

The East African Court of Justice and Human Rights Jurisdiction: Drawing the Line

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Abstract

Human rights in Africa have gradually gained a place of recognition few could have foreseen only a decade ago. With the promotion and protection of human rights entrenched deep in the African Charter on Human and Peoples' Rights, African states have a duty to uphold this principle in the larger goal of regional economic integration. The East African Court of Justice (EACJ), a regional court, has thus assumed the role of a watchdog in breathing life into these provisions, safeguarding the rule of law and ensuring everyone plays by the rules. It is unfortunate that these watchdogs can then lack the most important tool in steering the ship – jurisdiction. This paper, through a detailed analysis of literature review, tackles the pertinent question of whether the court has jurisdiction to handle human rights cases and arrives at the conclusion that an express mandate is lacking, but there is a somewhat implied mandate. Nonetheless, a clear articulation of the EACJ's mandate is necessary to enable it to address issues effectively and efficiently.

Keywords: EACJ, jurisdiction, human rights

I. Introduction

'Jurisdiction is everything. Without it, a court has no power to make one more step'.¹

i. 'Left to their own devices': Development of regional integration in post-colonial Africa

Regional economic integration in Africa has certainly been marred by numerous hurdles and obstacles owing to the continent's unique history. After

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¹ *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* (1989) KLR 1.

the demise of colonial rule, the reality of the political and economic fragility of post-colonial Africa in the 1960s became apparent.² As the first waves of independence moved over the continent, a number of national leaders started calling for the economic and political integration of African states in order to achieve development and undo the balkanisation of Africa brought by colonialism.³ This resulted in the creation of larger markets and consolidation of resources to form Regional Economic Communities (RECs) along geographical lines.⁴ Thus, the East, West and Southern parts of Africa came together in their respective regions to form the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) respectively.⁵

The economically-geared founding documents of these RECs, which were adopted before the African Charter on Human and Peoples' Rights (ACHPR), did not provide for the protection or promotion of human rights as objectives. This is because, initially, some African leaders were of the opinion that the issue of human rights was too political and could be used as a 'pretext for intervening in their countries' internal affairs', and thus it was argued that the 'treatment of human rights more appropriately belonged in other international fora'.⁶ However, the current position shows that their treaties now provide for human rights either as a fundamental or operational principle, or as one of the objectives of the RECs.⁷ Some scholars have written that this shift can be traced back to the Treaty Establishing the African Economic Community (the Treaty)⁸ which based the pursuit of African economic integration on *inter alia* the principle of recognition, promotion and protection of human and peoples' rights in accordance with the

² Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 7.

³ Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 7. See also Kritzing-van Niekerk L, 'Regional integration: Concepts, advantages, disadvantages, and lessons of experience' Southern African Regional Poverty Network—<https://sarpn.org/documents/d0001249/P1416-RI-concepts_May2005.pdf> on 1 May 2005.

⁴ Thoko K, 'SADC and human security: Fitting human rights into the trade matrix' 13(1) *African Security Review*, 2004, 110.

⁵ These were formed in 1967, 1975 and 1980 respectively. —<<https://www.uneca.org/oria/pages/eac-%E2%80%93-east-african-community>; <https://www.uneca.org/oria/pages/ecowas-economic-community-west-african-states>; <https://www.uneca.org/oria/pages/sadc-southern-african-development-community>> on 21 November 2017.

⁶ Mwinuka H, 'Regional human rights systems: Challenges facing the East African Court of Justice' *Academia.edu*, 2013, 3.

⁷ Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 1.

⁸ *Treaty Establishing the African Economic Community*, 3 June 1991, 2144 UNTS 255.

provisions of the ACHPR,⁹ a provision that became a common feature in all the RECs documents. This illustrated the fact that RECs are merely economic building blocks and are part of a greater regional agenda, as opposed to ‘isolated initiatives dependent on the will of member States’.¹⁰

In pursuit of regional economic integration, judicial bodies were established as the supranational organs of the RECs and were tasked with resolving disputes within the communities to ensure smooth sailing.¹¹ These are the East African Court of Justice (EACJ), the ECOWAS Community Court of Justice (ECCJ) and the Southern African Development Community Tribunal (SADCT).¹² Initially, these judicial organs were primarily set up to interpret and apply the treaties of the RECs. However, with the increasing significance accorded to human rights in Africa and the resultant acknowledgment of respect for human rights contained in the ACHPR as a principle in REC treaties, there has been a gradual move towards ‘clothing the judicial organs of the RECs with competence to receive human rights cases’.¹³ Although the entry of RECs as an avenue for protection of rights is generally favourably hailed, its novelty warrants concern over their capacity to effectively exercise this new competence in light of the economic focus of their founding treaties.¹⁴

ii. Focus of the study

Of the REC courts mentioned above, this study will focus mainly on the EACJ (the Court), whose situation is unique. The EACJ’s jurisprudence, which is relatively new and continues to grow, has raised eyebrows owing to what can best be described as the Court’s derivative human rights competence under the Treaty. Unlike the ECCJ, whose jurisdiction over human rights cases is expressly provided for,¹⁵ the EACJ cannot claim the enjoyment of such. In fact, in this regard, the EACJ and the now-disbanded SADCT are alike.¹⁶ The provisions in

⁹ Article 3(g), *Treaty Establishing the African Economic Community*.

¹⁰ Murungi L, ‘Revisiting the role of sub-regional courts in the protection of human rights in Africa’ Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 8.

¹¹ Ebobrah S, ‘Litigating human rights before sub-regional courts in Africa: Prospects and challenges’ 17(1) *African Journal of International and Comparative Law*, 2009, 80.

¹² These were established in 1999, 1991 and 1992 respectively.

¹³ Ebobrah S, ‘Litigating human rights before sub-regional courts in Africa: Prospects and challenges’, 80.

¹⁴ Viljoen F, *International Human Rights Law in Africa*, 1ed, Oxford University Press, Oxford, 2007, 503.

¹⁵ Revised Article 9(4) in Article 3, 2005, *Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1 of the English version of the said Protocol*, 2005.

¹⁶ However, a subtle but critical distinction must be made here. Whereas the Protocol on SADCT is silent on the human rights mandate of the Tribunal, the EAC Treaty expressly excludes such

the EAC Treaty regarding the promotion and protection of human rights are so ambiguous that the Court has often found itself in murky waters when it construes its powers broadly and adjudicates over cases involving human rights violations without the explicit mandate to do so, on what can loosely be termed by the author as an ‘implied mandate’. In this way, the Court has managed to ‘use the back door’ and hold member states accountable for human rights violations using the guise of other causes of action such as upholding the rule of law and good governance to indirectly protect these rights.

The problem then arises where cases clearly centred on human rights were not dismissed by the EACJ at the preliminary stages but, instead, the judges went into the merits of each, despite their apparent lack of jurisdiction. This study therefore sets out to assess whether the EACJ is usurping its authority and compromising State sovereignty by adjudicating over cases involving human rights violations without the proper mandate conferred to it by the Treaty. In addition, the paper will attempt to understand why and in what circumstances the EACJ has assumed this jurisdiction and further address whether the Court should be granted the explicit human rights mandate.

This discourse turns on the premise that human rights coupled with good governance creates an appropriate investment climate that is critical to furthering economic development.¹⁷ Moreover, the study is anchored on the premise that regional integration is often accompanied by high levels of economic, social and political interactions, which in turn call for a coherent framework of rules to govern these relations.¹⁸ Human rights form part of this framework, and thus a regional court such as the EACJ is indispensable to the integration process. However, the co-operation of national courts and the governments of member states bear a significant impact on the effectiveness of the Court. Specifically, the study will find that the EACJ does not have the explicit mandate to decide human rights cases; however, it cannot close its eyes to human rights violations

jurisdiction until the adoption of a Protocol to expand the jurisdiction of the EACJ to human rights. See Article 15, *Protocol on Tribunal in the Southern African Development Community*, 2000. See also Article 27(2), *The Treaty for the Establishment of the East African Community*, 30 November 1999, 2144 UNTS 255.

¹⁷ Murungi L, ‘Revisiting the role of sub-regional courts in the protection of human rights in Africa’ Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 10. See Ruppel O, ‘Regional economic communities and human rights in east and southern Africa’ in Bösl A and Diescho J (eds) *Human rights law in Africa: Legal perspectives on their protection and promotion*, Macmillan Education, Windhoek, 2009, 279.

¹⁸ Murungi L, ‘Revisiting the role of sub-regional courts in the protection of human rights in Africa’ Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 10.

brought before it given the provision of the Treaty calling for the promotion and protection of human and peoples' rights in accordance with the provisions of the ACHPR,¹⁹ and the aforementioned importance of human rights in the wider matrix of economic integration.

In addressing the problem, this paper will take the following approach. Part I has provided a brief history on the development of economic integration in Africa, focusing on the EAC, SADC and the ECOWAS and contextualising the rise of regional courts, specifically the EACJ. The problem of study has been highlighted here as the EACJ's adjudication of human rights cases without the proper mandate. Part II will then advance a background of the EACJ as a creature of the EAC, followed by a brief history of the Court. Consequently, Part III will focus on a case analysis of the EACJ's human rights decisions. The paper will then swiftly move to the EACJ's purposive interpretation of human rights cases in Part IV, explaining the rationale for judicial activism, contextualising state sovereignty in the formation of regional courts and providing counter-arguments in the Court's favour. Finally, the author will conclude and make recommendations on the way forward informed by the arguments and theories discussed in the paper in Part V.

II. The East African Court of Justice

i. 'The Nexus': Background of the EACJ in the context of the EAC

Of all the sub-regional communities in Africa, the EAC has so far been the most active and successful.²⁰ Once heralded as a 'highly acclaimed experiment in regional co-operation' the EAC has had its fair share of troubles and impediments, which witnessed it all come to naught in 1977 when it collapsed just a decade after it came into formal existence.²¹ The member states²² have since then picked up the pieces, acquired valuable lessons and actualised the revival of the EAC with the enactment of the Treaty for the Establishment of the East African

¹⁹ Article 6(d), *Treaty for the Establishment of the East African Community*.

²⁰ Van der Mei A, 'Regional integration: The contribution of the Court of Justice of the East African Community' 69 *Heidelberg Journal of International Law*, 2009, 404.

²¹ Agrippah T, 'Regional organisations and African underdevelopment: The collapse of the East African Community' 16(2) *Journal of Modern African Studies*, 1978, 262.

²² The EAC was initially formed by Kenya, Uganda and Tanzania. In 2007, Rwanda and Burundi became members. Eyster G, 'Economic development and regional integration in the East African Community' Unpublished LL.M Thesis, Indiana University, Bloomington, 2014, 5 –<https://spea.indiana.edu/doc/undergraduate/ugrd_thesis2014_pol_eyster.pdf> on 20 November 2017.

Community in 1999.²³ The re-establishment of the EAC reflected a renewed commitment to sub-regional integration and co-operation that goes beyond a constellation of Member States' interests and meeting of minds, but also involves the private sector and the people of East Africa.²⁴ This marked a coming of age and brought into play new organs that were envisioned to not only be the EAC's building blocks, but also the oars that steer the integration process towards the desired end and firmly anchor the community in a just system.²⁵ This was to ensure success of the regional bloc the second-time round.

One such organ is the EACJ, established by Article 9(1) (e) of the Treaty and inaugurated on 30 November 2001 after the appointment of the first judges by the Summit of Heads of State.²⁶ The formation of this court as a judicial organ is in line with the common tradition of economic communities setting up regional courts to ensure that member states and all other institutions in the international organisation adhere to treaty norms.²⁷ However, the EACJ has had its jurisdiction seriously limited to the 'interpretation and application of (the) Treaty'²⁸ and 'such other original, appellate, human rights and other jurisdiction (to) be determined by the Council at a suitable subsequent date'.²⁹ Therefore, consequently the first four years since its creation saw the Court stay without handling any case, some even terming it as a 'stillborn' – a sad state of affairs attributed by many in the legal fraternity to the limitation on its jurisdiction to Treaty interpretation only.³⁰

²³ *Treaty for the Establishment of the East African Community*.

²⁴ Alter K, Gathii J and Helfer L, 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' 27(2) *European Journal of International Law*, 2016, 300.

²⁵ Article 9, *Treaty for the Establishment of the East African Community*.

²⁶ Nsekela H, 'The role of the East African Court of Justice in the integration process' Third East African Community Media Summit, Kampala, 21-22 August 2009, 2.

²⁷ Possi A, 'Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice' 15(1) *African Human Rights Law Journal*, 2015, 193.

²⁸ Article 27(1), *Treaty for the Establishment of the East African Community*.

²⁹ Article 27(2), *Treaty for the Establishment of the East African Community*.

³⁰ Nsekela H, 'The role of the East African Court of Justice in the integration process' Third East African Community Media Summit, Kampala, 21-22 August 2009, 4.

ii. A history of the EACJ

The roots of the EACJ can be traced back to the Court of Appeal for Eastern Africa (EACA) that was established in 1909³¹ but ceased to exist with the collapse of the EAC in 1977.³² However, the EACJ is hardly comparable to the EACA as the current Treaty has restricted its jurisdiction by omitting the express authority of the court from hearing human rights cases. As noted earlier, the EACJ underwent a period of dormancy in the early years after its formation, during which it received no cases, bringing into question its relevance and significance. This has led some to believe that the EAC did not initially contemplate an active role for the EACJ in the integration process³³ and so did not give much attention to establishing it as an independent judicial organ.³⁴ Certainly, member states had envisaged that the Court would additionally serve as a tribunal to solve trade disputes and arbitrate; however, the Court submitted that its role had been seriously undercut and undermined by the establishment of parallel dispute resolution mechanisms like national courts and quasi-judicial bodies.³⁵

Despite this, the EACJ managed to emerge from behind the cloak of invisibility and obscurity when it received its first case in 2005, the *Mwatela case*, involving a power struggle between the East African Legislative Assembly (EALA) and the Council of Ministers (the Council).³⁶ In its decision, the Court sided with the EALA and nullified the Council's actions which it held were inconsistent with the Treaty.³⁷ This marked a defining moment for the Court as one that intends to

³¹ Nsekela H, 'Overview of the East African Court of Justice' Paper for presentation during the sensitisation workshop on the role of the EACJ in the EAC integration, Kampala, 1-2 November 2011, 1. The EACA reviewed decisions from national courts on both civil and criminal matters, with the only exceptions to its jurisdiction being constitutional matters and the offence of treason for Tanzania.

³² Nsekela H, 'The role of the East African Court of Justice in the integration process' Third East African Community Media Summit, Kampala, 21-22 August 2009, 1.

³³ Gathii J, 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' 24 *Duke Journal of Comparative and International Law*, 2013, 250.

³⁴ East African Court of Justice, Strategic Plan: 2010 – 2015, April 2010 – <http://eacj.org/?page_id=1359> on 13 February 2017. The Court faced 'crippling challenges' including 'budgetary constraints' and 'undetermined terms and conditions of service for judges'. The EAC also did not adequately fund the Court in its initial years or subsequently, leaving judges to operate on an *ad hoc* basis.

³⁵ Nsekela H, 'The role of the East African Court of Justice in the integration process' Third East African Community Media Summit, Kampala, 21-22 August 2009, 9.

³⁶ *Calist Andrew Mwatela & 2 others v East African Community*, Application No. 1 of 2005. This case involved challenging the legality of the Council to introduce and withdraw Bills without the express consultation of the EALA, who had the legislative authority.

³⁷ *Calist Andrew Mwatela & 2 others v East African Community*, Application No. 1 of 2005.

rise above the ranks, avoiding the judicial subservience to political organs that had long characterised judicial decision-making in East African national judiciaries.³⁸ The *Mwatela* case can be viewed as a success in that the pique between the EALA and the Council provided an opportunity for the EACJ to step in and judicially determine the balance of power among EAC organs; and the outcome indicated the Court's independence from the EAC executive organs and while reflecting its readiness to begin deciding cases independently.³⁹

Of course, such a bold decision came with repercussions⁴⁰ but none comparable to the backlash witnessed after the contentious *Nyong'o* case.⁴¹ In this case, the EACJ delivered an interim ruling barring EAC officials from recognising Kenya's slate of EALA nominees⁴² and preventing the nine Kenyan parliamentarians from being sworn in on the grounds that the Kenyan rules for electing members of the EALA were *prima facie* at odds with Article 50 of the Treaty.⁴³ This ruling was met with hostility and outrage from Member States, especially the Kenyan government who were deeply infuriated and accused the Court of overstepping its jurisdiction.⁴⁴ Consequently, the East African presidents responded in a manner that did not reflect great respect for the notion of an independent judiciary⁴⁵ by convening a meeting to amend the Treaty hurriedly

³⁸ Gathii J, 'Mission creep or a search for relevance', 265.

³⁹ Gathii J, 'Mission creep or a search for relevance', 265.

⁴⁰ The EAC executive organs began to attempt to limit the Court's jurisdiction. Gathii J, 'Mission creep or a search for relevance', 265.

⁴¹ *Peter Anyang' Nyong'o & others v Attorney General of Kenya & 5 others*, Ref No. 1 of 2006.

⁴² Alter K et al, 'Backlash against international courts in West, East and Southern Africa', 302.

⁴³ Article 50 of the Treaty states that:

'The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall 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, in accordance with such procedure as the National Assembly of each Partner State may determine'.

The Court held that Kenya violated the provisions of the Treaty by holding a 'fictitious election in lieu of a real election'. Van der Mei A, 'Regional integration: The contribution of the Court of Justice of the East African Community', 410.

⁴⁴ The president of Kenya went even further, declaring that the EACJ's ruling undermined the country's sovereignty, noting that the 'ruling of the Court poses serious challenges to the East African Community' and that the 'Council of Ministers is well seized of these challenges and their grave implications'. Speech delivered by Kenyan President Mwai Kibaki, Eighth EAC Summit, Arusha, 30 November 2006. Alter K et al, 'Backlash against international courts in West, East and Southern Africa', 302.

⁴⁵ Van der Mei A, 'Regional integration', 405.

without broad consultations, and aimed primarily at curbing the authority of the EACJ.⁴⁶

The ‘punitive’ amendments substantially changed the EACJ’s structure, scope of jurisdiction and the Court’s accessibility. These included restructuring the Court into two divisions: a First Instance Division and an Appellate Division,⁴⁷ providing grounds for appeal to the Appellate Division.⁴⁸ It extends the grounds for the removal or suspension of judges on the basis of ‘misconduct’ or investigation in their home State,⁴⁹ thus compromising their security of tenure limiting the Court’s jurisdiction, so as not to apply ‘to [the] jurisdiction conferred by the Treaty on organs of Partner States’.⁵⁰ It also included the addition of a two-month time limit for private litigants to file complaints challenging national actions or decisions that were contrary to the Treaty.⁵¹

Although the EACJ managed to survive Kenya’s backlash campaign,⁵² these amendments have changed the Court’s subsequent evolution⁵³ and have been characterised by academic commentators as an attempt to weaken the EACJ.⁵⁴ However, if the Court had annulled the Summit’s amendments entirely, it might have triggered much antagonism and would have undermined its own legitimacy.⁵⁵ Despite these strategic roadblocks, the judges of the EACJ straightened their

⁴⁶ Kenya’s treaty revision proposal was based on the following objectives: i) To pressure the judges to avoid further adverse rulings in the *Nyong’o case*, ii) To restrict the Court’s ability to hear cases from private litigants, iii) To establish an appellate chamber staffed by pro-government jurists and iv) To create a procedure to remove judges for misconduct. Alter K et al, ‘Backlash against international courts in West, East and Southern Africa’, 304. See also Onoria H, ‘Botched-up elections, treaty amendments and judicial independence in the East African Community’ 54(1) *Journal of African Law*, 2010, 84.

⁴⁷ Article 23(2), *Treaty for the Establishment of the East African Community*.

⁴⁸ Article 23(3), *Treaty for the Establishment of the East African Community*. More conservative judges were appointed in the Appellate division, an obvious ploy by the Summit. Nonetheless, the appellate judges still did not constrain the EACJ’s foray into human rights.

⁴⁹ Article 26, *Treaty for the Establishment of the East African Community*. This amendment was clearly directed at the two Kenyan judges in the EACJ.

⁵⁰ Article 27(1), *Treaty for the Establishment of the East African Community*.

⁵¹ Article 30(2), *Treaty for the Establishment of the East African Community*.

⁵² It is instructive to note that Kenya initially pushed for the disbandment of the EACJ like that of its sub-regional cousin, the SADC Tribunal, but Uganda and Tanzania did not welcome the idea for fear of compromising the goal of an ultimate political federation. See generally –<<https://worldview.stratfor.com/article/east-africa-where-ambition-meets-reality>> on 19 December 2017.

⁵³ Alter K et al, ‘Backlash against international courts in West, East and Southern Africa’, 306.

⁵⁴ Van der Mei A, ‘The East African Community: The bumpy road to supranationalism - some reflections on the judgments of the Court of Justice of the East African Community in Anyang’ Nyong’o and others East African Law Society and others’ Maastricht University, Working Paper Number 7, 2009, 12 –<https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1392709> on 9 February 2017.

⁵⁵ Van der Mei A, ‘Regional integration’, 418.

backs and continued to press on in their quest to dispense justice fairly and without the influence of political actors.

Having analysed and understood the unique context of the EACJ, it is prudent to examine the jurisprudence of the EACJ in order to provide a clearer understanding of the research problem, as shall be done subsequently.

III. 'Out on a Limb': The EACJ and Human Rights Decisions – A Case Analysis

The remarkable scope of the EACJ's human rights jurisprudence stands in sharp contrast to the institutional weaknesses the Court faces. Regardless of the fact that the EACJ's jurisdiction has not yet been extended to include human rights, most of the cases the Court has received have pertained to violations of human rights, and the Court has been more than eager to broaden their interpretative mandate in a show of judicial activism by masking these violations as the contravention of a fundamental or operational principle enshrined in Articles 6 and 7 of the Treaty respectively.⁵⁶

The first case involving a human rights violation that the Court received was infamously known as the *Katabazi case*.⁵⁷ In this case, fourteen Ugandans were re-arrested and detained by the government of Uganda on charges of treason after the High Court had just granted them bail. They were then tried in a court martial on additional charges of unlawful possession of arms and terrorism and were thrown back in jail, contrary to an order from the Ugandan Constitutional Court for their release.⁵⁸ The applicants challenged their re-arrest, detention and military charges as inconsistent with the provisions of the Treaty.⁵⁹ The Respondents argued that the Council had not yet extended the

⁵⁶ The specific Articles the author refers to in the Treaty are Article 6(d) which states that:

'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'.

Article 7(2) which states that 'The 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'.

⁵⁷ *James Katabazi and 21 others v Secretary General of the East African Community and another* (2007) EACJ 3.

⁵⁸ *James Katabazi and 21 others v Secretary General of the East African Community and another* (2007) EACJ 3.

⁵⁹ The applicants argued that the conduct of the government of Uganda went against Articles 5(1), 6, 7(2) and 8(1) (c) of the Treaty. *James Katabazi and 21 others v Secretary General of the East African Community and another* (2007) EACJ 3.

Court's jurisdiction to human rights and thus it should not entertain the case.⁶⁰ However, the Court struck down this claim, and in response to the question of its jurisdiction, stated as follows:

'Does this court have jurisdiction to deal with human rights issues? The quick answer is: no it does not have... It is very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violations of human rights *per se*'.⁶¹

Yet it continued to note that 'while the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not 'abdicate' from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation(s) of human rights violation(s)'.⁶²

Moreover, the Court held that it could not shun or shy from its obligation to 'ensure the adherence to law'⁶³ and concluded that member states were obliged to abide by the decisions of their courts in order to uphold the rule of law; a principle that was found to have been undermined and disregarded by the Ugandan government in their actions, thus contravening the Treaty.⁶⁴ The Court's decision to deal with this matter in the face of an express exclusion of its jurisdiction over human rights is nothing short of extreme judicial activism skewed towards usurpation of legislative functions.⁶⁵ Yet, if the court had determined otherwise, it would have indeed 'abdicated itself' from performing one of its duties, that is to interpret a provision of the Treaty.⁶⁶ Herein lies the dilemma of courts like the EACJ, whose express mandate does not sufficiently cover the scope of its functions.

Another contentious case brought before the EACJ was the *Rugumba case*, brought on behalf of a Rwandan national who had been arrested and detained for five months by the Rwandan authorities without any notice to his family.⁶⁷ The Applicant claimed that the incommunicado detention without trial and failure by the Rwandan government to investigate breached the EAC's provisions

⁶⁰ *James Katabazi and 21 others v Secretary General of the East African Community and another* (2007) EACJ 3.

⁶¹ *James Katabazi and 21 others v Secretary General of the East African Community and another* (2007) EACJ 3.

⁶² *James Katabazi and 21 others v Secretary General of the East African Community and another* (2007) EACJ 3, 16.

⁶³ Article 23, *Treaty for the Establishment of the East African Community*.

⁶⁴ *James Katabazi and 21 others v Secretary General of the East African Community and another* (2007) EACJ 3.

⁶⁵ Ebobrah S, 'Litigating human rights before sub-regional courts in Africa', 82.

⁶⁶ Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 35.

⁶⁷ *Placeda Rugumba v Secretary General of the East African Community and Attorney General of Rwanda*, Ref No. 8 of 2010, EACJ.

relating to good governance, human rights and the rule of law.⁶⁸ The Court's First Instance Division quashed the Respondents' claims regarding the timeliness of filing the case and prior exhaustion of local remedies.⁶⁹ The Court held that it did have jurisdiction to interpret whether the state had promoted or protected human and peoples' rights in accordance with the ACHPR as provided for in Article 7(2), but lacked the power to enforce these rights, asserting that 'the invocation of the provisions of the ACHPR was not merely decorative of the Treaty but was meant to bind Partner States'.⁷⁰

In *Independent Medico Legal Unit v Attorney General of Kenya*, the EACJ entertained yet another high profile human rights case testing the limits of its jurisdiction. This time, the Applicants alleged that Kenyan government authorities perpetuated crimes of torture, execution, cruelty and inhumane treatment in the Mount Elgon district and that this had never been investigated, and had consequently gone unpunished.⁷¹ Once again, the Court's jurisdiction to adjudicate on this matter was brought into question by the Respondents; and the Court reiterated the fact that the non-extension of its jurisdiction under Article 27(2) did not preclude it from interpreting the Treaty, and that as long as allegations brought before it involved the interpretation of the Treaty, their relation to violation of human rights did not nullify jurisdiction.⁷²

The case that really cemented the place of the EACJ in the EAC was a uniquely interesting one known as the *Sibalu case*.⁷³ Here, the Applicant had lost judicial challenges to an electoral result in the Ugandan Supreme Court, and had consequently filed a two-pronged suit against the Ugandan government in the EACJ claiming that the Council's failure to extend the jurisdiction of the Court since 2004⁷⁴ infringed Articles 6, 7(2) and 8(1)(c) of the Treaty. Uganda's failure to annotate on the Draft Protocol infringed the Treaty as it restricted the Ugandan people from enjoying the full rights of good governance, democracy, human rights and the rule of law encompassed in Article 6.⁷⁵ The Court affirmed that

⁶⁸ *Plaxeda Rugumba v Secretary General of the East African Community and Attorney General of Rwanda*, Ref No. 8 of 2010.

⁶⁹ *Plaxeda Rugumba v Secretary General of the East African Community and Attorney General of Rwanda*, Ref No. 8 of 2010.

⁷⁰ *Plaxeda Rugumba v Secretary General of the East African Community and Attorney General of Rwanda*, Ref No. 8 of 2010, para. 37.

⁷¹ *Independent Medico Legal Unit v Attorney General of Kenya*, Ref No. 3 of 2010.

⁷² *Independent Medico Legal Unit v Attorney General of Kenya*, Ref No. 3 of 2010, 4-6.

⁷³ *Honourable Sitenda Sibalu v Secretary General of the East African Community, Attorney General of Uganda, Honourable Sam Njumba and the Electoral Commission of Uganda*, Ref No. 1 of 2010, EACJ.

⁷⁴ This is when the *Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ* was written.

⁷⁵ *Honourable Sitenda Sibalu v Secretary General of the East African Community, Attorney General of Uganda*,

the era of unaccountable governance had passed, and stressed the importance of individual citizens holding their elected officials accountable in the manner in which they exercise their duties.⁷⁶ The EACJ found that the Secretary General was required by Article 29 to facilitate the Ugandan government's implementation of the protocol but failed to; and that the delay in extending the Court's jurisdiction directly contravened the principles of good governance.⁷⁷

From the analysis of the cases discussed above, one thing comes to the fore time and again – the fact that these are all clearly centred on violations of human rights. Thus, the EACJ is seen to be assuming jurisdiction in this regard. However, scholars have differed on this view, and their sentiments are discussed in the subsequent part of this discourse.

IV. A Purposive Interpretation: Contextualising the EACJ's Adjudication of Human Rights Cases

i. *Scholars' views on the human rights jurisdiction of the EACJ*

At this point, before we delve into the contextual nature of the EACJ's predicament, it is prudent that one considers the divergent views put forth regarding the Court's competence to decide human rights cases.

Ojienda notes that the indeterminacy of Article 27(2) of the Treaty⁷⁸ illustrates an attempt to cover future functions of the EAC, and the reference to an initial and other jurisdiction 'as will be determined' by the Council indicates that the Member States intended to develop its jurisdiction in phases.⁷⁹ He argues that this essentially means that the second set of areas of the EACJ's jurisdiction, which include human rights and are to be determined at a later date, and therefore, fall outside the current jurisdiction of the Court.⁸⁰ This view is

Honourable Sam Njumba and the Electoral Commission of Uganda, Ref No. 1 of 2010.

⁷⁶ Human Rights Decisions of the East African Court of Justice, June 2013 –<<https://www.opensocietyfoundations.org/briefing-papers/case-digests-human-rights-decisions-east-african-court-justice-june-2013>> on 7 February 2017.

⁷⁷ *Honourable Sitenda Sibalu v Secretary General of the East African Community, Attorney General of Uganda, Honourable Sam Njumba and the Electoral Commission of Uganda*, Ref No. 1 of 2010.

⁷⁸ This Article states that: 'The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction'.

⁷⁹ Ojienda T, "'Alice's adventures in wonderland": Preliminary reflections on the jurisdiction of the East African Court of Justice' 2(2) *East African Journal of Human Rights and Democracy*, 2004, 94.

⁸⁰ Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 16.

shared by Ruppel who argues that in the absence of express provisions vesting human rights jurisdiction on REC courts, the content of their founding treaties notwithstanding, lack such jurisdiction.⁸¹ Thus, in the absence of the relevant determination and adoption of the necessary protocol, it is said that the EACJ does not yet have jurisdiction over human rights.

However, the inference of lack of mandate is contested by some commentators who argue that the provision is simply not clear⁸² as opposed to those who interpret it to mean that the jurisdiction is lacking.⁸³ While Viljoen deems the exercise of a human rights jurisdiction by REC courts in the absence of express jurisdictional provisions as a necessary activism of the court,⁸⁴ Ebobrah regards it as the exercise of a 'derivative mandate' and a potential usurpation of the role of the legislative organs of the REC.⁸⁵ The author concurs with the views of Viljoen.

The provision is simply not clear, the Court's show of judicial activism is necessary. This position is driven by the premise that if Member States collectively agreed that the promotion and protection of human rights is fundamental to achieve economic integration as indicated in the Treaty, then it is only sensible that there should be some level of accountability in case of human rights violations. This view is also shared by some commentators who opine that gap-filling is exactly what courts must do, functioning as an anti-majoritarian device to guarantee individual rights against government abuse.⁸⁶

ii. *Qualifying the EACJ's treaty interpretation*

There is a global consensus that treaty interpretation should be governed by the Vienna Convention on the Law of Treaties (VCLT)⁸⁷ and that the VCLT

⁸¹ Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 4. See also Ruppel, 'Regional economic communities and human rights in East and Southern Africa', 281.

⁸² Viljoen F, *International Human Rights Law in Africa*, 504.

⁸³ Ruppel and Ebobrah argue that though the Treaty provides for broad protection with regard to human rights, the EACJ has no jurisdiction over human rights cases. Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 16.

⁸⁴ Viljoen F, *International Human Rights Law in Africa*, 497-498.

⁸⁵ Murungi L, 'Revisiting the role of sub-regional courts in the protection of human rights in Africa' Unpublished LLM Thesis, University of Pretoria, Pretoria, 2009, 4. See also Ebobrah S, 'Litigating human rights before sub-regional courts in Africa', 82.

⁸⁶ Pauwelyn J and Elsig M, 'The politics of treaty interpretation: Variations and explanations across international tribunals' *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, 2013, 455 –<[http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Pauwelyn/Publications/Pauwelyn-Elsig%20Corrected%20Proofs%20\(1\).pdf](http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Pauwelyn/Publications/Pauwelyn-Elsig%20Corrected%20Proofs%20(1).pdf)> on 21 November 2017.

⁸⁷ *Vienna Convention on the Law of Treaties*, 23 May 1969 155 UNTS 331.

rules apply to all international tribunals irrespective of their institutional setup, subject matter or geographical scope.⁸⁸ However, there has been some divergence by international tribunals in the practical application of the VCLT rules, with a variation in interpretation choices.⁸⁹ Perhaps shedding some light on the different interpretation choices will aid in understanding why the EACJ has assumed a mandate that was not expressly given to them.

The general rules for interpreting treaties are found in Articles 31 to 33 of the VCLT and encompass two main principles. The first principle is that treaties must be interpreted in *good faith*, in accordance with the ‘ordinary meaning’ of the terms or text of the treaty, in their ‘context’, and in light of the treaty’s ‘object and purpose’.⁹⁰ The second principle is that the ‘preparatory work of the treaty and the circumstances of its conclusion’ are only secondary sources of interpretation to confirm meaning established under the first principle or in case the meaning of the treaty remains unclear or leads to an absurd result.⁹¹ That being said, there is a general agreement that the application of these VCLT rules leaves ample ‘wiggle room’ and allows different tribunals to prioritise different interpretative methods or elements (that is text, context or purpose).⁹²

Pauwelyn and Elsig outline three broad types of dominant hermeneutic⁹³ and the author deduces that the EACJ’s adjudication over human rights cases is qualified by the so-called teleological approach. This is where the focus is not so much on the literal interpretation of the treaty or the subjective intentions of the drafters themselves, but on the underlying objectives these drafters were attempting to achieve.⁹⁴ The author submits that this is perhaps why the judges of the EACJ keep reiterating the fact that the promotion and protection of human rights is both a fundamental and operational principle of the EAC,⁹⁵ necessary for achieving the objectives of the Community. With regard to how the EACJ construes its own role or function, the aforementioned scholars provide two options. The first is a deferential, strict constructionist approach, dubbed the

⁸⁸ Pauwelyn J and Elsig M, ‘The politics of treaty interpretation’, 445.

⁸⁹ Pauwelyn J and Elsig M, ‘The politics of treaty interpretation’, 445.

⁹⁰ Article 31(1), *Vienna Convention on the Law of Treaties* (Emphasis mine).

⁹¹ Article 32, *Vienna Convention on the Law of Treaties*.

⁹² Pauwelyn J and Elsig M, ‘The politics of treaty interpretation’, 448.

⁹³ These are (a) the text of the treaty, (b) the intent of the parties to the treaty, or (c) the underlying objective that the treaty seeks to attain. Pauwelyn J and Elsig M, ‘The politics of treaty interpretation’, 450.

⁹⁴ Pauwelyn J and Elsig M, ‘The politics of treaty interpretation’, 451.

⁹⁵ Article 6 and Article 7, *Treaty Establishing the African Economic Community*.

work-to-rule, and the second is a more activist, gap-filling approach.⁹⁶ From the cases explored above, the author arrives at the conclusion that the EACJ employs a gap-filling approach, evident in the fact that even when the EAC Treaty does not explicitly regulate a question brought before the Court, it has, based on its purposive interpretation of the Treaty, construed an applicable rule⁹⁷ such as a breach of the rule of law or of the principle of good governance.

iii. Understanding the EACJ's judicial activism

Some scholars have conceptualised what they refer to as the 'paradox of international adjudication' which describes a situation where there is more demand for treaty interpretation, given the ambiguity and rigidity of treaties; yet at the same time there is less supply of treaty interpretation, given the reluctance of states and tribunals to deal judicially with highly contested questions between sovereign states.⁹⁸

Pauwelyn and Elsig identify three institutional features that determine whether an international tribunal will exercise judicial activism or not. For the purposes of this discussion, the author will examine only two.⁹⁹ The first of these is the tribunal's lifespan. The theory behind this is that whether a tribunal is established as a permanent institution or is created *ad hoc* strongly determines the motivation of tribunal members.¹⁰⁰ An international tribunal that is established as a permanent institution¹⁰¹ reflects the support of its creators (sovereign States) and suggests that they intend to engage in long-term co-operation with each other.¹⁰² These courts are usually confronted with a stream of cases and are characterised by constant interaction, which allows them to develop more systemic approaches to interpretation, including, over time, more focus on an evolutionary interpretation and using precedents to build case law coherence.¹⁰³

By contrast, an *ad hoc* tribunal, as is the EACJ, looks at interpretation more on a case-by-case basis since the principals' support is not only limited, but

⁹⁶ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 454.

⁹⁷ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 455.

⁹⁸ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 447-448.

⁹⁹ 'This is because these two features are the most relevant to the EACJ's situation.

¹⁰⁰ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 465.

¹⁰¹ One such court is the ECOWAS Community Court of Justice. See Alter K, Helfer L and McAllister J, 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' 107(737) *The American Journal of International Law*, 2013, 746.

¹⁰² Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 465.

¹⁰³ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 465.

the lack of a long-term co-operation impedes the development of a systemic approach of interpretation and leads to more attention paid to parties' intent, and a largely original and self-contained interpretation.¹⁰⁴ The common thread in both scenarios is the fact that the normative support of strong principals for an international tribunal affects the way judicial agents read their mandate.¹⁰⁵ The result is that a court such as the EACJ, with minimal support from its principles, is likely to construe a broad interpretation of their mandate as determined on a case-by-case basis.

The second institutional feature is known as the composition of constituency which is concerned with who has standing before the court and the type of actors involved.¹⁰⁶ Where an international court operates only to solve a dispute between two parties, it will be inclined to focus on party intent, and will take a more deferential approach to interpretation. On the other hand, where a court's audience goes beyond the governments that set up the tribunal, for example individual victims of human rights violations, then we expect the court's motivations to reflect a teleological or more activist interpretation.¹⁰⁷ This explains why some of the most contentious or influential cases in the EACJ's docket have involved private litigants. Where private parties have a *locus standi*, given the absence of intergovernmental gate-keeping determining which cases will be brought, courts feel inclined to interpret rules more in light of individual rights than state-based rights, and test more activist types of interpretation.¹⁰⁸ This may explain some of the activism of the EACJ.

iv. *State sovereignty in the formation of regional courts*

One of the obstacles predominant in regional integration is the 'recognition and awareness that being part of a common project and a common supranational-like entity implies a loss of some level of sovereignty and the possibility of being bound against one's own will'.¹⁰⁹ In the case of the EAC, recent events¹¹⁰ demonstrate that this awareness has certainly not fully registered among all parties.

¹⁰⁴ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 465.

¹⁰⁵ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 465.

¹⁰⁶ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 465.

¹⁰⁷ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 465-466.

¹⁰⁸ Pauwelyn J and Elsig M, 'The politics of treaty interpretation', 466.

¹⁰⁹ Van der Mei A, 'Regional integration', 405.

¹¹⁰ Refer to Part II and Part III of this paper.

Of all the theories of delegation pointed out by Gathii,¹¹¹ it becomes apparent that the EACJ's situation cannot be neatly pigeon-holed into any one of them exclusively. Other commentators have opined that the institutional structure of the EAC mirrors and seems to have been inspired by the European Community (EC). It is also said that the EACJ undoubtedly draws its inspiration from its European counterpart, the European Court of Justice (ECJ), and views legal integration as foundational in the wider matrix of East African integration.¹¹² It is easy to see how one can arrive at this conclusion, given the aggressive role being played by the EACJ in asserting its authority and interfering in the functions of national parliaments. This mirrors the experience of the ECJ, which was once politically weak and did not stray far from the interests of the European governments, but now has significant political authority and boldly rules against their interests with no repercussions.¹¹³

One of the theories that describes the relationship between partner states and regional courts is the principal-agent (P-A) theory.¹¹⁴ Here, the Agents (the regional courts) are always under the control of the Principals (Partner States); and re-contracting threats¹¹⁵ are the predominant way in which States influence the decision-making of such regional courts.¹¹⁶ As much as semblances of this theory were witnessed when amendments to the Treaty were made in response to an unfavourable ruling by the EACJ, member states have not always been successful in securing complete control of the Court,¹¹⁷ rendering this theory inapplicable to the EACJ.

In the *Nyong'o case*, a classic example of judicial fiat, the Court observed that:

'When the Partner States entered into the treaty, they embarked on the proverbial journey of thousands of miles which of necessity starts with one step. To reach the desired destination...there are bound to be hurdles on the way. One such hurdle is

¹¹¹ These include: The Principal Agent theory; International Courts as Trustees; the Altered Politics framework; the Constrained Independence theory; and the Bounded Discretion Theory. Gathii J, 'Mission creep or a search for relevance', 283-291.

¹¹² Van der Mei A, 'Regional integration', 404-406.

¹¹³ Alter K, 'Who are the "masters of the treaty"?': European governments and the European Court of Justice' 52(1) *International Organization*, 1998, 122.

¹¹⁴ Gathii J, 'Mission creep or a search for relevance', 283.

¹¹⁵ This could mean either firing the Agents (removing judges from office) or rewriting the terms of their contracts (Treaty amendments).

¹¹⁶ Alter K, 'Agents or Trustees? International courts in their political context' 14(1) *European Journal of International Relations*, 2008, 33-36.

¹¹⁷ This has been due to the sustained advocacy and support by human rights litigants and organisations across East Africa who have urged the Court to adjudicate violations of the rule of law, social justice and human rights despite member states' disapproval of certain rulings delivered by the Court. Alter K et al, 'Backlash against international courts in West, East and Southern Africa', 305-306.

balancing individual state sovereignty with integration. While 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 in limited areas to enable them to play their role*.¹¹⁸

This observation resonates with European Union lawyers in that it resembles the ECJ's own sentiments in the *Van Gend en Loos case*:¹¹⁹ 'the Community constitutes a new legal order of international law for the benefit of which the States have *limited their sovereign rights*, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.¹²⁰

From the foregoing arguments, it becomes clear that the Member States of the EAC did not intend to give the EACJ human rights jurisdiction, as evident in their formal opposition and perpetual delay in adopting the Protocol intended to bring this into effect. Further, the EACJ needs to be cognisant of the fact that the States have each ceded a part of their sovereignty to allow the Court to exercise its jurisdiction over certain matters pertaining to the Treaty; and so, it must be careful not to overstep its mandate or unnecessarily step on Member States' toes while discharging its noble duties as the 'Temple of Justice'.

v. Arguments in favour of the EACJ

On the flip side of the coin is the argument that procedural hurdles and technicalities should be eliminated in the implementation of human rights, given their sensitive nature. This notion was elicited in the case of *Michelot Yogogombaye v Republic of Senegal*¹²¹ which was brought before the ACHPR and was dismissed because Senegal had not expressly signed the declaration accepting the Court's jurisdiction. However, in a separate opinion,¹²² Justice Ouguergouz stressed the idea that procedural matters should not be a bar to the realisation of human rights and that the principle of *forum prorogatum*¹²³ should have been applied to

¹¹⁸ *Peter Anyang' Nyong'o & others v Attorney General of Kenya & 5 others*, Ref No. 1 of 2006 (Emphasis mine).

¹¹⁹ *Van Gen den Loos v Nederlandse Administratie der Belastingen* (1963) ECR 1.

¹²⁰ *Van Gen den Loos v Nederlandse Administratie der Belastingen* (1963) ECR 1.

¹²¹ *Michelot Yogogombaye v Republic of Senegal*, Application No. 1 of 2008.

¹²² Separate Opinion of Justice Fatsah Ouguergouz, 2008 –<http://www.jurisafrica.org/html/pdf_judge-fatsah-ouguergouz.pdf> on 15 February 2017.

¹²³ This means 'prorogation of competence' and applies when a State has not recognised the jurisdiction of the Court at the time the application to institute proceedings is filed against it. If so, the State has the possibility of accepting such jurisdiction subsequently to enable the Court to entertain the case; thus, the Court has jurisdiction as of the date of acceptance in virtue of this rule. Obtained from the International Court of Justice 'Basis of the Court's jurisdiction' –<<http://www.icj-cij.org/en/basis-of-jurisdiction>> on 15 February 2017.

this case.¹²⁴

In accordance with this line of thought, the EACJ Rules of Procedure¹²⁵ were written with the view of removing many of the procedural technicalities that make litigation in East African judiciaries complicated, lengthy and expensive.¹²⁶ Nonetheless, the Member States tried to add certain technicalities in accessing the Court in their amendment of the Treaty, such as the two-month time limit in filing cases, which was meant to serve as a roadblock in the Court's already-assumed role of protecting human rights across the region.¹²⁷ Despite this, the EACJ proved over and out that it will always be one step ahead by maintaining a purposive approach to the interpretation of the Treaty and thus manipulating these technicalities to the aggrieved party's advantage as seen in the *Rugumba case*.

The author submits that the provision of a later human rights mandate on conclusion of a protocol is a State ploy to prevent the actualisation of human rights. After all, it is not plausible to deny the EACJ jurisdiction on human rights cases when the Treaty clearly calls for the promotion and protection of human rights on more than one occasion.¹²⁸ Many have commended the EACJ for deploying an 'elastic interpretative methodology' that has allowed it not only to push the textual boundaries of its jurisdiction,¹²⁹ but also to guarantee an avenue for the progression of human rights in Eastern Africa – a softer (yet equally important) supplement to the region's goal of economic liberalisation, which will ultimately raise the living standards of the East African people.

Following the discourse that has ensued above, and informed by the arguments and theories that have been propounded, the author will now propose an appropriate solution and conclude the study in the subsequent part.

V. Recommendations and Conclusion

i. *The way forward*

It is crucial, at this moment, that the respective roles of the EACJ, national

¹²⁴ Separate Opinion of Justice Fatsah Ouguergouz, 2008.

¹²⁵ *The East African Court of Justice Rules of Procedure*, 2013 –<http://eacj.org/?page_id=1271> on 16 February 2017.

¹²⁶ Gathii J, 'Mission creep or a search for relevance', 274.

¹²⁷ Gathii J, 'Mission creep or a search for relevance', 268.

¹²⁸ Articles 6 and 7, *Treaty for the Establishment of the East African Community*.

¹²⁹ Gathii J, 'Mission creep or a search for relevance', 294.

courts and areas of co-operation be re-examined and clarified, especially as the EAC sinks its feet deeper into regional activities, and the integration process is in top gear. The necessity of organs like the EACJ to be fully empowered to effectively manage the deep ends of the integration process cannot be emphasised enough. This will be particularly instrumental as the EAC plunges deeper into economic integration where matters will undoubtedly get more daunting, a situation that will create high demand for a vibrant independent judicial body to calm the waves and hold the community together.

From the foregoing discussion, it is impossible to miss the fact that the EACJ has proven on numerous occasions that it does possess the legal tools to make an active contribution to the East African integration process, and is more than willing to use these to ensure that the process proceeds within the limits of the rule of law.¹³⁰ However, this has not always been an easy task for the Court which faces major opposition from governments of Member States. Nonetheless, the EACJ must remain alive to the fact that by acting as the custodians of the community's rule of law, interpreting the Treaty and resolving disputes emanating from the application of the Treaty, it occupies a vantage point in defining both the course and quality of integration.

Some scholars have expressed concerns about whether the multiplicity of human rights adjudicatory bodies is problematic insofar as it facilitates the fragmentation of international human rights law in Africa. This is especially so given the fact that the ACHPR also sits in Arusha and has a broad and uncontested human rights mandate. These scholars often cite the lack of clarity from inconsistent legal rulings, and the fear that governments may use that inconsistency to follow the most lenient interpretations of their human rights obligations.¹³¹ To address this, it is submitted that sub-regional tribunals actually offer a way to minimise the 'obstruction, haggling, and delay' that many observers associate with the continental human rights system.¹³² For litigants, sub-regional litigation provides a corrective to the limited avenues of legal recourse available to victims of human rights abuses in Africa.¹³³ For the judges of sub-regional courts, the adjudication of human rights provides an opportunity to expand their dockets and develop legal doctrines.¹³⁴ In any case, if the sub-regional courts' decisions also complement or extend the norms of the African Charter, so much

¹³⁰ Van der Mei A, 'Regional integration', 424.

¹³¹ Alter K et al, 'A new international human rights court for West Africa', 778.

¹³² Alter K et al, 'A new international human rights court for West Africa', 778.

¹³³ Alter K et al, 'A new international human rights court for West Africa', 778.

¹³⁴ Alter K et al, 'A new international human rights court for West Africa', 778.

the better.¹³⁵

The author is therefore of the opinion that the extension of the EACJ's jurisdiction to include human rights is long overdue; and the adoption of the Protocol to effectuate this should be of highest priority to the EAC member states right now. In applying the teleological reading of a treaty as prescribed in the VCLT,¹³⁶ it is clear that the member states had, in fact, intended to confer this jurisdiction upon the Court from a reading of Article 27(2) of the EAC Treaty. Thus, delaying this agenda any longer will only cause a farrago of opinions among Court officials and nationals when it comes to handling cases containing allegations of human rights abuses. In this regard, States should stop side-lining the issue and adopt the Protocol in order not to impede, but to effectively speed up the process of regional integration.

ii. Conclusion

In the sixteen years of its existence, the EACJ has certainly faced numerous obstacles in the dispensation of its functions. Most of these have been attributed to its slow start and the Council's failure to extend the jurisdiction of the Court to include human rights as was intended by Article 27(2) of the Treaty. This has undoubtedly caused conflicts between the EACJ and member states when most of the cases in the Court's docket are human rights violations. Nonetheless, the Court has managed to adjudicate these cases, despite their apparent lack of jurisdiction, by applying a purposive interpretation to the Treaty and disguising these violations as breaches of fundamental and operational principles such as good governance and the rule of law. However, it is as clear as day that these are human rights cases and the bitter truth is that the EACJ has been dragging member state governments kicking and screaming to hold them accountable for such violations without the explicit mandate to do so; a situation that member States describe as a subversion of their sovereignty.

As much as this is true, it is not lost on this author that the Treaty calls for the protection and promotion of human rights in accordance with the ACHPR, a provision that the Court cannot shy away from. Thus, the argument of an implied mandate for human rights is compelling. But while it does not absolutely bar exercise of jurisdiction, it does not achieve optimum protection for rights either, and is inconsistent with the commitment of RECs to protect human

¹³⁵ Alter K et al, 'A new international human rights court for West Africa', 778.

¹³⁶ Article 31(2), *Vienna Convention on the Law of Treaties*.

rights which is increasingly evident in their founding documents. Moreover, it is important to note that these principles were not added merely as decorative features but with the intention that member states would abide by them. It is ultimately the Court's duty to evaluate whether these principles are being upheld. Thus, the EACJ finds itself backed into a corner as it cannot enforce the very rights it endeavours to protect without the explicit jurisdiction to do so.

In essence, the Court is not really usurping the States' authority in acting as a check and balance on the protection of human rights as this is a principle clearly embedded in the Treaty. While some may consider the venturing of the EACJ into human rights cases as an aversion of its main mandate, which is economic integration, the author argues against this line of thought with the theoretical claim that international institutions, like their domestic counterparts, respond and adapt to changing norms and societal pressures. Going by this view, the EACJ can be seen to be simply addressing the more pertinent issues in the current economic setting of the East African Community, regardless of whether these are human rights violations or not. It is imperative, therefore, that the Council stops hiding behind the bush and accords requisite attention to the EACJ. The Protocol conferring human rights jurisdiction to the Court should be adopted at the earliest opportunity in order to complement the provisions in the Treaty and ensure smooth sailing towards a better and more successful East African Community.