⁷⁹ The budget of the EACJ is funded through the general budget of the Community; for this reason. The EACJ does not have a sustainable source of funding. Also, by relying on the general budget of the Community as determined by member states, there is no guarantee that the financial autonomy of EACJ will be sustainable. It is vital for an international judiciary to have adequate resources in order to discharge its functions effectively.

Accordingly, an independent source of funding could be a long-term answer in financing the functions of the EACJ. There is the danger that inadequate resources may render the judiciary vulnerable to corruption which could weaken its

¹⁷⁸ Art XXVIII of the CCJ Agreement.

¹⁷⁹ L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal', World Trade Initiative Advisors (2011) 67.

independence to the extent of losing its legitimacy.¹⁸⁰ The judiciary should also be autonomous to the extent of being not interfered with when distributing its resources for its functions.¹⁸¹ The executive organs should not have a say in how a court should allocate its budget. This is generally the duty of the court registrar and all administrative officers of a court responsible for allocating the Court's resources. The EACJ needs to be consulted about the preparation of its budget and should have autonomy when locating its resources – without interference from other Community organs.

EAC member states have discretion when deciding the amount to be allocated to the EACJ. There is a risk that inadequate resources could render the EACJ vulnerable in discharging its duties effectively. The possibility that the EACJ could be more lenient on member states as part of a financial bargaining strategy should not be underestimated, taking into consideration the fact that its financial capability depends on member states. In other words, when the EACJ is under-resourced, there is a risk that it may use leniency when discharging its duties as a bargaining strategy with member states for securing the finance it needs. The EAC itself depends on the financial support from friendly donors. The lack of adequate funds affects the work of the EACJ. For instance, it is only the Judge President and the Principal Judge who are currently permanently based in Arusha,¹⁸² while others work on ad-hoc basis. Besides, the EACJ does not have a regular schedule of sessions for a year. The case register and the budget determine the framework of the sessions conducted by the Court. The EAC budget stipulates the exact number of days on which the EACJ judges will conduct their sessions, which compels EACJ judges to discharge their duties within a fixed period of time. This lack of funds thus makes the EACJ to be unable to discharge its duties as required. .

¹⁸⁰ Federico *International principles on the independence and accountability of judges, lawyers and prosecutors: A practitioners' guide* (2004) 31.

¹⁸¹ Federico *International principles on the independence and accountability of judges, lawyers and prosecutors: A practitioners' guide* (2004) 33.

¹⁸² The budget for 2012/2013 of the EACJ was USD 4,117,210.

The budget of the EACJ for the financial year 2013/2014 was USD 4 279 489 of the total USD 130 429 394 allocated to the organs and institutions of the EAC.¹⁸³ As the Court continues to grow, it will become busier and more cases will need to be determined. Therefore the current budget is not adequate for a regional court such as the EACJ. In addition, the expected future expansion of the Court's jurisdiction will require more human resources and the expansion of its activities which imply that more finances need to be injected into the Court.

During the time of the establishment of the Caribbean Court, sources of sufficient and reliable funding for the Court were a major concern¹⁸⁴ because governments in the region had in the past defaulted on their contributions to regional institutions.¹⁸⁵ The creation of a trust fund has taken away dependence on the contributions of member states of the Caribbean Community for the running costs of the court. The trust fund is made up of contributions by member states, income derived from operations of the Fund and contributions of third parties – who are unlikely to prejudice the independence or integrity of the Court.¹⁸⁶ The Fund is considered a significant success and could be a model that can be replicated by developing countries.¹⁸⁷ Another method that could be looked at in order to obtain a reliable source of funding for the EACJ could be by fixing the Court's budget at a percentage of the overall EAC budget. By having a fixed percentage, the Court's budget would not be reduced unless the regular Community budget was scaled down.

5.5.7 Privileges and immunity

It is recommended that international judges are guaranteed full immunity from prosecution, equivalent to full diplomatic immunity from all claims arising from the exercise of their judicial function.¹⁸⁸ Judicial officers are entitled to have full immunity when exercising judicial functions and only the court itself or an

¹⁸³ Budget speech of the East African Community for the financial year 2013/2014 to the East African Legislative Assembly, 45.

¹⁸⁴ Malleson (2009) *International and Comparative Law Quarterly* 671, 677.

¹⁸⁵ Malleson (2009) *International and Comparative Law Quarterly* 671, 677.

¹⁸⁶ Art IV(1) of the Revised Agreement establishing the Caribbean Court of Justice Trust Fund.

¹⁸⁷ Malleson (2009) *International and Comparative Law Quarterly* 671, 678.

¹⁸⁸ Burgh House Principles, principle 5.1.

independent body should be capable of waiving the immunity of its judicial officers.¹⁸⁹ Courts such as the Caribbean Court have a specific protocol that guarantees the privilege and immunity of judicial officers. The privileges and immunity of international judges are very similar to those guaranteed under the Convention on Diplomatic Relations, in which judges and registrars of International courts are provided with diplomatic status.¹⁹⁰ Any member of an international judiciary, when engaging in the activities of adjudication, enjoys diplomatic privileges and immunity.¹⁹¹ Article 43 of the EAC Treaty guarantees the immunity of the EACJ judges. Accordingly, EACJ judges are immune from any legal action resulting from the disposition of their judicial duties.

5.6 Chapter conclusion.

This chapter concludes that the EAC Treaty does not guarantee the independence of the EACJ. Mostly, the nature of judicial appointments and the security of tenure of the judges raise concerns over the independence of the Court. As the EACJ is anticipating playing a leading role in promoting democracy, rule of law, good governance and human rights in the EAC, its current set-up does not create an environment suitable for guaranteeing the independence of the EACJ, which is vital for fulfilling Community ambitions. In order for the EACJ to operate and function effectively, its independence and impartiality should not be compromised. It is acknowledged that there is no proof as to whether the EAC member states appoint judges who would compromise their wishes. However, the existing institutional and legal setup of the EACJ gives member states an opportunity to interfere the work of EACJ. It is high time the independence of the EACJ judges is given maximum attention. In as such, as stated above, amendments to the EAC Treaty in order to

¹⁸⁹ Para 14.2 of the Mt. Scopus Approved Revised International Standards of Judicial Independence.

¹⁹⁰ NJ Miller 'Independence in the international judiciary: General overview of the issues' (2002) Background paper for the Meeting of the Study Group of the International Law Association, London, 2 February 2002, at page 13, available at http://www.picti.org/activities/ILA_study_grp/ILA1.pdf (accessed on 12 August 2013).

¹⁹¹ Art 10 of the Statute of the International Tribunal for the Law of the Sea of 1992 and entered into force in 1994; art 19 of the ICJ Statute.

adopt modern institutional approaches that guarantee judicial independence might be necessary.

Having an independent and impartial EACJ would increase the prospects of successful regional integration in East Africa. Without doubt, the presence of independent courts is essential in establishing stable regimes.¹⁹² An independent court, established in a regime that adheres to the principles of good governance, has an opportunity to effectively use and develop the established normative and institutional framework for the benefit of the citizens in the regime. As indicated above, the role of the EACJ is not only to settle disputes and ensure adherence to EAC law, it also to participate in the functioning of the whole regime, meaning the EACJ also participates in the functioning of other Community institution. Through cooperation with other institutions, and by making decisions or giving advisory opinions, the EACJ may have a significant effect on the functioning of EAC institutions. It can therefore be said that the EACJ is entrusted to develop the legal and institutional framework of the EAC. According to Shany, judicial independence symbolises ‘procedural fairness’ and serves as a means of connoting a professional and unbiased decision-making process, increases the legitimacy of the legal norms that international courts apply and strengthens the image of the institutions they monitor’.¹⁹³

Judicial independence is a human rights aspect that has to be strongly adhered to. International courts have often linked judicial independence to the right to a fair trial. It goes without saying that the impact of international law on judicial independence is influenced by the existing international human rights treaties that accord the right to fair hearing before an impartial and independent body.¹⁹⁴

One of the controversial developments in the EAC is the additional grounds for the removal and suspension of EACJ judges after the disputed amendments of the EAC

¹⁹² Shany in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 260.

¹⁹³ As above.

¹⁹⁴ Shetreet (2009-2010) 10 *Chicago Journal of International Law* 275, 275.

Treaty in 2007. In general, the 2007 amendments of the EAC Treaty are believed to have weakened rather than strengthened the EACJ.¹⁹⁵ This is evident from the introduced grounds for the removal and suspension of EACJ judges which undermines the security of tenure of the Court's judicial officers. Resignation from office, being physically unfit for further judicial office, age limit or the end of a fixed term of office might be some of the genuine reasons for suspending or terminating judicial tenure. In cases of misconduct, after determining the nature of the alleged misconduct, members of the judiciary may vote and recommend appropriate action to be taken against a particular judge. In supranational organisations, the recommendations will be submitted to the political organs.

In international organisations, there is a possibility that an international judge may be influenced by the home government.¹⁹⁶ In the EU, judges' decisions in the EU Court are shielded from scrutiny by their home states through the Court's practice of issuing decisions on the basis of consensus.¹⁹⁷ Also, the decisions of the International Court of Justice (ICJ) are based on the majority of judges present at a case.¹⁹⁸ Apart from the reasons on which they were based, ICJ judgments contain the names of the judges who have taken part in the decision.¹⁹⁹ However, the ICJ Statute does not provide for the judgment to contain the names of the judges with the majority or minority opinion, although it does in practice. Nevertheless, any judge of the ICJ is entitled to deliver a separate opinion as desired.²⁰⁰ In determining the independence of international courts, it is observed that 'the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a

¹⁹⁵ Onoria (2010) 54 *Journal of African Law* 74, 84.

¹⁹⁶ PP Russell 'Toward a general theory of judicial independence' in PH Russell & DM O'Brien *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) 7.

¹⁹⁷ RD Kelemen 'The political foundations of judicial independence in the European Union', Paper presented to the annual meeting of the American Political Science Association, Seattle, September 1-4 2011, at page 10, available at http://www.euce.org/eusa/2011/papers/5b_kelemen.pdf (accessed on 8 August 2013). Also see *Padovani v Italy*, ECtHR judgment of 26 February 1993, Series A257-B, para 25; *The Constitutional Rights Project v Nigeria*, African Commission, Communication No 87/93 (1995), paras 13-14.

¹⁹⁸ Art 55(1) of the ICJ Statute.

¹⁹⁹ Art 56 of the ICJ Statute.

²⁰⁰ Art 57 of the ICJ Statute.

guarantee against external pressures'.²⁰¹ In order to establish a culture of judicial independence, there should be a constitutional framework which guarantees an independent judiciary.²⁰² There should also be a formal constitutional and legislative framework for the independence of the judiciary. In most cases, the principles of judicial independence should be provided for in the founding constitution.²⁰³

This chapter argues that for the EACJ to be effective in discharging its current obligations and the expected expansion to adjudicate human rights disputes, it must have absolute independence from other organs of the Community. The chapter has shown that the EAC political organs have extensive powers over the composition and operations of the EACJ to the extent of undermining the Court's autonomy. However, there have been some positive developments when it comes to establishing a culture of judicial independence, as shown by other international courts.

²⁰¹ *Lauko v Slovakia*, ECRHR judgment of 2 September 1998, Series 1998-IV, para 75.

²⁰² The constitutions of the EAC member states provide a legal foundation for the independence of the judiciary. See art 107B of the Constitution of Tanzania of 1977 as amended, art 160 of the Constitution of Kenya of 2010, art 60 of the Constitution of the Republic of Rwanda of 2003.

²⁰³ Shetreet in S Shetreet & C Forsyth (eds) *The culture of judicial independence: Conceptual foundation and practical challenges* (2012) 28.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

Despite of the fact that all East African countries have Bill of Rights in their national constitutions, and are also parties to various regional and international human rights instruments, human rights have not been given the required attention at the domestic level. This is also common to most countries around the world, and it is for such reasons international law started to regulate human rights standards within the international sphere. Various institutional mechanisms have been put in place for supervising international values. Through regional integration, judicial organs are formed to oversee all integration activities as provided in their founding treaties. In this process, judicial organs have found themselves dealing with human rights norms.

During the early days of the Organisation of African Unity (OAU), human rights did not form an important part of the agenda. In fact the OAU Charter merely made reference to the United Nations (UN) Charter and the Universal Declaration of Human Rights (UDHR) in pursuit of its objective of promoting international cooperation.¹ After the political independence of most African states, most of these states experienced fragile economic growth. As a result, the United Nations Economic Commission for Africa (UNECA) recommended that African countries establish single economies by instituting a sub-regional system that would establish a single African economic community.² Various regional economic communities (RECs) were accordingly established, including the East African Cooperation (1967), the Central Africa Economic and Customs Union (1964), the Economic Community of West African States (1975) and the Southern African Development Coordinating

¹ Art II(e) provided that the OAU shall have the purpose of promoting international cooperation, having due regard to the UN Charter and the Universal Declaration of Human Rights.

² OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in JA Bösl & J Diescho (eds) *Human rights in Africa* (2009) 275.

Conference (1980), which aimed at promoting economic development in the continent. However, these RECs played a minimal role in protecting human rights during the early days of their establishment.

At present, as already stated in this study, human rights in Africa are galvanised under two systems – regional and sub-regional human rights systems. At the regional level, the African human rights system was pioneered by the OAU which was later transformed into the African Union (AU).³ The African Charter on Human and Peoples' Rights (African Charter) is the primary human rights instrument and provides some common standards for human rights protection in Africa. The African Commission on Human and Peoples' Rights (African Commission) was the first commission to be established in this regard. Its purpose is to monitor the operationalisation of the African Charter in the continent. In 1998, the Heads of State and Government of the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court). The main aim of establishing the African Court was to strengthen human rights protection in Africa, simply by establishing an institution which could make legally binding decisions. Thus, the African Commission can only make declarations and recommendations which are viewed as not legally binding.⁴

At the sub-regional level, in the early days of their existence, the founding treaties of RECs did not make reference to human rights. In the 1990s, some of RECs had to revise their founding treaties and others had to be reformed. These reworded treaties make reference to human rights as one of the founding principles in their respective communities. At present, it is undisputed that human rights play a key role in the viability of sub-regional organisations. According to Viljoen, 'although human rights and the rule of law do not feature as prime goals of RECs, these aspects form part of the way in which the goals have to be attained in a principled way'.⁵ It is therefore not surprising to find that the governing principles of most RECs

³ The AU has 54 member states with the recently joined South Sudan.

⁴ EG Nalbandian 'The challenges facing the African Court of Human and Peoples' Rights' (2007) 1 *Mizan Law Review* 75.

⁵ F Viljoen *International human rights law in Africa* (2007) 498.

include the recognition, promotion and protection of human rights in accordance with the African Charter. RECs refer to the African Charter as a common human rights standard for achieving their goals. However, not all RECs in Africa have integrated human rights in their agenda. For instance, RECs such as the Arab Maghreb Union (AMU) and the Economic Community of Central African States (ECCAS)⁶ have not given human rights space in their activities.

The realisation of human rights within RECs has not come about easily. For supervising the established treaty norms, RECs have put in place judicial organs in the form of courts or tribunals. Prior to 2000, there was little practical use of the judicial organs within RECs. One of the factors might have contributed to this neglect of REC judicial organs was a failure to establish the necessary rules and to appoint judges in a timely fashion.⁷ Another significant factor was the denial of direct individual access to the judicial organs.⁸ REC judicial organs are pivotal if human rights are to be observed and realised in Africa. In the middle of 2000s, some of the RECs were transformed and human rights started to be given more weight. To date, the East African Court of Justice (EACJ) and the Economic Community of West African States Court of Justice (ECOWAS Court) are showing positive signs in their involvement in human rights. One can easily admit that the ECOWAS Court is playing a leading role in that endeavour.

With respect to the East African Community (EAC) integration, the EACJ is the heartbeat of EAC progression. The EAC Treaty confers the EACJ the task of interpreting and monitoring the rightful applicability of the EAC Treaty. Despite of the enrichment of the EAC Treaty with human rights values, the EACJ does not have an explicit human rights jurisdiction. The EACJ's lack of an explicit human rights authority means that the protection of human rights in the EAC is halted. However, the EACJ is to be given other original, appellate and human rights jurisdiction, as will

⁶ See the Treaty establishing the ECCAS of 1983/1984 and Treaty establishing the AMU of 1989.

⁷ H Onoria 'Locus standi of individuals and non-state entities before regional economic integration judicial bodies in Africa' (2010) 18 *African Journal of International and Comparative Law* 143, 146.

⁸ Viljoen (2007) 196.

be determined by the Council at a suitable subsequent date.⁹ When EAC member states adopt the protocol to extend the jurisdiction of the EACJ, human rights will hopefully be given priority.¹⁰ With relevance to the EAC, Quashigah is of the opinion that 'if courts are to be of any value in promoting and protection of human rights, the nature of their jurisdiction and effects of their decisions matter more than their creation'.¹¹

Whether there are human rights norms in the EAC which needs to be adhered. The prevalence of human rights within sub-regional organisations is subject to the legal nature of their establishment. The EAC has some supranational organisational features with an autonomous regime with its own objectives and functions. With respect to human rights, the EAC Treaty makes various references to human rights, defining the norms with which EAC member states should undertake to comply. Article 3(3)(b) of the EAC Treaty provides that 'adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice' are among the prerequisites for a non-member to be accepted into the community. Article 6 provides for the fundamental principles of the community. Among the fundamental principles that shall govern the achievement of the objectives of the Community, article 6(d) lists good governance, rule of law, democracy and the promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter. Article 7 provides for the principles that shall govern the practical achievement of the objectives of the Community, of which the maintenance of universally accepted standards of human rights is one.¹²

The main question that this study has answered is how the EACJ can effectively protect human rights. In answering this question, one of the research sub-question was whether the EACJ has played any role to protect human rights in the EAC. In

⁹ See art 27 of the EAC Treaty.

¹⁰ Art 27(2) of the EAC Treaty.

¹¹ EK Quashigah 'Human rights and integration' in R Lavergne (ed) *Regional integration and cooperation in West Africa: A multidimensional perspective* (1997) 266.

¹² Art 7(2) of the EAC Treaty.

responding to this question, this study concludes that despite the fact that the EAC Treaty contains explicit human rights norms, the EACJ has not been able to protect human rights effectively in the EAC. The major obstacle to the EACJ in protecting human rights is the limitations imposed under article 27(2) of the EAC Treaty.¹³ In addition, the continuing politicisation of the functioning of the EACJ by the member states weakens the Court. Furthermore, the lack of jurisdiction to adjudicate human rights cases has led to the EACJ facing preliminary objections from respondents, challenging the jurisdiction of the EACJ in dealing with cases with human rights allegations. Despite of such a setback, the EACJ's position is that it will not abdicate its interpretive duties regardless of a matter before it containing human rights allegation. The EACJ obtains such a mandate by simply saying that it can entertain matters with respect to rule of law, good governance and democracy but not explicitly making findings in human rights. In doing so, the Court has been adopting judicial activism in protecting human rights in the EAC.

Civil society and all stakeholders in the region have been calling for the EACJ to be granted a human rights jurisdiction since 2004. However, there is no guarantee that the EACJ will be granted an explicit human rights jurisdiction in the near future. At the moment, all indications suggest that member states are not keen to grant the EACJ a human rights mandate. With the restrictions under article 27(2) of the EAC Treaty, the EACJ is carefully exercising its interpretive duties when dealing with cases containing human rights allegations. When a matter is referred to the EACJ in respect of the legality of acts or omission against a member states, the Court's jurisdiction is subject to the limitations imposed under article 27 of the Treaty.¹⁴ Thus, the presence of article 27(2) of the EAC Treaty does not allow the EACJ a human rights jurisdiction. In *James Katabazi v Attorney General of Uganda (Katabazi case)*, the EACJ famously acknowledged that article 27(2) of the EAC Treaty limits its mandate in adjudicating human rights disputes. The current position of the Court is that it does not have jurisdiction to 'adjudicate on disputes concerning violation of

¹³ Art 27(1) of the EAC Treaty.

¹⁴ Art 30 of the EAC Treaty.

human rights'.¹⁵ When infringements alleged before the Court are of a human rights nature or relate to other individual rights without being corroborated by other forms of cause of action such as the rule of law, the EACJ is likely to dismiss the case. Furthermore, when exercising its mandate, in cases that touch on human rights the EACJ does not base its findings on human rights violations.

The EACJ's decision in the *Katabazi* case was a path-breaking one. Subsequently individuals started to submit more cases before the EACJ, most of which contained human rights allegations. However, arguably, the decision in the *Katabazi* case was to an extent unclear with respect to the EACJ's human rights mandate. The uncertainty of the EACJ's human rights jurisdiction became clearer in cases which were referred to the EACJ immediately after the *Katabazi* case. For example, in the First Instance Division in *Plaxeda Rugumba v Attorney General of Rwanda (Rugumba case)*¹⁶ and *Independent Medical Legal Unit v Attorney General of Kenya & Others (Independent Medical Legal Unit case)*,¹⁷ the applicants invited the EACJ to interpret human rights norms as provided in the EAC Treaty, including the African Charter. In demonstrating the uncertainty of the EACJ's mandate concerning disputes that touch on human rights, the First Instance Division, in both cases, relied on the decision in the *Katabazi* case, and stated that it would be a complete dereliction of this Court's oath of office not to interpret the EAC Treaty as long as article 6(d) and 7(2) are in the Treaty.¹⁸ The First Instance Division in both cases did not link the allegations claimed by the applicants with the rule of law. In fact, the First Instance Division interpreted the human rights values of the EAC Treaty and other human rights instruments such as the Universal Declaration of Human Rights (UDHR).

When the two illustrated cases reached the Appellate Division, the Court stressed the relevance of linking other forms of cause of action which are not restricted under article 27(2) of the EAC Treaty. The Appellate Division provided a clear position; that

¹⁵ *James Katabazi & Others v Attorney General of Uganda*, Ref No 1 of 2007, 15.

¹⁶ *Plaxeda Rugumba v The Secretary General of The EAC & Attorney General of Rwanda*, Ref No 8 of 2010, EACJ First Instance Division.

¹⁷ *Independent Medical Legal Unit v Attorney General of Kenya & Others*, Ref No 3 of 2010, EACJ First Instance Division.

¹⁸ *Rugumba case*, 16.

is, that the Court would only entertain matters in connection with human rights when there are other forms of breach such as the rule of law, good governance and social justice. In the *Independent Medical Legal Unit* case, the Appellate Division informed the litigants that the *Katabazi* case had no mystic properties of a magic wand that made the EACJ automatically capable of adjudicating human rights related cases.¹⁹

Therefore, this study concludes that, as long as the EACJ is not given an explicit human rights mandate, it will continue to be incapable of protecting human rights in the EAC in a significant manner. Consequently, when an important international norm such as human rights is not adequately protected in a regional integration initiative such as with the EAC, the entire integration process is in danger of not succeeding as envisaged.

Another sub-question which this study answers is with respect to the existing challenges facing the EACJ in its quest of protecting human rights. Apart from the lack of an explicit human rights mandate, politics behind the work of the EACJ is a major setback to the aspirations of the Court. The functioning of the EACJ is to a large extent being politicised by EAC member states. This politicisation has led to the ineffectiveness of the Court and its effects on the EACJ are clearly visible. The 2007 EAC Treaty amendments, seen as a political response to the decision of the EACJ in *Anyang' Nyong'o and Others v Attorney General of Kenya & Others*,²⁰ have had an impact on the current and future functioning of the court. These amendments, among other things, limited the Court's jurisdiction, introduced the two-month limitation clause for individuals to lodge their complaints before the Court, and introduced additional grounds for the removal of judges which undermines the independence of the Court.

The political response to the EACJ has issued a reminder of how fragile an international court such as the EACJ can be in the hands of its member states. The

¹⁹ *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal No 1 of 2011, the EACJ Appellate Division, 11.

²⁰ *Anyang' Nyong'o & Others v Attorney General of Kenya & Others*, Ref No 1 of 2006.

amendments, which clearly targeted the work of the EACJ, are believed to ‘act as a brake on the Court’s willingness to deliver’ in future any ‘expansionist ruling advancing the integration process’.²¹ According to Alter, European Union (EU) member states were unable to restrain the EU Court from developing progressive jurisprudence as a result of the inability of the EU political institutions to reverse the Court’s judgments.²² The requirement that there must be unanimity or consensus in order to take any serious measures that affect the EU Treaty is not easily met owing to the existing divergent interests of the EU member states.²³ The same requirement applied in the EAC, but the EAC member states number only five; hence it is relatively easy for all member states to have a common agenda.²⁴

With the politicisation of the EACJ being identified as a major challenge facing the EACJ, this study has found the necessity of promoting the culture of judicial independence in the EACJ. One major reason might suffice this course. Judicial independence of an international court has not been given much attention by most international law scholars. Linking with the challenge of politicisation, judicial independence of any court is always at risk when working in politicised environment. For the effective functioning of any judicial body, judicial independence should be considered to be a prerequisite. Judicial independence is thus regarded as an essential element of a democratic society. As stated above, one of the fundamental principles that govern the achievements of the objectives of the EAC is good governance, including adherence to the principles of democracy, rule of law, and human rights.²⁵ There is a close link between human rights and judicial independence. Various international human rights instruments call for the independence of the judiciary.²⁶ The independence of the judiciary is derived from the doctrine of ‘separation of power’, in which the judiciary plays a ‘checks and

²¹ AP Van der Mei ‘Regional integration: The contribution of the Court of Justice of the East African Community’ (2009) 69 *Heidelberg Journal for International Law* 403, 424.

²² See K Alter ‘Who are the “Masters of the Treaty”? European Governments and the European Court of Justice’ (1998) 52 *International Organizations* 121, 135.

²³ Van der Mei (2009) 69 *Heidelberg Journal for International Law* 403, 424.

²⁴ As above.

²⁵ Art 6(d) and 7(2) of the EAC Treaty.

²⁶ Art 26 of the African Charter.

balances' role. Courts should not be interfered with in any way when discharging their duties. In the work of the EACJ, the inclusion of additional grounds under article 26, beyond the grounds of 'misconduct and infirmity', to include allegations of 'impropriety' have raised concerns over the independence and impartiality of the EAC judges.²⁷ In the *East African Law Society and Others v Attorney General of Kenya & Others*,²⁸ it is stated that in the presence of such grounds for the automatic removal or suspension of judges under the EAC Treaty, there is the possibility of having un-uniform standards for judges of the same court. This study has found that it is not only the grounds for the removal or suspension of the EACJ judges that causes concern on the EACJ's independence, in fact, the whole institutional and legal set-up of the EACJ does not provide a strong foundation for judicial independence. For example, the fact that there is no special body to appoint EACJ judges, thus, leaving to the Summit to appoint, it is obvious that the independence of the EACJ is in danger of being compromised.

Therefore, in summary, this study has found that the pronouncements made by the EACJ so far have created a path which would seem to be taking a positive direction for human rights litigation in the EAC.²⁹ However, one cannot consider the EACJ to be a human rights court, as it was not created for that purpose. Nevertheless, the very nature of EAC integration forces the EACJ to play a central part in protecting human rights. Despite the lack of an explicit human rights mandate, the EACJ has upheld human rights principles by holding states accountable for breaches of the rule of law, as provided in the EAC Treaty. Nevertheless, despite such a progressive interpretive approach, the EACJ is unable to effectively protect human rights in the Community. The main obstacle to the Court is the insertion of article 27(2) into the EAC Treaty, which has made the EACJ Appellate Division cautious when interpreting the human rights norms found in the EAC Treaty.

²⁷ H Onoria 'Botched-up elections, treaty amendments and judicial independence in the East African Community' (2010) 54 *Journal of African Law* 74, 85.

²⁸ Ref No 3 of 2007.

²⁹ ST Ebobrah 'Human rights development in African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Law Journal* 199, 216.

In answering the question as to how the EACJ can effectively protect human rights in the EAC, this study concludes as follows. First, the study has found that there are human rights norms in the EAC Treaty which must be adhered to. As member states envisage a strong EAC with the ultimate dream of a federation, it is inevitable that human rights will have to be fully integrated in the Community agenda. Human rights can never be side-lined if we are to have a strong EAC. The rule of law, democracy, the free movement of people, goods and services, together with the right to residence, are all human rights issues connected with the integration process. This is a reflection on the role of human rights in EAC integration. In supervising EAC integration norms, the EACJ is in better position to do so than any other forum in the continent. Indeed, the African Court is not in a position to deal with matters concerning the right to free movement of people as provided in the EAC Treaty; this has to be done by the EACJ itself. The conditions needed in order to allow the EACJ to dispense justice are already present. Now the existing working environment of the EACJ needs to be nurtured, consolidated and developed. There can never be a fully-fledged EAC integration, when the EACJ is weak.

6.2 Recommendations

6.2.1 The EACJ should acquire an explicit human rights mandate

As stated in the problem statement of this study, the inability of the EACJ to protect human rights rests on the lack of an explicit human rights mandate. The fact that the EAC Treaty exhorts member states to act in a manner which does not contravene universal human rights standards means that there is no reason why the EACJ should not be given a mandate to supervise such standards. The protocol that would grant the EACJ an explicit human rights mandate is still pending, however; and discussions for adopting such a protocol are still on-going. It is thus uncertain whether member states will adopt this protocol and give the Court an explicit human rights jurisdiction any time soon. Both the Human Rights Bill of the EAC, which is still waiting to be passed by the Summit, as well as other Community protocols establish genuine claims for the EACJ to be given an explicit human rights jurisdiction.

The majority of cases submitted before the EACJ are of a human rights nature. The current attempt by Mr Sebalu³⁰ to challenge the EAC Secretary General for his failure to speed up the protocol that would extend the jurisdiction of the EACJ provides yet another clear piece of evidence of the wish of EAC citizens to have a Community court that protects human rights.

Through its decisions, the EACJ has the potential to harmonise human rights norms in East Africa, especially if given an explicit mandate to adjudicate human rights disputes. The Court would in this way be establishing common jurisprudence in the Community, which would pave way for the harmonisation of Community values in all member states. Successful economic integration requires the enforcement of rights conferred upon individuals, companies and traders. The enforcement of such rights should be monitored at the Community level because, if left to the individual states, the standard of their protection might be different resulting in states adhering to the Community principles at an unequal rate. It is time for the EACJ to expand its authority and act as a motor for regional integration in a wider context that includes the promotion and protection of human rights. This can only be realised if the EACJ is fully mandated to adjudicate human rights cases and its functioning is not undermined by political interference. Member states should therefore take urgent measures to ensure that the EACJ has an explicit human rights mandate and abstains from any acts undermining the Court's independence.

This study therefore recommends that the EACJ should be given an explicit human rights mandate. Lessons from the ECOWAS Court are sufficient to show that the EAC will be a success when the EACJ is able to protect human rights effectively. The argument that there is an African Court that is vested with an explicit human rights mandate should not be overstressed in order to overshadow the purpose for which the EACJ was established. In truth, the EACJ is best suited and has been specifically established to supervising EAC norms of which human rights form part. In addition to, the EACJ will be complementing the work of the African Court which is welcome trend in contemporary international law.

³⁰ *Sitenda Sebalu v Secretary General of the EAC*, Ref No 8 of 2012, EACJ First Instance Division.

When the decision of *Katabazi* case was issued, the uncertainties over the scope of the EACJ's mandate in interpreting human rights standards under the EAC Treaty were evident. Article 27(2) of the EAC Treaty brings to light some key questions over the EACJ's powers. On one hand, one would seek clarity as to whether the EACJ is entitled to interpret the human rights standards enshrined in the EAC Treaty. If it is, to what extent should the EACJ exercise that mandate. On the other hand, article 27(2) brings a presumption that member states had not intended to confer the EACJ with an explicit human rights authority, and therefore the EACJ should refrain from exercising such authority.

Despite all the existing assumptions over article 27(2), litigants have never stopped referring claims before the EACJ specifically alleging human rights violations. To its credit, the EACJ has not refrained from exercising its interpretive duties in cases that contain human rights allegations. In such cases as elaborated on in chapter 3 of this study, the EACJ tends not to base its findings in human rights but rather relies on cause of action as being the rule of law, democracy and good governance when handling cases with human rights allegations. This also raises questions as to whether causes of action such as good governance, rule of law and social justice are not human rights issues. Although the EACJ is continuing to receive a number of cases, the issue of jurisdiction has appeared in almost every case before the Court. Article 27 is used as an escape route by states before the EACJ, which invoke article 27 to denounce the Court's jurisdiction in all matters even those with no human rights allegations.

The process of EAC integration continues to deepen. Mainly, the EAC member states target to reach political federation phase of integration. It will be difficult to attain successful political federation cannot if citizens will be deprived of their fundamental rights. In as such, the EACJ is well placed to harmonise and establish a human rights culture in the EAC than any other regional court. As the EAC continues to deepen, the Court will inevitably be confronted with cases connected with integration issues such matters concerning freedom of movement as well as the right to residence and establishment. It is now an accepted trend that REC courts can play an important

role in protecting human rights. By granting the EACJ with an explicit human rights jurisdiction, the Court will complement the existing regional and international organisations. The EACJ also has an open door policy for to individuals to access it with ease, compared to other human rights bodies. Thus, the EACJ will be the appropriate forum for its citizens to lodge human rights claims.

6.2.2 The time limitation clause should be abolished

This study has found necessary to bring into attention the time limitation clause for bringing a claim before the EACJ. The two-month limitation clause has become a major obstacle for the EACJ citizens in attempting to access the Court. The requirement under article 30(2) of the EAC Treaty of submitting a claim before the EACJ within two months of the knowledge or occurrence of an act or omission that violates the EAC Treaty prevents EAC citizens from lodging some important claims before the Court. Due consideration must be given to the fact that this provision was inserted after the 2007 EAC Treaty amendments. The EACJ is strictly applying article 30(2) of the EAC Treaty by developing a position in terms of which a continuing breach or violation of the Treaty cannot be a ground for disregarding the two-month limitation period under article 30(2). By disregarding the continuing violation principle, the EACJ is going against well-established and accepted principles of international law. This study therefore recommends that article 30(2) of the EAC Treaty should be amended so that individuals should not be faced with the time limit obstacle in bringing claims before the EACJ. The two-month time limit is very short, taking into consideration the real-life situation of the victims of crime and rights abuse in Africa who are in need of legal assistance.

6.2.3 A need for a more meaningful institutional and legal framework for judicial independence

As the study has discovered that politics affect the work of the EACJ and it has bearing in the Court's independence, this study recommends for the reforming measures in order to provide for a strong foundation for judicial independence of the EACJ. The process of appointing and removing EACJ judges is political and

involves only political organs of the Community. As seen in chapter 5, international courts, notably the Caribbean Court, have recently established independent institutions which are involved in the appointment and removal of judges, as well as overseeing their tenure of office. The manner of appointing and removing EACJ judge's raises concerns over the Court's independence. In light of the fact that there are expectations that the EACJ will in future have an explicit human rights mandate, this study recommends that the way in which EACJ judges are appointed and removed should be reconsidered. There should be an independent body that will supervise the tenure of judges, as it is done in the Caribbean Court and the ECOWAS Court. The task of assuring judicial independence rests not only with the member states. EACJ judicial officers should conduct themselves in such a manner that their judicial functions are not induced by any one. Their judicial duties should be discharged independently and should be imbued with an impartial character.

6.2.5 The EACJ should be endowed with its own enforcement mechanisms

Although the obligation of enforcing a decision of the EACJ is on member states, the Court still needs to ensure that its decisions are complied with or that there is some degree of compliance when a state is not willing to comply. Failure to comply with the judgments of the EACJ would lead to little development in the EAC legal order. Therefore, the EACJ should establish its own machinery for improving compliance. Follow-up and state reporting mechanisms could be ideal for this purpose. The EACJ should conduct follow-up to its decisions and find out to what extent member states are complying. It is also an opportunity for the Court to engage with member states to ensure compliance.

6.2.5 The EACJ should take measures to deal with the politicised environment

As observed in this study, the on-going politicisation of the EACJ may undermine the legitimacy and credibility that the EACJ has attained. It is undisputed that trust and confidence in the EACJ is gradually increasing on the part of EAC citizens. However, the continuing politicisation of the Court is detrimental to its future. Recent attempts to confer the EACJ with a criminal jurisdiction raised a number of questions

about the credibility of the Court. To insulate itself from an overly politicised environment, the Court should take care to deliver credible and well-reasoned decisions. It should also strengthen its legitimacy with the general public by organising workshops and seminars with legal practitioners, judges and magistrates in the region.

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