

Understanding The East African Court of Justice

*The hard road to independent institutions
and human rights jurisdiction*

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This background paper is part of a series on the Political Economy Dynamics of Regional Organisations (PEDRO). It was prepared in March 2017. In line with ECDPM's mission to inform and facilitate EU-Africa policy dialogue, and financed by the Federal Ministry for Economic Cooperation and Development, BMZ, the studies analyse key policy areas of seventeen regional organisations in Sub-Saharan Africa. In doing so they address three broad questions: What is the political traction of the organisations around different policy areas? What are the key member state interests in the regional agenda? What are the areas with most future traction for regional organisations to promote cooperation and integration around specific areas? The studies aim to advance thinking on how regional policies play out in practice, and ways to promote politically feasible and adaptive approaches to regional cooperation and integration. Further information can be found at www.ecdpm.org/pedro.

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Table of Contents

Table of Contents	2
1. Introduction	3
2. Political traction of the EACJ	3
2.1. Structural and institutional drivers and obstacles	3
2.2. EAC governance and institutions	4
2.3. EACJ mandate, functions and structure	7
2.4. The EACJ agenda and implementation challenges	8
2.5. Financial autonomy of the EACJ	9
3. Resistance by Member States- resilience by the EACJ	10
3.1. National level dynamics around human rights	10
3.2. The case of Kenya's backlash - independence of the court	12
3.3. A case advocating for extension of the court's jurisdiction	14
4. Human rights - possible area of traction in the EAC's regional integration	16
4.1. Key human rights cases in the EACJ	16
4.2. Civil society and legal organisations support - conduits in the work of the EACJ	18
5. Conclusion	19
Bibliography	21

1. Introduction

The East African Court of Justice (EACJ) is one of the organs established under Article 9 of the East African Community Treaty¹. The East African Community (EAC) has demonstrated some effectiveness in promoting regional cooperation in economic relations. It also disposes of a range of institutions - including the EACJ and the Treaty - to advance the respect for human rights and to adjudicate independently cases brought before the court.

Within the EAC institutions or organs, the EACJ has a special mandate in terms of areas to cover and independent ways of working. This report will deal with the formal arrangements in place, including those to implement its mandate. Secondly, this report will deal with challenges relating to the interpretation and implementation of its mandate. This has resulted in rulings by the court that were politically controversial to one or more EAC Partner States, given - among other things - the court's efforts to adjudicate on matters that hint on human rights, an area that it has no mandate yet to adjudicate upon. Section 3 then deals with the political backlash and the approaches by member states to eliminate the EACJ, undo rulings or otherwise constrain the actions, scope and independence of the court. The paper will also look at key conduits which push for the EACJ to further take - what some have called - an *activist* stance in the pursuit of implementing its mandate and pushing the boundaries for the enforcement of the protection of human rights within the EAC.

This is a desk-based report, drawing on a limited number of interviews.

2. Political traction of the EACJ

2.1. Structural and institutional drivers and obstacles

The EAC is one of the officially recognised Regional Economic Communities of the African Union. Its ultimate objective is the establishment of a political federation². Steps have been taken to achieve a customs union, common market and a monetary union, which are perceived to be prerequisites for the formation of a political federation. The EACJ was inaugurated in 2001 as the judicial organ of the EAC. When the EAC was founded, its executive organs did not contemplate an active role for the EACJ in regional integration, and especially not in the adjudication of human rights matters³.

The EACJ replaces the former East African Court of Appeal (EACA) that was operational under the former EAC. This appeals court was established in the colonial period in East Africa under the East African Common Services Organisation Agreements of 1961 to 1966⁴. It was initially referred to as 'His Britannic Majesty's Court of Appeal for Eastern Africa' when it was established in 1902 by the Order in Council⁵ and later as 'His Majesty's Court of Appeal for East Africa' in 1909. The East African Community was first established in 1967. Its then three members - Kenya, Tanzania and Uganda - decided to keep the EACA as an institution of the community⁶. It served a role in the interpretation of the 1967 EAC Treaty and as an appeals court for civil and criminal matters⁷. However, the EACA did

¹ Treaty for the Establishment of the East African Community, signed on 30 November 1999, came into force on 7 July 2000. Amended on 14 December 2006 and 20 August 2007 [herein EAC Treaty].

² EAC Treaty, Article 5(2).

³ Gathii (2014).

⁴ See historical discussion of the EACJ in Possi (2014).

⁵ Ibid, p.111.

⁶ Ibid, p.112.

⁷ Ibid.

not have jurisdiction over human rights matters⁸. This is mainly because human rights were not a priority for most newly independent East African states and the Constitutions of some of these states like Tanzania (Tanganyika) did not include a Bill of Rights at the time⁹. The 1967 EAC Treaty was also silent on the protection of human rights, indicating the reluctance of member states to commit to the adjudication of such cases at the community level. The EACA was shut down when the first EAC dissolved in 1977 mainly as a result of Kenyan dominance and divergent political positions and ideologies amongst the member states¹⁰.

The EAC was re-established in 2000. In contrast to its predecessor, the new EAC institutionalised the EACJ as one of its organs with the mandate to interpret and apply the EAC Treaty. In addition, article 27 confers on the EACJ such “original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date”. The ‘Council’ refers to one of the key organs of the EAC, the Council of Ministers. This article indicated a formal recognition by the highest decision making body of the EAC to recognise the role of the court in adjudication of human rights issues. However, in practice, the jurisdiction to hear human rights matters is not explicit and is subject to the conclusion of a Protocol to operationalise such jurisdiction.

Since its revival, the EAC has made rapid progress and is proceeding at a faster pace than any other African REC¹¹. There are a number of economic areas where interests of the member states align. But clearly, in other areas they remain competitors or opponents, which has resulted in bilateral or trilateral agreements outside of the EAC. Kenya continues to play a dominant role in the region as a *swing state*¹² due to its economic size, and its more elaborate institutional capabilities (including diplomacy and military might) to influence regional and national level institutions and dynamics.

EAC has gradually expanded its membership, with Rwanda and Burundi joining in 2009, and the newly independent South Sudan joining in 2016. All countries in the region except Tanzania have gone through major political upheaval, often combined with mass violence and even genocide as was the case in Rwanda (1994) and attempts at genocide in Burundi (1992), with ongoing faction fighting and major human rights violations in South Sudan.

2.2. EAC governance and institutions

The EAC and human rights, good governance

The EAC Treaty is the key legal document of the EAC, although its Article 151 also recognises protocols and annexes as part of the Treaty. All EAC Partner States proscribe to the principles and values outlined in the EAC Treaty. Article 3(3) explicitly provides for the “adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice” as one of the key considerations for membership. The EAC’s admission criteria is guided by these principles and members who do not meet these criteria may be denied admission.

The objectives of the EAC are to develop policies and programmes aimed at widening and deepening cooperation including in legal and judicial affairs for their mutual benefit. More so, Article 6(d) outlines one of key principles of the EAC Treaty as:

⁸ Ibid, p.113.

⁹ Ibid, p. 1112.

¹⁰ Mathieson (2016).

¹¹ Ibid.

¹² Refers to states with relative economic, diplomatic, military and political weight in influencing cross-country and regional dynamics.

“Good 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”¹³.

In addition, one of the operational principles of the EAC under Article 7(2) is that:

Partner 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”¹⁴.

The EAC Treaty considers the rule of law and human rights as part of good governance. Good governance encompasses accountability and transparency, which are key in acting as checks and balances within the EAC. The EAC Treaty specifies the mandates of each of its organs delineating the roles of the executive, judicial and legislative institutions. For example, judges of the EACJ are appointed by the Summit (on recommendation by Partner States) from among national judges or jurists with proven integrity, impartiality and independence. This ensures that the judges of the EACJ are independent from any influence in their decision making. In addition, members of the EALA are vested with legislative authority and can introduce private bills. A decision to withdraw a bill has to be in accordance with the Assembly's procedure and the Council cannot unilaterally withdraw private member bills as it attempted to do in the past¹⁵.

Apart from the EAC Treaty, the EAC has a Draft Protocol on the Good Governance¹⁶ (GGP), which incorporates key principles including the protection of human rights and promotion of equal opportunities¹⁷. Initially the GGP was drafted as a framework and Partner States recommended that it be upgraded to a protocol which has legal binding effect. The GGP gives clarity on the definition of good governance and sets principles by which EAC Partner States and those aspiring to join the EAC, have to adhere. It outlines the development of an East African Bill of Rights for the protection of human rights. The GGP provides that Partner States that do not amicably resolve a dispute may refer the matter to the EACJ. This affirms the role of the EACJ in regional dispute resolution. Correspondence with Mr Owora Othieno from the EAC Secretariat indicates that GGP is on hold as the relevant stakeholder consultations are still being undertaken¹⁸.

Summit and Council of Ministers

The Summit is the highest decision making organ of the EAC and its decisions are taken by consensus. This means that one of the Partner States can potentially block the adoption of a decision within the Community. Similarly, the Council of Ministers has authoritative decision making power within the EAC and makes decisions by consensus. The Council plays an important role in setting the Agenda for Summit discussion and gives directions to the Partner States as well as to all the other organs of the EAC¹⁹. The hierarchy of decision making has implication for the functioning of other organs of the EAC. For example, the appellate and human rights jurisdiction of the EACJ are subject to a Protocol by the Council of Ministers to extend such jurisdiction. To date, the Council has not extended the EACJ's human rights jurisdiction. More so, the Summit has to assent to Bills from the

¹³ EAC Treaty, Article 6(d).

¹⁴ Ibid, Article 7(2).

¹⁵ See East African Court of Justice (2006a).

¹⁶ The East African Community Protocol on Good Governance (Draft), copy with author.

¹⁷ Ibid, Article 6.

¹⁸ Email correspondence with Mr. Owora Othieno, East African Community Secretariat, Head of Department: Corporate Communication and Public Affairs and Mrs. Annah Nabaasa, EAC Secretariat. 21 and 23 November 2016.

¹⁹ EAC Treaty, Article 14(3).

EALA before they become effective. Failure to assent to a Bill may lead to it lapsing, thereby preventing the adoption of key legislature within the EAC. The Summit is responsible for the appointment, removal and determination of the salary and other terms and conditions of the judges,²⁰ and hence it may influence the composition of the judges.

Secretariat

The Secretariat is aligned to the executive organs, and has been described as viewing its “mandate through the prism of member state interests”²¹. It has been criticised for failing to effectively monitor Partner States compliance with the EAC Treaty. The Secretariat has been criticised as not being open enough to civil society efforts in support of the court²². However, its inaction or inadequacy could be due to the executive control, which does not leave it with much autonomy to effectively execute its mandate. The Secretariat plays an important role in the EAC. The EAC Treaty empowers it to refer a matter to a Partner State where such a state has failed to meet an obligation or has infringed a provision of the EAC Treaty²³. More so, the EAC Treaty gives the Secretariat the power to refer a matter to the EACJ where the Council of Ministers has failed to resolve such a matter²⁴. This is important for cases involving governance, respect for the rule of law and human rights as the Secretariat acts as a check on the conduct of Partner States.

East African Legislative Assembly

The East African Legislative Assembly (EALA) is the organ of the EAC with a legislative, representative on and oversight mandate. The EALA is more advanced compared to other regional legislative assemblies as it has the power to pass legislation that applies to the EAC. The EALA also plays an oversight role through its seven standing committees that monitor and report on the implementation of programmes of the EAC. The EALA was an early supporter of the EACJ and has in the past advocated for the increase of resources to the EACJ to enable it to carry out its human rights protection mandate²⁵. The EALA has passed the EAC Human Rights Bill, 2012²⁶ which seeks to give effect to the provisions of the Treaty for EAC on human and peoples’ rights as well as those in the GGP. The Bill consolidates the various principles on human and people’s rights found in various conventions and agreements including the African Charter. The Bill further provides an institutional framework for the protection of human rights and will lead to harmonisation of applicable principles and rules across the region. The Bill is still awaiting assent by heads of State since it was passed. Once this Bill is assented to and becomes law of the EAC, the EACJ will in interpretation and application of the EAC Treaty use the human rights Bill to adjudicate on human rights cases. The Human Rights Bill dealing with the enforcement of rights, affords a person the right to appeal the decision of their highest national court to the EACJ.

Members of EALA have also supported the protection and promotion of human rights by proposing individual bills that cover a range of human rights for example, the HIV and AIDS Prevention and Management Act, 2012, was introduced as private member bill. EALA has also advocated for the adoption of human rights jurisdiction by the court and urged the Council of Ministers to address the extension of jurisdiction arguing that the framers of the EAC Treaty “could not have intended that a fundamental principle of the community remains inoperative”²⁷. This shows EALA’s inter-organ

²⁰ EAC Treaty, Articles 24- 26.

²¹ Alter, Gathii & Helfer (2016).

²² Ibid.

²³ EAC Treaty Article 29(1).

²⁴ EAC Treaty, Article 29(3).

²⁵ East African Legislative Assembly. 2011.Roundtable on Strengthening the Implementation of Human Rights in the EAC Region: The Role of the East African Legislative Assembly, Arusha, Tanzania 27 May 2011.

²⁶ <http://www.eala.org/media/view/bill-on-human-rights-is-passed-by-eala>.

²⁷ East African Legislative Assembly (2007).

support to the EACJ to ensure that it can to hear human rights cases. EALA has enacted the Administration of the East African Court of Justice Bill 2016, which seeks to operationalise the provisions of the Treaty relating to the EACJ, to strengthen its judicial independence, establish structures of administration and provide for employment and disciplinary control of the Court's employees and other matters incidental to the Court.

2.3. EACJ mandate, functions and structure

The EACJ mandate is to serve as “a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with” the EAC Treaty²⁸. Its task is to ensure smooth regional integration through administration of justice and respect for the rule of law. It also has jurisdiction to issue advisory opinions²⁹ and to determine arbitral matters³⁰ as well as employment and labour disputes that arise between the EAC and its staff.³¹ The jurisdiction of the EACJ is therefore limited to the interpretation of the Treaty. However, as the judicial organ of the EAC, the court plays an important role in regional integration especially in adherence to the operational principles and objectives laid down in the EAC Treaty. The EACJ is necessary to ensure harmonious settlement of disputes to foster regional integration.

Initially the court was set up with only one chamber consisting of six judges. However following the controversial *Anyang' Nyong'o*³² case, the EAC Summit championed by Kenya, led to the amendment of the EAC Treaty on 14 December 2006 and 20 August 2007 which inter alia re-structured the court into two divisions (the First instance division and the Appellate Division); increased the number of judges from six to 15. At present, the EACJ is staffed with 11 judges: six judges in the First Instance Division and five judges in the Appellate Division. The retirement of the judges is staggered with one third of the judges retiring after serving five years, one third after six years and the remaining one third after seven years. The EACJ is headed by a President who is responsible for the supervision of the Court. The President also directs the work of the Appellate Division. The Principal Judge in the First Instance Division supervises the work of the division. With the exception of the President and Principal Judge, all the other judges work on an ad hoc basis. As most of the judges also serve as judges in national courts, it is problematic to compose a panel of judges which impacts on the court's ability to efficiently hear and dispose of cases.³³

The Registrar carries out the administration of the EACJ and is assisted by the Deputy Registrar and court staff. The Court has established its Sub-registries in the Partner States (South Sudan has committed to setting up one but it is yet to be established), which are located in the premises of the National Courts³⁴. This shows the effort of the EACJ to liaise with national courts to ensure easier access to it by its bringing services closer to the people.

Currently, the temporary seat of the EACJ is located in Arusha. The sessions of the Court are held on an ad hoc basis until the Council of Ministers determines there is enough business to make it fully operational. As such, the judges are not required to permanently seat in Arusha. This arrangement in effect means that the court is not functioning at its full operational capacity. This has implications for the financing of the EACJ as an organ of the EAC. A permanent seat would ensure that the full operations of the court are budgeted for in the EAC budget and replace the current ad hoc operations

²⁸ EAC Treaty, Article 23(1).

²⁹ Ibid, Article 36.

³⁰ Ibid, Article 32.

³¹ Ibid, Article 31.

³² East African Court of Justice (2006b).

³³ See Ruhangisa (2011).

³⁴ See East African Court of Justice, Sub registries. http://eacj.org/?page_id=1269.

of the court. Given the increase in the cases heard by the EACJ since its inauguration, it is pertinent that the Summit establish a permanent seat for the court as required by the EAC Treaty.

The EACJ addresses complementarity between EACJ and national courts. Under Article 33, the decisions of the EACJ on interpretation of the EAC Treaty have precedence over that of national courts on similar subject matter. Article 34 directs national courts or tribunals to refer a matter to the EACJ, if it considers that a ruling on the interpretation of the EAC Treaty is necessary to enable the national court to give a judgment. This ensures uniform interpretation and application of the EAC Treaty amongst the national courts of the Partner States thereby fostering the harmonisation of laws.

The EACJ allows cases to be brought by natural persons resident in any of the Partner States. Individuals can challenge the legality of any act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that it is unlawful, or it infringes the provisions of the Treaty³⁵. Compared to other regional courts, the EACJ is unique as the EAC is silent on the exhaustion of local remedies before the court can be accessed. This makes the EACJ more accessible as national legal proceedings may take a long time to resolve a matter due to backlog of cases. However, there is a limitation as cases must be brought before the EACJ within two months of the act challenged or two months from the time they became aware of the act challenged³⁶. Apart from individuals, Partner States as well as the Secretariat of the EAC are allowed access to the courts³⁷. However, to date no state party has instituted proceedings against a fellow state party, as Partner States prefer to use diplomatic avenues to resolve disputes.

2.4. The EACJ agenda and implementation challenges

The EACJ was inaugurated in 2001 but did not start receiving cases until 2005. Since then, the caseload of the EACJ has gradually increased and more cases containing human rights issues have come before the court. The current case load of the EACJ comprises a large number of cases that deal with human rights issues including arbitrary arrests and detention, cruel and inhumane treatment, property rights, freedom of movement and protection of the environment. The EACJ has also delivered advisory opinions on questions of the interpretation and application of the EAC Treaty. As at March 2017, the court has issued 62 judgements, 50 other rulings, 20 taxation rulings, and two advisory opinions³⁸.

In its operations the EACJ faces challenges including budgetary constraints, ad hoc operation of the court, slow extension of appellate and human rights jurisdiction, the establishment by Partner States of parallel quasi-judicial bodies with the same mandate as the EACJ and sovereignty challenges by members states upon the court's jurisdiction³⁹. The court also faces politicisation of its decisions by Partner States which threatens its independence (see further discussion in section 3.2). These challenges hinder the court's ability to effectively settle disputes within the EAC.

Rather than serve primarily as a tribunal to adjudicate over trade issues as envisioned by the leaders of Partner States (in the move towards a political federation), the EACJ has evolved in that cases that it deals with seek to hold governments accountable and promote the good governance and the rule of law⁴⁰. The human rights jurisprudence of the EACJ is in contrast to the reluctance of some national

³⁵ EAC Treaty, Article 30(1).

³⁶ Ibid, Article 30(2).

³⁷ Ibid, Articles 28 and 29.

³⁸ East African Court of Justice, http://eacj.org/?page_id=2414.

³⁹ Ruhangisa note 33.

⁴⁰ Gathii note 3, p. 250; Interview with Selemani Kinyunyu, African Governance Architecture Focal Point, African Court of Human and Peoples Rights, 15 December 2016.

courts of Partner States to enforce human rights⁴¹. This growing jurisprudence of has allowed the EACJ to become a forum for the adjudication of rights' claims. The judicial activism of the judges in interpreting and applying the EAC Treaty have resulted in the adjudication of cases that 'hint on human rights' even though the court does not have an explicit mandate to hear such cases.

The first case the EACJ dealt with was *Mwatela v East African Community*⁴² which was brought by members of EALA to adjudicate over the tension between the Council and EALA regarding the latter's legislative power. EALA members argued that the withdrawal by the Council of private member bills was in contravention of the EAC Treaty. This case involved a question on the competencies of the organs of the EAC (separation of powers). The EACJ found that the EAC Council had no powers under the EAC Treaty to withdraw bills introduced by private parties without following the EALA procedure for the withdrawal of bills⁴³. This decision is important as it demonstrated the willingness of the EACJ to judicially determine the balance of power within the EAC as well as indicate the court's independence in determining cases.

This case set the tone for the judicial activism of the EACJ in passing judgments that avoid judicial subservience to political organs. This judicial activism will be discussed more in section 4 that deals with human rights cases.

2.5 Financial autonomy of the EACJ

The EACJ is funded by the EAC as one of its organs. The EAC Treaty is funded by equal contributions by the Partner States and receipts from regional and international donations and any other sources as may be determined by the Council⁴⁴. The 2016/2017 budget allocation to the organs of the EAC is as follows: the EAC Secretariat- \$57.9m, EALA- \$16m, and the EACJ- \$4.3m⁴⁵. In 2006, the EAC established the Partnership Fund through which development partners can support EAC programs and projects geared towards regional integration⁴⁶. Given the limited funding from Partner States of the EAC, donors (development partners) have assisted the EACJ by providing funds for sensitisation workshops to increase the visibility of the court amongst the EAC citizens. Although such funding is important, certain stakeholders are critical of the potential influence of donor funding.

The EAC budget is prepared by the EAC Secretariat and submitted to the Council for consideration. Although the EAC Treaty mandates the EALA to debate and approve the budget, it does not provide for consultations with the EACJ on the EAC budget. One of the key challenges highlighted by in the EACJ Strategic Document⁴⁷ (2010-2015) is budgetary challenges. The budget of the court is small in comparison to the other organs. Given the increased role of the EACJ in dispute settlement in the region, the budget of the court will have to be increased to deal with issues that may arise out of the move towards integration with the expansion towards a political federation.

⁴¹ Ibid, p. 251.

⁴² East African Court of Justice (2006a).

⁴³ Ibid, p. 18.

⁴⁴ EAC Treaty, Article 132(4).

⁴⁵ Presentation of the Budget of the East African Community for the Financial Year 2016/2017 to the East African Legislative Assembly (2016). By Hon. Dr. Augustine Philip Mahiga, the Chairperson of the EAC Council of Ministers and Minister for Foreign Affairs and East African Cooperation, The United Republic of Tanzania. 26 May 2016. EALA Chambers, EAC Headquarters, Arusha, The United Republic of Tanzania p. 85.

⁴⁶ See East African Community, Partnership Fund, http://www.eac.int/sectors/resource_mobilisation/partnership_fund.

⁴⁷ East African Court of Justice (2010).

Apart from budget funding the EAC Treaty makes provision for extra budgetary resources from “grants, donations, funds for projects and programmes and technical assistance” and income earned from activities undertaken by the Community⁴⁸. This provides an avenue for the EACJ to source funds outside the EAC budget to finance programmes that are not covered under the EAC budget.

At present, since the EACJ is funded by the EAC budget, it is dependent on the contribution of Partner States who have discretion on the allocation of resources to the Court. There is a risk that inadequate funding could make the court vulnerable and affect its ability to effectively discharge its function. Due to the ad hoc operation of the court, it does not have a regular schedule of sessions a year. The case register and budget determine the framework of sessions for the judges. The EAC Budget stipulates the number of days on which the EAC judges will conduct their sessions thereby compelling EAC judges to discharge their duties within a fixed period of time.⁴⁹ The review of the ad hoc nature of the EACJ is overdue but the decision to grant it a permanent seat is left to the Summit and not to the court itself.

3. Resistance by Member States- resilience by the EACJ

Most EAC Partner States face widely varying challenges of human rights violations, as well as challenges to the separation of power and to the independence of the judiciary⁵⁰. This section deals briefly with how respect for human rights is institutionalised - and violated - in some countries. Subsection 3.2 reviews a few cases that highlight the interests of Partner States, their interactions with the EACJ and any influence they may have on the operations of the court - primarily on the independence of the court and its dealing with human rights - and its further institutional development. Generally speaking Partner States have tried to curb the influence of the EACJ, with strong resilience of the court through an ‘activist’ application of its mandate⁵¹.

3.1. National level dynamics around human rights

Nationally, Partner States have established human rights commissions which are mandated to promote and protect human rights. The constitutions of Kenya,⁵² Rwanda,⁵³ Uganda,⁵⁴ Tanzania⁵⁵ and South Sudan⁵⁶ provide a mandate for their respective human rights commissions which are operationalised by legislation. The constitutions of the Partner States also make provision for the protection of human rights. While almost all EAC countries have the formal institutional mechanisms of democracies, their adherence to the core principles of good governance, human rights and democracy is not in sync. Human rights violations occur despite the human rights commissions and laws providing for human rights protections. Weaknesses of human rights commissions in the EAC include lack of enforcement mechanisms, funding challenges and human capacity constraints⁵⁷. Human rights commissions also face challenges arising from political interference. For example, the independence of the Kenyan human rights commission is threatened by political influence in the

⁴⁸ Articles 132(4) and 133 of the EAC Treaty.

⁴⁹ Possi, note 4.

⁵⁰ See also PEDRO report on NEPAD

⁵¹ See Gathii (2014), note 3.

⁵² Constitution of the Republic of Kenya. 2010. Article 59.

⁵³ Constitution of the Republic of Rwanda. 2003 as amended in 2015. Article 177.

⁵⁴ Constitution of the Republic of Uganda. 1995. Article 51.

⁵⁵ Constitution of the Republic of Tanzania. 1977. Article 129.

⁵⁶ Transitional Constitution of the Republic of South Sudan. 2011. Article 145.

⁵⁷ The Network of African Human Rights Institutions. 2016. A Mapping Survey of the Complaint Handling Systems of African National Human Rights Institutions.

appointment procedures of the commissioners; attempts by politicians to undermine its credibility; and attempts by politicians to direct the work of the Commission⁵⁸.

Civil society plays a key role in the national protection of human rights nationally and has been vocal in highlighting violations of human rights nationally. However, at times the interests of civil society clash with those of ruling elites that often constrain the role of civil society. For example, concerns were raised that Uganda's Non-Governmental Organisations Bill "would extinguish the very character of non-governmental organisations and make them puppets of the state. It unjustifiably restricts the space for civic engagement, civic association [and] civic participation in governance and in service delivery"⁵⁹. The Bill was assented to by President Museveni on 30 January 2016⁶⁰. The Act imposes special obligations on NGOs and bars organisations from doing anything that would be deemed as prejudicial to the "security of Uganda," and the "interests of Uganda and the dignity of Ugandans"⁶¹. This vague provision leaves a risk of the Act being used to arbitrarily intimidate NGOs whose work is in conflict with the interests of the government of Uganda.

Kenya has an NGO Coordination Board which is a state body that monitors the activities of NGOs. It has the power to deregister NGO. This has raised criticism from civil society that some of the closures may be politically motivated⁶². This was especially seen post 2008 election violence following threats of closure of NGOs that were key players in the indictment of President Kenyatta before the International Criminal Court (ICC). Similarly, Burundi has closed down human rights organisations critical of the government including Ligue Iteka the oldest rights organisation in the country⁶³. This has raised criticism from civil society and the United Nations, which urged Burundi to reinstate the Ligue Iteka as it "carries out crucial work in monitoring and documenting human rights abuses committed in Burundi, which is all the more important given the precarious human rights situation in the country"⁶⁴.

Rwanda has lengthy and onerous registration and reporting requirements for both domestic and foreign NGOs and government has been accused of using infiltration tactics in human rights organisations⁶⁵. In order to avoid being banned, some civil society organisations in the EAC have resorted to self-censoring which affects their ability to objectively monitor government activities. In South Sudan the work of human rights activists and defenders is hindered by lack of security in some areas due to the ongoing political and ethnic unrest.⁶⁶ NGOs also face the risk of barriers to entry due to the mandatory requirement for registration of all NGOs which may involve multi-tiered registration.⁶⁷ More so, NGOs may face barriers to their operational activity arising from the controlling regulatory approach by government towards NGOs.⁶⁸

Given the lack of effective protection of human rights at the national level, citizens of the EAC have found an avenue for their claims to be addressed by the EACJ. However, Partner States have challenged the jurisdiction of the EACJ and in some cases have politicised the decisions of the court as discussed below.

⁵⁸ Ibid, p. 25.

⁵⁹ Mwesigwa (2015).

⁶⁰ Jjuko (2016).

⁶¹ Republic of Uganda, The Non-Governmental Organisations Act (2016), section 44(f).

⁶² Allison (2016).

⁶³ Akwei (2017).

⁶⁴ Michael (2017).

⁶⁵ Freedom in the World 2016, Rwanda Country Report. 2016. <https://freedomhouse.org/report/freedom-world/2016/rwanda>.

⁶⁶ International Center for Not-for-Profit Law, Civic Freedom Monitor: South Sudan (2017). <http://www.icnl.org/research/monitor/southsudan.html>

⁶⁷ Ibid.

⁶⁸ Ibid.

3.2. The case of Kenya's backlash - independence of the court

The most controversial case before the EACJ was *Anyang' Nyong'o and Others v Attorney General of Kenya*⁶⁹. Although this case did not involve human rights, the court's decision on the matter showed the willingness of the court to independently and impartially carry out its mandate and at the same time exposed the backlash of Partner States against the court. The applicants challenged the rules of election by the Kenyan National Assembly for members to the East African Legislative Assembly (EALA). The applicants who were opposition parties viewed the election of the 9 candidates as an "attempt to control the domestic legislative agenda and renege on promises to share power"⁷⁰. They turned to the court seeking redress against the actions of the governing party.

Article 50 of the EAC Treaty governs election of members to the EALA. It specifies that the nine members elected should "represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State"⁷¹. In contrast the Kenya rules provide that members will be elected "according to the proportion of every party in the National Assembly". The applicants alleged that the way in which the 9 members were elected contravened Article 50(1) of the EAC Treaty. The EACJ held that there was a significant degree of non-compliance with Article 50 in the failure to provide for gender and other special interest representation⁷². In addition, the 9 members were not 'elected' into office through voting by the National Assembly, as required by the EAC Treaty⁷³. Instead, the House Business Committee had divided the seats among the country's political parties in proportion to their strength in the national parliament and the names were tabled before Parliament. The Kenyan rules provided for a "fictitious election in lieu of a real election"⁷⁴. The EACJ had granted an interim injunction restraining the EALA from recognising the nine nominees forwarded by Kenya pending a final determination of the matter,⁷⁵ which had the effect of delaying EALA's opening.

The court in its ruling on the merits held that a country cannot invoke its domestic laws as a justification for a failure to meet its treaty obligations. The court concluded that:

"[w]hile the Treaty upholds the principle 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 to play their role"⁷⁶.

This conclusion shows that the EACJ in interpreting the EAC Treaty may make a ruling that is contrary to the position of an individual Partner State.

Kenya viewed the court's interim decision preventing EALA from recognising the nine members as an interference in a domestic political issue, thus violating its sovereignty⁷⁷. This led to a backlash by the then President Kibaki who triggered a campaign against the EACJ and sought to 'kill the fledgling court'⁷⁸ and exert greater control over the judges. The initial efforts of Kenya to curb the EACJ's power

⁶⁹ East African Court of Justice (2006b). This decision was an interim order of the court.

⁷⁰ Ibid.

⁷¹ Article 50(1) of the EAC Treaty.

⁷² East African Court of Justice (2006b). This decision dealt with the merits of the case.

⁷³ Ibid, p. 43.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid p. 44.

⁷⁷ East African Community. 2006. Speech delivered by Kenyan President Kibaki at the 8th EAC Summit, 30 November 2006. Arusha Tanzania.

⁷⁸ Alter et. al note 21, p. 303.

were not supported by Uganda and Tanzania who saw merit in supporting regional integration and “resisted regionalising Kenya’s domestic political squabbles”⁷⁹ Tanzanian officials viewed the proposal as “too extreme”⁸⁰ whilst Uganda (driven by President Museveni’s hope of becoming the EAC President once the EAC Political Federation was achieved) sided with Tanzania as the actions could lead to the collapse of the EAC⁸¹. This opposition by Uganda and Tanzania succeeded in redirecting Kenya’s backlash to completely eliminate the EACJ.

Blocked in its efforts to suppress the EACJ, Kenya unilaterally resorted to intimidating two Kenyan judges of the EACJ to recuse themselves from the *Anyang’ Nyong’o* case⁸². The Solicitor General of Kenya also threatened the judges with accusations of corruption in the courts of Kenya if they did not recuse themselves, as both judges served in both the national courts and the EACJ.⁸³ The Solicitor General argued that because of the corruption allegations, the judges could not render a fair trial in the *Anyang’ Nyong’o* case.⁸⁴ However, the judges backed by their EACJ colleagues did not succumb to political pressure. One of the judges voluntarily resigned and one was later reinstated after a Kenyan national court found that the government of Kenya had violated his natural justice rights.⁸⁵

Kenya’s third approach was to draft amendments to the EAC Treaty that sought to set up an appeals division and to provide additional grounds on which to dismiss a judge of the EACJ for misconduct.⁸⁶ Given the role of the Summit in appointing judges, this move was seen as an effort for the Appeals division to be stacked with ‘pro-government jurists’ sympathetic to the Partner States⁸⁷. The inclusion of the appellate division is welcome as it extended the operational function of the court. However, the amendments substantially changed the EACJ structure, jurisdiction and access rules. The Appeals division has also overturned some key decisions of the First Instance division. The EAC Treaty amendments also limited the time within which a legal person can access the court. The current time limit is within two months from the infringement or the date on which the claimant becomes aware of the infringement. This has led to a number of cases being dismissed because they were outside the time limit, thereby restricting access to the court. This time limitation does not apply to other applicants like the EAC Secretary General. Another amendment was the limitation on the court’s jurisdiction by excluding its interpretation from “jurisdiction conferred by the Treaty on organs of Partner States”⁸⁸.

On 7 December 2006, Kenya’s Attorney General Wako chaired a meeting of attorneys general to finalise the amendments to the EAC Treaty. The following day the Council of Ministers convened an extraordinary meeting to approve the draft amendments. Uganda was the first Partner state to adopt the amendments on 11 December 2006 followed by Tanzania and Kenya.

The EAC Treaty amendments were criticised for being hastily adopted and for circumventing the institutional procedures that other stakeholders might have used to block the decisions⁸⁹. Civil society and the East African Law Society (EALS), for example, criticised their exclusion from the amendment process. The EALS eventually challenged the adoption of the amendments in *East African Law*

⁷⁹ Warigi (2006). At the time EAC comprised Kenya, Uganda and Tanzania. Rwanda, Burundi and South Sudan were not members.

⁸⁰ Alter et al., note 21, p. 302.

⁸¹ Ibid.

⁸² Ibid, p. 303.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid, p. 304.

⁸⁸ Proviso to Article 27 and Article 30(3) of the EAC Treaty.

⁸⁹ Alter et al. note 21.

*Society and others v Attorney General of Kenya and others*⁹⁰ challenging the procedure as not complying with Article 150 of the EAC Treaty. The EACJ held that the amendment process infringed on the Treaty as civil society and the private sector had not been allowed to participate in drafting the amendments⁹¹. However, the court did not invalidate the amendments as the “infringement was not a conscious one” and was “not likely to recur”⁹². This case is important because it showed the court’s stance on the proper interpretation and application of the EAC Treaty, which means that future EAC Treaty amendments will have to adhere to proper procedure.

The EACJ held that the amendments excluding its interpretation from jurisdiction conferred upon organs of Partner States have the effect of compromising or contradicting the principle of the supremacy of the EACJ in the interpretation and application of the EAC Treaty. Similarly concerning the amendment to the criteria for the removal of judges,⁹³ the court held

“The introduction of automatic removal and suspension on grounds raised or established in the home State, and applicable to only those in judicial or public office, makes possibilities of applying un-uniform standards to judges of the same court endanger the integrity of the Court as a regional court”⁹⁴.

The objective of the EAC Treaty was for EACJ judges to be independent from their home states to avoid conflict of interest⁹⁵. The EACJ strongly recommended for these amendments to be reviewed. However, to date, the amendments have not been revisited by the Summit.

Despite the backlash to the EACJ in the *Anyang’ Nyong’o* case, the EACJ showed its determination in maintaining its impartiality and independence in the adjudication of cases. Judicial independence (both externally and internally) is an attribute of an effective international court. Although the EAC Treaty addresses the appointment of independent and impartial judges, it is silent on the explicit independence of the EACJ from the other organs of the EAC. The Summit exercises control over the EACJ in terms of the appointment of judges. However, the judicial activism shown by the judges in the *Anyang’ Nyong’o* case shows that the EACJ operates independently from the influence of the Summit. An independent judiciary contributes to building a democratic culture within the EAC.

3.3. A case advocating for extension of the court’s jurisdiction

In *Sitenda Sebalu v Secretary General of EAC & Attorney General of the Republic of Uganda*⁹⁶ Reference No. 1 of 2010, the applicant argued that the inaction by the Secretary General of the EAC in convening the Council to deliberate and conclude the Protocol to extend the appellate jurisdiction of the EACJ constituted a breach of the EAC Treaty. The applicant brought the case as appeal from the decision of the Supreme Court of Uganda. He averred “the continuous delay to establish the East African Court of Appeal as stipulated by Article 27 of the Treaty is a blatant violation of the rule of law and contrary to the Treaty and East African integration”⁹⁷. The EACJ in this case declared that quick action should be taken to conclude the protocol to operationalise the extended jurisdiction. However, the EAC did not undertake such action. Subsequently, the matter was again brought before the EACJ

⁹⁰ East African Court of Justice (2008).

⁹¹ *Ibid*, pp. 30-31.

⁹² *Ibid*, pp. 43-44.

⁹³ EAC Treaty, Article 26(1)(b) provides that a judge may be removed by the Summit where in the case of a judge who holds judicial or other public office in a partner state, they are removed from that office for misconduct or inability to perform functions or resign following allegations of misconduct or inability to perform functions.

⁹⁴ East African Court of Justice (2008), p.45.

⁹⁵ EAC Treaty, Article 43(2).

⁹⁶ East African Court of Justice (2011b).

⁹⁷ *Ibid*, p. 5.

in *Sitenda Sebalu v Secretary General of EAC and others*⁹⁸ addressed the fact that quick action was not taken by the EAC to conclude the Protocol to operationalise the extended jurisdiction of the EACJ under Article 27(2) of the Treaty, and the Council of Ministers instead revised the said Draft Protocol to exclude the appellate and human rights jurisdiction to the EACJ⁹⁹.

The Court noted that the EAC Treaty obligates partner state or the Council to take (without delay), measures required to implement a judgment of the Court¹⁰⁰. This means that as long as court orders are not discharged, they are valid and since they are valid, they should be obeyed. Ultimately the court held that the Council of Ministers were in contempt of the court's orders by failing to take quick action to extend the jurisdiction of the court. To date the Council of Ministers has not extended the jurisdiction of the EACJ to cover appellate or human rights matters. This shows a procedural block by the Council towards the full operational functioning of the court.

According to the EACJ, regional integration would be best served if the court could adjudicate on human rights issues. As it stated in the *Sitenda Sebalu* case,

“National courts have the primary obligation to promote and protect human rights. But supposing human rights abuses are perpetrated on citizens and the State in question shows reluctance, unwillingness or inability to redress the abuse, wouldn't regional integration be threatened? We think it would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the Community Partner State concerned to access their own regional court, to wit, the EACJ, for redress? We think they would”¹⁰¹.

Several reasons have been given for the delay in extending the jurisdiction of the EACJ to cover human rights cases. Some of reasons include: Partner States already subscribe to the African Charter on Human Peoples' Rights; jurisdiction over human rights should be deferred pending the attainment of a political federation; human rights should remain the domain of national jurisdictions; and the need to clarify the role of human rights institutions to act as *amicus curiae* before the EACJ¹⁰².

The first reason may have some merit, given the fact that all members of the EAC have ratified the African Charter. In November 2013, the 15th Ordinary Summit of Heads of State of EAC directed the Council of Ministers to work with the AU on human rights, which shows their recognition of the protection and promotion of human rights enshrined in the African Charter. However, only one of the six Partner States - Tanzania- has made the declaration allowing individuals direct access to the African Court of Human and Peoples' Rights (ACHPR). Rwanda which previously made the declaration, deposited a withdrawal to its declaration, which became effective on 1 March 2017.¹⁰³ This means that access by East African citizens to the ACHPR still remains limited. There is therefore a role for the EACJ given its proximity to the peoples of East Africa to be best placed to adjudicate on human rights in the region. This fact is reinforced by the importance placed on human rights as one of the guiding principles of the EAC Treaty. More so, the EACJ hears matters brought by individuals which makes the court more accessible than the ACHPR.

Ultimately the decision to grant the extended jurisdiction of the court is a political one and is driven by the interests of Partner States. Another problem is that the decisions of the court are not always implemented. This is because the EACJ does not have an enforcement mechanism which leaves Partner States with the final decision on whether or not to implement the court's judgements.

⁹⁸ East African Court of Justice (2013c)

⁹⁹ *Ibid*, para 27.

¹⁰⁰ EAC Treaty, Article 38(3).

¹⁰¹ East African Court of Justice, note 96, p. 40.

¹⁰² Odhiambo et al. (2015). p. 20.

¹⁰³ ACtHPR Monitor (2017).

4. Human rights - possible area of traction in the EAC's regional integration

4.1. Key human rights cases in the EACJ

Approximately 90% of cases heard by the EACJ are of a human rights nature,¹⁰⁴ yet the court does not have the explicit jurisdiction over such cases yet as required by Article 27(2). As such human rights jurisdiction of the EACJ remains a contentious issue¹⁰⁵. Nevertheless, the EACJ has built jurisprudence on the protection of the rights of individuals in the EAC. It has relied on Articles 6, 7(2) and 27 of the EAC Treaty to justify its jurisdiction over cases involving human rights reasoning that the fact that several matters in the treaty touch on human rights, the court is compelled to hear such cases by virtue of Articles 6 and 7. In addition to this, the Common Market Protocol provides for a series of 'freedoms' of the movement of goods, services, capital, persons, information and technology across the Common Market's borders; as well as the 'rights' of establishment and residence within the EAC borders. The EACJ has jurisdiction to interpret, apply and assure compliance with all these provisions.

Observers have debated on the EACJ's jurisdiction over human rights cases. Some argue it does not have such jurisdiction, as the protocol extending its jurisdiction has not been operationalised. Others argue the EACJ jurisdiction over human rights may be implied given the reference to human rights in the EAC Treaty as well as to the African Charter and the fact that the EACJ has adjudicated in cases involving human rights¹⁰⁶. The following section will look at some of the key human rights cases dealt with by the EACJ.

Uganda - violation of the rule of law

In *James Katabazi and others v Secretary of the EAC*,¹⁰⁷ the applicants were charged with treason and were reprimanded. Fourteen of them were granted bail by the High Court of Uganda. However, the processing of the bail conditions was interfered with by security forces who invaded the High Court and subsequently arrested, re-incarcerated and prosecuted the applicants. They were charged before a military court with the offences of unlawful possession of firearms and terrorism based on the same facts as before which they were granted bail by the High Court. The Law Society of Uganda challenged this interference of the court process by the security personnel and the constitutionality of simultaneous prosecutions before the civilian and military courts before the Constitutional Court of Uganda. The Constitutional Court ruled that the interference was unconstitutional. Despite the ruling by the Constitutional Court the government of Uganda kept the applicants in jail.

The applicants argued before the EACJ that their arrest and re-incarceration and continued prosecution in the military court was an infringement of the EAC Treaty especially Articles 7(2), 8(1)(c) and 6 and the fundamental principle of peaceful settlement of disputes. The key issue before the EACJ was whether the arrests by the military were a violation of the rule of law and, therefore, an infringement of the EAC Treaty.

¹⁰⁴ Possi (2016).

¹⁰⁵ See discussion in Gathii (2014) note 3.

¹⁰⁶ See discussion in Komakech (2012).

¹⁰⁷ East African Court of Justice (2007).

The EACJ was faced with the important question of whether it had jurisdiction to hear human rights cases. The court gave a quick answer in the negative, stating that its jurisdiction was mandated under Article 27, which states clearly that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of these steps have not been taken to date. The court concluded that it “may not adjudicate on disputes concerning violation of human rights per se.” However, in its reasoning the court concluded that “[w]hile the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation.” This shows an activist or purposive approach to the interpretation of the treaty with the court acknowledging that although it does not have explicit jurisdiction to try human rights cases, it based its interpretation on the provisions of the EAC Treaty that contain human rights aspects. The *Katabazi* case established precedent for the court's interpretation of the rule of law, which is referred to in subsequent cases of the EACJ.

Kenya - mass violations of human rights

In 2011 the EACJ dealt with *Independent Medico Legal Unit v Attorney General of Kenya*¹⁰⁸ which involved the forcible disappearance, torture and execution of approximately 3,000 Kenyan residents of Mt Elgon by Kenyan governmental authorities between 2006 and 2008. The applicants alleged that the failure of the Kenyan government to take measure to prevent, investigate and punish those responsible for the acts constituted a violation of international human rights conventions, the Kenyan constitution and the EAC Treaty. The EACJ held that it would not abdicate its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violations, because the EACJ is the institution mandated to determine whether a Partner State has or has not breached, infringed, violated or otherwise offended the provisions of the Treaty.

In addition, this case is useful for its interpretation of the time limits within which to bring a case before the EACJ. The court of First Instance held that the application was not time barred by the two month limitation period in Article 39. However, this decision was overturned on appeal with the Appellate Chamber holding that the applicants had been aware of the failure by the government to investigate the violations at least one and a half years before the application was filed which meant the two month time limit to file a case before the EACJ had run from that time. This decision of the Appeals Chamber on the time limit was confirmed in a review of the case¹⁰⁹. Amendments to the time limits was one of the results in the backlash case of *Anyang' Nyong'o* discussed above. This time limitation restricts access to the court as it prioritises procedure over substantive justice. The Appellate Division has strictly construed the time limit provision, which has enabled governments to successfully overturn cases with credible human rights violations¹¹⁰.

Rwanda - illegal detention and the rule of law

The EACJ in *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda*¹¹¹ heard a case where the applicant alleged that the arrest and detention of her brother by the Rwandan authorities without a trial and the failure of the Rwandan government to investigate the matter, was a violation of the EAC's good governance and human rights principles under Articles 6(d) and 7(2). The EACJ held that the Rwandan government had breached the principles of good governance and the rule of law enshrined in Articles 6(d), 7(2) of the EAC Treaty, including the jurisdiction to interpret whether the state had promoted or protected human and peoples' rights contained in the African Charter. The court further held that in his case, the applicant was not barred by the time limit as the

¹⁰⁸ East African Court of Justice (2011a).

¹⁰⁹ East African Court of Justice (2012a).

¹¹⁰ For example, East African Court of Justice (2013a).

¹¹¹ East African Court of Justice (2011c).

government's failure to provide a remedy was in a continuous chain of events until the applicant filed her application. The court further held that the application was not barred for failure to exhaust local remedies as the EAC Treaty has no such requirement. The case was appealed in the case of *Attorney General of Rwanda v Plaxeda Rugumba*¹¹² where the Attorney General tried to argue the case was time barred but the court held the time started running when the applicant became aware of her brother's illegal detention and was within the procedural limit.

Uganda - scope of the jurisdiction of the EACJ and the African Charter

In the recent Appellate Division case of *Democratic Republic v Secretary General of the EAC and Others*,¹¹³ the question on whether the EACJ has the right to adjudicate human rights cases under the African Charter on Human and Peoples Rights (African Charter) was debated. The Court held that Article 6(d) of the EAC Treaty obligates the Partner States to adhere to inter alia the principles of democracy, the rule of law, accountability, transparency, social justice, as well as recognition, promotion and protection of Human and Peoples' Rights in accordance with the provisions of the African Charter. The wording "... in accordance with the provisions of the African Charter", creates an obligation on the EAC Partner States to act in good faith and in accordance with the provisions of the Charter. Failure to do so constitutes an infringement of the EAC Treaty. Such violation can be legally challenged before the EACJ by virtue of its jurisdiction provided for especially under Article 23 read together with Article 27 of the Treaty. In addition, the same obligation is emphasised by Article 7(2) of the Treaty in which Partner States undertake to abide by the principles of the rule of law, social justice and the maintenance of universally accepted standards of human rights. Of importance, the Appellate Division held that "nothing can preclude the East African Court of Justice from referring to the relevant provisions of the Charter, its Protocol and the Vienna Convention on the Law of Treaties in order to interpret the Treaty". The court then concluded that the EACJ has the jurisdiction to interpret the Charter in the context of the Treaty. This decision varies from the court's ruling in earlier cases where it found the allegation of African Charter violations to be outside the purview of the EAC Treaty¹¹⁴.

The *Democratic Party* case is an important ruling on the application of the African Charter by the EACJ. Some scholars, like Possi, argue that the ruling of the Appellate Division gives the EACJ jurisdiction over cases involving human rights violations¹¹⁵. However, he warns against complacency as there is bound to be resistance from the Partner States who to date have not extended the jurisdiction of the EACJ to cover human rights cases¹¹⁶. Possi argues that the *Democratic Party* decision is an inevitable judicial law making process of the EACJ which shows judicial activism in the development of jurisprudence within the EAC.¹¹⁷ Two reasons can be mentioned for this major development by the EACJ. First, the EACJ judges who presided over the matter are new, which feeds the assumption they are keen to develop the EACJ's human rights mandate. The second reason relates to the number of human rights cases submitted to the EACJ. Since 2001, a number of cases before the EACJ involve elements of human rights.

4.2. Civil society and legal organisations support - conduits in the work of the EACJ

The EACJ has also received support from - mainly non-state - actors within the region including the East African Law Society and the East African Magistrates and Judges Association, which both have

¹¹² East African Court of Justice (2012b).

¹¹³ East African Court of Justice (2015).

¹¹⁴ East African Court of Justice (2013b).

¹¹⁵ Possi (2016) note 104.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

observer status before the EAC. The EALA as an EAC organ is supportive of the EACJ (see section 2).

One of the primary mandates of the East African Law Society is public interest advocacy where it seeks to promote the common good of the people of the region through targeted interventions in the public interest, particularly in issues on the rule of law, democracy, respect of human and peoples rights and peace building¹¹⁸. The East African Law Society comprises lawyers from the Burundi Bar Association, Kigali Bar Association, Law Society of Kenya, Tanganyika Law Society, Uganda Law Society and the Zanzibar Law Society. It has held sensitisation workshops on the EAC, the work of the EACJ and the role of lawyers in regional integration¹¹⁹. On 9 March 2017, representatives from the the East African Society met with the EAC Secretary General. Discussions centred around the need for a strong and vibrant EAC Secretariat especially on matters of human rights and good governance¹²⁰. The East African Law Society has brought cases before the EACJ including cases which cover human rights and the amendment of the EAC Treaty¹²¹.

The East African Judges and Magistrates Association comprises membership from the organisational bodies representing magistrates and judges in Kenya, Uganda and Tanzania. Its mission is to promote and enhance the rule of law and accessibility to justice through the harmonisation of judicial systems within East Africa¹²². It has supported the role of the EACJ by urging national courts to refer matters to the EACJ concerning the interpretation of the EAC Treaty¹²³. It also urged national officials and EAC organs to ensure the uniformity and consistency of interpretation of the EAC Treaty through the EACJ. This reinforces the role of the EACJ as the primary legal institution in the interpretation and application of the EAC Treaty.

The East African Civil Society Organisations' Forum (EACSOFF) works to ensure that East African citizens and their organisations work together to play a more effective role in the integration process through building stronger citizen organisations that respond to citizens' needs and hold duty bearers to account. EACSOFF and the Pan African Lawyers Union (PALU) have brought cases before the EACJ. On 6 July 2015, PALU together with EACSOFF filed an application at the EACJ to obtain a ruling on the legality of the decision of the Constitutional court of Burundi which allowed President Nkurunziza to run for a third term in elections on 5 May 2015¹²⁴. Although the decision was time barred, the step highlighted the role civil society plays in bringing matters before the court. Civil society and the lawyers also play a role as *amicus curiae* before the court to assist the EACJ in providing answers to legal questions. This supports the court in fulfilling its interpretive mandate in the EAC Treaty.

5. Conclusion

This report on the EACJ summarised the court's mandate and activist approach towards the adjudication of human rights in the EAC. Although the EAC was primarily established for economic

¹¹⁸ East African Law Society, Public interest Advocacy. <http://www.ealawsociety.org/index.php/our-programmes/public-interest-advocacy>.

¹¹⁹ Ameyo (2011).

¹²⁰ Interview with Daniel Birungi, Information and Communications Officer, East African Law Society, 30 March 2017; See also https://www.facebook.com/ealawsociety/?hc_ref=SEARCH.

¹²¹ See East African Court of Justice (2008).

¹²² East African Judges and Magistrates Association, <http://www.eamja.org/history.html>.

¹²³ East African Judges and Magistrates Association, Conference on Human Rights in East Africa, EAJMA News, Issue No. 1 of 2010, May 2010. http://www.eamja.org/eamja_news_letter.pdf

¹²⁴ See East African Civil Society Organizations Forum. 2016. <http://eacsof.net/EACSOFF/2016/07/21/palu-and-eacsof-jointly-file-a-case-at-the-eaci-challenging-the-constitutional-court-of-burundis-decision-permitting-president-nkurunzizas-third-term-re-run-for-elections-6th-july/>.

reasons to foster trade amongst its Partner States, normatively speaking the need for good governance encompassing the rule of law, democracy and human rights cannot be separated from the wider goal of integration. The EACJ as an organ of the EAC has a role to play in dispute settlement and interpretation of the EAC Treaty. However, the decision making structure of the EAC with the Summit as the highest decision maker means decisions are politically motivated, which has implications for the functioning of the EACJ.

The paper looked at the structural factors and establishment of the EACJ, a successor of the EACA under the former EAC which dissolved in 1977. The EACA had no jurisdiction over human rights cases, reflecting the reluctance of Partner States to give human rights jurisdiction to the regional court. The EAC Treaty gives the EACJ appellate and human rights jurisdiction to be operationalised by a protocol. Since its inauguration in 2001, the Protocol to extend the appellate and human rights jurisdiction of the court have not been operationalised. Nevertheless, the EACJ has developed jurisprudence in which it has used the EAC Treaty to adjudicate over cases that have human rights issues.

The court faces implementation challenges including budgetary constraints as its funding is tied to the EAC budget. Other challenges include the ad hoc nature of the court which affects its ability to effectively dispose of cases. The court has also faced political backlash from Partner States who see the court's rulings as interfering with its sovereignty. This was the case of Kenya - the most powerful player in the region - in the *Anyang' Nyong'o* case which saw retaliation by Partner States in the form of amendments to the EAC Treaty. These amendments include limitations on the EACJ's interpretation where such jurisdiction is conferred upon organs of Partner States and limitation on the time within which individuals can bring a matter before the EACJ. This amendment has led cases being considered time barred by the EACJ limiting access to justice for individuals in the EAC. The amendments also divided the court into two divisions and revised the criteria for the removal of judges.

The extension of the court's jurisdiction to human rights matters has been brought before the EACJ in the *Sebalu* case. The EACJ held that quick action should be taken to extend the court's jurisdiction. However, as the court lacks an enforcement mechanism the decision has not been implemented by the Council of Ministers or the Summit. Nevertheless, the court has adopted an activist approach and embarked on judicial lawmaking by hearing cases with human rights issues despite its lack of a clear mandate to do so. The EACJ has interpreted such cases within the framework of the EAC Treaty's provisions on good governance, respect for the rule of law and respect for human rights.

The EACJ is supported by the regional parliament, EALA. This EACJ organ was an early supporter of the court, and brought the first case before the EACJ, which activated the court's operation. EALA has passed bills which cover human rights issues and give jurisdiction to the EACJ. The EALA has campaigned for the increase of funding to the EACJ to ensure that the courts can hear suits concerning human rights issues. Civil society and legal profession organisations such as the East African Law Society, comprising lawyers from the region, have also supported the work of the court.

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