Adjudication of human rights disputes in the sub-regional courts in Africa: A case study of the East African Court of Justice

Emily M Njiru
LLM (Nairobi) LLB (Nairobi)
Consultant Research Officer at the East African Court of Justice

SUMMARY

The establishment of regional economic blocs with fully fledged judicial organs provides alternative fora for litigating human rights disputes. Thus, the adjudication of human rights disputes is no longer the exclusive domain of domestic courts. Sub-regional courts such as the East African Court of Justice (EACJ) and the Economic Community of West African States (ECOWAS) Community Court of Justice have been at the forefront of promoting and protecting human rights within their respective regions as is evident by the pragmatic and bold jurisprudence emanating from the courts. This paper examines whether the adjudication of human rights disputes by the sub-regional courts demonstrates a stronger human rights protection regime in Africa and particularly in the regions where these courts operate. In doing so, the paper traces the evolution of human rights jurisprudence particularly regarding the EACJ where the majority of the cases concern violations of human rights even though it has no explicit human rights jurisdiction. The paper also addresses some of the challenges that have arisen or may arise as a result of the EACJ assuming jurisdiction on human rights issues and proposes mitigating solutions.

1 Introduction

It has been twenty years since the East African Community (EAC) was re-established by the coming into force of the Treaty for the Establishment of the East African Community (EAC Treaty) on 7 July 2000. At that time, the EAC only had three partner states, namely Uganda, Kenya and Tanzania, the founding members. Rwanda and Burundi joined the EAC in 2007, while South Sudan did so in 2016. The membership has thus doubled, and the Democratic Republic of Congo and Somalia have expressed their interest to be part of the EAC.[1] This growth has translated into an increase in the number of cases brought before the East African Court of Justice (EACJ or the Court). Articles 9 and 23 of the EAC Treaty establish the EACJ as the judicial organ of the East African Community. The Court was inaugurated in 2001,[2] but the first case was filed in 2005.[3]

1 See *Kenyan Wall Street* (2019-06-18).
2 East African Court of Justice Strategic Plan (2018-2023) 4.
3 Apiko "Understanding the East African Court of Justice: The Hard Road to Independent Institutions and Human Rights Jurisdiction" 2017 European Centre for Development Policy Management (ECDPM) 8.

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In 2006, Article 23 of the Treaty was amended, to expand the Court from the initial First Instance Division and establish the Appellate Division, introducing an avenue of appeal against the decisions of the First Instance Division.

The EACJ – comprised of the two divisions - has the mandate of ensuring adherence to the law in the interpretation and application of the Treaty. However, the Court has not been conferred with the jurisdiction to determine human rights matters. Instead, Article 27(2) of the Treaty provides that the Court may be granted "original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date". This provision was partly given effect to in 2014 when the Court's jurisdiction was extended to include trade and investment disputes and matters associated with the Monetary Union.[4] Interestingly, that Protocol conspicuously avoided granting the Court a human rights jurisdiction, even though it is one of the envisaged potential jurisdictions. Indeed, by 2014, the Court had already applied its interpretative jurisdiction to find that it had the authority to adjudicate human rights related violations. As a result, the Court had been moved on numerous occasions to redress human rights violations. It would therefore have been expected that the existence of substantial litigation on this area, was the sufficient cue to guide the determination of areas where the Court's jurisdiction ought to be fortified. However, irrespective of such glaring facts, the partner states remained unmoved by that reality by hiding behind the shadow of the African Court on Human and Peoples' Rights (African Court) arguing that they subscribed to the jurisdiction of the African Court which exclusively determines human rights violations within Africa.[5] This argument is of course self-defeating since by then, only the Republic of Tanzania allowed its individuals or Non-Governmental Organisations (NGOs) to directly move the African Court seeking redress of human rights violations. Regrettably, in 2019, Tanzania made known its decision to withdraw the rights of individuals and NGOs to directly file cases before the African Court.[6]

Another reason for failing to clothe the Court with a human rights jurisdiction as advanced by Tanzania and Kenya was that the constitutional safeguards in the respective partner states are sufficient to ensure the protection of human rights of the EAC residents.[7] While this argument is valid, it fails to recognise that the mere presence of progressive constitutional and municipal laws alone, is not a

4 Report of the Sixteenth Meeting of the Sectoral Council on Legal and Judicial Affairs (2014-09-30) 20-23.

5 The Thirteenth Meeting of the Sectoral Council on Legal and Judicial Affairs (2012-10-24) 7.

6 Amnesty International "Tanzania: Withdrawal of Individual rights to African Court will deepen repression" (2019-12-02); De Silva "Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania" *EJIL:Talk! Blog of the European Journal of International Law* (2019-12-16).

7 Report of the Fifteenth Summit of the Heads of State (2013-11-30) 17.

manifestation of a society that upholds human rights, without a functional implementation and enforcement mechanism. In other words, the institutions responsible for protecting and enforcing human rights, must be ready, well equipped and bold enough to exercise their mandate.

The lack of an express human rights jurisdiction notwithstanding, the Court has embraced its interpretative role and breathed life into the Treaty in a manner that has led to adjudication of human rights related disputes. At present, the majority of the cases before the Court are human rights related. This reality undoubtedly demonstrates the yearning of the East African citizens to aggressively seek the enforcement of human rights and redress for violations. It also demonstrates that the litigants have confidence in the Court. The expectation then is that the Council of Ministers will take heed and solidify the human rights protection regime in the East African Community by operationalising the human rights Protocol envisaged under Article 27(2) of the Treaty. The partner states must be ready to reconsider this issue by confronting and critically interrogating the impact that the assumed "human rights" jurisdiction has caused to the residents of the Community. Meanwhile, the EACJ continues to develop and shape the human rights jurisprudence in the East African Community. The subsequent topics explore the journey traversed by the EACJ in developing the human rights jurisprudence as well as the successes and challenges of this voyage. This paper, succinctly, argues a case for the significance of sub-regional courts in entrenching sustainable human rights values in Africa and providing alternative fora for resolving human rights issues.

Specifically, the paper discusses the evolution of human rights in the EACJ by analysing cases that first invoked human rights jurisdiction and subsequent decisions which concretised that jurisdiction. The paper then explains how the EACJ has been a protector of human rights within the EAC by highlighting three factors, namely: the Court's accessibility, the justiciable disputes before the Court and the availability of an array of remedies. The paper concludes by discussing some of the challenges facing the Court in determining human rights related disputes and proposes possible mitigation thereof.

2 The foundation and evolution of human rights jurisdiction in the EACJ

Seven years after the Court's inauguration, the EACJ delivered the *locus classicus* case that changed the trajectory of the human rights protection in the East African Community. This is the celebrated decision of *Katabazi*[8] which opened the doors for human rights adjudication before

8 *James Katabazi v EAC Secretary General* (Ref 1 of 2007) EACJ First Instance Division (1 November 2007).

the EACJ, thus ushering in a new dawn for the human rights discourse in the EAC. The case concerned the legality of the actions of Ugandan security officers who continued to hold the applicants in detention in complete disregard of an order by the Constitutional Court of Uganda. It was urged before the EACJ that the contempt of the court order as well as charging civilians in a military court was an infringement of Articles 7(2), 8(1)(c) and 6 of the EAC Treaty. Specifically, Article 7(2) embodies the undertaking by the partner states to abide by the principles of good governance, rule of law and maintenance of universally accepted standards of human rights. Article 8(1)(c) enjoins the partner states to abstain from any measure likely to jeopardise the achievement of the Community's objective or the implementation of the Treaty, while Article 6 contains the fundamental principles of the Community which include amongst others the rule of law and the promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Right (African Charter).

In considering this case, the Court reminded itself that it had no jurisdiction to adjudicate human right issues. However, upon reflecting on the meaning of Articles 6, 7 and 8, it concluded that the provisions are integrally linked and that the partner states have undertaken to promote and protect the fundamental principles that guide the Community. Having found as such, the Court then made the historical pronouncement which is aptly captured as follows:

> 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[s] of human rights violation.[9]

The *Katabazi* decision thus signified the direction which the Court would take when confronted with a human right related question. It showed that human rights are an integral part of the fundamental principles which bind the Community such as the rule of law, gender equality, social justice, equal opportunities, democracy amongst other principles enshrined in Article 6 of the Treaty. By doing so, the Court injected profound meaning into the principles and obligations under the Treaty, thereby providing the residents of East Africa with a judicial forum for seeking redress against human rights violations. The human rights jurisdiction of the Court thus arises as a result of the Court exercising its interpretative role under the Treaty by requiring the partner states to abide by the fundamental principles governing the EAC.[10]

Since the pronouncement in *Katabazi*, the Court has been moved on numerous occasions to adjudicate on a broad range of human rights

9 *James Katabazi v EAC Secretary General* para 39.

10 See the case of *Samuel Mukira Mohochi v AG Uganda* (Ref 5 of 2011) EACJ First Instance Division (17 May 2013) para 26, where the Court reasoned that: "While we agree … that the Court's jurisdiction will be extended via a Protocol as envisaged by Article 27(2), we do not consider that the

related questions. However, litigants must formulate their cases in a way that identifies specific violations of any provisions of the Treaty, particularly Articles 6(d) and 7(2) of the Treaty which provide for the fundamental principles that bind the Community and the undertaking by the partner states to respect them.

To breathe life into these particular principles, the Court has emphasised that the principles are justiciable and not merely aspirational.[11] Specifically, the principles under Article 6 are "foundational, core and indispensable to the success of the integration agenda and were intended to be strictly observed". This finding by the Court demonstrates the significance of the obligations arising from the Treaty and that the Court will not hesitate to give effect to the rights and duties arising thereunder.

The Court has also held that the scope of the human rights protection under the Treaty extends to the African Charter. In the *Democratic Party* case the Court held that it has the jurisdiction to interpret the African Charter in the context of the EAC Treaty.[12] This case interrogated whether the failure by Burundi, Kenya and Uganda, to accept the competence of the African Court was an infringement of the Treaty. It was argued that by failing to recognise the African Court, individuals and NGOs within these partner states could not institute cases before the African Court thus weakening the human rights protection regime in the region. The Applicant sought a declaration that the said failure was a violation of the fundamental principles of good governance, rule of law, democracy, social justice and the universally accepted standards of human rights.

It is noted that whereas the First Instance Division had adopted a more cautious approach by stating that it could not usurp the powers of other organs, and that EACJ was not an appropriate forum for challenging a violation of the African Charter, the Appellate Division disagreed with that view and held that the words "in accordance with the provisions of the African Charter on Human and Peoples' Rights" found under Article 6(d) of the Treaty created an obligation on the EAC partner states to act in good faith and in accordance with the provisions of the African Charter.[13] The case reminded the partner states that they are bound by the African Charter and any contrary action constitutes an infringement of the EAC Treaty. Once more, that was a revolutionary pronouncement which asserted the powers underneath the fine print of the Treaty.

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envisaged extension, in any way acts to prohibit the Court from interpreting and applying any provision of the Treaty." As such, "the mere inclusion of allegations of human rights violations in a Reference will not deter the Court from exercising its interpretation jurisdiction under Article 27(1)".

11 *Mukira Mohochi v AG Uganda* para 36.

12 *Democratic Party v The Secretary General of the East African Community* (Appeal 1 of 2014) EACJ Appellate Division (28 July 2015) para 73.

13 *Democratic Party v The Secretary General of the East African Community* para 64.

The reasoning in the *Democratic Party* case was applied in the case of the *African Network for Animal Welfare*, where the Appellate Division affirmed that "by being signatories to other international Conventions and Declarations, the EAC partner states, do subscribe to the various standards, norms and values of those Conventions".[14] Specifically, the Court has recognised that the fundamental rights provided for in the African Charter deserve protection under the Treaty by virtue of Article 6(d) of the EAC Treaty.[15] Residents therefore can and have sought redress for breach of rights recognised under the African Charter as well as other international legal instruments which the partner states have acceded to. Thus, recognising the importance of other regional and international legal instruments in enforcing the provisions of the Treaty translates to a greater human rights protection within the EAC region. However, even with this expansive protection and a growing jurisprudence, one area of human rights largely remains unexplored. A review of human rights related cases adjudicated by the Court shows that most of the litigation touches on the enforcement of civil and political rights as opposed to socio-economic rights. This situation poses several questions worthy of reflection. Do the principles under Article 6(d) of the Treaty extend to the application of socio-economic rights? Are the residents of the East African Community aware of the justiciability of socio-economic rights? Is there adequate protection of the socio-economic rights in the respective countries within the EAC? These and more questions deserve scrutiny for a better understanding of the current state of affairs.

The preliminary view in the paper is that the fundamental principles under Article 6(d) of the Treaty contain equal protection for all human rights, irrespective of their categorisation. Indeed, human rights are indivisible and interdependent and the general comments on the rights recognised under the International Covenant on Economic, Social and Cultural Rights (ICESCR) explain the normative content of what those rights entail thereby enlarging the scope of their protection. Therefore, litigants should not shy away from seeking the enforcement of socio-economic rights such as housing, water and health related rights before the EACJ since every human right is accorded the same protection. This is especially so where such rights are recognised and protected by domestic laws within the partner states, the African Charter or other international instruments which the partner states have acceded to. Where such protection exists, if a partner state acts contrary to the dictates of that law, a claim can arise before the EACJ questioning the infringement. Even where such rights are not justiciable within some partner states, a state will still be held accountable at the EACJ, for infringement of the African Charter or if it has ratified the relevant

14 *Attorney General of the United Republic of Tanzania v African Network for Animal Welfare* (Appeal 3 of 2014) EACJ Appellate Division (29 July 2014) para 48.

15 *Plaxeda Rugumba v The Secretary General of the East African Community* (8 of 2010) EACJ First Instance Division (1 December 2011) para 37.

international conventions on human rights such as the ICESCR. For example, in the case of *Media Council of Tanzania*, the Court determined the extent of the exercise of freedom of press and expression, and reasoned that, "the powers granted to the Minister … are far reaching, and clearly place limitations on the rights stated in both Article 19 of the International Covenant on Civil and Political Rights, as well as in Article 9 of the African Charter on Human and Peoples' Rights."[16] In this regard, the EACJ has held that a partner state is bound by the international legal instruments it has ratified and a claim can be found for violation of the Treaty.[17]

Despite the dearth of substantial litigation on socio-economic rights, it is clear that given a chance the Court will embrace the opportunity to further develop the law and give effect to the rights in question. One key decision in this area is the First Instance decision of *African Network for Animal Welfare*[18] where the Court issued a permanent injunction stopping the Republic of Tanzania from building a road through the Serengeti National Park because of the likely negative impact that would be caused to the environment and the ecosystem.[19] In this case, the Court affirmed a state's obligation to protect the environment and ensure sustainable development.

3 EACJ as a protector of human rights in the EAC

Having demonstrated above how the human rights jurisprudence developed and has advanced over the years, this section argues that the EACJ has fashioned itself as a protector of human rights within the EAC as demonstrated by the broad access to the Court, the justiciable disputes before the Court and the remedies available to the litigants. Each of these components is analysed sequentially.

3 1 Access to the Court

Unlike the Protocol establishing the African Court which requires member states to make separate declarations in order to allow direct

16 See the case of *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania* (Ref 2 of 2017) EACJ First Instance Division (28 March 2019) para 106.

17 *The Managing Editor, MSETO v the Attorney General of the Republic of Tanzania* (Ref 7 of 2016) EACJ First Instance Division (21 June 2018) paras 46 & 66; *African Network for Animal Welfare* Appeal paras 48-49.

18 *African Network for Animal Welfare v Attorney General of the Republic of Tanzania* (Ref 9 of 2010) EACJ First Instance Division (20 June 2014).

19 Also relevant is the case of *Godfrey Magezi v the Attorney General of the Republic of Uganda* (Appeal 3 of 2015) EACJ Appellate Division (26 May 2016) which, though unsuccessful, sought to hold the Government of Uganda accountable for the loss of money meant for the provision of medical drugs.

access to individuals and NGOs to institute cases directly before the African Court,[20] the EAC Treaty unconditionally grants audience before the EACJ to all persons resident in the partner states.[21] Persons in this context refers to both legal and natural persons. Even though the African Court was established with the core mandate of enforcing the African Charter, which contains extensive protection on human rights, only nine African states have accepted the Court's competence to receive cases from the NGOs and individuals. This grim reality questions the capability of the African Court to live up to its objectives of promoting and protecting human and peoples' rights within the African continent. In appreciating this shortcoming, it is recalled that the EACJ had been called upon to compel the EAC member states to accept the competence of the African Court so that residents could have expansive fora to seek redress for human rights violations.[22] Even though the EACJ could not grant the orders sought, the mere filing of that reference demonstrates the desire by the EAC residents to have the utmost access to justice particularly regarding human right issues. In the absence of the EAC partner states making a declaration under Article 34(6) of the Protocol establishing the African Court, the residents are left with little alternative but to look up to the EACJ for enforcement of human rights. Seemingly, the EACJ is continuously living up to the expectation as is demonstrated from the progressive jurisprudence emanating on the topic.

Access to the EACJ is further made easier because, unlike the African Court, there is no requirement for exhausting the local remedies before filing a case.[23] The only hindrance, which will be discussed in more detail later on, is the prescribed time limit within which a person can file a claim. Furthermore, litigating before a sub-regional court such as the EACJ is likely to be cheaper and faster compared to a regional body.[24] This arises because of the size of the population which is being served by the sub-regional Court as compared to the regional Court as well as the proximity of the Court to the population it serves. Currently, the EACJ only serves six member states as opposed to a regional or an international court which would obviously have a wider application and that would translate to a bigger workload. Getting services before the

20 Articles 34(6) and 5(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

21 Article 30(2) of the EAC Treaty.

22 *Democratic Party v The Secretary General of the East African Community.*

23 See the case of the *Attorney General of Rwanda v Plaxeda Rugumba* (Appeal 1 of 2012) EACJ Appellate Division (1 June 2012), where the Appellate Division affirmed that the EAC Treaty does not require exhaustion of local remedies as a condition for accessing the Court; see also the case of *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*.

24 Ebobrah "Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges" 2009 *African Journal of International and Comparative Law* 87.

EACJ has been made even easier because the Court currently has sub-registries in all the capital cities of the member states excluding South Sudan.[25] This has made the Court more responsive to the litigants needs by allowing them to file and receive correspondences through the sub-registries. These sub-registries have greatly contributed to the increase in the number of cases filed.[26] In addition, the Court may conduct hearings at a place different from where it is currently situated in Arusha,[27] thus bringing justice closer to the people. All these factors contribute to accessing the Court and ensuring that justice is delivered in a timely manner. Furthermore, since the outbreak of Covid-19 in 2020, the Court has fully embraced technology with all hearings and any court work happening virtually. The judges and litigants are able to converge virtually, from their respective member states. The Court has therefore been able to continue with its work without any adverse interferences.

3 2 Justiciable disputes before the EACJ

Natural and juristic persons can move the Court to question the legality of any act, regulation, directive, decision or action of a partner state or an institution of the Community on grounds that there is an infringement of the Treaty.[28] It is important to note that only a partner state or an organ or institution of the EAC can be sued as a respondent. The actions or inactions of state organs are attributed to the state party. Institutions such as the arms of government, being the executive, parliament and judiciary would be considered as organs of state for purposes of impugning their actions or inactions before the EACJ. On this basis, the EACJ has stated that a partner state would be held responsible where judicial decisions of its national courts violate the Treaty.[29] The impact of this is that even the judicial institutions are not immune from the EACJ's scrutiny. What this means is that a person can approach the EACJ, impugning a decision delivered at the domestic courts. In this regard, the EACJ has found that where a national court violates the domestic law, that constitutes infringement of the Treaty.[30] In terms of human rights protection therefore, a person needs not be complacent where the national courts fail to enforce fundamental rights and freedoms. One can still ventilate an issue before the EACJ specifically demonstrating how the said domestic court has acted contrary to the domestic laws thus

25 Rule 9(2) of the EACJ Rules of Procedure 2019 provides that "there shall be sub-registries of the Court at such places in the Partner States as the President may from time to time direct".

26 Report of the Council of Ministers during the 38th Ordinary Meeting (May 2019) 102.

27 Rule 9(1) of the EACJ Rules of Procedure.

28 Article 30(1) of the EAC Treaty.

29 *Eric Kabalisa v Attorney General of Rwanda* (Ref 1 of 2017) EACJ First Instance Division (18 June 2020) para 20.

30 *Henry Kyarimpa v The Attorney General of the Republic of Uganda* (Appeal 6 of 2014) EACJ Appellate Division (19 February 2016) para 70; *Manariyo Désirév v The Attorney General of the Republic of Burundi* (Appeal 1 of 2017) EACJ Appellate Division (29 November 2018) (dissenting judgment) para 69.

violating the Treaty. Notably, in such a case, the EACJ would not be exercising any appellate jurisdiction over the decision of the domestic court. Rather, a litigant is expected to file a reference before the First Instance Division detailing violations of the Treaty arising from the impugned decision of the domestic court. If dissatisfied by the decision of the First Instance Division, a litigant has the option of filing an appeal before the Appellate Division.

The *Martha Karua*[31] case delivered by the First Instance Division on 30 November 2020, evidently demonstrates how the EACJ has taken up the mantle as the protector of human rights where a decision of the highest domestic court fails to enforce fundamental rights of a litigant. In this case, the applicant argued that the Supreme Court of Kenya failed to interpret the Constitution and other laws of Kenya in a manner that upheld the rule of law, democracy and human rights.[32] It was argued that the impugned decision of the Supreme Court offended the EAC Treaty, the Universal Declaration for Human Rights as well as the African Charter by failing to uphold the rule, right of access to justice and a fair hearing.[33] The Supreme Court had found that the time limited by the Constitution of Kenya could not be expanded.[34] The EACJ disagreed and held that a court cannot interpret the Constitution in a manner that infringes the fundamental rights of litigants where there is a lacuna in law.[35] That further, the Constitution of Kenya provides, "an appropriate legal framework for the solution to the unjust situation the applicant found herself in".[36] Thus, the EACJ faulted the Supreme Court of Kenya for failing to interpret the Constitution of Kenya in a manner that promoted the applicant's right of access to justice, human dignity, equity and social justice. The Court thus found that the impugned decision contravened the principle of the rule of law enshrined under Articles 6(d) and 7(2) of the Treaty. In the end, the Republic of Kenya was found liable for a breach of its Treaty obligations through the acts or omissions of its judicial organ and the applicant was awarded general damages in the sum of USD $ 25 000.[37]

This decision shows that the domestic courts have a duty to interpret their internal laws in a manner that enforces the fundamental rights of persons. Failure to do so would attract the intervention of the EACJ which would not hesitate to hold a partner state responsible for such breaches while at the same time issuing appropriate remedies to the affected persons. Therefore, EAC residents have an alternative forum for litigating issues already determined by the domestic courts. However, since there is no requirement for exhausting the local remedies, an aggrieved person

31 *Martha Wangari Karua v The Attorney General of Kenya* (Ref 20 of 2019) EACJ First Instance Division (30 November 2020).
32 Para 39.
33 Para 40.
34 Para 49.
35 Para 59.
36 Para 56.
37 Para 70.

would not be obligated to litigate an issue that can be determined by the EACJ before the domestic courts or where the process has begun, to exhaust the judicial avenues provided in their country. In fact, once the EACJ is seized of the matter, it has no obligation to await the conclusion of similar proceedings ongoing before the national court.[38] This is because, the EACJ exercises a specific mandate of interpreting the Treaty and while doing so, it does not pay deference to any other court. In the same measure, the national courts are encouraged to refer any question of interpreting or applying the Treaty to the EACJ wherever such questions confront them.[39] On occasions where the national courts decide to interpret the Treaty, the decisions of EACJ on similar matters take precedence.[40]

Even though the doors of EACJ remain open to receive possible claims, where a person goes through numerous court processes in search of justice, the objective that they seek to obtain may be defeated. Thus, where domestic courts are perceived to be human rights non-compliant, a person may choose to move the EACJ from the very beginning.

As a word of caution though, the EACJ is not an appellate court against decisions of the domestic courts. Therefore, the EACJ cannot overturn a decision of a domestic court.[41] However, it reviews the impugned decision to confirm compliance with the Treaty. Thereafter the EACJ can make any consequential orders arising from such interrogation. In the *East African Civil Society Organization's Forum* case, the Appellate Court was categorical that:

> [T]he Trial Court is not expected to review the impugned decision … looking for new evidence or some mistake, fraud or error apparent on the face of the record. The Trial Court will however have to sift through the impugned decision and evaluate it critically with a view of testing its compliance with the EAC Treaty and then make a determination. In so making the said determination the Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers but rather make declarations as to the decision's compliance with the EAC Treaty.[42]

The above shows that even though the EACJ does not exercise appellate powers against the decisions of the domestic courts, the EACJ still acts as a watch dog. This is because the EACJ can still render that decision inoperative where it finds that the decision does not comply with the Treaty. In other words, the EACJ can arrive at a different finding from a domestic court. A case in point is where a domestic court approves the enactment of a certain law, but the EACJ finds that this law is contrary to

38 *Henry Kyarimpa v The Attorney General of the Republic of Uganda* Appeal para 120.
39 Art 34 of the EAC Treaty.
40 Art 33(2) of the EAC Treaty.
41 *East African Civil Society Organization's Forum v Attorney General of Burundi* (Appeal 4 of 2016) EACJ Appellate Division (24 May 2018) para 61.
42 *East African Civil Society Organization's Forum v Attorney General of Burundi* para 61.

certain human rights principles and thus an infringement of the Treaty. In such a case, the EACJ would then require the partner state to ensure that the law is brought into conformity with the Treaty.[43]

Beyond the domestic judicial decisions, other actionable claims include circumstances when the state violates its own laws. A successful claim will then arise if those violations are found to be inconsistent with the Treaty. Violations can take the form of actions or omissions. Where the complaint is that the action is contrary to a state's internal law, then the Court will interrogate that internal law to determine whether the action complained of infringes the Treaty.[44] Therefore, where a national law protects the socio-economic rights of the citizens, and a partner state or organs of a state acts contrary to the said law, a person can compel the state's enforcement of that law through the EACJ.

Laws of partner states can also be challenged if they do not comply with the expected standard of human rights. By doing so, the EACJ holds partner states accountable for the enforcement of the principles of the Treaty. In the decision of the *Media Council of Tanzania* the Court declared several provisions of the Tanzania Media Services Act, 2016 to be a violation of the Treaty.[45] The Court then directed the Republic of Tanzania to bring the Media Services Act into compliance with the Treaty. Violations have also arisen where a state fails to abide by the court orders (of the national courts).[46] Such an action is a violation of the rule of law, a principle which is recognised by the Treaty.

3 3 Remedies

In the case of *Margaret Zziwa,* the Appellate Division held that the EACJ has the power to issue appropriate remedies including injunction, reparations and declaratory orders.[47] In *African Network for Animal Welfare* the Court granted an injunction as a sanction against threatened infringement of the Treaty. This case acknowledged that the spheres of human rights protection go beyond individual violations to include

43 See the case of *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*.

44 *Henry Kyarimpa v The Attorney General of the Republic of Uganda*; *Godfrey Magezi v the Attorney General of the Republic of Uganda* para 89.

45 *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*; See also the case of *The Managing Editor, MSETO v the Attorney General of the Republic of Tanzania*, where the EACJ found that the Minister's order to stop the publication of a newspaper violated the Treaty by restricting the freedom of press and religion. The Court thus ordered the Minister to allow the resumption of the publication and the Republic of Tanzania was ordered to implement the judgement without delay.

46 *Henry Kyarimpa v The Attorney General of the Republic of Uganda* Appeal paras 80-81.

47 *Hon Dr Margaret Zziwa v the Secretary General of the East African Community* (Appeal 2 of 2017) EACJ Appellate Division (25 May 2018) para 43.

damages to ecosystems and the environment.[48] In the *Media Council* case,[49] the Court declared certain provisions of the impugned legislation of Tanzania to be in violation of Articles 6(d) and 7(2) of the Treaty. The Court then directed the Republic of Tanzania to take measures necessary to bring the legislation into compliance with the Treaty. The Court also has powers to grant interim relief in order to preserve the subject matter of the case. Hence, as far as reparation is concerned, it is clear that the EACJ is not handicapped to fashion an appropriate remedy where the need arises in order to redress human rights violations. This assurance goes to great lengths in giving confidence to the now accepted human rights jurisdiction of the EACJ.

4 Challenges facing the exercise of a human rights jurisdiction

4 1 Time limit

Reference by natural and legal persons should be instituted before the EACJ within two months from the date when the cause of action arises.[50] The time limit was introduced by way of an amendment to the Treaty which was approved by the Heads of States Summit on 14 December 2006.[51] Scholarly articles suggests that the amendment was introduced as a retaliatory measure against an unfavourable decision by the Court towards one of the partner states.[52] In interpreting the two-months' limitation period, the EACJ, particularly the Appellate Division has adopted a very stringent position which may hinder access to justice. In this regard, the Appellate Division has failed to recognise the principle of continuing violation which would exclude time limitation where the infringement complained of still subsists. In *Omar Awadh* the Appellate Division overturned the decision of the First Instance Division and reasoned that "there is nothing in the express language of Article 30(2) that compels any conclusion that continuing violations are to be exempted from the two-month limit".[53] What the Appellate Court failed to recognise is that a continuing violation does not have a defined

48 *African Network for Animal Welfare* First Instance Division para 85.
49 *Media Council of Tanzania* First Instance Division.
50 Art 30(2) of the EAC Treaty.
51 Report of the Fourth Extraordinary Summit of the Heads of State (December 2006).
52 Lando "The domestic impact of the decisions of the East African Court of Justice" 2018 *AHRLJ* 472; Alter, Gathii and Helfer "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences" 2016 *European Journal of International Law* 293 at 302-307.
53 *Attorney General of the Republic of Uganda v Omar Awadh* (Appeal 2 of 2012) EACJ Appellate Division (15 April 2013) para 49.

ending.[54] Hence, there cannot be a lapse of time when the violation is still taking place. This principle of continuing violation protects the enforcement of human rights by ensuring that one is able to get redress where the human rights are still being suppressed irrespective of when that suppression begun.

However, the Appellate Division was very categorical that for purposes of determining the commencement or expiry of the two-months' time limit, it is either the start date of the act complained of or the date when the complainant first acquired the requisite knowledge.[55] This same reasoning has been applied in other cases effectively locking out aggrieved litigants from accessing the Court.[56]

Even more unfortunate is that the Appellate Court has found that the two-months' limitation period is reasonable.[57] It is suggested that the two-months' limitation period especially concerning violations of human rights is very stringent and does not align with comparative practices. The African Court for example, does not have a specified time limit within which a claim should be filed. The case only needs to be filed within a reasonable time from the date of exhausting the local remedies.[58] On the other hand, Article 9(3) of the Supplementary Protocol of Economic Community of West African States (ECOWAS) Community Court of Justice provides a time limit of three years for actions against community institutions or member states. While the EACJ has observed that it cannot order for an amendment of the Treaty to expand the time of filing a claim,[59] the Court should reconsider its position and recognise the principle of continuing violations in order to ensure that victims of human rights abuses are not locked out of the seat of justice particularly where the violation is still ongoing.

It is also noted that the time limitation is only with respect to claims filed by natural and legal persons as opposed to other bodies who have a *locus standi* before the Court. The Court has already found this to be discriminatory in the case of *Steven Deniss*.[60] In light of this, steps should be taken towards eliminating that discriminatory element and

54 See the case of *The Federation of African Journalists v The Republic of Gambia* ECW/CCJ/JUD/04/18 Community Court of Justice (13 March 2018), where the ECOWAS Community Court of Justice held that where an injury is continuing, it will give rise to a cause of action day in and day out and postpones the running of time.

55 *Attorney General of the Republic of Uganda v Omar Awadh* Appeal.

56 *Nyamoya Francois v Attorney General of the Republic of Burundi & Secretary General of the EAC* (Ref 8 of 2011) EACJ First Instance Division (28 March 2014); *Hilaire Ndayizamba v Attorney General of the Republic of Burundi* (Ref 3 of 2012) EACJ First Instance Division (28 March 2014).

57 *Attorney General of the Republic of Uganda v Omar Awadh* Appeal.

58 *Kenedy Ivan v United Republic of Tanzania* (Applic 025/2016) ACtHPR (28 March 2019).

59 *Steven Deniss v the Attorney General of Burundi* (Ref 3 of 2015) EACJ First Instance Division (31 March 2017) para 38.

60 *Steven Deniss v the Attorney General of Burundi*.

consideration should be given by the partner states through Treaty amendment.

4 2 Lack of an express human rights jurisdiction

As already stated, the Court does not have an express human rights jurisdiction. Even though this has not dampened the spirit of the Court in redressing human rights violations, there is likely to be greater protection of human rights where such jurisdiction is expressly recognised and provided for in the Treaty. At the very least, litigants would be able to approach the Court directly questioning infringement of human rights as opposed to the current position where a claim must be based on a violation of a principle in the Treaty. Additionally, an express mandate would give the Court more confidence in enforcing human rights and also possibly a wider mandate in terms of human rights instruments that can be interpreted and applied by the Court. For example, the ECOWAS Community Court of Justice has an expansive mandate with regards to jurisdiction on human rights matters. In this respect, one of the fundamental principles of ECOWAS according to Article 4(g) of the Revised Treaty is the recognition, promotion and protection of human and people's right in accordance with the provisions of the African Charter on Human and People's Rights. [61]

Indeed, the EACJ has been criticised for assuming a human rights' jurisdiction in the absence of an express mandate.[62] The EACJ has been urged to exercise more caution and avoid exercising judicial craft. In this regard, it is noted that only a minority of scholars support this proposition and instead the EACJ has been hailed for its meaningful interpretation of the EAC Treaty. This does not however undermine the need for an express human rights Protocol as envisaged under Article 27(2) of the Treaty.

Notably in 2010, in *Sitenda Sebalu* the question for determination was whether the delay in vesting the EACJ with the extended jurisdiction as envisaged under Article 27(2) contravened the doctrines of good governance, adherence to the rule of law, social justice and the maintenance of universal standards of human rights enshrined in the Treaty.[63] In a decision delivered on 30 June 2011, the Court noted that there had been various consultative meetings from 2005 to 2010 on the draft protocol yet those meetings did not culminate in the conclusion of a Treaty. Thus, the Court found that there was failure to fully discharge

61 See also Art 1(h) of the ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, which guarantees the rights recognised by the African Charter and other international legal instruments.

62 Oppong "Legitimacy of Regional Economic Integration Courts in Africa" 2014 *African Journal of Legal Studies* 81.

63 *Hon Sitenda Sebalu v EAC Secretary General* (Ref 1 of 2010) EACJ First Instance Division (30 June 2011).

the obligations regarding the conclusion of a protocol to operationalise an extended jurisdiction of the EACJ. Accordingly, the Court held that the delay "contravenes the principles of good governance as stipulated in Article 6 of the Treaty".

It is sad to note that it is now almost ten years since the Court first made that call to operationalise Article 27(2), yet the provision remains in the Treaty, still, meaningless. This is irrespective of the Court holding the Council of Ministers in contempt, for failure to implement that decision.[64]

4 3 Adjudicating by avoidance: A seemingly cautious approach towards sensitive cases

Without a doubt, as demonstrated in this paper, there has been very progressive jurisprudence from the Court. However, the journey towards attaining and sustaining such impactful jurisprudence has not been without its flaws. While the Court has not shied away from issuing bold pronouncements, a review of some decisions reveals instances where the Court has avoided delving into the merits of the cases before it. In those cases, the Court went to great lengths to craft conditions which generally dimmed the possibility of the EACJ interrogating the merits of a domestic court. The conditions issued by the Court lead to a perception that the Court was intentionally treading carefully and exercising more than just the expected judicial restraint. A case in point is the analysis of the approach taken by the First Instance Division in case of the *East African Civil Society Organizations' Forum (EACSOF)*[65] as compared to the subsequent case of *Martha Karua*.[66] Both cases challenged the legality of the decisions of the domestic courts.

The case of *East African Civil Society Organizations' Forum* Appeal questioned the decision of the Constitutional Court of Burundi for holding that the then incumbent President, Pierre Nkurunziza, was eligible to run for the third time as the President of the Republic of Burundi. The First Instance Division held that "its mandate did not extend to interrogation of decisions of other courts in a judicial manner".[67] Aggrieved by that determination, the Applicants approached the Appellate Division which disagreed with the First Instance Division's view and referred the matter back to the First Instance Division for a re-hearing on the merits. In remitting the matter back to the First Instance Division, the Appellate Court noted that a determination by the highest domestic court on constitutionality of an internal law does not prevent the EACJ from interrogating whether the said domestic law is in violation of the

64 See the contempt judgment in the case of *Sitenda Sebalu*.
65 *East African Civil Society Organizations' Forum (EACSOF) v the Attorney General of Burundi* (Reference 2 of 2015) EACJ First Instance Division (20 July 2015).
66 *Martha Wangari Karua v The Attorney General of Kenya* First Instance Division.
67 See para 9(a) of *East African Civil Society Organizations' Forum* Appeal.

Treaty.[68] The Appellate Division then gave clear directions that the First Instance Division should re-hear the matter and determine whether the impugned decision of the Constitutional Court of Burundi was in violation of the EAC Treaty.[69]

When the matter went back for re-hearing, the First Instance Division noted that there were various conditions which ought to be satisfied before the EACJ could review a decision of a domestic court. It thus pronounced that: [70]

> A judicial decision of a domestic court would only give rise to a cause of action first, where, it is established on the face of the record as depicting outrage, bad faith and willful dereliction of judicial duty, and, secondly, where no or manifestly insufficient action has been taken by the appropriate judicial disciplinary body to redress such judicial outrage.

Similar pronouncements had been made by the First Instance Division in the case of *Manariyo Désiré*[71] where the Court after being persuaded by cases from other jurisdictions reasoned that

> judicial decisions of national courts, particularly those emanating from the apex court of a country, may only be categorized as wrongful acts for purposes of state responsibility where they reflect blatant, notorious and gross miscarriages of justice.[72]

By those pronouncements, therefore, the First Instance Division introduced subjective tests as a pre-condition for the exercise of its mandate of interrogating whether a decision of a domestic court conforms with the Treaty. Thus, in determining the case of *East African Civil Society Organizations' Forum (EACSOF)*,[73] the First Instance Division read through the judgment of the Constitutional Court of Burundi and stated that

> we take the considered view that the foregoing decision, as well as the legal reasoning that underpins it, cannot be categorised as an outrageous judicial decision, let alone one that depicts outrage, bad faith or willful dereliction of judicial duty so as to invoke State responsibility therefore by the Respondent's State.[74]

The Court noted that the Constitutional Court of Burundi applied its mind to the questions that were before it thus, in the Court's view, there was no reason for interfering with that reasoning.[75] This conclusion was arrived at without the Court analysing the impugned decision. Rather, the

68 *East African Civil Society Organizations' Forum* Appeal para 55.
69 *East African Civil Society Organizations' Forum* Appeal para 79(a).
70 *East African Civil Society Organizations' Forum* First Instance Division Rehearing para 43.
71 *Manariyo Désiré v The Attorney General of Burundi* **(**Ref 8 of 2015) EACJ First Instance Division (2 December 2016).
72 *Manariyo Désiré v The Attorney General of Burundi* paras 34 and 36.
73 First Instance Division.
74 First Instance Division para 49.
75 First Instance Division para 49.

Court made observations purely at face value and using the standards it had set, reasoned that the impugned judgment was reasonable and did not warrant an examination of its compliance with the Treaty. This holding failed to appreciate the Court's mandate of ensuring adherence to the Treaty. This was despite the Appellate Division's guidance that the Trial Court had an obligation to consider whether the impugned decision of the Constitutional Court of Burundi was in violation of the Treaty. Instead, the First Instance Division introduced an almost impossible test to surmount before the EACJ can interrogate the merits of a decision of a domestic court.

Even though the above decisions may have defined the approach that the First Instance would take when confronted with similar questions, the *Martha Karua* case which was delivered on 30 November 2020 seems to herald a new dawn.[76] Unlike the previous approach, in *Martha Karua*, the First Instance Division acknowledged right from the beginning that: "[T]his Court is well within the purview of its mandate to interrogate the decision of the Supreme Court of Kenya that has been impugned in this Reference, with a view to determining its compliance with the Treaty".[77]

Interestingly, the *Martha Karua* case did not refer to the two contested previous decisions nor the conditions that had been proposed therein. Instead, the Court accepted without any hesitation its mandate of interrogating whether the Supreme Court correctly applied the governing internal laws. This is something to be celebrated and it is hoped that this signifies a new direction which the Court intends to take moving forward. The previous benchmark should only remain as lessons to be learnt and not a fallback jurisprudence when an opportunity arises. It is also hoped that the Appellate Division which seems to have had clarity of thought will be up to challenge when appeals are filed on merits before it. Indeed, a glimpse of what is to be expected may be perceived from the minority decision of *Manariyo Désiré*, where the two dissenting judges questioned the trial court's position on circumstances when a decision of the domestic court may be impugned. The judges were categorical that:

> With respect to the complaint that the Trial Court was in error in holding that the actions of a judicial organ of a State could only be categorized as wrongful acts for the purpose of state responsibility where they reflect blatant, notorious and gross miscarriage of justice for having been done in an outrageous way, in bad faith, with willful neglect of duty, or in blatant violation of the substance of natural justice, we completely agree with the excellent submissions by counsel for the appellant that the holding of the trial court is without support in international law as it stands today.[78]

76 *Martha Wangari Karua v The Attorney General of Kenya* First Instance Division.

77 *Martha Wangari Karua v The Attorney General of Kenya* First Instance Division para 27.

78 *Manariyo Désirév v The Attorney General of the Republic of Burundi* (dissenting judgment) para 79.

5 Conclusion

Undoubtedly, the EACJ has been at the forefront of developing and shaping a robust human rights jurisprudence in the EAC. The Court has demonstrated time and again, its willingness to enforce and protect human rights within the region. The residents of the EAC and particularly civil society have been aggressive in holding the partner states accountable for the violations of human rights. Every case brought before the EACJ establishes that yearning to go beyond the borders in search of justice. Furthermore, the increase in the number of human rights cases before the Court, demonstrates that the residents are now more aware of the place of the EACJ in promoting and protecting human rights. The decisions of the Court have ensured that there is legal certainty, consistency and predictability in as far as human rights protection is concerned.

The EACJ therefore is a good example of how progressive jurisprudence can determine the course of human rights adjudication in a region. The Court, has the potential to and should get a fully-fledged human rights jurisdiction as suggested under point 4.2. This will ensure that the Court serves the utmost need of the residents of East Africa who have tenaciously been seeking redress of human rights violations. From that experience, the Court can only be strengthened and its jurisdiction jealously guarded in order for it to effectively fulfil the hope and aspirations of the people it serves.

It is also recognised that notwithstanding the potential vulnerability of the Court which rests on the political good will of the partner states and the politics of the day, the Court has continued to perform its duty thereby providing the residents with a forum for ventilating their grievances and thus filing a gap in the demand for human rights enforcement. Further, it is advised that the partner states should inculcate a culture of obedience of court orders so that the decisions of the Court are effective. As a corresponding duty, the Court should always aspire to produce judgments that inspires public confidence.