

SAFEGUARDING HUMAN AND PEOPLES' RIGHTS WITHIN THE AGENDA OF THE EAST AFRICAN COMMUNITY

PROGRESS, CHALLENGES AND PROSPECTS





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Foreword

International concern for human rights is not a novel concept. With the rise of regional integration through the establishment of Regional Economic Communities (RECs) came the motivation to establish regional human rights systems that would build on the human rights protections accorded in the international system. The East African Community (EAC), as part of its fundamental principles, requires member states to promote good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities and gender equality. Ultimately, EAC member states are required to recognise, promote and protect human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights (African Charter).

Yet, despite these various progressive provisions, the EAC is still encumbered by a concerning and chequered human rights record. States have continued to act in ways that are antithetical to their human rights obligations, and this has in turn suggested the existence of deficiencies within the EAC's human rights framework. A discourse highlighting the positive aspects of the various mechanisms within the system while also pointing out the challenges, be they of a normative or institutional nature, is therefore critical to any wider discussion of reforms.

It is against this backdrop that the Kenya Human Rights Commission (KHRC) resolved to commission the development of this publication that analyses the EAC human rights framework, its interplay with the wider African human rights system and the experiences of practitioners in utilising the relevant judicial and quasi-judicial mechanisms in the system. At 30 years of existence, the KHRC is one of Kenya's and indeed the region's premier non-governmental organisation (NGO). The KHRC's mission is to root human dignity, freedoms and social justice in Kenya and beyond. The KHRC mandate is to enhance human rights centred governance at all levels. Therefore, the pursuit of an inquiry towards a rights-based and people-centred EAC falls well within the mission and mandate of the KHRC.

Through this publication, the KHRC is pleased to present a compilation that considers what ails the EAC human rights framework as it currently exists, proposes recommendations through which it can be improved and conceives tangible roles that civil society can play in seeking to realise an EAC integration agenda that truly serves the people by upholding human dignity and protecting human and peoples' rights.

Davis Malombe

Executive Director, Kenya Human Rights Commission

FEBRUARY 2023.

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Abbreviations and Acronyms

ACDEG	African Charter on Elections, Democracy and Governance
ACERWC	African Charter on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
AfCHPR	African Court on Human and Peoples' Rights
AGA	African Governance Architecture
AMU	Arab Maghreb Union
AU	African Union
CEN-SAD	Community of Sahel-Saharan States
COMESA	Common Market for Eastern and Southern Africa
CSOs	Civil society organisations
DRC	Democratic Republic of the Congo
EAC	East African Community
EACJ	East African Court of Justice
EACSOF	East African Civil Society Organisations' Forum
EALA	East African Legislative Assembly
EALS	East African Law Society
ECCAS	Economic Community of Central African States
IGAD	Intergovernmental Authority on Development
KHRC	Kenya Human Rights Commission
NGOs	Non-Governmental Organisations
PALU	Pan-African Lawyers Union
REC	Regional Economic Communities

SADC Southern African Development Community
SCIJA Sectoral Council on Legal and Judicial Affairs

Table of Key Policies and Instruments

African Union

African Charter on Democracy, Elections and Governance

African Charter on Human and Peoples' Rights

African Charter on the Rights and Welfare of the Child

Agenda 2063, the Africa We Want

Human Rights Strategy for Africa

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa

Rules of Procedure of the African Commission on Human and Peoples' Rights (2020)

Treaty Establishing the African Economic Community

East African Community

East African Community Vision 2050: Vision for Social Transformation

East African Court of Justice Strategic Plan (2018-2023)

East African Legislative Assembly Rules of Procedure (2001)

Protocol on the Establishment of the East African Common Market

Treaty for East African Cooperation

Treaty for the establishment of the East African Community

Economic Community for West African States

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa

Protocol AP.1/7/91 on the Community Court of Justice

Revised Economic Community of West African States (ECOWAS)) Treaty.

Common Market for Eastern and Southern Africa

Treaty for the Common Market for Eastern and Southern Africa

Southern African Development Community

Treaty of the Southern African Development Community

Economic Community for Central African States

Treaty to the Economic Community of Central African States

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African Commission on Human and Peoples' Rights (Ogiek Indigenous Community) v Kenya (merits) (2017) 2 AfCLR 9

African Commission on Human and Peoples' Rights v Libya (2016) 1 AfCLR 153

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Akwasi Boateng and Others v Republic of Ghana, AfCHPR , Application No. 059/2016

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Alfred Agbesi Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235

Ally Rajabu v Tanzania (merits and reparations) (2019) 3 AfCLR 539

Anudo Ochieng Anudo v Tanzania (merits) (2018) 2 AfCLR 248

Dexter Eddie Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99

Ingabire Victoire Umuhoza v Rwanda (jurisdiction, withdrawal) (2016) 1 AfCLR 540

Ingabire Victoire Umuhoza v Rwanda (merits) (2017) 2 AfCLR 165

Jean-Claude Roger Gombert v Côte d'Ivoire (jurisdiction and admissibility) (2018) 2 AfCLR 270

Jebra Kambole v Tanzania, AfCHPR, Application No. 018/2018, Judgment of 15 July 2020

Kenedy Gihana and Others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

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African Network for Animal Welfare (ANAW) v the Attorney General of the United Republic of Tanzania, EACJ Ref. No. 9 of 2010

Burundian Journalists Union v Attorney General of the Republic of Burundi, EACJ Law Report, 299 (2012 – 2015)

Calist Andrew Mwatela and 2 Others V East African Community, EACJ Ref. No. 1 of 2005

Centre for Constitutional Governance and 3 Others v the Attorney General of the United Republic of Tanzania, EACJ Ref. No. 43 of 2020

Centre for Food and Adequate Living Rights (CEFROHT) Limited and 3 Others v the Attorney General of the Republic of Uganda and 2 Others, EACJ Ref. No. 39 of 2020

Democratic Party and Mukasa Mbidde v the Secretary-General of the East African Community and the Attorney General of the Republic of Uganda, EACJ Ref. No. 6 of 2011, First Instance Division

Democratic Party v Secretary-General EAC and Others, EACJLR [2012 – 2015]

Democratic Party v the Secretary-General and the Attorney General of the Republic of Uganda, the Attorney General of the Republic of Kenya, the Attorney General of the Republic of Rwanda and the Attorney General of the Republic of Burundi, EACJ Ref. No. 2 of 2012

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East African Law Society and 4 Others v the Attorney General of Kenya and 3 Others, EACJ Ref. No. 3 of 2007

East African Law Society v Secretary-General of the EAC, EACJ Ref. No. 7/2014

Emmanuel Mwakisha Mjawasi and 748 Others v Kenya, EACJ Ref. No. 2 of 2010, Judgment of 29 September 2011

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Freeman Mbowe and 3 Others, Legal Human Rights Centre V the Attorney General of the United Republic of Tanzania, EACJ Consolidated Ref. No. 3 and 4 of 2019

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Media Council of Tanzania and Others v Tanzania [2015 -2017] EACJLR

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

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Democratic Republic of Congo v Burundi, Rwanda and Uganda, ACHPR Communication 227/99, (2004) AHRLR 19 (ACHPR 2003)

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ECOWAS Community Court of Justice

Federation of African Journalists v. Gambia, ECW/CCJ/JUD/04/18

African Committee of Experts on the Rights and Welfare of the Child

Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya) v Kenya, ACERWC Communication 002/2009, adopted on 22 March 2011

Legal and Human Rights Centre and Centre for Reproductive Rights (on Behalf of Tanzanian Girls) v Tanzania, ACERWC Communication 001/2019 received on 17 June 2019

Michelo Hunsungule and Others (on behalf of children in Northern Uganda) v Uganda, ACERWC Communication 001/2005, adopted at the 21st Ordinary Session, 15 to 19 April 2013

Nubian Community in Kenya v Kenya, ACERWC Communication 317/2006, adopted during the 17th Extra-Ordinary Session, 19 to 28 February 2015.

Chapter 1

Introduction: In Pursuit of a Rights-Based and People-centred East African Community

Andrew Songa

Keywords: Integration, human rights, African Union, East Africa Community

Abstract

This chapter sets the stage for the publication by locating the nexus between human rights and Africa's continental integration and how this translates into the East African Community's integration framework. It discusses the African Union's normative frameworks that are aimed at fostering the continent's integration as well as the role of Regional Economic Communities in facilitating this effort. It then highlights a series of issues affecting the East African Community's human rights framework and concludes by providing a synopsis of the publication's subsequent chapters; as a doorway for readers to begin imagining the opportunities, challenges, lessons and recommendations that are available in the pursuit of a people-centred and rights-based East African Community.

1 Human rights as a regional integration agenda

This publication explores the importance of promoting and protecting human and peoples' rights as part of the integration agenda for the East African Community (EAC). It does so by considering the EAC human rights framework as it currently exists, analysing its relationship with the wider African human rights system and making concrete recommendations on how the framework can be improved to provide greater protections for the EAC's people.

Under the collective vision of Agenda 2063, African states have prioritised democracy, good governance, and respect for human rights, justice and the rule of law as essential ingredients for the continent's transformation towards inclusive and sustainable development.¹ To operationalise this aspiration, African states also recognise the need for strong, capable institutions that provide transformative leadership at all

¹ 'Our Aspirations for the Africa We Want' African Union' <https://au.int/agenda2063/aspirations> (accessed 25 January 2022)

levels. This approach is embodied in the African Union's (AU) Africa Governance Architecture (AGA) which is defined as "a platform for dialogue between the various stakeholders who are mandated to promote good governance and strengthen democracy in Africa, in addition to translating the objectives of the legal and policy pronouncements in the AU Shared Values".²

The AGA framework at its first level brings together AU institutions and Regional Economic Communities (RECs) as they broadly possess formal mandates to promote and sustain democracy, good governance and human rights on the continent. At the second level, the AGA framework provides for the involvement of other stakeholders who include the private sector, development partners, civil society and the diaspora.³ It is for this reason that a focus on the effectiveness and functionality of RECs becomes essential towards realising the promotion and protection of human rights as a continental aspiration.

RECs are appreciated by the AU as being essential tools for regional cooperation and integration as they enable member states to foster valuable collaborations in furthering key norms on democracy, governance, security and development. This is embodied in the 1991 Treaty Establishing the African Economic Community (Abuja Treaty) which, among other things, aims to strengthen existing RECs and establish other communities where they do not exist, while also harmonising and coordinating policies among existing and emerging communities. Consequently, the AU has recognised eight RECs on the continent: the Arab Maghreb Union (AMU), Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).⁴

These RECs provide valuable in-depth knowledge of the political economies of their respective regions, complement the AU by developing norms that embody the AU shared values and establish frameworks for implementation at their respective levels. The African Union Human Rights Strategy for Africa aptly captures this role as follows:⁵

At the regional level, RECs contribute to the promotion, protection, and strengthening of the human rights system on the continent by encouraging its members to ratify, domesticate and

² 'AGA, African Union' <https://au.int/en/aga> (accessed 25 January 2022)

³ 'About AGA African Union', accessed 25 January 2022, <https://au.int/aga/about>.

⁴ Africa Peer Review Mechanism (APRM) and African Governance Architecture (AGA), 'The Africa Governance Report: Promoting African Union Shared Values' (African Union, 2019) p 81.

⁵ African Union (AU), 'Human Rights Strategy for Africa' [37]

implement human rights instruments. RECs shall also play an important role in the harmonization and coherence of policies, programmes and institutional co-ordination at the continental level.

Indeed, while the African human rights system is founded on obligations borne by states, it requires the effective cascading of norms from the continental level to the RECs and then to states where the fundamental rights and freedoms should be felt in the daily lived realities of the people. Among the constitutive objectives of the AU is to advance the political and socio-economic integration of the continent, advance democratic governance and to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter).

Article 1 of the African Charter places a primary responsibility on states to put in place legislative and other measures that would give effect to the rights contained in the Charter. This means that in their relations, which include being organised in RECs, states must act in a manner that furthers the promotion and protection of human and peoples' rights; an obligation that should reflect in the normative and institutional frameworks of RECs. Additionally, Article 45(3) of the African Charter mandates the African Commission on Human and Peoples' Rights (ACHPR) to promote and protect human and peoples' rights on the continent. As part of its functions, the ACHPR is required to "cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights", thereby opening the door to cooperation and collaboration with RECs.

Beyond treaty-based obligations that give effect to human and peoples' rights, it has been conceded that human rights are integral to facilitating successful integration of the continent and its peoples. It is now well-established that human rights are in fact interdependent and interconnected with economic development, which is the primary motivation for integration. Ruppel describes this as follows:⁶

This interconnection can be seen as a two-way relationship insofar as economic development is obliged to respect human rights in a democratic society. Conversely, human rights can be given more effect through economic growth, as one outcome of economic growth is the increasing availability of resources, resulting in the reduction of poverty and a higher standard of living.

With human and peoples' rights being recognised as an essential ingredient to regional integration, it becomes important to evaluate the normative and institutional arrangements of RECs and whether they are in fact up to the task of facilitating the promotion and protection of these rights.

⁶ Oliver C. Ruppel, *Regional Economic Communities and Human Rights in East and southern Africa* (2009) p 279

2 East African Community and human rights

The EAC was first established in 1967 but was subsequently dissolved in 1977 on account of ideological differences in the political and economic approaches of its then member states which were Kenya, Tanzania and Uganda.⁷ A series of negotiations then led to the re-establishment of the EAC when the Treaty for the Establishment of the East African Community (EAC treaty) came into force on 7 July 2000. The EAC now consists of Burundi, Kenya, Rwanda, South Sudan, Tanzania, Uganda and most recently, the Democratic Republic of Congo (DRC). With the entry of DRC in April 2022, the EAC has an estimated population of 300 million persons, a land mass of 4.8 million square kilometres and, as of 2019, a combined Gross Domestic Product of US\$ 240 billion.⁸

The vision of the EAC is “to be a prosperous, competitive, secure, stable and politically united East Africa”⁹ made operational through a customs union, a common market, a monetary union, and eventually a political federation.¹⁰ It is within this overall vision of prosperity, political and social cohesion and stability that the advancement of human and peoples’ rights should reside. Indeed, the EAC Treaty at Article 6(d) recognises as one of its fundamental principles, the promotion and protection of human and peoples’ rights as outlined in the African Charter. This stands along other fundamental principles which include democracy, accountability, the rule of law, transparency, social justice, equal opportunities and gender equality. These provisions have also been reinforced through policies advanced by the EAC. The EAC Vision 2050, which is the region’s blueprint for socio-economic transformation and development, sets out good governance, peace and security as key cross-cutting issues to be realised through entrenching democratic values, human rights, access to justice and the rule of law.

The implementation of the mandate on human and peoples’ rights rests on the various organs of the EAC. At the political level, the Summit of Heads of State and Government (Summit) makes political decisions on behalf of the community, while the Council of Ministers (Council) gives effect to these decisions by way of regulations and policies. This is further aided by the Co-ordination Committee which brings together permanent or principal secretaries, and the Sectoral Committees which conceptualise and monitor the implementation of programmes. Illustratively, in 2008, the Council adopted the EAC Plan of Action on the Promotion and Protection of Human Rights in East Africa.¹¹ The East African Legislative Assembly (EALA) is mandated to discharge

⁷ Viljoen as cited by Ruppel, *ibid*, p 301.

⁸ ‘Overview of EAC’, <https://www.eac.int/overview-of-eac> (accessed 30 January 2022)

⁹ *Ibid*.

¹⁰ Article 5(2) of the Treaty for the Establishment of the East African Treaty (EAC Treaty) (1999).

¹¹ *Supra* Ruppel p. 305.

law-making, representative and oversight responsibilities. Notably for human and peoples' rights, the EALA has adopted the following: the EAC Human Rights Bill, 2012;¹² the East African Community Persons with Disabilities Bill, 2015;¹³ and the report on the legal framework and implementation of policies on the rights of children.¹⁴

The East African Court of Justice (EACJ) is established under the EAC treaty as the judicial body with the responsibility of ensuring adherence to law in the interpretation, application and compliance with the Treaty. The Court does not have explicit jurisdiction to deal with human rights cases. Article 27(2) of the EAC Treaty requires the jurisdiction of the Court (including the issue of human rights) to be made operational by way of a protocol to be concluded by the Council. However, even in the absence of the stated protocol, the EACJ has through its judgments demonstrated, in the words of one author,¹⁵ its "determination to fulfil its role, exercise its independence, defend the rule of law and promote good governance in the region". In particular, the Court has used "a mix of judicial activism and creative interpretation"¹⁶ to address human rights violations as part of its overall interpretative mandate with regard to the EAC Treaty and in particular, the Treaty's objectives, fundamental principles and operational principles. This understanding was captured in *James Katabazi and 21 others V Secretary-General of the East African Community and Attorney General of the Republic of Uganda* where the court stated:¹⁷

While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.

With the normative and institutional frameworks in place, what are the lived realities for the people of the EAC?

¹² 'Bill on Human Rights Is Passed by EALA –East African Legislative Assembly', <https://www.eala.org/index.php/media/view/bill-on-human-rights-is-passed-by-eala> (accessed 2 February 2022)

¹³ 'EALA Passes Bill on PWDs, Wants Dignified, Humane Treatment for All' <https://www.eac.int/press-releases/461-694-729-eala-passes-bill-on-pwds-wants-dignified-humane-treatment-for-all> (accessed 2 February 2022)

¹⁴ 'EALA Adopts Report on Child Rights, Wants Them Fully Protected' <https://www.eac.int/press-releases/207-235-360-eala-adopts-report-on-child-rights-wants-them-fully-protected> (accessed 2 February 2022)

¹⁵ Helen Trouille, 'The origins, jurisdiction and authority of the East African Court of Justice', in Jean-Marc Trouille, Helen Trouille and Penine Uwimbabazi (eds), *The East African Community: Intra-regional Integration and Relations with the EU* (New York, Routledge: 2021).

¹⁶ V Lando, 'The Domestic Impact of the Decisions of the East African Court of Justice' (2018) 18 African Human Rights Law Journal 463-485.

¹⁷ *James Katabazi and 21 Others V Secretary-General of the East African Community and Attorney General of the Republic of Uganda*, EACJ Ref. No. 1 of 2007 <https://www.eacj.org/?cases=james-katabazi-and-21-other-vs-secretary-general-of-the-east-african-community-and-attorney-general-of-the-republic-of-uganda> (accessed 2 February 2022)

While Burundi and South Sudan are not rated and with the exception of Rwanda which is rated in the upper percentile, the 2021 World Justice Project's Rule of Law Index suggests that the EAC region trends below average on key rule of law indicators which include fundamental rights. Tanzania (0.47), Kenya (0.44), Uganda (0.39) and DRC (0.35) are classified as weak on adherence to the rule of law.¹⁸ Furthermore, another 2021 report covering Kenya, Tanzania and Uganda suggested that the COVID-19 pandemic has amplified the constrictions to civil liberties in these countries, especially with regard to the freedom of speech and assembly, the freedom of the media and the safety of human rights defenders.¹⁹ These challenges call attention on whether the EAC's enforcement mechanisms have the requisite levels of functionality and independence to provide redress to those who suffer human rights violations.

Despite the earlier mentioned initiatives such as the EAC Human Rights Bill and the prioritisation of human rights within the EAC's Vision 2050, the slow process of enforcing human rights raises doubts on the existence of political will at the highest levels of the EAC. Worryingly, the Summit is yet to adopt the protocol that would provide the EACJ with explicit jurisdiction on human and peoples' rights. Furthermore, some analysts have opined that the EACJ's broad interpretation of the EAC Treaty to enable it address human rights issues risks attracting backlash from member states who may proceed to further constrict the Court's jurisdiction and access to it. This has already been experienced in the case of the African Court on Human and Peoples' Rights (AfCHPR) where Rwanda and Tanzania withdrew direct access to the AfCHPR for their citizens and Non-Governmental Organizations (NGOs) in 2016 and 2019 respectively.²⁰ The remaining EAC member states have never granted their citizens and NGOs direct access to the AfCHPR.²¹

Another trend that plagues the African human rights system is the failure by member states to comply with the judicial decisions of regional and continental courts.²² There is also the concerning trend of shrinking civic space within the EAC, which is characterised by arbitrary arrests and enforced disappearances, excessive use of force by the police, torture and other ill treatment and the harassment and intimidation

¹⁸ 'WJP Rule of Law Index' <https://worldjusticeproject.org/rule-of-law-index/> (accessed 2 February 2022)

¹⁹ 'LAUNCH: Promoting Civil Liberties In East Africa Friedrich Naumann Foundation' <https://www.freiheit.org/sub-saharan-africa/launch-promoting-civil-liberties-east-africa> (accessed 2 February 2022)

²⁰ Apollin Koagne Zouapet, "'Victim of Its Commitment ... You, Passerby, a Tear to the Proclaimed Virtue": Should the Epitaph of the African Court on Human and Peoples' Rights Be Prepared?', *EJIL: Talk!* (blog), 5 May 2020, <https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/>.

²¹ See, 'Declarations', *African Court on Human and Peoples' Rights* (blog) <https://www.african-court.org/wpafc/declarations/> (accessed 29 June 2022)

²² Lilian Chenwi, 'Successes of African Human Rights Court Undermined by Resistance from States', *The Conversation*, <http://theconversation.com/successes-of-african-human-rights-court-undermined-by-resistance-from-states-166454> (accessed 14 June 2022)

of human rights defenders.²³ These negative trends have created an environment that inhibits the ability of civil society and the wider citizenry to effectively influence policy-making and implementation, and to hold the member states accountable. It also presents serious challenges to victims of human rights violations in accessing justice at the national, regional and continental levels. Rather than share in the espoused values of democracy, good governance and the rule of law, these trends point to a shared ambivalence for the values, and this ultimately undermines the human rights element of the region's integration.

3 Assessing the landscape and charting the future

Against the above context, this publication presents a series of chapters that seek to interrogate the status of safeguarding human and peoples' rights in the EAC. The publication locates human and peoples' rights within the EAC integration agenda by taking a close look at the opportunities and challenges presented by the normative and institutional arrangements of the EAC. It also appreciates the jurisprudence emerging from the EACJ as well as the experiences of litigants as a pathway to understanding the system as it exists and how it can best be improved. It also turns attention to the EAC member states as subjects of litigation within the AU human rights system, and it draws further lessons from that jurisprudence and explores how synergies can be created from the continental to the regional and national levels to foster greater compliance from states when it comes to decisions on human rights cases.

In terms of the structure of the publication, Chapter One is the introduction to the publication.

In Chapter Two, Victor Lando lays out the evolution of the EAC and proceeds to interrogate how human rights are factored into the EAC's integration agenda. Lando does this by interrogating the manner in which the EAC's organs and institutions give effect to human rights within their respective mandates. The chapter then analyses the experiences of civil society in seeking to engage with the EAC organs, and extracts successes, challenges, gaps and opportunities that can be harnessed to define the role that civil society can play in improving the EAC's human rights framework.

²³ See, for example, the African Commission on Human and Peoples' Rights: [445 'Resolution on the Human Rights Situation in the Republic of Kenya' - ACHPR/Res. 445 \(LXVI\) 2020](#); [Press Release on the growing trend of stringent regulation of the internet in East African States](#); [Press release on the socio-political situation in the Republic of Uganda](#); [Press Statement of the African Commission on Human and Peoples' Rights on the Situation in Tanzania](#)

In Chapter Three, Selemani Kinyunyu focuses on the role of the EACJ in protecting human rights and the experiences of litigants who have sought to use the Court as a platform for seeking remedies for human rights violations. Kinyunyu explores the structural, operational and political challenges faced by the EACJ as it navigates the reality of possessing indirect rather than express jurisdiction over human rights violations. The chapter takes stock of the innovations that have been adopted by litigants in the human rights cases they file before the EACJ while also taking note of the challenges they face in litigating. Kinyunyu then concludes with a discussion on what stands in the way of realizing express mandate on human rights for the EACJ and makes recommendations for litigants and civil society on how they should confront these challenges.

In Chapter Four, Sègnonna Horace Adjolohoun turns attention to the use of litigation within the AU human rights system as a tool for the advancement of human and peoples' rights in the EAC. Working on the premise that one of the fundamental pillars of the EAC framework is the realisation of the rights enshrined in the African Charter, Adjolohoun explores how the AU human rights enforcement mechanisms can be utilised to complement the EACJ system. The chapter analyses the jurisprudence in the AU human rights system that involves EAC member states and extracts lessons that are then used to explore the possibilities of complementarity between the EACJ and the human rights adjudicative organs of the AU. The chapter then concludes with recommendations on how to strengthen the EAC's human rights regime.

Chapter Five concludes the publication by suggesting how civil society organisations and other stakeholders may support the integration of human and peoples' rights into the agenda and practice of the EAC. The chapter concludes that it is critical for civil society to internalise and utilise a people-centred approach to regionalism that ensures the people's inclusive participation in the affairs of the EAC.

Through these chapters, this publication aims to further public discourse on the importance of human and peoples' rights as a foremost priority for the EAC integration agenda. After all, regional integration must first and foremost be a people-centred affair, and this can only be realised by upholding everyone's inherent human dignity and rights as eloquently laid out in the African Charter.

With this foundation, the publication invites readers to imagine truly independent human rights mechanisms within the EAC framework, to consider the roadmap and recommendations laid out to achieve these institutions and take up some measure of the tasks required to realise improved protections for human and peoples' rights in the EAC.

Chapter Two

Locating Human and Peoples' Rights within the Integration Framework of the East African Community

Victor Lando

Keywords: Regional integration, human rights, EAC Treaty

Abstract

The interdependence between human rights and regional integration is a key ingredient for the success of any integration endeavour. Most early African Regional Economic Communities were fashioned primarily as vehicles for the achievement of economic development with no references to human rights. However, with increasing emphasis on democratic governance and the strengthening of the global human rights discourse, both old and emergent Regional Economic Communities in Africa have refined their focus to pursue development through the prism of human rights. It is within this context that this chapter examines the East African Community's framework for the promotion and protection of human rights. Specifically, the chapter reviews the basis for the incorporation of human rights into the workings of the EAC as well as how its organs and institutions have given effect to human rights within their respective mandates. This examination also includes an analysis of the successes, challenges, gaps and opportunities for civil society to meaningfully contribute to the consolidation of human rights and democratic governance.

1 Introduction

The early post-independent African Regional Economic Communities (RECs) were fashioned primarily as vehicles for the achievement of economic development, with limited references to human rights in their respective constitutive instruments. The 1969 Treaty for East African Cooperation was no exception. The aims of the East African Community (EAC) as stipulated under Article 2 of that Treaty were limited to strengthening industrial, commercial and other relations for the achievement of accelerated economic development.¹

¹ This was the case, for instance, in the founding Treaty to the Economic Community of Central African States (ECCAS), also referred to in French as Communauté Économique et Monétaire de l'Afrique Centrale (CEMAC). It is an organisation established, among others, by Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon, the Democratic Republic of Congo and the Republic of Congo. CEMAC was established by the Brazzaville Treaty of 1964. Article 4 sets out the aim of the Community as to promote and strengthen harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity. In Article 3, the principles governing the Community include sovereignty, equality and independence of all states, good neighbourliness, non-interference in their internal affairs, non-use of force to settle disputes and the respect of the rule of law in their

With increased emphasis on democratic governance and the strengthening of the human rights discourse globally and regionally, both old and emergent RECs in Africa have refined their focus to pursue development through the prism of human rights. In this respect, they have either included in or revised their founding instruments to include the recognition, promotion and protection of human rights as an objective or fundamental norms for achieving their goals, with references to the African Charter on Human and Peoples' Rights (African Charter) as the prime normative standard.² Notable examples are the Revised Economic Community of West African States (ECOWAS) Treaty,³ the Treaty of the Southern African Development Community (SADC Treaty),⁴ the Treaty for the Common Market for Eastern and Southern Africa (COMESA Treaty),⁵ as well as the Treaty for the Establishment of the East African Community (EAC Treaty).

It is against this backdrop of infusion of human rights into the agenda of RECs that this chapter examines the EAC's human rights framework. Specifically, the chapter reviews the basis for the incorporation of human rights into the EAC's integration agenda as well as how its organs and institutions have given effect to human rights within their respective mandates. Included in this examination is an analysis of the successes, challenges, gaps and opportunities for civil society participation and engagement towards the consolidation of human and peoples' rights within the region. This chapter provides the contextual background for the rest of the chapters in the publication which focus on specific aspects of human and peoples' rights within the EAC.

mutual relations. Under the 1975 ECOWAS Treaty, Article 2(1) provided that the aims of the Community are to promote cooperation and development in all fields of economic activity particularly in industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, and in social and cultural matters for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic stability, of fostering closer relations among its members and of contributing to the progress and development of the African continent.

²The African Charter on Human and Peoples' Rights, adopted on 27 June 1981 and entered into force on 21 October 1986. See also Article 6(d) and 7(2) of the Treaty for the Establishment of the East African Treaty (EAC Treaty) of 1999, Article 4(g) of ECOWAS treaty, Article 6(e) of COMESA Treaty of 1993, Article 4(c) of the SADC Treaty and Article 6(A)(e) of the Agreement Establishing the Intergovernmental Authority on Development (IGAD) of 1996.

³Article 4(g) of the revised ECOWAS Treaty provides that one of the Community's fundamental principles is the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights." In addition, ECOWAS has under its framework adopted a number of protocols that are designed with the promotion and protection of human rights in mind.

⁴The Treaty of the Southern African Development Community (SADC) outlines human rights, democracy and the rule of law as one of its principal objectives, in addition to investing in institutions and mechanisms for the promotion of good governance and human rights. It however does not make reference to the African Charter as a normative standard. The Treaty establishing the SADC was adopted on 17 August 1992 and entered into force on 30 September 1993.

⁵The Treaty for the Common Market for Eastern and Southern Africa (COMESA Treaty) articulates in article 6(e) that the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on is one of its fundamental principles.

2 Integrating human rights in Regional Economic Communities

Various perspectives have been put forward to explain the integration of human rights into the mandates of RECs. Nwauche observes that human rights form part of the integration process from the outset, even if this is not explicitly declared or acknowledged. He attributes this to the fact that integration aims at satisfying at least the socio-economic rights of the people of the region in question.⁶ In the same vein, Ebobrah argues that there is a measure of convergence between human rights and the socio-economic objectives of integration, particularly in the context of the improvement of the welfare of the people in participating countries.⁷ Viljoen notes that “although human rights and the rule of law do not feature as prime goals of RECs, these aspects form part of the way in which the goals have to be attained in principled way.”⁸

Nwogu observes that regional integration is an instrument for realising the right to development as outlined in Article 22 of the African Charter.⁹ Accordingly, the peoples’ right to development imposes a corresponding duty on states, individually or collectively, to ensure its realisation. She, therefore, posits that state efforts at economic development through regional economic integration regimes can be deemed to be the collective effort of states to ensure the fulfilment of the right to development as set out in the African Charter. Baimu observes that peace and stability are essential ingredients for socio-economic development. Therefore, RECs need to integrate human rights to create peace and stability, thus contributing to enhanced socio-economic development.¹⁰

These arguments demonstrate the interdependence between human rights and regional integration - that the respect for human rights is a key ingredient for successful integration, and that regional integration provides opportunities for enhanced protection of human rights among the converging states.¹¹

⁶See E S Nwauche ‘Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries’, in Anton Bösl & Joseph Diescho (eds) *Human Rights Law in Africa: Legal perspectives on their Protection and Promotion* (2009) 319-347.

⁷ See S Ebobrah ‘Human Rights Realisation in the African Sub-Regional Institutions’ in M Ssenyonjo (ed), *The African Regional Human Rights System-30 Years after the African Charter on Human and Peoples’ Rights* (2011) 283-300.

⁸See F Viljoen, *International Human Rights Law in Africa* (2007) 498. He further links aspects of integration such as free movement with the need to ensure the protection of human rights, and also touches on the realisation of the right to development as one of the outcomes of integration.

⁹N Nwogu ‘Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS’ (2007) 6 (3) *Journal of Human Rights* 345.

¹⁰E Baimu ‘The African Union: Hope for Better Protection of Human Rights in Africa?’ (2001) 1 *African Human Rights Law Journal* 299.

¹¹See A L Garin ‘Human Rights and Regional Integration in Mercosur: a Bipolar Relationship.’ Presentation at the VIIIth World Congress on Constitutional Law, Mexico 6-10 Dec 2010. See also S E Mvungi ‘Constitutional Questions in the Regional Integration Process: The Case of the Southern African Development Community with References

3 East African Community Treaty and human rights

The framers of the 1999 EAC Treaty deliberately hinged the EAC on principles of good governance, democracy and human rights. Articles 6(d) and 7(2) of the Treaty highlight a set of fundamental and operational principles including good governance, democracy and the rule of law, “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”¹²

Furthermore, Article 7(1)(a) of the EAC Treaty stipulates people-centred and market-driven co-operation as one of the EAC’s operational principles. Arguably, “people-centeredness” includes notions of good governance, democracy and transparency, which are key drivers for the promotion and protection of human rights. Reflecting on this principle, the East African Court of Justice (EACJ) in the case of *East African Law Society and 4 others v the Attorney General of the Republic of Kenya and 3 Others*, held that the amendment of several articles of the EAC Treaty by the Summit of Heads of State and Government (Summit) without holding national consultations was inconsistent with their commitments under Article 7(1)(a) of the EAC Treaty. This decision established the requirement for public participation in the treaty amendment process established in Article 150 of the EAC Treaty.¹³ It can, therefore, be inferred that public participation is critical in all aspects of implementation of the EAC Treaty.

At the same time, Article 3(3)(b) of the EAC Treaty stipulates that adherence to universally acceptable principles of good governance, democracy, the rule of law and the observance of human rights and social justice are among the prerequisites for a non-member to be accepted into the EAC or to be associated with or participate in any of its activities. Articles 146 and 147 of the Treaty, respectively, which provide for the suspension and expulsion of a partner state from the EAC, stipulate that a state may be suspended for failure to observe the fundamental principles of the Treaty, of which the promotion and protection of human rights is a component. Thus, at least in theory, the persistent failure by a partner state to respect and protect human rights may constitute grounds for suspension or expulsion from the EAC.

The EAC Treaty is replete with other provisions which may be deployed to enhance the protection and promotion of human rights within the Community, notwithstanding the lack of express mention of human rights. Under Article 5(2), partner states undertake to ensure “accelerated, harmonious and balanced development and sustained

to the European Union.’ Unpublished LLD Dissertation, University of Hamburg, 1994, 49, where he argues that no meaningful integration measures can be implemented in a region torn in ethnic, ideological or national wars.

¹²See Article 6(d) of the Treaty for the Establishment of the East African Treaty (EAC Treaty) (1999).

¹³*East African Law Society and 4 Others v Attorney General of Kenya and 3 Others*, EACJ Ref. No. 3 of 2007.

expansion of economic activities".¹⁴ Thus, as per Nwogu's earlier stated proposition, the EAC's development objective, when viewed through the human rights lens, is in essence a commitment to the achievement of human rights outcomes stipulated in the African Charter.¹⁵

Furthermore, Articles 5(1) and 5(3)(f) outline the promotion of peace and security as one of the objectives of the EAC. This falls into step with Baimu's observation that peace and stability, being essential ingredients for socio-economic development, can only thrive where human rights are respected, promoted and protected.¹⁶ To this end, Article 123 of the EAC Treaty outlines the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms as one of the objectives of the common foreign and security policies to be developed by the EAC. The partner states further undertake under Article 124 of the EAC Treaty to strengthen cooperation for maintaining regional peace and security. Taken together, these two provisions translate into a commitment to ensure the protection of human rights through the prism of peace and security.¹⁷

The EAC partner states also make treaty commitments towards gender mainstreaming and the enhancement of the role of women in cultural, social, political, economic and technical development.¹⁸ Gender equality and gender equity are inextricably interlinked with the enjoyment of human dignity, which sits at the core of all human rights.¹⁹

In Article 120 of the EAC Treaty, the EAC partner states undertake to develop and adopt a common approach to address the specific needs of vulnerable populations such as children, the elderly and persons with disabilities through rehabilitation and provision of, among others, foster homes, health care, education and training. This again contributes towards the enhanced realisation of the rights of sections of the population that have hitherto been marginalised and rendered vulnerable.

Besides, the partner states agree under chapter 17 of the EAC Treaty to adopt measures to achieve free movement of persons, the right to work in any partner state, and the right to establishment and residence. Such measures, as a matter of course, come hand in hand with inherent human rights guarantees for those they apply to.²⁰

¹⁴See article 5(2) of the EAC Treaty.

¹⁵See supra Nwogu.

¹⁶See supra Baimu.

¹⁷ See O Ruppel 'Regional economic communities and human rights in East and Southern Africa' in Anton Bösl & Joseph Diescho (eds) *Human Rights Law in Africa: Legal perspectives on their protection and Promotion* (2009) 319–350.

¹⁸See Article 5 of the EAC Treaty.

¹⁹See, for instance, the Preamble to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), Adopted in July 2003, entry into force in November 2005.

²⁰ See article 107 of the EAC Treaty and generally Chapter 17.

Nwauche reaffirms this argument and notes that “If the people of a region have a regional right of residence instead of a national right of residence, their freedoms of movement, assembly and association are enhanced.”²¹ Other human rights references may be gleaned from EAC Treaty provisions relating to food security,²² the right to live in a clean and healthy environment through sustainable exploitation of natural resources and measures for environmental protection and management.²³

Last, Article 8(1) (c) prohibits partner states from taking any measures likely to “jeopardise” the implementation of the provisions of the EAC Treaty - including its provisions on the realisation of human rights as outlined in Article 6(d) and 7(2). This reaffirms the principle of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention on the Law of Treaties and requires partner states to implement their treaty obligations in good faith.²⁴

From the foregoing, it is conclusive that the inclusion of human rights as fundamental and operational principles of the EAC means that they should be infused into every aspect of the integration process.²⁵ These fundamental and operational principles form the bedrock upon which the objectives of integration are built. Indeed, the EACJ observed in *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda (Mohochi Case)* that:

these principles are foundational, core and indispensable to the success of the integration agenda and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance; they are to observe them as a matter of Treaty obligation...these are rules that must be followed or adhered to by the Partner States in order that the objectives of the Community are achieved.²⁶

The EACJ has similarly held in *Plaxeda Rugumba v Secretary-General of the EAC & Attorney General of Rwanda* that the insertion of human rights principles in the EAC Treaty was not meant to be a cosmetic exercise, but rather denoted a serious commitment by the partner states to the promotion and protection of human rights in line with the Treaty imperatives.²⁷

²¹See supra E S Nwauche.

²²Chapter 18 of the EAC Treaty.

²³Chapter 19 of the EAC Treaty. Indeed, it is pursuant to this that the partner states concluded the Protocol on Environment and Natural Resources, 2005.

²⁴ This principle means that states undertake to implement their treaty obligations in good faith. See Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entry into force on 27 January 1980.

²⁵ See also Article 121 of the EAC Treaty on matters relating to gender equality.

²⁶ *Samuel Mukira Mohochi v Attorney General of the Republic of Uganda*, EACJ Ref. No. 5 of 2011. First Instance Division.

²⁷See *Plaxeda Rugumba v Secretary-General of the EAC & Attorney General of Rwanda*, EACJ Ref. No. 8 of 2010, EACJ First Instance Division, para 37.

4 Human rights within EAC's institutional architecture

The EAC's integration process is driven by the organs and institutions set out in chapter three of the EAC Treaty. For the purpose of this chapter, focus will be on the human rights outcomes of the following EAC organs: the Summit, the Council of Ministers (Council), the East African Community Secretariat (EAC Secretariat), the East African Legislative Assembly (EALA) and the EACJ.

4.1 Summit of Heads of State and Government

The Summit is the highest political organ of the EAC, consisting of the heads of state or government of the partner States, and is responsible for "giving directions and impetus for achieving the objectives of the Community".²⁸ One of the key mandates of the Summit is the adoption of protocols and other annexes to the EAC Treaty as may be necessary to deepen integration.²⁹ Within the human rights context, Article 27(2) of the EAC treaty envisages the adoption of a protocol extending the jurisdiction of the EACJ to include human rights matters.

A protocol adopted under Article 27(2) of the EAC Treaty in 2014 excluded human rights jurisdiction from the EACJ based on the argument that partner states had already acceded to the African Charter and thus any human rights concerns should be ventilated through the African Court on Human and Peoples' Rights (AfCHPR).³⁰ Furthermore, partner States argued that they had sufficient national constitutional safeguards for the protection of human rights.

Another misstep by the Summit in the context of norm setting can be seen in the amendments to the EAC Treaty made by the Summit in the context of political backlash against the EACJ as a result of its decision in *Prof. Peter Anyang' Nyong'o and 10 others v the Attorney General of the Republic of Kenya and 5 Others (Nyong'o*

²⁸Articles 10(1) and 11 (1) of the EAC Treaty.

²⁹Specifically, the EAC Treaty outlines a number of protocols to be concluded as follows: Protocol on Decision Making (Article 4), Protocol on Extended Jurisdiction of the EACJ (Article 27(2)), Protocol on a Customs Union (Article 75), Protocol on a Common Market (Article 76), Protocol on Standardisation, Quality Assurance, Metrology and Testing (Article 81), Protocol on Free Movement of Persons, Labour Services and Right of Establishment and Residence (Article 104), Protocol on Combating Illicit Drug Trafficking (Article 124) and such other Protocols as may be necessary in each area of cooperation (Article 151). Full details on all the EAC protocols to date are available at <https://www.eac.int/documents/category/key-documents> (accessed on 10 May 2022). Each protocol once negotiated, concluded and signed by the partner states as contracting parties, enters into force upon the deposit of instruments of ratification with the Secretary-General. See generally Articles 151, 152 and 153 of the EAC Treaty. To date, partner states have concluded protocols in diverse thematic areas such as the creation and regulation of the EAC Customs Union, EAC Common Market and the EAC Monetary Union, as well as standardisation, quality assurance, metrology and testing, and on decision making by the Summit and the Council.

³⁰See Report of the 13th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref EAC/ SCLJA/13/2012 and Report of the 16th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref: EACJ/ SCLJA/16/2014. Notably, the Court continues to proactively and creatively engage on human rights matters even without this specific protocol on extended jurisdiction.

Case).³¹ This decision triggered a series of rushed amendments to the EAC Treaty, substantially altering the EACJ's structure and jurisdiction.³² The Court was split into a First Instance Division and an Appellate Division, new grounds for removal of judges were introduced which allowed their suspension on allegations of misconduct in the countries of origin, and a 60-day time limit was set for litigants to institute references before the Court challenging violations to the Treaty.

Furthermore, the Court's jurisdiction was limited by the provision that it had no power to review cases for which "jurisdiction [is] conferred by the Treaty on organs of Partner States".³³ Although these political manoeuvres were fiercely resisted by the EAC Bar Association, the EACJ and several non-governmental organisations (NGOs), the EAC's political organs had already passed the message that they were willing to take action against the Court in the event of further "unpalatable" decisions.

A matter of particular concern relates to the poor track record by the Summit in assenting to human rights related bills passed by the EALA. Once a bill has been duly passed, the assent procedure under Article 63 of the EAC Treaty kicks in, where the heads of state and government play a leading role in deciding whether or not it gains force of law as an Act of the Community. Most human rights related bills have not received assent by the heads of state, thus pointing to lack of political goodwill by the partner states to follow through with their human rights commitments as set out in the EAC Treaty.³⁴

In spite of these missteps, the conclusion by the Summit of the Protocol on the Establishment of the East African Common Market (the Common Market Protocol) stands out as one of the outcomes that may be deployed to promote and protect human and peoples' rights. Its human rights foundation is primarily based on Article 3 of the Protocol where Partner States reiterate their commitment to the fundamental and operational principles of the Community as enshrined in Articles 6 and 7 of the EAC Treaty. Additional human rights references may be deciphered from provisions within the Protocol which give effect to the free movement of persons across national

³¹KJ Alter, JT Gathii and LR Helfer 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 (2) *European Journal of International Law* 293.

³²For a detailed account and analysis of the backlash arising from the EACJ's decision in the Anyang' Nyong'o Case, see J Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2014) 24 *Duke Journal of Comparative & International Law* 249.

³³See EAC Treaty, Articles 26(1), 26(2), 27(1) and 30(2). See also Gathii *ibid*. The creation of an Appeals Chamber may not have been altogether negative as it provides an opportunity for refinement of issues through litigation and judicial scrutiny at the appellate level.

³⁴ If a bill receives assent by all the heads of state and it is published in the Community Gazette, it gains the force of law as an Act of the Community. If the heads of state fail to assent to a bill within three months of its passing, they are required to refer it back to the Assembly with reasons for withholding assent and a recommendation for reconsideration. The EALA may elect to reconsider the bill and resubmit it to the heads of state for assent. If a head of state withholds assent to a re-submitted bill, the bill lapses. See the schedule of Acts of the East African Community, available at <<https://www.eala.org/documents/category/acts-of-the-community>> (accessed on 10 May 2022). See also the section in this chapter on the role of the EALA in promotion and protection of human rights for a more detailed discussion.

frontiers, the guarantee of the right of establishment, the right to work, the protection of refugees and non-discrimination on the basis of nationality. Indeed, in the *Muhochi Case*, the petitioner relied on Articles 7 and 54 of the Protocol to convince the EACJ to make a finding in his favour, that his denial of entry into Uganda and eventual expulsion without being accorded due process of law was unlawful and a breach of Uganda's obligations under Article 7 of the Common Market Protocol.³⁵

4.2 Council of Ministers

The Council is subordinate to the Summit and functions as the EAC's policy organ.³⁶ Consisting of ministers responsible for regional cooperation, the Attorney Generals and such other ministers as may be determined by the partner states,³⁷ the Council has a broad range of functions which include to promote, monitor and keep under constant review the implementation of the programmes of the EAC and to ensure the proper functioning and development of the Community in accordance with the EAC Treaty.³⁸ As the EAC's main policy organ, the Council provides crucial linkages between the Summit and the bureaucracies within the respective partner states charged with policy development and implementation in all areas of integration including the promotion and protection of human rights.³⁹

One of the main human rights outcomes of the Council is the adoption of policy documents, strategies and action plans to advance human rights within the community. The Secretariat works closely with the Council in the development of Community action plans and strategic documents to guide the EAC towards the achievement of its integration objectives. Unfortunately, just like with the Summit, the meetings and workings of the Council are closed to external participation, including by civil society and other actors, unless by special invitation.

4.3 Secretariat

The EAC Secretariat is the Community's executive organ, consisting of the Secretary-General, the Deputy Secretary-General, the Counsel to the Community and other staff

³⁵See supra *Muhochi Case*, para. 83 and 84.

³⁶See article 14(1) of the EAC Treaty.

³⁷ Ministers may be accompanied to Council Meetings by officials and advisors. The Council may also invite observers to its meetings. See Article 13 of the EAC Treaty as well as Rule 3 of the Rules of Procedure for the Council of Ministers of the East African Community.

³⁸See generally article 14 of the EAC Treaty.

³⁹Being an organ of the Community, the Council is required to give effect to human rights as one of the guiding and operational principles of the EAC as stipulated in Articles 6 and 7 of the EAC Treaty.

of the Community.⁴⁰ The Secretary-General is appointed by the Summit upon nomination by a head of state based on the principle of rotation.⁴¹

Being the implementing arm of the Community, the EAC Secretariat has a wide array of functions which include the mobilisation and management of funds for the implementation of the Community's projects, strategic planning and management of Community programmes, the custody of Community property, the co-ordination and harmonisation of the policies and strategies relating to the development of the Community and the general promotion and dissemination of information on the Community to stakeholders, the general public and the international community.⁴²

In terms of human rights outcomes, the Secretariat has institutionalised and implemented annual meetings of oversight bodies such as the EAC national human rights commissions, anti-corruption commissions, electoral management bodies and national chief justices, which provide platforms for standard setting, harmonisation of standards and experience sharing across the partner states. These oversight institutions play key roles in their respective national systems by contributing towards the enhancement of the rule of law, governance and the realisation of human rights.

Furthermore, being the Community's executive organ, the Secretariat functions as the face of the EAC and in this regard interfaces with the partner states' national frameworks across a broad spectrum of sectors through its programmes and projects. Of relevance to the promotion and protection of human rights are its programmes in gender, community development and civil society, peace and security, as well as political affairs, in which it interfaces with national state and non-state actors across the partner states.⁴³ In furtherance of this, the Secretariat has established a forum for consultations between EAC organs and institutions and the private sector, civil society organisations (CSOs) and other interest groups as required under Article 127 of the EAC Treaty, which provides an avenue for feedback and dialogue between the EAC and its stakeholders.⁴⁴ These dialogue sessions on thematic areas of integration contribute to enhancing awareness by national actors, thereby spurring them to take action at their national levels based on the regional framework. These diverse forums are fertile ground for civil society actors to gain

⁴⁰See Article 66 of the EAC Treaty.

⁴¹See Article 67 of the EAC Treaty. In essence, the office holders come from the partner states on a rotational basis.

⁴² See generally Chapter 10 of the EAC Treaty. For additional information on the Secretariat see also <<https://www.eac.int/the-secretariat>> (accessed on 10 May 2022).

⁴³See the EAC Sectors as administratively divided. Available at <https://www.eac.int/eac-sectors> (accessed 10 May 2022).

⁴⁴For instance, the EAC Secretariat has institutionalised the annual EAC Secretary-General's Forum for Private Sector and Civil Society, which includes participation from broad based stakeholders from across the Partner States. See EAC Press Release on <https://www.eac.int/news-and-media/press-releases/20160307/4th-annual-eac-secretary-generals-forum-private-sector-civil-society-and-other-interest-groups-held> (accessed 10 May 2022).

accreditation and interface with the Secretariat in terms of human rights mainstreaming and advocacy.

In addition, the EAC Secretariat works closely with the Council in policy formulation and development. Policy documents on human rights such as the EAC Policy on Persons with Disabilities 2012,⁴⁵ the EAC Gender Policy 2018⁴⁶ as well as the EAC Plan of Action on Human and Peoples Rights 2012, have been formulated by the Secretariat, working closely with national and sub-regional actors in government as well as civil society and development partners.⁴⁷

4.4 East African Legislative Assembly

Established under Article 9 of the EAC Treaty, EALA is vested with legislative, representative and oversight mandates⁴⁸ structured to mirror the legislature in a constitutional democracy at the national level.⁴⁹

In the exercise of its legislative mandate, the EALA has passed several bills which relate to human rights, including the East African Community HIV & AIDS Prevention and Management Bill 2010; the East African Community Human and Peoples Rights Bill 2011; the East African Community Persons with Disabilities Bill 2015; the East African Community Gender Equality and Development Bill 2016; the East African Community Sexual and Reproductive Health Rights Bill 2017; the East African Community Prohibition of Female Genital Mutilation Bill 2016; as well as the East African Community Counter-Trafficking in Persons Bill 2016.

If all these instruments had entered into force, they would have formed a formidable basis for enhanced human rights protection within the Community.⁵⁰ Unfortunately, these human rights related bills have not been enacted into law, and most of them have lapsed after failing to gain assent by the Summit. A review of the laws passed by the EALA and assented to by the Summit shows a particular bias for legislation that addresses the economic outcomes of integration.⁵¹ This then throws into question the commitment by the EAC Organs to achieve the EAC Treaty's human rights

⁴⁵ Available at <https://www.eac.int/gender/persons-with-disabilities> (accessed on 10 June 2022)

⁴⁶ See 'EAC Launches Gender Policy' available at <https://www.eac.int/press-releases/146-gender-community-development-civil-society/1217-eac-launches-gender-policy> (accessed 10 June 2022)

⁴⁷ See, for instance, the Preamble to the EAC Strategy on Gender, Children and Persons with Disabilities which acknowledges the input of the Secretariat in its formulation.

⁴⁸ See Article 49 of the EAC Treaty. For additional information see < <https://www.eala.org> > (accessed on 10 May 2022).

⁴⁹ See Article 50 of the EAC Treaty. See also the EACJ decision in *Prof. Peter Anyang' Nyong'o and 10 others v the Attorney General of the Republic of Kenya and 5 Others* (Anyang' Nyong'o case) EACJ Ref. No. 1 of 2006; and EACJ Appeal No. 1 of 2009; and *Democratic Party and Mukasa Mbidde v The Secretary-General of the East African Community and the Attorney General of the Republic of Uganda*, EACJ Ref. No. 6 of 2011, First Instance Division.

⁵⁰ Interview with Generose Minani, EAC Directorate of Social Sectors, 8 March 2016, EAC Headquarters, Arusha, Tanzania. (Notes on file with author).

⁵¹ See the schedule of Acts of the East African Community, available at < <https://www.eala.org/documents/category/acts-of-the-community> > (accessed on 10 May 2022)

outcomes. It also presents an opportunity for civil society to interrogate the seemingly poor record of the EALA in passing human rights and human rights-related legislation and present workable proposals towards the reversal of this trend.

The EALA plays a fundamental role in Community governance through its oversight competence which is exercised, among other ways, through its budgetary oversight function,⁵² its powers to receive petitions from any resident of the EAC on matters touching on integration,⁵³ the Committee system⁵⁴ as well as the power of the EALA to pass resolutions and make recommendations to the Council on thematic matters of integration.⁵⁵ These mechanisms present a useful opportunity that may be exploited by civil society within the sub-region to interface with the EALA towards the enhancement of human and peoples' rights.⁵⁶

4.5 East African Court of Justice

Established under Article 9 of the EAC Treaty, the EACJ is the Community's judicial arm whose core function is to ensure the adherence to law in the interpretation and application of the Treaty.⁵⁷

The EACJ delivers its mandate through a First Instance Division and an Appellate Division. The EACJ currently comprises 11 judges, five in the Appellate Division and six in the First Instance Division, serving on an ad hoc basis for a single seven-year non-renewable term.⁵⁸ Judges are appointed by the Summit on the recommendation of the partner states (usually a head of state) from persons who fulfil the conditions required for holding high judicial office in their respective countries.⁵⁹

The EACJ is not clothed with express jurisdiction to hear and determine human rights complaints.⁶⁰ As earlier mentioned, Article 27(2) of the EAC Treaty provides that the

⁵²See Article 49(2)(b) of the EAC Treaty.

⁵³Rule 85 of the EALA Rules of Procedure empowers the Assembly to receive and consider petitions from any citizen of the partner states, and any natural or legal person residing or having its registered office in a Partner State, on any matter within the Community's fields of activity and which affects them directly.

⁵⁴See Article 49(2)(b) of the EAC Treaty. See also Article 78 of the EALA Rules of Procedure.

⁵⁵See Article 49(2)(d) of the EAC Treaty.

⁵⁶ See, for instance, the use of Petitions to address emergent human rights issues within the Community. The EALA Schedule of Petitions is available at <<https://www.eala.org/index.php?/documents/category/petitions> > (accessed on 10 May 2022)

⁵⁷The EACJ is different in composition and jurisdiction from the defunct East African Court of Appeal which was a court of appeal from decisions of the national courts on both civil and criminal matters except constitutional matters and the offence of treason for Tanzania.

⁵⁸For details on the current judges of the EACJ refer to <https://www.eacj.org/?page_id=19 > (accessed on 10 May 2022).

⁵⁹See Article 23 of the EAC Treaty.

⁶⁰This contrasts with the ECOWAS Court, which has express human rights jurisdiction under the revised ECOWAS Treaty. In the case of the SADC Tribunal, the SADC Treaty does not expressly circumscribe human rights jurisdiction in the manner done under the EAC Treaty framework, hence it is arguable that its human rights

EACJ shall have human rights competence 'as will be determined by the Council at a suitable subsequent date' upon the conclusion of a protocol to operationalise the extended jurisdiction. To date, no such protocol has been enacted. Nonetheless, the EACJ has consistently asserted that it will not relinquish its mandate of interpreting and ensuring appropriate application of the Treaty merely because the matter referred to it has elements of human rights violations.⁶¹

Thus, while it is not a human rights court *per se*, the EACJ has, through a mix of judicial activism and creative interpretation, handed down decisions which although not based on express human rights provisions, have nonetheless had the effect of safeguarding and promoting rights within the Community. In this way, the EACJ has repurposed its mandate from a court initially established to interpret disputes in the context of economic integration, into one which now also adjudicates human rights claims.⁶²

In spite of its successes in protecting human rights, a series of challenges have continued to hamstring the EACJ in the discharge of its mandate. First, the EACJ still lacks express jurisdiction to hear and determine human rights claims. This means that litigants who wish to approach the EACJ on matters of human rights have to frame them in terms of violations of Article 6 and 7 of the EAC Treaty. While there is no mandatory Treaty obligation on the partner States to vest the EACJ with human rights jurisdiction, the Court would have more impact on national and regional human rights practices if it was able to issue binding decisions to reinforce the Community's human rights commitments as stipulated in its founding Treaty. Moreover, the progressive integration of the EAC into a political federation requires a corresponding robust framework for the promotion and protection of human rights. Thus, CSOs need to revive the conversation on the enactment of the EAC Bill of Rights together with expanded and express human rights jurisdiction for the EACJ.

Furthermore, the Court's effectiveness continues to be hampered by the fact that it is still operating on an *ad hoc* basis, notwithstanding its increasing caseload.⁶³ None of the sitting judges are on full-time engagement at the EACJ. They still hold offices either in the private sector, academia or in their respective national governments as judicial officers or public servants and are thus constrained to juggle between their private endeavours or national commitments and their judicial duties at the EACJ.⁶⁴

jurisdiction is derived from its overall mandate to interpret the SADC Treaty, which has several references to human rights.

⁶¹See *James Katabazi and 21 others v the Secretary-General of the EAC and Another*, EACJ Ref. No. 1 of 2007.

⁶²See JT Gathii 'Saving the Serengeti: Africa's new international judicial environmentalism' (2015) 16 *Chicago Journal of International Law* 386, 391. He also argues that the EACJ has since expanded its jurisdictional horizons to now adjudicate matters of environmental protection and sustainable development.

⁶³ See, for instance, the EACJ Strategic Plan, 2018-2023, available at www.eacj.org (accessed on 10 June 2022)

⁶⁴A practical challenge posed by this situation is the possibility of a high court judge, who also functions as a judge at the EACJ, arriving at a decision at the EACJ which binds the Superior court of record in his national jurisdiction,

This creates an untidy legal situation, which may affect the reception, application and implementation of decisions of the EACJ at the national level. The most sustainable option would be to have a permanent court, with judicial officers who do not have corresponding duties especially within their national judiciaries. This would enhance its stature as a Court both in the eyes of litigants and national governments, thus making it a preferred forum for the resolution of claims which may arise in the integration process.

Just like its regional counterparts under the ECOWAS and SADC frameworks, the EACJ has experienced interference and backlash from the EAC's political organs as a result of its decisions that are unpopular with national executives of the partner States.⁶⁵ A clear instance of this was illustrated in the circumstances surrounding the decision of the EACJ in the *Nyong'o Case* discussed earlier in this chapter. Nonetheless, the Court has proved itself as a vibrant and influential organ with regard to the promotion and protection of human rights within the region.

5 Opportunities for civil society participation in the EAC's human rights agenda

The creation of organs and institutions under the EAC Treaty has availed opportunities for citizens and residents of EAC partner states to interface on matters relevant to integration, including the promotion and protection of human and peoples' rights. Whereas there are limited opportunities for direct engagement with the Summit and the Council, the EALA, EACJ and EAC Secretariat remain open for engagement.

The EACJ provides another layer for EAC residents to ventilate their claims on matters of good governance and human rights. The East African Law Society (EALS), the Pan-African Lawyers Union (PALU) as well as other civil society actors have made considerable efforts to drive the EACJ's human rights jurisprudence by litigating at the EACJ. However, there is still space for concerted and sustained strategies to support litigation before the Court. This would include training lawyers on the practice and procedures of the Court, creating opportunities for the bench and the bar to interact and enhance delivery of justice at the EACJ through court users' engagements or specific bar-bench committees, publishing case digests on the Court's jurisprudence, undertaking targeted litigation before the EACJ and awareness raising within the national jurisdictions on the issues that may be ventilated before the EACJ. As an example, the EALS has invested in developing materials and training the region's advocates to litigate before the EACJ.⁶⁶

by virtue of Article 33(2) of the EAC Treaty which provides that decisions of the EACJ prevail over those of national courts on matters relating to the interpretation and application of the Treaty.

⁶⁵Supra KJ Alter, JT Gathii and LR Helfer.

⁶⁶ See "East African Court of Justice (EACJ): Advocates Practicing Manual" (2020)

In terms of interfacing with the EALA, Rule 85 of EALA's Rules of Procedure empowers it to receive and consider petitions from any citizen of the partner states, and any natural or legal person residing or having its registered office in a partner state, on any matter within the Community's fields of activity which affects them directly. This mechanism has been employed by non-state actors within the EAC partner states to influence the human rights discourse within their national frameworks. A notable instance in this regard was the petition to the EALA filed by PALU and other CSOs urging it to conduct an inquiry into the human rights situation in Burundi following the political crisis that unfolded in early 2015. This petition contributed towards spurring action on the part of the Council and the Summit engaging with the government of Burundi to address the humanitarian and human rights crisis.⁶⁷

Other petitions that have been filed with the EALA include on the protection of persons with albinism and another calling for the EAC to conclusively address the insecurity situation in northern Uganda.⁶⁸ Thus, the power of petition to the EALA, if robustly deployed, presents an opportunity for enhanced engagement with the EAC towards the promotion and protection of human and peoples' rights within the sub-region.

Being the face of the EAC, the Secretariat is another organ that affords ample opportunities for civil society engagement towards the promotion and protection of human rights. Article 127 of the EAC Treaty requires the Secretariat to put in place mechanisms for civil society engagement in the integration process. Moreover, it has in place an accreditation framework for CSOs in order to provide a framework for collaboration and cooperation. Civil society actors should take up this opportunity and seek accreditation, where possible, and strategically place themselves to meaningfully contribute to and influence the human rights and governance conversations at the EAC level. This can be in the form of conducting studies on the integration process, policy development and formulation, and interfacing in the Community's legislative and oversight processes, among others.

However, while opportunities to engage do exist, civil society continues to face several challenges that hinder effective engagement. These challenges relate to the democratic credentials of the EAC partner states, the EAC's bureaucracy and organisational culture and the inherent challenges of the civil society movement itself.⁶⁹ Indeed, a majority of EAC partner states under the 2021 World Justice Project's Rule of Law Index are rated as falling below average on key rule of law

⁶⁷ See Petitions submitted to EALA at < <https://www.eala.org/index.php?/documents/category/petitions> > (accessed on 10 May 2022)

⁶⁸The available information at the EALA reveals that eleven petitions have been filed with the EALA since 2010, with six relating to the promotion and protection of human rights. See < <http://www.eala.org/documents/category/petitions>> (accessed on 10 May 2022).

⁶⁹ Theresa Reinold (2019) Civil society participation in regional integration in Africa: A comparative analysis of ECOWAS, SADC and the EAC, *South African journal of International Affairs*, 26:1,53-71

indicators which include fundamental rights.⁷⁰ Other reports have also highlighted concerning restrictions experienced in EAC states with regard to freedom of speech and assembly, the freedom of the media and the safety of human rights defenders.⁷¹

Regarding the existing platforms for civil society engagement with the EAC's structures, partner states and EAC officials have been criticised for exhibiting reluctance and applying the rules "in a way that undermines the purported goal of a people-driven integration process."⁷² Consequently, civil society engagement has been described as weak and the policy-making space as dominated by the state.⁷³ Civil society has attempted to strengthen and coordinate its engagement efforts, with a notable example being the establishment of the East African Civil Society Organisations' Forum (EACSOF). EACSOF was established in 2007 with its mission being to "provide an inclusive platform for civil society to promote good policies and democratic governance for the wellbeing of East Africans".⁷⁴

While EACSOF is recognised as a much needed platform for civil society engagement, its founders have conceded that it lacks sufficient structures for representation at the national and regional levels, and this has led to frustrations among the very civil society constituency they hope to serve.⁷⁵ The reality remains that civil society in the EAC has to contend with limited resources for its operations and the worrying dynamic of shrinking civic space at the state levels.

6 Conclusion

This chapter set out to examine the integration of human and peoples' rights within the EAC's legal and institutional framework as well as the challenges and opportunities for civil society engagement to enhance the promotion and protection of human rights. The respect for human rights and the achievement of the ideals of regional integration are two sides of the same coin. Successful integration as envisaged within the EAC Treaty framework can only be achieved where there are robust mechanisms for the promotion and protection of human and peoples' rights among the converging states.

⁷⁰ See 'WJP Rule of Law Index', accessed 2 February 2022, <https://worldjusticeproject.org/rule-of-law-index/> Rwanda stands out as the only examined EAC member state that is considered above average in this rating while Burundi and South Sudan were not part of the evaluation.

⁷¹ See, for example, 'LAUNCH: Promoting Civil Liberties In East Africa Friedrich Naumann Foundation', accessed 2 February 2022, <https://www.freiheit.org/sub-saharan-africa/launch-promoting-civil-liberties-east-africa>.

⁷² Supra Reinold p7

⁷³ Ibid.

⁷⁴ 'East African Civil Society Organisations' Forum (EACSOF) – The Voice of Civil Society in East Africa', accessed 29 June 2022, <https://eacsof.net/EACSOF/>.

⁷⁵ Supra Reinold p7

While the EAC Treaty has laid a strong legal foundation for the promotion and protection of human and peoples' rights, much still remains to be done. First, there is need for greater coordination between the policy and legislative organs of the EAC with particular focus on human rights related legislation such as an EAC Bill of Rights. Second, as the EAC moves towards a political federation, and as it expands to include more partner states, the EACJ needs to be made operational on a full-time basis, with express human rights jurisdiction to effectively play its oversight and adjudicative roles.

Furthermore, the EAC Secretariat should create a specific office for the coordination of human rights matters within the EAC. Its key functions would include technical support and advice to the EAC and its organs, coordination of human rights activities and engagements across the region with civil society actors, private sector, academia and other stakeholders in the human rights ecosystem as well as cooperation with other RECs and international organisations. In the exercise of its oversight mandate, the EAC should take advantage of its powers to receive petitions and hold inquiries on thematic areas affecting the EAC.

Given that the EAC Treaty has made provision for people-centred integration, opportunities are open for civil society actors within and across the region to dovetail into and actively participate in creating a more robust framework for the promotion and protection of human and peoples' rights. However, in order to maximise on these engagement opportunities, CSOs should take actions to overcome the challenges they face. They must embody an integrated approach to their advocacy for an improved human rights framework in the EAC; one that builds on existing efforts for coordination such as EACSOFA, sees them pool their resources for greater impact and express solidarity and support for each other's causes at a country level even as they seek to enhance engagement at the EAC level as a common endeavour. Ultimately, the commitment to a people-centred integration agenda by EAC partner states must be adjudged not by the structures they create but by their effectiveness in facilitating public participation and effective civic input to policy making.

Chapter Three

Litigating Human and Peoples' Rights: Appreciating the Jurisprudence and Experience of Litigants at the East African Court of Justice

Selemani Kinyunyu

Keywords: East African Court of Justice, public interest litigation, regional norms

Abstract

The East African Court of Justice (EACJ) has played a leading role in reaffirming and even formulating human rights standards in the East African region and beyond. The Court is thus viewed in some respects as a safe space for litigants seeking redress that would ordinarily be distant or unavailable in national settings. As a result, a significant community of practice has evolved around the Court. Despite these positive gains, internal and external factors, including political interference, resourcing challenges and non-compliance with the Court's decisions, have and continue to constrain the Court as a champion of human rights. Most notably, partner states are reticent to grant the Court explicit human rights jurisdiction. The Court has also faced criticism from litigants for delays in finalising cases. Other commentators refer to a creeping culture of judicial conservatism and deference to partner state interests. This chapter explores these themes. It concludes that the EACJ has and can continue to play a vital role in safeguarding human rights. However, this will be dependent on the posture that partner states take towards empowering the EACJ, the tenacity and tactics that litigants deploy to strengthen the Court as well as the Court's own efforts to ensure that its jurisprudence is relevant and impactful.

1 Introduction

The East African Community (EAC) was originally founded by Kenya, Uganda and Tanzania in 1967 to enhance regional integration. The EAC collapsed in 1977 due to mistrust between the partner states, before subsequently being revived in 2000 with the much bolder vision of widening and deepening co-operation among the partner states in the political, economic, social and cultural fields. The revived EAC was people-centred and market-driven.¹ This served as an effective counterbalance to the political interests that led to the EAC's initial collapse and was also grounded on the reality that an effective Community had to address the needs of its citizens.

In this light, the Treaty for the Establishment of the East African Community (EAC Treaty) established mechanisms for preventing and resolving conflict among or within

¹ Article 7(1)(a) of the Treaty for the Establishment of the East African Community (1999).

partner states based on the principles of good neighbourliness, human rights, collective security and other relevant Community principles.² Conflict resolution mechanisms would ensure that grievances could be addressed independently, timeously and within defined frameworks in order to prevent the sorts of fractures that led to its initial collapse.

The revival of the EAC in 2000 and the creation of dispute resolution mechanisms was also influenced by other factors. At the time, the Eastern Africa region was dealing with the immediate aftermath of violent conflict in Burundi and Uganda as well as the genocide in Rwanda.³ There were also wider challenges that impacted the region, including instability following the civil conflict in Zaire (now the Democratic Republic of the Congo [DRC]), and humanitarian crises in Eritrea, Ethiopia and Somalia. Concurrently, African leaders were negotiating the transition of the Organisation of African Unity to the African Union (AU) in the wider context of the shift by Africa's continental mechanisms from non-interference in internal affairs to non-indifference.⁴ Further, many African countries were in various stages of constitutional reform and the transition to more democratic and pluralistic political systems. Hence, there was a clear understanding on the importance of adopting standards that respected human rights, the rule of law and good governance.⁵

As a result, the EAC Treaty enshrined as fundamental principles the respect for 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 (African Charter).⁶ It further committed partner states 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.⁷

The East African Court of Justice (EACJ) is established as the judicial organ for assisting the EAC to resolve conflicts and to give effect to various obligations under the EAC Treaty. The powers of the EACJ are stipulated in Article 23(1) as ensuring 'adherence to law in the interpretation and application of and compliance with this Treaty.' In addition to receiving contentious matters, also known as references, the

² Ibid Article 6(c).

³ Nigel Carlson, *Human Rights and International Law in Africa* (Surrey, Duhame Law Press 2006) 11.

⁴ Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention' IRRC December 2003 Vol. 85 No 852 available at https://www.icrc.org/en/doc/assets/files/other/irrc_852_kioko.pdf

⁵ Kemp, Gerhard, and Selemani Kinyunyu. "The Crime of Unconstitutional Change of Government (Article 28E)." In *The African Criminal Court*, pp. 57-70. TMC Asser Press, The Hague, (2017) 61.

⁶ Supra EAC Treaty Article 6(d).

⁷ Ibid Article 3(3) (b).

Court is also empowered to provide advisory opinions.⁸ The jurisdiction of the Court may be invoked by partner states or any natural or legal person resident in a partner state.⁹

The EACJ was established in 2000, and its first judges were elected in 2001. However, it was only in June 2005 that the first case was filed before the EACJ¹⁰ by members of the East African Legislative Assembly (EALA) challenging the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs (SCLJA) held on 13 to 16 September 2005 and the decisions taken in relation to bills pending before EALA. The EACJ's prominence grew in 2006 when it was called upon to determine the nomination and selection processes for aspirants to EALA from Kenya, in the landmark case of *Prof. Anyang' Nyong'o and 10 Others V. the Attorney General of the Republic of Kenya and 5 Others (Anyang' Nyong'o Case)*.¹¹ This case established *locus standi* requirements before the EACJ, and clarified that individual citizens had direct access to the EACJ. The case also introduced a new regional dynamic to the effect that political power could be checked at the regional level by its censure of Kenya's actions in proposing EALA parliamentarians through a nomination process that did not meet EAC treaty standards.

Following the outcomes of the *Anyang' Nyong'o Case*, the EACJ increasingly continued to pronounce bold decisions, some of which will be discussed in this chapter. The ability of citizens to access the EACJ directly and the progressive decisions handed down by the Court irked some partner states. In particular, in 2008, Kenya pushed for amendments to the jurisdiction of the EACJ, limiting access to it to 60 days after the occurrence of an alleged violation and creating an appellate chamber. These moves were widely viewed as a means to restrict access to the Court by giving partner states a second bite of the cherry on appeal.¹² Partner states also took keener interest in appointments to the EACJ in an apparent effort to pack the Court with state-friendly judges.

As of June 2022, the EACJ had received over 120 cases and disposed 78 cases. It had also received two cases on staff matters and rendered three advisory opinions.

This chapter is organised into five parts. Following this introduction, part two considers some of the notable jurisprudence of the EACJ. Part three examines the perceptions and experiences of litigants before the Court with a view to highlighting the key trends. Part four assesses the prospects of extending the jurisdiction of the

⁸ Ibid Article 36.

⁹ Ibid Article 30.

¹⁰ *Calist Andrew Mwatela and 2 Others V East African Community*, EACJ Ref. No. 1 of 2005.

¹¹ *Prof. Anyang' Nyong'o and 10 Others V the Attorney General of the Republic of Kenya and 5 Others*, EACJ Ref. No. 1 of 2006.

¹² Alter, Gathii and Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', *The European Journal of International Law* Vol. 27 no. 2, 2016, 304.

EACJ to cover human rights matters explicitly. Part five concludes with final observations and recommendations.

2 Notable jurisprudence of the EACJ

A number of notable cases determined by the EACJ have contributed to advancing human rights in the EAC. The Court has addressed issues such as the rights of refugees and stateless persons,¹³ electoral integrity standards,¹⁴ transboundary environmental rights¹⁵ and fair trial rights. For example, in *East African Law Society v Secretary-General of the EAC*,¹⁶ the EACJ was called upon to determine the lawfulness of *Operation Kimbunga*, a crackdown targeting illegal immigrants in Tanzania's Kagera Region bordering Rwanda and Burundi. Among those expelled in the Operation were individuals who claimed Tanzanian citizenship. The Operation was criticised for its discriminatory, arbitrary and corrupt implementation, relying on unauthorised government officials to make citizenship determinations. In March 2016, the EACJ found Tanzania in violation of the EAC Treaty.

Regarding environmental rights, the EACJ in *African Network for Animal Welfare (ANAW) v the Attorney General of the United Republic of Tanzania*,¹⁷ issued a permanent injunction restraining Tanzania from constructing a permanent road across the Serengeti National Park due to the impacts it would have on the ecosystem. Thus, the EACJ has played a leading role in reaffirming and even formulating human rights standards within the EAC and beyond.

The EACJ has, however, also been criticised for avoiding political questions and for deferring to partner states. In *East African Civil Society Organisations Forum (EACSOF) v the Attorney General of the Republic of Burundi and 2 Others*,¹⁸ the applicant challenged the decision of the Constitutional Court of Burundi in Case No. RCCB 303 in so far as it endorsed the legality of Pierre Nkurunziza's participation as a candidate in Burundi's 2015 presidential elections. The decision of Burundi's Constitutional Court was criticized widely and there were strong allegations of

¹³ See *East African Law Society v Secretary-General of the EAC*, EACJ Ref. No. 7/2014.

¹⁴ See also *Centre for Constitutional Governance and 3 Others v the Attorney General of the United Republic of Tanzania*, EACJ Ref. No. 43 of 2020 and *Dr Lina Zedriga and 4 Others v the Attorney General of Uganda and the Secretary-General of the EAC*, EACJ Ref. No. 13 of 2021. These ongoing cases challenge both the process, conduct and outcome of national elections in Tanzania and Uganda.

¹⁵ See for example *Centre for Food and Adequate Living Rights (CEFROHT) Limited and 3 Others v the Attorney General of the Republic of Uganda and 2 Others*, EACJ Ref. No. 39 of 2020, challenging the construction of the East African Crude Oil Pipeline in Uganda and Tanzania for failing to pay regard to applicable EAC Standards, international environmental law and international human rights law.

¹⁶ *East African Law Society v Secretary-General of the EAC*, EACJ Ref. No. 7/2014.

¹⁷ *African Network for Animal Welfare (ANAW) v the Attorney General of the United Republic of Tanzania*, EACJ Ref. No. 9 of 2010.

¹⁸ *East African Civil Society Organisations Forum (EACSOF) v the Attorney General of the Republic of Burundi 2 Others*, EACJ Ref. No. 2 of 2015

interference in the determination of that case, with the Vice President of the Court fleeing the country before the decision was issued.¹⁹ The EACJ found it had no temporal and subject matter jurisdiction to determine the case, reasoning it could not interrogate the decision of a national court since in effect it would be acting as an appellate court.

This reasoning can be faulted, since the EACJ in *Burundi Journalists Union V the Attorney General of the Republic of Burundi*²⁰ found that Burundi's press law violated the Treaty even though a court in Burundi had found it mostly compliant. Further, a plain reading of Article 30(1) of the EAC Treaty entitles any person to challenge any directive or decision, meaning that a judgment of a national court is a decision that may be challenged at the EACJ.

This chapter considers in more detail two cases that focused on human rights. The cases have been selected for their novelty and the quality of reasoning employed by the EACJ in rendering them.

In *Samuel Mukira Mohochi v the Attorney General of the Republic of Uganda*,²¹ the applicant, a citizen of Kenya, lawyer and human rights defender, travelled to Uganda on 13 April 2011 as part of a 14-member delegation of the International Commission of Jurists - Kenya Section (ICJ Kenya) scheduled to meet the then Chief Justice of Uganda. The entire delegation departed from Nairobi on the same flight. On arrival at Entebbe International Airport, at 9.00 a.m., the applicant was not allowed beyond the immigration checkpoint in the airport.

The applicant contended that he was arrested, detained and confined by airport immigration authorities. He was subsequently served with a copy of a 'Notice to Return or Convey Prohibited Immigrant' addressed to the Manager, Kenya Airways by the Principal Immigration Officer, Entebbe International Airport, bearing his names as the prohibited immigrant. On the same day at 3.00 p.m., he was put on a Nairobi bound Kenya Airways flight and returned to Kenya. The applicant was not informed verbally or in writing about why he was denied entry, declared a prohibited immigrant and subsequently returned to Kenya. The Immigration authorities argued that they owed him no such duty under the law.

The applicant argued that Uganda's actions were in violation of her obligations pursuant to Article 104 of the EAC Treaty and Article 7 of the Common Market Protocol to Guarantee Free Movement of Persons. The applicant further argued that Uganda was in violation of Articles 6(d) and 7(2) of the EAC Treaty with regard to the denial of

¹⁹ 'Senior Burundi Judge Flees Rather than Approve President's Candidacy', *The Guardian* May 5, 2015, <https://www.theguardian.com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve-presidents-candidacy>.

²⁰ *Burundi Journalists Union v The Attorney General of the Republic of Burundi*, EACJ Ref. No. 7 of 2013.

²¹ *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda*, EACJ Ref. No. 5 of 2011.

his due process of law or fair administrative process, the right to non-discrimination, freedom from arbitrary arrest and detention, the right to a fair and just administrative action, the right to information and freedoms of assembly, association and movement as fundamental human rights pursuant to Articles 2, 6, 7, 9, 10, 11 and 12 of the African Charter.

Uganda's defence was premised on three limbs. First, it denied that the applicant was arrested, restrained or detained by Immigration authorities. On the second limb, it argued that the applicant was validly denied entry in accordance with Article 7(5) of the Common Market Protocol which provides that the right to free movement would be subject to public policy, public security or public health. Further, Uganda was under no legal obligation to give the applicant reasons for the denial of entry. Under the third limb of its defence, Uganda contended that its actions did not violate the provisions of the Treaty and EAC law and that the EACJ did not have jurisdiction to enforce Articles 2, 6, 7, 9, 10, 11 and 12 of the African Charter as alleged by the applicant.

The EACJ made several notable findings. First, in relation to Uganda's preliminary objection that Articles 6(d) and 7(2) of the EAC Treaty consisted of "aspirations and broad policy provisions ... which were futuristic" and in effect were not justiciable, the Court stated:

It is clear to us that the provisions of Article 6(d) of the Treaty are solemn and serious governance obligations of immediate, constant and consistent conduct by the Partner States. In our humble view, we know of no other provisions that embody the sanctity of the integration process the way the above do.²²

This finding was resounding. Several respondents before the EACJ had unsuccessfully argued that the Court had no jurisdiction over human rights matters. In the instant case, Uganda attempted to introduce a new element to the argument by stating that even if the Court had jurisdiction over human rights matters, they were too distant and non-justiciable for the Court to enforce. In rejecting this argument, the Court made it explicitly clear that those provisions were a central tenet of the Treaty, that they could not be distinguished from provisions of the Treaty and that they were justiciable.

With respect to whether the EAC Treaty and the Common Market Protocol took away the sovereignty of Uganda to deny entry to unwanted persons who were citizens of partner states of the EAC, the Court held:

once the Treaty and, subsequently, the Protocol, were given force of law within Uganda, they became directly enforceable within the country and took precedence over national law that was

²² Ibid.

in conflict with them. Existing legal provisions became qualified and started to be applicable only to the extent that they were consistent with the Treaty and the Protocol.²³

Further, with respect to how the Treaty and Community law impacted Uganda's sovereignty, the Court found:

Sovereignty, therefore, cannot take away the precedence of Community law, cannot stand as a defence or justification for noncompliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty or the Protocol.²⁴

The finding of the Court on this issue clarified two important points: that the Treaty and Community law took precedence over national law; and that sovereignty could not serve as a bar to the implementation of EAC obligations. In essence, after voluntarily joining the Community, Uganda had ceded part of its sovereignty to community standards which included human rights, rule of law and good governance. Uganda and, therefore, other partner states, could not rely on sovereignty or national laws to avoid their human rights obligations.

Finally, in determining whether the applicant's rights were violated by the declaration that he was a prohibited immigrant, the Court found that even though the applicant was not properly declared a prohibited immigrant, Uganda's actions constituted a violation of his rights to free movement under the Treaty following the unreasonable restriction of his movement and the failure to proffer him with reasons for denying him entry into Uganda. The Court stated:

even if that power existed under Section 52 [*of the Uganda National Citizenship and Immigration Control Act (Chapter 66) of the Laws of Uganda*], the Immigration authorities knew or ought to have known that by Uganda's accession to and domestication of the Treaty and Protocol, that power would be strictly qualified and limited by Articles 104 and 7(2) of the Treaty and (Articles) 7 and 54(2) of the Protocol. In other words, they were duty bound to treat the Applicant in accordance with those provisions, and not to do so amounted to violation of his rights and Uganda's obligations there under.²⁵

The decision of the EACJ on this matter reaffirmed the right to freedom of movement which is a cornerstone of any integration process. It also contributed to recalibrating the perception of some partner states about the tension between sovereignty and the right to freedom of movement in the EAC.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

The second case for consideration here is *Freeman Mbowe and 3 Others, Legal Human Rights Centre V the Attorney General of The United Republic of Tanzania*.²⁶ The facts of that case were that Tanzania enacted the Political Parties (Amendment) Act No. 1 of 2019 on 29 January 2019 after which the Act was given assent by the President on 13 February 2019. The Act expanded the powers of the Registrar of Political Parties to monitor *intra* party elections and nominations, to oversee civic education and capacity development activities, to suspend a member of a political party from conducting political activities, to penalise party leaders who fail to furnish the Registrar with any information demanded, and it created criminal sanctions for violations of any regulations. The applicants filed the reference before the EACJ contending that the provisions of the Act constituted unjustified restriction of democracy, good governance and freedom of association which were fundamental and operational principles of the EAC Treaty.

Tanzania argued that the impugned legislation was enacted to promote institutionalism, intra-party democracy, and political and financial accountability in conformity with the Constitution of Tanzania and international instruments. It further contended that the impugned Act provided for reasonable limitations to monitor the conduct of political actors to ensure an adequate balance between the right to freedom of association through political parties and “increased alarm on deterioration of intra-party democracy.” Tanzania argued that the legislation was not discriminative and did not contravene the Treaty, Community principles and international human rights norms.

The case called upon the Court to evaluate whether national law complied with Treaty provisions. The Court applied the test it first used in *Burundian Journalists Union v the Attorney General of the Republic of Burundi*.²⁷ The test assessed the following factors/questions:

1. Is the limitation one that is prescribed by law? It must be part of a statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited;
2. Is the objective of the law pressing and substantial? It must be important to the society; and
3. Has the state, in seeking to achieve its objectives, chosen a proportionate way to do so? This is the test of proportionality relative to the objectives or purpose it seeks to achieve.

²⁶ *Freeman Mbowe and 3 Others, Legal Human Rights Centre V the Attorney General of the United Republic of Tanzania*, Consolidated EACJ Ref. No. 3 and 4 of 2019.

²⁷ *Burundian Journalists Union v the Attorney General of the Republic of Burundi*, EACJ Reference No. 7 of 2013.

Applying this test, the Court found that Sections 3, 4, 5, 9, 15 and 29 of the Political Parties (Amendment) Act, No. 1 of 2019 violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty as they were unclear, lacked a legitimate objective and they were disproportionate in nature.

This test borrowed heavily from the test applied by the African Court on Human and Peoples' Rights (AfCHPR) in *Konate v Burkina Faso*,²⁸ stating: "To be considered as law, norms have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and made accessible to the public".

In doing so, the EACJ continued to rely on established principles of human rights adjudication in which reasonability and proportionality tests are used to determine whether national legislation complies with international human rights norms. In relying on existing adjudication standards, the EACJ contributed to strengthening and mainstreaming a human rights approach to legislative review.

Within the policy space, the decision of the EACJ contributed to reversing a dangerous trend of authoritarianism by "lawfare" in Tanzania whereby political space was constrained using perceived legitimate power. The case and the methodology applied would also quite likely be applied in other countries where similar trends are apparent.

Finally, the decision of the Court contributed towards a holistic review of the law and policy space for political parties in Tanzania. It also amplified the need for an equal and level playing field for opposition political parties which culminated in an ongoing national political dialogue on a possible truth and reconciliation process.

The above two cases determined by the EACJ are relevant to understanding the greater role that the Court has in protecting human rights. In relation to the *Mbowe Case*, the EACJ was chosen as a litigation forum following concerns about the independence of national courts. Similarly, and in relation to other countries, the EACJ is seen as a forum that is more independent than national adjudicative systems. The EACJ is perceived as sufficiently removed from the influence of national apparatus but appropriately proximate to grasp the nuances of national dynamics. Another factor that has made the EACJ relevant is its ability to deal with intra-regional matters, as evidenced in the *Muhochi Case*. With the increased pace of integration and the interconnectivity of the region, applicants approach the Court as a neutral and cross jurisdictional forum to ventilate rights violations which ordinarily would have been addressed in national courts.

These and other reasons will continue to place the EACJ in a unique position to add value to the human rights protection framework in the region. They will also continue to encourage litigants to access the EACJ to seek redress for rights violations.

²⁸ *Konate v Burkina Faso*, AfCHPR App. No. 004/2013/ (2014).

However, as was noted earlier in the chapter, the EACJ has limitations particularly concerning complex and politically sensitive matters. The next section of the chapter examines some of the perspectives discussed here from the lens of litigants.

3 Experiences of litigants before the EACJ

Litigation particularly in the arena of human rights is a sensitive issue especially considering the direct interests of litigants, the outcome of each case and the possibility for backlash.²⁹ As such, litigants have certain biases when polled on their experiences before the EACJ. There is no comprehensive and empirical study assessing the experiences of litigants before the EACJ, and many of the available studies focus largely on individual citizens.

Litigants have reflected positively on access to the EACJ. The Court is relatively accessible to litigants from a technical and procedural perspective and also from a geographical and logistical outlook.³⁰ At the procedural level, the Court does not require litigants to exhaust local remedies.³¹ At the practical and administrative level, the Court has sub-registries in most partner states, and it does not charge filing fees for cases.³²

Litigants have also positively noted the speed at which cases are dispensed with at the Court relative to national courts and AU human rights mechanisms. Again, while no empirical study has been conducted on the dispensation rate of the Court's entire caseload, cases are usually heard and determined within 24 months of filing.³³

Another area where the Court has been lauded is its perceived authority. Litigants perceive that the Court has immense value in abetting violations of human rights, and thus trust in the Court is relatively high.³⁴ As a result, the Court has also been used as a forum for advocacy to spotlight issues or to apply judicial pressure to states to reverse certain courses of action thereby creating deterrent effects.³⁵ As was noted in the *Democratic Party Case*,³⁶ the mere filing of a case challenging Rwanda's failure to

²⁹ Cavallaro and Brewer 2017, 817.

³⁰ John Eudes Ruhangisa 'The East African Court of Justice: Ten Years of Operation Achievements and Challenges', repository.eac.int, January 11, 2011. <http://repository.eac.int/handle/11671/328>.

³¹ Ibid.

³² Ibid.

³³ Luke Anami, 'OKUBO: EAC Court Limping Along under Difficult Conditions', *The East African* 2022 www.theeastafrican.co.ke. Accessed June 27, 2022. <https://www.theeastafrican.co.ke/tea/news/east-africa/eac-court-limping-along-under-difficult-conditions-3814736>.

³⁴ Victor Lando, 'The Domestic Impact of the Decisions of the East African Court of Justice' 2018 (18) *African Human Rights Law Journal* 463,

³⁵ Ibid.

³⁶ *Democratic Party v The Secretary General of the East African Community & 4 Others*, EACJ Ref. No. 2 of 2012.

deposit a declaration granting litigants access to the AfCHPR caused or accelerated Rwanda's action to file the stated declaration.

Adversely, the EACJ has come under criticism from litigants for non-implementation of decisions. In certain cases, partner states have failed or have been obstinate in implementing decisions of the Court. In a study conducted in 2019, 36% of the decisions of the EACJ were not implemented.³⁷ The Court does not have a documented implementation framework to ensure compliance with its decisions.³⁸ As a result, this weakens the legitimacy of the Court and reduces confidence in its role before litigants.

The increase in the number of partner states and use of the Court by litigants has also created a significant backlog at the Court.³⁹ The Court has not adequately evolved its legal framework and strategies to match the increased demand for its services. Based on these factors, litigants have complained of delays in the hearing and determination of cases. Following the COVID-19 pandemic, the EACJ had to fast track the integration of additional features to its case management system to allow electronic filing and the conduct of hearings virtually.⁴⁰

A final area of concern has been the perceived deference to state authority and judicial conservatism that some litigants have complained about.⁴¹ In several cases where political or other sensitive questions have been raised, the Court has adopted contentious reasoning in what some litigants perceive as pandering to states. Notable cases in this regard include the challenge to amendments of the EAC Treaty⁴² and a case challenging the presidential elections in Burundi,⁴³ discussed earlier in this chapter.

4 Granting the EACJ explicit human rights mandate

As has already been noted in this chapter, the EACJ has rendered decisions touching on human rights because the EAC Treaty provides for certain basic rights of every

³⁷ Supra Anani.

³⁸ Supra Lando.

³⁹ Supra Anani.

⁴⁰ Geoffrey Kiryabwire, 'COVID -19: East African Court of Justice Considers Use of On-Line Hearings' 2021, <https://www.eacj.org/wp-content/uploads/2020/04/COVID-19-East-African-Court-of-Justice-considers-use-of-On-Line-Hearings.pdf>

⁴¹ Supra Alter, Gathii and Helfer, 305.

⁴² See *East African Law Society and 4 Others V The Attorney General of The Republic of Kenya & 3 Others*, EACJ Ref. No. 3 of 2007 in which the Applicants challenged the legality of the amendments to the Treaty and sought declarations that the amendment process which created a two tier court and imposed a 60 day window under which violations could be brought to the EACJ infringed provisions of the Treaty and norms of international law and was of no legal effect.

⁴³ See *East African Civil Society Organisations Forum (EACSOF) v The Attorney General of the Republic of Burundi and 2 Others*, EACJ Reference No. 2 of 2015.

citizen of the EAC. However, the jurisdiction of the EACJ is limited merely to pronounce declaratory judgments. As was noted in *James Katabazi and 20 Others v Secretary-General of the East African Community and Another*, the EACJ does not have any powers to enforce human rights.

In order to remedy this challenge, the EACJ would need to be conferred with express powers to be a court of human rights.

Debate continues within scholarly, activist and policy circles on whether the extension of the jurisdiction of the EACJ is desirable and practical. Those that argue for the Court's expanded powers point to the scale of human rights violations in the region and the need for additional protection mechanisms, the proximity of the Court relative to other regional and international mechanisms, the track record of the Court in dispensing justice and the ability of the Court to narrow the impunity gap by addressing violations in states that are not party to normative instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (the African Court Protocol).

Those that argue against the extension of the EACJ's direct jurisdiction to cover human rights refer to challenges such as forum shopping, forum hopping, fragmentation of human rights norms, administrative and logistical expenses and the absence of effective implementation frameworks to give full effect to the decisions of the EACJ.

Notwithstanding this debate, there remains adequate room for extending the EACJ's jurisdiction to cover human rights as envisioned by the drafters of the EAC Treaty.

The legal basis for the extension of the jurisdiction of the EACJ is found in Article 27(2) of the EAC Treaty which states:

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 operationalize the extended jurisdiction.

The provisions of Article 27(2) of the Treaty reflected the understanding of its drafters that the jurisdiction of the Court would progressively evolve along with the integration process. Indeed, in November 2004, the SCLJA decided that in view of the growing scope of the integration process, the jurisdiction of the Court should be extended. In April 2005, the Council of Ministers of the EAC (Council) approved that decision and in July 2005, SCLJA adopted a Zero Draft Protocol extending the jurisdiction of the Court. The Council further directed the EAC Secretariat to conduct public consultations on the Draft.

In 2006 and 2007, public consultations were held in Kenya, Tanzania and Uganda. Civil society organisations, including the East Africa Law Society, participated in the

consultations where they advocated for the extension of the jurisdiction of the Court to explicitly cover human rights.

In January 2009, at its 6th meeting, the SCLJA decided that considering the Customs Union and Common Market, developments of which gave rise to enhanced cross border trade, movement and investment, there was a need to extend the jurisdiction of the Court to include trade matters. The SCLJA subsequently directed, *inter alia*, that public consultations be held in Rwanda and Burundi (following their accession to the EAC in July 2009) and that the proposal to extend the Court's jurisdiction to cover human rights and appellate jurisdictions should not be pursued.

In June 2010, the case of *Sitenda Sibalu v the Secretary-General of EAC, the Attorney General of Uganda and 2 Others*⁴⁴ was filed at the EACJ by a Ugandan applicant alleging that the delay and inaction of the Secretary-General of the EAC to convene the Council as stipulated under Article 27 of the Treaty to extend the jurisdiction of the Court infringed Articles 7(2), 8(1)(c) and 6 of the Treaty. On 30 June 2011, the EACJ rendered its judgment in favour of the applicant, noting: "quick action should be taken by the East African Community in order to conclude the protocol to operationalise the extended jurisdiction of the East African Court of Justice under Article 27 of the Treaty".

However, when the SCLJA met in 2011, it decided to extend the Court's jurisdiction only with respect to trade related matters, excluding jurisdiction for original, human rights and appellate matters. The SCLJA advised against vesting the EACJ with explicit human rights jurisdiction for several reasons.

It contended that partner states already subscribed to the AfCHPR, having ratified the African Court Protocol. However, despite this being true, at the time, only one of the then five partner states, Tanzania, had deposited the declaration pursuant to Article 34(6) of the African Court Protocol that allowed individuals and non-governmental organisations to file cases directly before the AfCHPR.

Other reasons advanced by the SCLJA for suspending the extension of the EACJ's jurisdiction were that human rights matters were best left as the primary reserve of national jurisdictions, that the extension should be deferred pending the attainment of a political federation, and that there was a need to clarify the role of National Human Rights Institutions (NHRIs) vis-à-vis their potential role in accessing the EACJ as litigants or *amicus curiae*.

Aggrieved by the outcomes from the SCLJA, in January 2012, the Democratic Party of Uganda instituted *Democratic Party v the Secretary-General and the Attorney General*

⁴⁴ *Sitenda Sibalu v the Secretary-General of EAC, the Attorney General of Uganda and 2 Others*, EACJ Ref. 1 of 2010.

*of the Republic of Uganda, the Attorney General of the Republic of Kenya, the Attorney General of the Republic of Rwanda and the Attorney General of the Republic of Burundi.*⁴⁵ The case challenged the inaction by the four partner states of depositing the Article 34(6) declaration that allows direct access to the AfCHPR pursuant to the African Court Protocol. The case was eventually dismissed as discussed above.

On 26 April 2012, EALA adopted a resolution that the Council should request the transfer of Kenyan cases then before the International Criminal Court to the EACJ. Two days later at the EAC Summit held on 28 April 2012, the Summit deliberated on the EALA resolution and instructed the Council to examine the possibility and expedite the extension of the EACJ's jurisdiction to cover international crimes. Thereafter at its 25th Extra-Ordinary Meeting held on 30 June 2012, the Council directed the EAC Secretariat to prepare a comprehensive technical paper addressing policy and legal issues on extending jurisdiction of the EACJ to cover universal jurisdiction (including crimes against humanity) and other commitments under AU initiatives on the protection and promotion of human rights. It also directed the SCLJA to meet by the end of July 2012 to consider the technical paper and report to the Council at its 25th Meeting.

With little appetite to grant the EACJ explicit human rights jurisdiction, policy discussions continued within the EAC with respect to extending the EACJ's jurisdiction over trade related matters. On 30 November 2013, the Summit approved the Council's decision to extend the Court's jurisdiction to include matters of trade, investment and EAC monetary union. A protocol was subsequently adopted in 2018 but is yet to come into force.

Given the existing political and policy climate in the region, it is unlikely that there will be broad-based interest in extending the jurisdiction of the Court to cover human rights. In addition, extending its jurisdiction would require significant political, structural, administrative and legislative changes to the EACJ and related EAC processes.

Another significant challenge is the absence of a consistent and coherent approach by civil society actors to advocate for the extension of the Court's jurisdiction. As a result, the idea of an expanded EACJ has not captured the imagination of the wider public within the EAC.

A final challenge, though theoretical, relates to the potential disadvantages of an expanded Court. The creation of multiple regional and continental spheres to adjudicate over human rights issues may give rise to fragmentation or dissonance of

⁴⁵ *Democratic Party v the Secretary-General and the Attorney General of the Republic of Uganda, the Attorney General of the Republic of Kenya, the Attorney General of the Republic of Rwanda and the Attorney General of the Republic of Burundi*, EACJ Ref. No. 2 of 2012.

the human rights system. Other concerns include the possibility of forum shopping and hopping if no mechanism is put in place to share information between regional and continental mechanisms. This has been witnessed by the emerging strategy by some litigants of pursuing similar or related claims before multiple adjudicative bodies. Examples include the litigation of alleged violations during Tanzania's 2020 elections.⁴⁶

Where carefully crafted, extended human rights jurisdiction may serve to amplify human rights standards by leveraging on the respective comparative advantages of different adjudicative bodies. It may also serve as a robust advocacy strategy. However, where improperly applied, it may give rise to fragmentation, admissibility concerns under the principle of *lis pendens* and the provisions of the African Charter. This (over indexing) strategy warrants actors to critically examine whether in the context of increasing caseloads and with limited resources to adjudicative bodies these strategies contribute to flooding the pathways of justice that may prevent the timely resolution of other matters that may be of importance.

Finally, part of the motivation of extending the jurisdiction of the EACJ relates to the deficiencies of national justice systems. In advocating for expanded EACJ human rights jurisdiction, litigants have to evaluate whether over exporting cases that should be dealt with at the national level will place a burden on international mechanisms that are ordinarily supposed to serve as courts of last resort. As such, human rights actors should work towards developing durable, effective and transparent national adjudicative systems to give effect to human rights norms.

5 Conclusion

The EACJ has and will continue to play an important role in human rights protection. It has rendered important jurisprudence to establish, restate or interpret human rights norms. These decisions are of value in themselves but can also be used for the broader purpose of advocacy, legislative reform and policy change.

To this end, litigants have a crucial role in ensuring the EACJ continues to dispense justice. Litigants need to present the right cases and formulate the right arguments to persuade the EACJ to continue to render notable decisions but also to progressively assert its authority. The EACJ on its part will also likely need to review its posture toward complex and politically sensitive cases.

⁴⁶ See *Centre for Constitutional Governance and 3 Others V. the United Republic of Tanzania*, EACJ Ref. No. 43 of 2020.

The extension of the jurisdiction of the EACJ will grant the Court full powers to address human rights issues. However, that currently appears to be a distant dream unless actors including the EACJ itself concertededly press for the extension of its jurisdiction.

Litigants can and should continue to share lessons and perspectives particularly through the formulation of litigants forums to draw on lessons from within the east African region, across the African continent and even internationally.

Chapter Four

Advancing Human and Peoples' Rights in the East African Community through Litigation within the African Union Human Rights System: Lessons, Challenges and Prospects

Segnolla Horace Adjolohoun

Keywords: East African Community, African Union, regional integration, human rights litigation, human rights system, enforcement

Abstract

This chapter discusses the advancement of human rights in the East African Community (EAC) in relation to litigation before the human rights mechanisms of the African Union (AU). The chapter shows that while there is an established framework for enforcement of human rights within the EAC, that framework faces challenges which, however, can be addressed by building on the AU human rights system. The AU human rights system is relevant given that EAC member states, which are also AU member states, are parties to the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments. An examination of litigation involving EAC member states before the African Commission on Human and Peoples' Rights (ACHPR), the African Court on Human and Peoples' Rights (AfCHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) reveals that these bodies have adjudicated on a wide range of issues, including fair trial rights, freedom of expression, the right to nationality, women's rights, children's rights, the death penalty and the right to life, and indigenous peoples' rights. The chapter also sheds light on the normative and jurisprudential complementarity between the East African Court of Justice and the ACHPR, AfCHPR and ACERWC.

1 Introduction

Formed as a classic Regional Economic Community (REC),¹ the East African Community (EAC)² is one of the eight RECs formally recognised by the African Union

¹ On RECs in Africa, see Richard Frimpong Oppong, 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web', (2010) 18(1) *African Journal of International and Comparative Law*, 92-103; Soumana Sako, 'Challenges Facing Africa's Regional Economic Communities in Capacity Building' Occasional Paper No. 5 (2006) African Capacity Building Foundation.

² Treaty for the Establishment of the East African Community (EAC, 1999) entered into force 2000. The EAC was originally formed by Tanzania, Kenya and Uganda, which were later joined by Burundi and Rwanda in 2007, South Sudan in 2016, and the Democratic Republic of Congo (DRC) in 2022. On human rights within the EAC, see in general, Ally Possi, 'Striking a Balance Between Community Norms and Human Rights: The Continuing Struggle of

(AU).³ The main purpose of the EAC was to achieve political, economic, social and cultural integration.⁴ As such, human rights did not specifically form part of the foremost objectives of the EAC. However, just as other RECs, the EAC established the East African Court of Justice (EACJ)⁵ as its judicial organ with the primary mandate to oversee the interpretation and application of Community norms. Member states of the EAC pledged to achieve Community objectives under the guidance of principles such as democracy, the rule of law, social justice and human rights.⁶ A particular commitment was made under Article 6(d) of the Treaty for the Establishment of the East African Community (EAC Treaty) to the effect that one of the “fundamental principles” of the Community was the recognition of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights (African Charter).⁷ Finally, and perhaps more importantly, member states committed under Article 27(2) of the Treaty to grant human rights jurisdiction to the EACJ, to be done at some suitable subsequent date.

Against this normative background, the EACJ impliedly proceeded to implement what commentators have referred to as the EAC human rights regime.⁸ It did so through judicial enforcement of the EAC’s fundamental principles set out under Articles 6(d) and 7(2) of the EAC Treaty, i.e., good governance, the rule of law, democracy and human rights in accordance with the African Charter. The EAC’s human rights regime as enforced by the EACJ is now well established as witnessed by landmark and widely publicised judgments of the Court.⁹

the East African Court of Justice’ (2015) 15 *African Human Rights Law Journal* 192-213; Solomon T Ebobrah, ‘Human Rights Developments in African Sub-Regional Economic Communities During 2010’ (2011) 1 *AHRLJ* 216-250.

³ African Union, ‘Regional Economic Communities’ <https://au.int/en/recs> (accessed, 23 May 2022).

⁴ Article 5(1) of the Treaty for the establishment of the East African Community (EAC Treaty).

⁵ Established under Article 9 of the EAC Treaty, started its operation on 30 November 2001.

⁶ See Article 3(3)(b) of the EAC Treaty.

⁷ African Charter on Human and Peoples’ Rights (African Charter) (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev. 5.

⁸ See Philomena Apiko, ‘Understanding the East African Court of Justice: The Hard Road to Independent Institutions and Human Rights Jurisdiction’ Background Paper Series on the Political Economy Dynamics of Regional Organisations (March 2017) 10-14; John Eudes Ruhangisa, ‘The East African Court of Justice: Ten Years of Operation, Achievements and Challenges’, Paper presented during the Sensitisation Workshop on the Role of the EACJ in the EAC Integration (Kampala, 1-2 November 2011) 6 <https://www.eacj.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf> (accessed 4 June 2022); Sègnonna Horace Adjolohoun, ‘Giving Effect to the Human Rights Jurisdiction of the ECOWAS Court of Justice: Compliance and Influence’, Unpublished Doctoral Thesis, University of Pretoria (2013).

⁹ See, among others, *James Katabazi and Others v Secretary-General of the East African Community and the Attorney General of the Republic of Uganda* (Katabazi Case) EACJ Law Report 51 (2005-2011) (Attempts to circumvent courts orders to release the Applicants violate the rule of law; *Hon. Sitenda Sebalu v Secretary-General of EAC and Others*, EALS Law Digest 110, para 93 (delay incurred to grant EACJ appellate and human rights jurisdiction violates good governance); *Burundian Journalists Union v Attorney General of the Republic of Burundi* EACJ Law Report. 299 (2012 – 2015) (provisions of the Press Law requesting among others that journalists reveal their sources and restricting certain publications violate the Treaty).

While the EAC's framework for enforcement is thus established, it possesses a series of challenges, which hamper full achievement of a human rights-based regional integration. First, the EACJ has still not been granted the express human rights jurisdiction envisaged under Article 27(2) of the EAC Treaty. Instead, the EAC Heads of State and Government on 30 November 2013 only agreed to expand the jurisdiction of the Court to address matters of trade, investment and monetary union.

Although the EACJ has exercised implied or indirect human rights jurisdiction through its interpretation of Articles 6(d) and 7(2) of the EAC Treaty, this approach risks attracting backlash from the EAC's governments. Indeed, a precedent for political backlash was established following a case where Kenya was aggrieved by EACJ's interpretation of the EAC Treaty. Kenya mounted a successful campaign to alter the structure and jurisdiction of the Court, subsequent to which amendments to the EAC Treaty made it easier for EAC member states to remove the EACJ judges, and restricted the time period for litigants to file cases before the EACJ to 60 days from when the complaint to be litigated arose.¹⁰ Finally, the EAC does not have a formal mechanism for monitoring enforcement and compliance and this means that non-compliance is neither effectively evaluated nor reported on.

In light of these challenges, this chapter reflects on how the AU human rights mechanisms may serve as a way to reinforce the EAC's human rights framework. The chapter first explains how the EAC's framework on human rights is fundamentally anchored on realising the African Charter to which all EAC states are party, and the related challenges. The chapter then analyses how EAC member states have engaged with the three main human rights mechanisms of the AU: the African Commission on Human and Peoples' Rights (ACHPR),¹¹ the African Court on Human and Peoples' Rights (AfCHPR)¹² and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).¹³ The subsequent section of the chapter discusses complementarity between the EACJ and the AU human rights bodies. Last, proposals are made on how to strengthen enforcement of decisions made by the AU human rights mechanisms within the EAC regime including through the consolidation of a human rights based constitutional culture.

2 Relevance of the AU human rights mechanisms to the EAC human Rights framework

¹⁰ See Karen J Alter *et al*, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *EJIL* 293–328, 300-306

¹¹ Established under the African Charter in 1981, started its operations in 1987.

¹² Established under the African Court Protocol in 1998, started its operations in 2006.

¹³ Established under the African Children's Charter in 1990, started its operations in 2001.

The EAC Treaty incorporates human and peoples' rights under the African Charter as a fundamental principle on which to achieve regional integration. Article 1 of the African Charter, which is the main human rights instrument of the AU, expressly obligates state parties to recognise the rights, duties and freedoms enshrined in the Charter and to adopt legislative and other measures to give effect to them. This commitment makes the human rights norms and institutions of the AU relevant in seeking to enforce human and peoples' rights within the EAC.

For the purpose of this analysis, we consider adherence of EAC member states to four main human rights instruments of the AU: the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),¹⁴ the African Charter on the Rights and Welfare of the Child (African Children's Charter),¹⁵ and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol).¹⁶ We also consider one more instrument that contains human rights related provisions, which the AfCHPR has held is a human rights instrument:¹⁷ the African Charter on Democracy, Elections and Governance (ACDEG).¹⁸

First, we assess the extent to which EAC member states recognize the jurisdiction of the main institutions mandated to enforce human rights on the continent, i.e., the AfCHPR, the ACHPR and the ACERWC. All EAC member states are parties to the African Charter. However, South Sudan has not ratified the African Children's Charter. Burundi and South Sudan are not parties to the Maputo Protocol while Burundi, Tanzania and Uganda are not parties to the ACDEG.

A further relevant issue is access to justice for EAC's citizens before the AU human rights mechanisms. All EAC member states recognise the mandates of the ACHPR and the EACJ. Similarly, the ACERWC exercises its mandate in respect of all EAC member states except South Sudan which has not ratified the African Children's Charter.

Conversely, recognition of the AfCHPR raises peculiar challenges. As provided under Article 34(6) of the African Court Protocol, recognition of the Court's jurisdiction by States requires, in addition to ratification, an express declaration allowing individuals and non-governmental organisations (NGOs) direct access. Currently, none of the EAC member states accord individuals and NGOs direct access to the AfCHPR, after Rwanda and Tanzania withdrew their Article 34(6) declarations in 2016 and 2019

¹⁴ Adopted 2003, entered into force 2005.

¹⁵ Adopted 1990, entered into force 1999.

¹⁶ Adopted 1998, entered into force 2004.

¹⁷ *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits)* (2016) 1 AfCLR 668.

¹⁸ African Charter on Democracy, Elections and Governance (adopted 2007, entered into force 2012).

respectively.¹⁹ However, the AfCHPR can still receive human rights cases involving States that have not made the declaration if the ACHPR files applications concerning those states directly to the AfCHPR as it is permitted to do under Article 5(1)(a) of the African Court Protocol. For this to happen, the individual or NGO applicant must have first submitted a communication to the ACHPR.

Still, the challenges to the indirect jurisdiction of the AfCHPR through its complementarity with the ACHPR cannot be understated. Since the two institutions formally inaugurated jurisdictional complementarity in 2010, concerns have been raised that the ACHPR has filed only three applications before the AfCHPR, including one involving an EAC member state, Kenya.²⁰ The two other cases concerned Libya.²¹ The ACHPR has not transferred any cases to the AfCHPR in recent years. Rule 130 of the Rules of Procedure of the ACHPR of 2020 provides that the ACHPR may transfer to the AfCHPR a case whose respondent is a state party to the African Court Protocol, before deciding on the case's admissibility.²²

3 Litigation before African human rights mechanisms

EAC member states have been involved in litigation before the judicial and quasi-judicial mechanisms of the African human rights system. Here, we highlight some of that litigation, taking into account the arising socio-political and legal quandaries to human rights-based regional integration in the EAC.

3.1 EAC member states before the ACHPR

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois decision)*,²³ which was decided in November 2009, the ACHPR found that by displacing the Endorois indigenous community from their ancestral lands, Kenya had violated a

¹⁹ African Court, 'Declarations' <https://www.african-court.org/wpafc/declarations/> (accessed 31 May 2022).

²⁰ *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9; African Commission, 'Press Statement of the African Commission on Human and Peoples' Rights following the handing down of the judgment in Application 006/2012 by the African Court' <https://www.achpr.org/pressrelease/detail?id=89> (accessed 31 May 2022).

²¹ *African Commission on Human and Peoples' Rights v Libya* (2016) 1 AfCLR 153; African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17.

²² Rules of Procedure of the African Commission on Human and Peoples' Rights (ACHPR 2020).

²³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, ACHPR Communication No. 276 / 2003.

number of the rights of the Endorois community. The Commission directed Kenya to recognise the rights of the Endorois and implement various remedial measures including compensation. To date, the *Endorois decision* remains largely unimplemented. Empirical surveys have shown that non implementation of the decision has had an adverse effect on the community.²⁴

In *Democratic Republic of Congo v Burundi, Rwanda and Uganda*,²⁵ the ACHPR found that the occupation of Eastern DRC and the mass killing of civilians by armed forces from Burundi, Uganda and Rwanda amounted to a violation of several provisions of the African Charter. The Commission called on the three respondent states to pay damages for the human rights violations. There is no evidence that the measures ordered in this decision have been implemented.

In *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi*,²⁶ the ACHPR found that denial of legal representation constituted a violation of the complainant's rights. The Commission directed Burundi to bring its criminal legislation into conformity with its African Charter obligations.

In *Agnes Uwimana-Nkusi and Saidati Mukakibibi (represented by Media Legal Defence Initiative) v Rwanda*,²⁷ the ACHPR found that the conviction and sentencing of journalists critical of the government violated freedom of expression and access to information.

In *Thomas Kwoyelo v Uganda*,²⁸ the Commission found that refusal to grant the victim, a former child-soldier, amnesty despite a decision of the Constitutional Court violated his rights to a fair trial and equality before the law.

In *Nubian Community in Kenya v Kenya*,²⁹ the ACHPR found that failure to prevent the applicants from becoming stateless violated their rights to nationality. While Kenya's 2010 Constitution and 2011 Citizenship Act provided a conducive framework on the

²⁴ See International Service for Human Rights, 'NGO Forum, Implementation of the African Commission's Decision on the Rights of the Endorois Indigenous People of Kenya' (30 June 2021) <https://ishr.ch/latest-updates/ngo-forum-implementation-of-the-african-commissions-decision-on-the-rights-of-the-endorois-indigenous-people-of-kenya/> (accessed 3 June 2022); Minority Rights Group International, 'Implement Endorois Decision 276/03: Report on the impact of non-implementation of the African Commission's Endorois decision' <https://minorityrights.org/publications/endorois-decision/> (accessed 3 June 2022).

²⁵ *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication 227/99, (2004) AHRLR 19 (ACHPR 2003).

²⁶ *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi*, Communication No. 231/99.

²⁷ *Agnes Uwimana-Nkusi and Saidati Mukakibibi (represented by Media Legal Defence Initiative) v Rwanda*, Communication 426/12, Adopted during the 65th Ordinary Session, 21 October to 10 November 2019. There is no evidence of implementation.

²⁸ *Thomas Kwoyelo v Uganda*, Communication 431/12, adopted during 23rd Extra-Ordinary Session, 12 to 22 February 2018. There is evidence of implementation.

²⁹ *Nubian Community in Kenya v Kenya*, Communication 317 / 2006, adopted during the 17th Extra-Ordinary Session, 19 to 28 February 2015.

issue, Kenya had yet to enforce the laws in a manner that addressed access to documents of nationality and effective fulfilment of the right to property.³⁰

3.2 EAC member states before the AfCHPR

Kenya was party to litigation before the AfCHPR through an application filed by the ACHPR in the matter of *African Commission on Human and Peoples' Rights (Ogiek Indigenous Community) v Kenya (Ogiek Case)*.³¹ The AfCHPR eventually found that the eviction of the Ogiek from their ancestral land in the Mau Forest violated their rights. Initially, the Court issued an order for provisional measures on 15 March 2013 directing Kenya to reinstate the ban on land transactions on Ogiek ancestral land. Then, in a judgment on the merits delivered on 26 May 2017, the Court ordered Kenya to take appropriate measures to remedy the violations. Kenya subsequently reported that it had reinstated the restrictions on land transactions, but the applicant submitted evidence that the provisional order was breached severally.³² While it is factual that Kenya has established a Task Force to oversee implementation of the judgment, the judgment remains unimplemented.³³

Tanzania was a party to several cases decided by the AfCHPR. These include the cases of:

1. *Alex Thomas v Tanzania*³⁴ where the Court found that the applicant's trial *in absentia* while he was unrepresented constituted a violation of his right to a fair trial. The Court ordered that the violations should be remedied.
2. *Reverend Christopher Mtikila V Tanzania*³⁵ where the Court held that the constitutional requirement that independent candidates for local, parliamentary and presidential elections should be endorsed by a political party violates rights in the African Charter and ordered Tanzania to amend its Constitution to remove the impugned restriction.

³⁰ Open Justice Initiative, 'Without Papers, Who Are You?' <https://www.justiceinitiative.org/litigation/nubian-community-kenya-v-kenya> (accessed 12 June 2022).

³¹ *African Commission on Human and Peoples' Rights (Ogiek Indigenous Community) v Kenya* (merits) (2017) 2 AfCLR 9.

³² *African Commission on Human and Peoples' Rights (Ogiek) v Kenya* (merits), paras 17, 21, 22.

³³ Minority Rights Group International, 'Two Years On, Kenya Has Yet to Implement Judgment in Ogiek Case – MRG Statement' <https://minorityrights.org/2019/06/05/two-years-on-kenya-has-yet-to-implement-judgment-in-ogiek-case-mrg-statement/> (accessed 23 June 2020); Kenya National Human Rights Commission, 'Chairperson's Remarks-Ogiek Victory Celebrations' <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1021/Chairpersons-Remarks-Ogiek-Victory-Celebrations> (accessed 23 June 2020); The Kenya Gazette, Vol.CXX-No.35, 16 March 2018, Gazette Notice No. 2446, page 758; Daniel M. Kobei, 'Preface' in Katiba Institute and Ogiek Peoples' Development Program (ed) *Defending our future: Overcoming the challenges of returning the Ogiek home – A report on implementing the Ogiek Judgment in Kenya* (2020) 2.

³⁴ *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465.

³⁵ *Reverend Christopher Mtikila v Tanzania* (2013) 1 AfCLR 34.

3. *Anudo Ochieng Anudo v Tanzania*³⁶ where the Court held that withdrawal of the Applicant's citizenship making him a stateless person violated his right to nationality and ordered Tanzania to restore the applicant's rights.
4. *Ally Rajabu v Tanzania*³⁷ concerning the mandatory imposition of the death penalty which the Court found breached the right to fair hearing as it took away judicial discretion from the sentencing court, thereby violating the right to life, and that execution by hanging violated dignity, and ordered Tanzania to remove the mandatory death penalty from its Penal Code and grant the applicant a fresh sentencing trial.
5. *Jebra Kambole v Tanzania*³⁸ where the AfCHPR found that ousting the jurisdiction of courts to hear challenges on presidential elections violated the right to fair trial and ordered Tanzania to align its law with the African Charter.

Cases decided by the AfCHPR in relation to Rwanda include the following:

1. *In Ingabire Victoire Umuhoza v Rwanda*,³⁹ the Court held that the applicant's imprisonment based on her statements violated her freedom of expression as it was disproportionate or unnecessary in a democratic society; and
2. *In Kenedy Gihana and Others v Rwanda*,⁴⁰ the Court found that invalidating the applicants' passports without officially notifying them or giving them an opportunity to appeal the decision thus rendering them stateless violated their rights and ordered the documents to be reinstated.

Implementation of decisions of the AfCHPR remains quite low. Tanzania has not implemented any of the decisions of the AfCHPR referred to above.⁴¹ Regarding Kenya, an empirical report shows that neither the order for provisional measures nor the judgment on the merits in the *Ogiek* Case have been implemented.⁴² The 2021 Activity Report of the AfCHPR explains that Rwanda has not complied with any of the above discussed decisions. Significantly, Rwanda has indeed informed the Court that it will no longer participate in its proceedings, and it has not filed any implementation reports.

³⁶ *Anudo Ochieng Anudo v Tanzania* (merits) (2018) 2 AfCLR 248.

³⁷ *Ally Rajabu v Tanzania* (merits and reparations) (2019) 3 AfCLR 539.

³⁸ *Jebra Kambole v Tanzania*, AfCHPR, Application No. 018/2018, Judgment of 15 July 2020.

³⁹ *Ingabire Victoire Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165.

⁴⁰ *Kenedy Gihana and Others v Rwanda* (merits and reparations) (2019) 3 AfCLR 655.

⁴¹ African Court, 'Report of the African Court on Human and Peoples' Rights (AfCHPR) – 1 January – 31 December 2021' <https://www.african-court.org/wpafc/report-of-the-african-court-on-human-and-peoples-rights-afchpr-1-january-31-december-2021/> (accessed 3 June 2022); African Union, Executive Council Decision EX.CL/1323(XL) Fortieth Ordinary Session 20 January - 03 February 2022 Addis Ababa, Ethiopia.

⁴² Minority Rights Group International, 'African Commission of Human and Peoples' Rights v Kenya (the 'Ogiek case')' <https://minorityrights.org/law-and-legal-cases/the-ogiek-case/> accessed 3 June 2022; African Commission 'Press Statement of the African Commission on Human and Peoples' Rights following the handing down of the judgement in Application 006/2012 by the African Court' <https://www.achpr.org/presse/release/detail?id=89> (accessed 3 June 2022).

3.3 EAC member states before the ACERWC

In *Michelo Hunsungule and Others (on behalf of children in Northern Uganda) v Uganda*,⁴³ the ACERWC found that conscription of children by the Uganda Defence Forces violated Article 22 of the African Children's Charter and ordered Uganda to amend its law to prohibit such recruitment and also take measures for the social reintegration of the children. Despite a multi-stakeholder effort, these measures have only been partly implemented.⁴⁴

In *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on Behalf of children of Nubian Descent in Kenya) v Kenya*,⁴⁵ the ACERWC concluded that by denying children of Nubian descent registration at birth and therefore nationality, Kenya violated their rights. Kenya was directed to take all necessary measures to restore those rights. Compliance with this decision is seen as partial or in-progress given that the Constitution of Kenya now provides a conducive framework for implementation, but there is lack of more specific policy and enforcement actions.⁴⁶

Finally, in *Legal and Human Rights Centre and Centre for Reproductive Rights (on Behalf of Tanzanian Girls) v Tanzania*,⁴⁷ the Applicants alleged that Tanzania's policies – including mandatory pregnancy testing, expulsion of pregnant and married girls, denial of education post-childbirth, illegal detention of pregnant girls and the lack of access to reproductive and sexual health information and services in schools – discriminated against women and girls by preventing them from continuing their education in violation of the African Children's Charter. In a preliminary decision, the Committee found the matter admissible.⁴⁸ Meanwhile, the Tanzanian Minister of

⁴³ *Michelo Hunsungule and Others (on Behalf of Children in Northern Uganda) v Uganda*, Communication 001/2005, adopted at the 21st Ordinary Session, 15 to 19 April 2013.

⁴⁴ See United Nations Security Council (UNSC) 'Security Council, Adopting Resolution 2225 (2015)' SC/11932 18 June 2015 <http://www.un.org/press/en/2015/sc11932.doc.htm> (accessed 21 February 2018); N Compton 'A Disjointed Effort: An Analysis of Government and Non-Governmental Actors' Coordination of Reintegration Programs in Northern Uganda' (2014) 1920 *Independent Study Project Collection Paper* http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2946&context=isp_collection (accessed 12 June 2022).

⁴⁵ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya) v Kenya*, Communication 002/2009, adopted on 22 March 2011.

⁴⁶ ACERWC, Briefing Paper on the Implementation of *Nubian Minors v. Kenya* (February 2014) 2 <https://www.opensocietyfoundations.org/sites/default/files/litigation-implementation-briefing-nubian-children-20170606.pdf> (accessed 12 June 2022).

⁴⁷ *Legal and Human Rights Centre and Centre for Reproductive Rights (on Behalf of Tanzanian Girls) v Tanzania*, Communication 001/2019 received on 17 June 2019.

⁴⁸ Decision on Admissibility No. 001/2020, adopted during the 35th Ordinary Session of the ACERWC, September 2020.

Education is reported to have announced that the country would end the discriminatory policy,⁴⁹ but the Applicants are still pursuing the case.⁵⁰

4 Complementarity between the EACJ and African Union human rights mechanisms

4.1 Normative and jurisdictional complementarity

For purposes of ease of explanation, the analysis in this section will not include the ACERWC, although many of the discussed issues apply to a greater or lesser level to that mechanism too.

While Article 2 of the African Court Protocol provides that the AfCHPR will complement the protective mandate of the ACHPR, these two AU human rights mechanisms do not have statutory complementarity with the EACJ. However, evidence exists of implied complementarity between the AU human rights mechanisms and the EACJ.

As already stated in this chapter, the EAC is one of the eight RECs recognised by the AU as the pillars upon which continental regional integration will be achieved.⁵¹ As such, it follows that complementarity would be assumed between organs of RECs such as the EACJ and continental mechanisms of the AU such as the ACHPR and AfCHPR. This is more so since the EACJ, ACHPR and AfCHPR are entrusted, directly or impliedly, with the common mandate to interpret and apply the African Charter and other continental and regional integration treaties to which their states are party.

The question that arises is the implication of the complementarity drawn from the material jurisdiction of these mechanisms to consider human rights matters. Potential conflict can be foreseen given that the EACJ, ACHPR and AfCHPR can exercise personal jurisdiction over the same state parties to the African Charter. International procedural rules have designed mechanisms to address potential conflicts of

⁴⁹ The Guardian, 'Tanzania to Lift Ban on Teenage Mothers Returning to School' <https://www.theguardian.com/global-development/2021/nov/26/tanzania-to-lift-ban-on-teenage-mothers-returning-to-school> (accessed 12 June 2022).

⁵⁰ Centre for Reproductive Rights, 'Legal and Human Rights Centre and the Centre for Reproductive Rights (on Behalf of Tanzanian Girls) Against the United Republic of Tanzania (ACERWC)' <https://reproductiverights.org/case/tanzania-acerwc-expulsion-pregnant-schoolgirls/> (accessed 12 June 2022).

⁵¹ UNECA, 'Key Pillars of Africa's Regional Integration' <https://archive.uneca.org/oria/pages/key-pillars-africa%E2%80%99s-regional-integration> (accessed 5 June 2022); African Union, 'Regional Economic Communities' <https://au.int/en/recs> (accessed 5 June 2022); East African Community, 'EAC takes the lead as the most integrated bloc in Africa' <https://www.eac.int/press-releases/1764-eac-takes-the-lead-as-the-most-integrated-bloc-in-africa> (accessed 5 June 2022).

jurisdiction on both material and personal aspects. These rules include observing *res judicata*,⁵² *lis pendens*,⁵³ *non bis in idem*⁵⁴ or complementarity- subsidiarity.⁵⁵

The EACJ applies *res judicata* although more as a general principle of procedural law – drawn by the EACJ from the Civil Procedure Acts of Kenya, Uganda and Tanzania⁵⁶ – and not as an express rule prescribed in its statutes. This is seen in *Emmanuel Mwakisha Mjawasi and Others v Kenya* where the EACJ held that *res judicata* does not apply because the issues before the Court were not similar or substantially the same ones as were litigated before the Kenyan High Court.⁵⁷

The AU mechanisms apply the rule of *res judicata* pursuant to Article 56(7) of the African Charter, meaning they would very likely dismiss a case already decided by the EACJ. Notably, in its consistent case-law, the AfCHPR⁵⁸ has dismissed cases already decided by the ECOWAS Court of Justice based on the same criteria used by the EACJ⁵⁹ in defining *res judicata*, *i.e.*, the parties were the same; the issues, claims and prayers were the same; and the matter was decided on the merits. In line with the principle of comity or deference, the EACJ should logically observe *res judicata* vis-à-vis the ACHPR and AfCHPR. The rule or principle of comity is to the effect that courts of one state or jurisdiction respecting the laws and judicial decisions of other jurisdictions – whether state, federal or international – not as a matter of obligation but out of deference and mutual respect.⁶⁰ The same argument would apply to other such procedural principles as *lis pendens* and *non bis in idem*, which mainly derive from or have the same finality as *res judicata*, *i.e.*, to guarantee legal certainty.

On the issue of time limit to file cases, the rule applies before the EACJ but not before the AU human rights mechanisms. The latter rather apply the principle of reasonable time as provided under Article 56(6) of the African Charter and pursuant to which an application will be admissible, among others, only if it is filed “within a reasonable period of time from the time local remedies are exhausted or from the date the Court is seized with the matter⁶¹ [or from the date set by the Court as the starting point to determine the time within which it shall be seized of the matter]”.⁶²

⁵² Disputes settled on the merits by a competent body should bring litigation to its end, and bind all other bodies seized with the same matter.

⁵³ A competent body should refrain from exercising jurisdiction and pend examination when the same matter is pending before another body with similar competence.

⁵⁴ The same subject of litigation, namely the respondent, cannot be tried twice for the same facts or actions.

⁵⁵ A competent body should exercise jurisdiction only when another competent body seized of the same matter is either unwilling or unable to do so.

⁵⁶ *Katabazi* judgment, para 30.

⁵⁷ *Emmanuel Mwakisha Mjawasi and 748 Others v Kenya*, Ref. No. 2 of 2010, Judgment of 29 September 2011.

⁵⁸ *Jean-Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270; *Dexter Eddie Johnson v Ghana* (jurisdiction and admissibility) (2019) 3 AfCLR 99.

⁵⁹ Supra *Emmanuel Mwakisha Mjawasi and 748 Others v Kenya*.

⁶⁰ See Cornell Law School, 'Comity' <https://www.law.cornell.edu/wex/comity> (accessed 7 June 2022).

⁶¹ English version of the text of the Charter.

⁶² English translation of the French version of the same provision.

Given that Article 56(6) of the Charter does not specify a time limit, the AfCHPR has consistently dismissed reliance by respondents on the six-month time frame expressly required to file applications before the European Court of Human Rights. It has adopted a liberal case-by-case interpretation of the requirement and, therefore, accepted cases brought even several years after local remedies were exhausted, taking into account factors such as whether the applicants were represented, whether they had sufficient knowledge of the AfCHPR's operation, or whether they were incarcerated, lay or indigent.⁶³ The ACHPR adopts the same law and case-law as the AfCHPR in respect of the time limit to file cases.

It may be noted that the EACJ and AfCHPR have both examined matters sharing some similarities. One such instance, where both mechanisms arrived at a similar conclusion, involved the state obligation to make or withdraw the declaration under Article 34(6) of the African Court Protocol. In *Democratic Party v Rwanda*,⁶⁴ the EACJ was called upon to decide on whether the failure and delay by Uganda, Kenya, Rwanda and Burundi to make the Article 34(6) declaration constituted an infringement of EAC principles. Similarly, in *Ingabire Victoire Umuhoza v Rwanda*, the AfCHPR held that states were at liberty to withdraw the declaration since its filing was voluntary.⁶⁵ While the EACJ and AfCHPR opportunely reached the same conclusion in these cases, they could potentially have rendered contrary findings on the same issue.

Could complementarity between the EACJ, AfCHPR and ACHPR also be approached under judicial and jurisprudential dialogue? There is evidence that applicants have relied on case-law from the AfCHPR in litigating cases before the EACJ. This practice is well illustrated in *Niyongabo Theodore and Others v Burundi*,⁶⁶ *Democratic Party v Secretary-General EAC and Others*⁶⁷ and *FORSC v Burundi*.⁶⁸ More notably, the EACJ itself has made significant references to rulings of the AfCHPR and ACHPR in cases such as *EACSOFF v Attorney General of Burundi and Others*⁶⁹ concerned with the nomination of Pierre Nkurunziza to run for a third presidential term; and *Media Council of Tanzania and Others v Tanzania* where reference was also made to a decision of

⁶³ *Norbert Zongo v Burkina Faso* (merits) para 122; *Mohamed Abubakari v Tanzania* (merits) paras 79-92; *Jean-Claude Roger Gombert v Côte d'Ivoire*, paras 31-38; *Anudo Ochieng Anudo v Tanzania* (merits) paras 54-59; *Alfred Agbesi Woyome v Ghana* (merits and reparations) (2019) 3 AfCLR 235, paras 71-88.

⁶⁴ *Democratic Party v Rwanda*.

⁶⁵ *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction, withdrawal) (2016) 1 AfCLR 540.

⁶⁶ *Niyongabo Theodore and Others v Burundi*, EACJLR [2015 – 2017], para 19, where Applicants cited the AfCHPR judgments in the cases of *Alex Thomas v Tanzania* and *Mohamed Abubakari v Tanzania*.

⁶⁷ *Democratic Party v Secretary-General EAC and Others*, EACJLR [2012 – 2015], para 54, where the Applicants relied on the AfCHPR judgment in the matter of *Michelot Yogogombaye v Senegal* in dealing with the failure and delay of EAC Member States to file the Declaration recognising the jurisdiction of the ACTHPR.

⁶⁸ *FORSC v Burundi*, EACJLR [2015-2017], para 25.

⁶⁹ *EACSOFF v Attorney General of Burundi and Others*, EACJLR [2015-2017], para 24, where, in forming its reasoning, the EACJ relied on the AfCHPR judgments on the merits in the cases of *Norbert Zongo v Burkina Faso*, *Lohé Issa Konaté v Burkina Faso*, *Wilfred Onyango Nganyi v Tanzania* and *Mohamed Abubakari v Tanzania*.

the ACHPR.⁷⁰ The ACHPR has on at least two occasions referred to rulings of the EACJ –in the *Katabazi* case while defining and applying the principle of *res judicata* as a condition of admissibility prescribed under Article 56(7) of the African Charter.⁷¹

4.2 Compliance monitoring and enforcement

In light of complementarity as earlier discussed, it is also important to consider in this section the potential for convergence between the EACJ, ACHPR, AfCHPR and ACERWC on monitoring compliance with and enforcing their decisions.

Under the EAC regime, there is no formal framework or procedure to monitor and enforce decisions of the EACJ. The EACJ's activity reports are merely taken note of by policy organs of the EAC. While decisions of the EACJ bind EAC member states party to the cases, there is no remedy or sanction for non-compliance as is the case, for instance, where a member state fails to pay its determined financial contributions to the EAC. This is notwithstanding the provisions of Article 143 of the EAC Treaty which provides that: "A Partner State which defaults in meeting its financial and *other obligations* under the Treaty shall be subject to such action as the Summit may on the recommendations of the Council, determine". In fact, non-compliance with decisions of the Court should fall under "other obligations" and be subject to sanction through a joint reading of Article 143 with the provision vesting the EACJ with the power to make binding and enforceable decisions. Hence, consideration of the EACJ's reports is not endorsed by any decision of the policy organs.

Unlike the EACJ, the ACHPR, AfCHPR and ACERWC present their activity reports to the policy organs of the AU twice a year.⁷² The process involves the concerned organ submitting an activity report to the African Union Commission for consideration by the Permanent Representatives Committee and endorsement by the Executive Council on behalf of the Assembly of Heads of State and Government. The report includes a section on non-compliance, and its endorsement is materialised by a decision of the Executive Council taking note of the status of compliance, encouraging compliant states and urging non-compliant ones to implement the decisions in cases involving them. In recent years, states have challenged the contents of the reports presented by these organs, demanded amendments as a pre-condition for endorsement, and

⁷⁰ *Media Council of Tanzania and Others v Tanzania* [2015 -2017] EACJLR, para 23 where the EACJ cited the AfCHPR and ACHPR decisions in the cases of *Urbain Mkandawire v Malawi* and *Article 19 v Eritrea* respectively; and para 103, where the EACJ referred to the AfCHPR *Konaté* judgment.

⁷¹ See *Jean-Claude Roger Gombert v Côte d'Ivoire*, op. cit., para 45 ; *Dexter Eddie Johson v Ghana*, op. cit., para 48.

⁷² Article 59 of the African Charter concerning the ACHPR, Articles 29 and 31 of the African Court Protocol, and Article 45(2) of the African Children's Charter.

decided to remove express mention of non-compliance by states from the Executive Council's decision endorsing the reports.⁷³

5 Strengthening human rights enforcement in the East African Community

In light of the discussions in this chapter, means should be devised to strengthen existing frameworks for enforcing human rights within the EAC. While the recommendations proposed here are not exhaustive, they draw from the analysis undertaken in the chapter while also building on ongoing debates towards the realisation of a formal EAC human rights regime.

The following suggestions are made:

1. **Human rights jurisdiction of EACJ:** Stakeholders should continue advocating for the adoption and fast-tracked entry into force of a protocol to extend the EACJ's jurisdiction to expressly include human rights. Advocacy should also be undertaken for the enactment of an EAC Bill of Rights. This advocacy should, however, be done with utmost tact to avoid more backlash against the EACJ, bearing in mind the ongoing jurisdictional crisis facing regional human rights mechanisms in general, and in particular, the row about the withdrawals from the AfCHPR.
2. **Two-month time limit in relation to filing cases at the EACJ:** Given its adverse effect on access to justice, enforcement of key EAC principles and vindication of individual rights, the two-month limit on filing of cases before the EACJ should be repealed, or litigants and the EACJ should seek its purposive and liberal interpretation.⁷⁴ A purposive interpretation could rely on the doctrine of continuing violations of human rights already adopted by the AfCHPR⁷⁵ and ECOWAS Court of Justice.⁷⁶
3. **Enforcement of regional decisions:** There should be comprehensive and effective enforcement of decisions of EACJ, including using the ECOWAS model to make decisions of the Court norms of Community subject to

⁷³ See in general, Rachel Murray, Debra Long, Victor Ayeni and Abdoulaye Somé, 'Monitoring implementation of the Decisions and Judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150-166; Suzgo Lungu, 'An appraisal of the Draft Framework for Reporting and Monitoring Execution of Judgments of the African Court on Human and Peoples' Rights' (2020) 4 *African Human Rights Yearbook* 144-164; Sègnonna Horace Adjolohoun, 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1-40.

⁷⁴ See Victor Lando, 'The Domestic Impact of the Decisions of the East African Court of Justice' (2018) 18 *African Human Rights Law Journal* 463, 472-473.

⁷⁵ See *Akwasi Boateng and Others v. Republic of Ghana*, AfCHPR, Application No. 059/2016, Ruling of 27 November 2020 (jurisdiction) paras 53-62.

⁷⁶ *Federation of African Journalists v. Gambia*, ECW/CCJ/JUD/04/18, Judgment of 13 February 2018, pages 18-21.

sanctions just as decisions of Community organs.⁷⁷ Lessons can also be learnt from the ACHPR, AfCHPR and ACERWC monitoring and enforcement mechanisms, including by establishing a specialised office within the EACJ to undertake systematic non-compliance reporting to the policy organs and undertaking consistent follow-up during meetings of ministers and heads of state. Non-compliance hearings should also be considered as an effective practice, with the caveat that follow-up rulings could also be ignored. Finally, cooperation between the (quasi) judicial organs of EAC and AU could lead to joint non-compliance reports and the consolidation of reporting ventures before the AU policy organs. Using mechanisms such as the African Peer Review Mechanism, and promotional engagements of the ACHPR could also prove effective.

6 Conclusion

The journey to realise human rights-based regional integration for the EAC is incomplete. At this stage of the EAC regional integration project, the question is how the commitment to human rights and the rule of law features in the bigger continental picture. As this chapter has shown, stakeholders should make use of the existing AU mechanisms to strengthen the EAC human rights framework. They should ensure that the EAC platform speaks to the bigger African human rights system in a purposive, coordinated and reinforcing manner.

A distinctive feature of regional integration-led human rights regimes may be socio-political proximity of the type that tampered Kenya's backlash in the *Nyong'o* case. The more effective peer pressure brought by RECs' approach to human rights has the potential of strengthening the continental human rights system. The same argument could apply to enforcement mechanisms, which could work on both a top-down and bottom-up approach between continental and regional mechanisms.

⁷⁷ Article 14 of the 2012 Supplementary Act A/SP.2/08/11 on Sanctions Against Member States that Fail to Honour their Obligations to the Community provides that the ECOWAS Authority, Member States, and the President of the Commission, may initiate the procedure for sanction. It is further provided that an individual or a legal person of a Member State may report to their national authorities or the President of the Commission cases of failure to honour an obligation.

Chapter Five

Conclusion: Towards Realisation of Human and Peoples' Rights in the Agenda and Practice of the East African Community

Lawrence Murugu Mute

Keywords: East African Community, civil society, people-centred approach to regionalism

Abstract

This concluding chapter of the publication suggests how civil society organisations and other stakeholders may support the integration of human and peoples' rights into the agenda and practice of the East African Community (EAC). The chapter recalls that human rights are a key pillar of the Treaty for the Establishment of the East African Community. However, further institutional arrangements are necessary to ensure that East Africans can have full exercise of human and peoples' rights. The chapter concludes that it is critical for civil society to internalise and utilise a people-centred approach to regionalism that ensures the people's inclusive participation in the affairs of the EAC.

1 Introduction

This publication set out to assess the extent to which human and peoples' rights are realised and safeguarded within the integration agenda of the East African Community (EAC). This final chapter draws on the assessments made in the preceding chapters to suggest how various stakeholders within the EAC, with particular focus on civil society, may advance and influence the content and process of ensuring human and peoples' rights in the region. The key message of this chapter, and indeed the whole publication, is that human rights must be part and parcel of the holistic integration agenda of the EAC.

2 Status of human rights in the framework of the EAC and its integration agenda

The EAC, like Africa's other Regional Economic Communities (RECs), was established primarily to achieve economic integration. In accordance with Article 5 of the Treaty for the Establishment of the East African Community (EAC Treaty), this integration would be realised through a customs union and a common market, and eventual monetary union and political federation. Yet, as the totality of the chapters in the publication have discussed, human and peoples' rights are an essential component of the EAC's integration agenda. In sum, REC's primarily ensure access to basic

amenities (otherwise defined as rights) such as education, health, food, housing, and freedom of movement and association in relation to the circulation of goods and persons.¹ Any contrary notion to the above conclusion is evidently disabused by the express recognition in Articles 6(d) and 7(2) of the EAC Treaty that ensuring human and peoples' rights, in accordance with the African Charter on Human and Peoples' rights (African Charter), is one of the principles that underpins the EAC.

Member states of the EAC are expected to adhere to the African Charter which obligates states parties to take legislative and other measures to give effect to the rights enunciated in the Charter. Indeed, as Victor Lando concludes in Chapter Two of the publication, human rights are fundamental and operational principles of the EAC which, therefore, should be infused into every aspect of its integration agenda. He stresses that successful regional integration has to be a people-centred agenda and this may only be truly realised with the enhanced promotion and protection of human and peoples' rights within and amongst the EAC's members.

The EAC's various organs have over time sought to oversee and implement policy, legislative, programmatic and judicial initiatives to advance the exercise of human and peoples' rights. These efforts have had decidedly mixed results, and as the authors in this publication have detailed, implementation of human and peoples' rights as part of the integration agenda of the EAC has remained quite tenuous.

The EAC Council of Ministers (Council) is yet to adopt proposals for extending the jurisdiction of the East African Court of Justice (EACJ) to include human rights matters, as envisaged in Article 27(2) of the EAC Treaty. At the same time, despite the determined intent and effort of the East African Legislative Assembly (EALA) to exercise its legislative mandate by passing bills on matters of human rights, these bills have by and large lapsed after the Summit of Heads of State and Government (Summit) failed to assent to them. As Lando explains, the Summit seems to have opted to focus on policy and law-making and implementation addressing economic outcomes (such as represented by a common market and monetary union) while ignoring policies and laws primarily understood as focusing on human rights. The Summit also has instigated political backlash against the EACJ by amending the EAC Treaty to alter the EACJ's structure and jurisdiction, as Selemani Kinyunyu explains in Chapter Three, in a bid to constrain the Court's independence.

3 Judicial enforcement as an avenue for the protection of human rights

On a more positive note, this publication has shown that the EACJ has, in exercise of its mandate of interpreting and applying EAC norms, been valiant in endeavouring to give meaning to the human rights mandate established in the EAC Treaty, despite the absence of explicit jurisdiction in that regard. Lando points to the Court's assertion that its mandate of interpreting and applying the EAC Treaty includes determining and providing remedies on human rights violations. As Kinyunyu shows, the EACJ has played a leading role in reaffirming

¹ Serges Djoyou Kamga, *The Right to Development in the African Human Rights System* (Routledge 2018).

human rights standards by addressing issues such as the rights of refugees and stateless persons, electoral integrity standards, transboundary environmental rights and fair trial rights. This understanding resonates with the conclusion made by an author writing about African regional trade agreement judiciaries, including the EACJ, that they are not sleeping sentinels of the treaties under which they are established,² and that one of their key features is the boldness of their decisions in relation to the fact they are relatively new institutions operating in a context in which adherence to notions of national sovereignty is very strong.³

Still, despite the EACJ's judicial activism and creative interpretation, a global view of the scope of its human rights-specific interventions and the redress it has offered litigants is quite underwhelming. Kinyunyu explains that the EACJ is fettered by limited jurisdiction, and that its scope for remedies is limited to declaratory as distinct from mandatory judgments enforceable by the Court. However, one study argues that the limitation on the EACJ to declaratory judgments may historically have been beneficial to its overall aims. The study contends that the Court's declaratory judgments do not create the types of direct conflicts that mandatory orders do on account of requiring governments to do specific things. It notes that the EACJ, therefore, has been able to determine politically-sensitive human rights cases since declaratory orders leave governments with wiggle room on how to respond to the orders. The study contrasts the EACJ's relative success with the relative failure of the Southern Africa Development Community Tribunal (SADC Tribunal) which "overstepped" its "boundaries" by ruling against the Government of Zimbabwe, thereby inviting political opprobrium.⁴ Even with the EAC, Kinyunyu notes that the EACJ still opted not to address some cases bearing particularly high political or other sensitivities.

Segnolla Horace Adjolohoun, in Chapter Four, illustrates quite clearly that the African Union (AU) human rights system provides a necessary and welcome avenue of relief from the EACJ's human rights limitations. As such, the AU is an essential part of the EAC's human rights framework, in line with the EAC Treaty which requires adherence to the African Charter whose oversight is managed by organs such as the African Commission on Human and Peoples' Rights (ACHPR), the African Court on Human and Peoples' Rights (AfCHPR) and, by extension, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

Adjolohoun shows that the AU human rights organs have demonstrably protected the exercise of human and peoples' rights within the EAC. He highlights instances where the AfCHPR, the ACHPR and the ACERWC have served to advance human rights jurisprudence in the EAC by making determinations on decisions with respect to EAC member states, setting precedence on critical matters such as indigenous peoples' rights, statelessness, the death penalty and electoral governance. However, as Adjolohoun illustrates, the AU human rights system is also encumbered by challenges of implementation and political backlash.

² James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) 264.

³ Ibid.

⁴ James Gathii (ed), *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change* (Oxford University Press 2020) chapter 1.

4 Charting the way forward: The role of civil society

How, then, may civil society engage to ensure that the EAC calibrates or refashions its integration agenda and practice to ensure respect for human and peoples' rights in accordance with the African Charter and other continental normative human rights instruments?

4.1 Kenya Human Rights Commission convening

As well as drawing from the varied perspectives presented in preceding chapters, this section also draws from a convening of civil society and other stakeholders from the EAC organised by the Kenya Human Rights Commission (KHRC) on 25 February 2022 to discuss strategies for safeguarding human and peoples' rights in the integration agenda of the EAC. The KHRC Convening concluded that the EAC Treaty indeed pronounces human and peoples' rights in its provisions; but provisions need to move from stock statements on paper to become actual realities in the daily lives of the region's citizens – moving from norm-development to norm-implementation.⁵

4.2 Value of civil society

Civil society is the distinct sphere of public space that mediates between the individual/citizen and the state by managing social relations and communications between citizens and their state.⁶ Civil society exists to promote positive interventions to bring about desired changes. It also resists the state when it follows undesired paths.⁷ Civil society has a number of necessary components: it consists of autonomously organised non-state actors and associations that are not purely driven by private or economic interests that interact in the public sphere and it is independent from but yet is oriented toward and interacts closely with the state and the political sphere.⁸ Civil society organisations (CSOs) include special interest groups, faith-based organisations, traditional and community groups, researchers and research institutions, humanitarian or development service delivery organisations, human rights and advocacy organisations, conflict resolution and peacebuilding non-governmental organisations (NGOs) and international NGOs, social and political movements and business associations.⁹

⁵ Convening of civil society and other stakeholders from the EAC organised by the Kenya Human Rights Commission (KHRC) on 25 February 2022. Notes on file with author.

⁶ Darren Kew and Modupe Oshikoya, 'Escape from Tyranny: Civil Society and Democratic Struggles in Africa', in Ebenezer Obadare, *The Handbook of Civil Society in Africa* (Springer 2014) chapter 2.

⁷ Jean Chrysostome K. Kiyala and Geoff Thomas Harris, *Civil Society and Peacebuilding in Sub-Saharan Africa in the Anthropocene: An Overview* (Springer 2022) chapter 1.

⁸ Ibid.

⁹ Ibid.

The EAC Treaty sees civil society as “a realm of organised social life that is voluntary, self-generating, self-supporting, autonomous from the state, and bound by a legal set of shared rules”.¹⁰ The Treaty predicates the realisation of its objectives on, among other factors, the “enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development”.¹¹ The Treaty obligates member states to promote continuous dialogue with civil society and the private sector both at the national and Community levels.¹² It is, however, clear that the EAC Treaty’s focus on the promotion of dialogue relates to matters such as entrepreneurship, improvement of the business environment and stimulation of market development,¹³ to the near-exclusion of concerns such as ensuring respect for human rights. In this latter regard, the Treaty simply enjoins member states to agree to promote an enabling environment for the participation of civil society in the development activities within the EAC.¹⁴

As all the chapters in this publication have shown, the importance of civil society within the EAC may not be understated. CSOs have played significant roles in advocating for and supporting the EAC’s human rights initiatives.¹⁵ Yet, as Andrew Songa, Lando and Kinyunyu show in their chapters, CSOs have faced serious challenges as they have endeavoured to safeguard and enhance human rights initiatives in the EAC. Songa explains in chapter one that civic space within the EAC has become increasingly constrained due to statutory limitations and hostile rhetoric deployed by state and political actors in resistance to unrelenting demands for transparency, public participation and accountability in matters of governance. As well, the capacity and influence of CSOs is also debilitated by dependence on donor-funding, weaknesses of internal governance as well as the reality that many NGOs are urban-based and elitist.¹⁶

Yet, despite these challenges, the EAC’s human rights agenda is far too important for civil society to retreat in apprehension and contemplative indecision. Foisting the human rights agenda onto the EAC is indeed one of the panaceas for the civic space shrinkage which has categorised many actions by EAC member states.

4.3 People-centred approach to regionalism

The KHRC Convening stressed that advancing human and peoples' rights in the EAC required a strengthened and reinvigorated human rights movement that would act collectively to breakdown the social barriers and silo approaches that have informed the interpretation of human rights.¹⁷ Writing about SADC, Chimpaka *et al* stress the need for the activism of CSOs

¹⁰ Article 1 of the Treaty for the Establishment of the East African Community (1999).

¹¹ Ibid Article 5(3)(g).

¹² Ibid Article 127(1).

¹³ Ibid.

¹⁴ Ibid Article 127(3).

¹⁵ For example, CSOs alongside other stakeholders such as academia and the private sector, worked with the EAC Secretariat to develop the EAC’s Vision 2050, including by participating in country consultative workshops. East African Community Vision 2050: Vision for Social Transformation (Arusha, EAC 2015) 14, 44.

¹⁶ Priscilla Wamucii, ‘Civil Society Organizations and the State in East Africa: From the Colonial to the Modern Era’, in supra Ebenezer Obadare (ed), chapter 8.

¹⁷ Notes on KHRC Convening on file with author.

to internalise a people-centred approach to regionalism. Borrowing from these authors' conclusions on civil society priorities for integration in SADC, it is not hard to see that the EAC too is dominated by state actors and technocrats who have assumed the mantle, in the words of Chimpaka *et al*, of shaping formal institutional arrangements and imposing them on ordinary citizens. Chimpaka *et al* challenge non-state actors to build their regions from below by constructing their own strategies, norms and rules.¹⁸

It is not practical to suggest that civil society should divorce itself wholly from the EAC's statist top-down institutions, including the Summit, the Council, the EALA and the EACJ. Yet Chimpaka *et al*'s people-centred approach to regionalism can inspire the EAC's civil society's philosophy for engaging with these statist institutions. Civil society can appropriate and refashion the EAC's top-down statist agendas to serve the people from below in inclusive ways. It is telling, for example, that decisions made by politicians and technocrats are hardly subjected to robust public debate and meaningful public participation. For example, the entry of the Democratic Republic of the Congo (DRC) in April 2022 to become the seventh member of the EAC was very much a top-down statist affair involving heads of states and technocrats.¹⁹

Moving forward, civil society must play even more concerted roles to integrate human rights into the EAC's agenda. It must spearhead inclusive initiatives that challenge statist initiatives, as indeed witnessed in a number of cases which have been determined by the ACHPR, the AfCHPR and the ACERWC. To illustrate this point, simply based on the non-implementation of decisions in previous human rights cases issued by African human rights mechanisms,²⁰ one may be fairly certain that Kenya's implementation of the decision made by the AfCHPR in the case of the Ogiek community will remain protracted for quite a while.²¹ The AfCHPR issued two judgments against Kenya for repeatedly evicting the Ogiek community from its ancestral lands in the Mau Forest, in 2017²² and in 2022.²³ In the latter instance, the AfCHPR awarded the Ogiek community Sh157 million both for material and moral prejudice. It also ordered Kenya, among other things, to: delimit, demarcate and grant collective title to the Ogiek on their ancestral land; guarantee within one year full recognition of the Ogiek as an indigenous people; and establish, within one year, a community development fund as a repository of all

¹⁸ Leon Mwamba Tshipaka, Christopher Changwe Nshimbi and Inocent Moyo, *Regional Economic Communities and Integration in Southern Africa: Networks of Civil Society Organizations and Alternative Regionalism* (Springer 2021) chapter 8.

¹⁹ For example see the content and tone of the press release issued by the EAC on the matter at <https://www.eac.int/press-releases/2411-the-democratic-republic-of-the-congo-formally-joins-eac-after-signing-of-the-treaty-of-accession-to-the-community>

²⁰ See Adjolohoun's discussion on the challenges of implementing decisions of the ACHPR, AfCHPR and ACERWC.

²¹ Eric Matara, 'Two Court Judgments Later, Justice Remains Elusive for the Ogiek' (*Nation*, Monday June 27 2022) <https://nation.africa/kenya/counties/nakuru/two-court-judgments-later-justice-remains-elusive-for-the-ogiek-3861578>

²² *African Commission on Human and Peoples' Rights v Republic of Kenya*, AfCHPR Application No. 006/2012 Judgment <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/5fe/9a9/5f55fe9a96676974302132.pdf>

²³ *Ibid*, 23 June 2022 Judgment (Reparations) <https://www.african-court.org/cpmt/storage/app/uploads/public/62b/aba/fd8/62babafd8d467689318212.pdf>

the compensation funds.²⁴ Civil society, therefore, must remain seized of this matter in the medium to long term to ensure that the Ogiek people get their deserved remedies.

Similar vigilance towards ensuring the enforcement of decisions is called for in respect of cases determined by the EACJ as indeed those determined by the ACHPR and the ACERWC. In this regard, it is significant that the EACJ's docket has included fairly contentious and yet locally-relevant cases. For at least a couple of years now, the EACJ has been seized with litigation against Tanzania for forcibly evicting residents and livestock from land bordering the Serengeti National Park and in Loliondo Game Controlled Area.²⁵ In 2018, the EACJ laid an injunction against Tanzania to stop the evictions until such time as the main suit was determined.²⁶

4.4 Extending the jurisdiction of the EACJ to include human rights

As Kinyunyu shows, the EACJ has understood its jurisdiction implicitly to include protection of human rights violations. Yet, the need to associate violations with other non-human rights aspects of the Treaty in order to gain the EACJ's jurisdiction has meant access to the Court is a tedious and complex process for litigants. In effect, the EACJ's implicit human rights jurisdiction may not be accessed by litigants who are unable to construct arguments linking the human rights violations they seek to allege with direct EAC Treaty norms. Another challenge relates to the 60-day time-limit for filing claims which undermines the possibility for well investigated and argued human rights cases to make it before the EACJ. As well, litigants face the challenge that the EACJ may offer only a limited range of remedies, as Kinyunyu points out, entailing declaratory rather than mandatory determinations.

This is the context within which the EACJ's implicit jurisdiction needs to be transformed into explicit jurisdiction. The EAC and all its stakeholders, including civil society, should work towards the extension of the EACJ's jurisdiction in accordance with Article 27(2) of the EAC Treaty. Extended jurisdiction would enable East Africans to seek direct redress against human rights violations without having to justify human rights claims using less direct norms in the EAC Treaty such as the principles of the rule of law and good governance.²⁷ Hence, while welcome, creative litigation cannot trump the need for explicit jurisdiction.

Kinyunyu identifies challenges that should be surmounted for the realisation of extended human rights jurisdiction for the EACJ. These include the following: political resistance to undertaking the structural, administrative and legislative changes required to introduce the explicit jurisdiction; hesitation from experts which stems from the concern that an additional

²⁴ Ibid para. 160.

²⁵ *Ololosokwan Village Council & 3 Others v The Attorney General of the United Republic of Tanzania*, (EACJ Reference No. 10 of 2017) <https://www.eacj.org/?cases=reference-no-10-of-2017-ololosokwan-village-council-3-others-vs-the-attorney-general-of-the-united-republic-of-tanzania>

²⁶ Patty Magubira, 'Leave Herders Alone, East African Court Tells Tanzania' (*The East African*, Saturday September 29 2018) <https://www.theeastafrican.co.ke/tea/news/east-africa/leave-herders-alone-east-african-court-tells-tanzania-1403544>

²⁷ Ally Possi, 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community' von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 17, 2013.

layer of mechanisms at the sub-continental level could distort or fragment the African human rights system; and the lack of coherent advocacy strategies from civil society.

4.5 Learning from the ECOWAS experience

Initiatives to include human rights in the EACJ's jurisdiction may learn from the experiences of the Economic Community of West African States (ECOWAS) which in 2005 amended Article 9 of the Protocol on the Community Court of Justice, among others, to provide the Economic Community of West African States Community Court of Justice (ECOWAS Court) with jurisdiction to determine cases of the violation of human rights occurring in any member state.²⁸ Drawing from the ECOWAS Court experience, the two-month time-limit for filing cases under the EAC Treaty should be reviewed upwards. Comparatively, the Protocol on the Community Court of Justice bars the ECOWAS Court from entertaining actions brought after three years from the date when the right of action arose.²⁹

The EACJ must be enabled to award tangible remedies, including compensation, to successful litigants. The Court must be more visible and more approachable, and its independence should be reinforced including by providing it with a permanent seat and fulltime judges.³⁰

4.6 A bill of rights for the EAC?

Stakeholders should also address whether the EAC should establish its own bill of rights or whether extended human rights jurisdiction should primarily continue to be anchored on the corpus of human and peoples' rights established under the African Charter. In the instance of the ECOWAS Court, it enforces the protection of human and peoples' rights in accordance with the rights established in the African Charter, while also drawing on other rights in international human rights instruments or consonant with international obligations.³¹ The exercise of human and peoples' rights within ECOWAS has not been hobbled by the fact that ECOWAS does not have its own specific bill of rights.³²

Stakeholders should reflect on whether the EAC requires a specific bill of rights or whether the human and peoples' rights established in the African Charter suffice. Clearly, anchoring human rights claims before the EACJ on the African Charter may be more convenient for purposes of tapping from and cross-fertilising on the jurisprudence of the African judicial and

²⁸ 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 http://www.courtecowas.org/wp-content/uploads/2018/11/Supplementary_Protocol_ASP.10105_ENG.pdf

²⁹ Jerry Ukaigwe, *ECOWAS Law* (Springer 2016) 3.10.8

³⁰ Jean-Marc Trouille, Helen Trouille and Penine Uwimbabazi (eds), *The East African Community: Intraregional Integration and Relations with the EU* (Routledge 2021) chapter 3.

³¹ *Supra* Jerry Ukaigwe, 5.3.

³² *Ibid*, 5.4.

quasi-judicial human rights mechanisms, which draw their norms from the African Charter and other continental human rights instruments.³³

Even if a bill of rights of the EAC was to be progressive, it might not provide adequate coverage to rights already well-established in the African Charter, such as Article 20 which provides all peoples with the right to self-determination or Article 21 which safeguards peoples' right to free disposal of wealth and natural Resources.

4.7 The question of complementarity

Stakeholders should introspect and act on the reasons that influence litigants to litigate before the EACJ even when they have the options of litigating in their domestic courts or indeed litigating before the AfCHPR, the ACHPR or the ACERWC. A primary consideration here is the need to ensure that domestic, regional and continental judicial organs complement each other and that their jurisprudence and practice does not undermine litigants from accessing justice.

While operational challenges such as forum shopping should not be understated, many of these difficulties can be surmounted in the course of time through operational engagements between relevant regional and continental organs and as a matter of evidence in the course of litigation. The underlying consideration in this regard should be what Adjolohoun refers to in his chapter as the implied complementarity between the EACJ and the judicial and quasi-judicial bodies of the African human rights system.

4.8 The imperative to access justice

The EAC's human rights agenda must continue to be understood as part of the AU human rights system and its institutions. As Adjolohoun discusses, the EAC's member states have struggled with mixed levels of success to adhere to their obligations under the AU human rights system by implementing the recommendations or decisions of the AfCHPR, ACHPR and the ACERWC. He highlights the fact that litigants' access to justice within AU human rights mechanisms is constrained by limitations, such as the requirement under the African Court Protocol that a litigant may have direct standing before the Court only when a state has made a declaration to that effect in terms of Article 34(6) of that Protocol. As already noted in this chapter, in the instance of the ACHPR, a litigant ordinarily must exhaust domestic remedies before seeking recourse. On the contrary, a litigant has direct standing to seek redress from the EACJ and indeed there is no requirement to exhaust local remedies.

³³ Over and above the African Charter, the African human rights normative landscape now includes human rights instruments on women's rights (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003); children's rights (African Charter on the Rights and Welfare of the Child, 1990); the rights of older persons (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016); and the rights of persons with disabilities (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa).

A significant limitation on access to justice by litigants before the EACJ though is the provision in the Treaty which set litigants a 60-day time limit for instituting references before the court challenging violations to the Treaty. Ultimately, domestic, regional and continental human rights mechanisms must interrelate to optimise access to justice for East Africans. These institutions must leverage on each other's comparative advantages and opportunities, for example by drawing from progressive human rights jurisprudence developed by one or other of the mechanisms.

Civil society and other stakeholders should harness political and technical resources to support integration of human and peoples' rights in the EAC's agenda. The EAC's various organs have both express and implied convening power which civil society should leverage for purposes of exploring innovative solutions and concretising dialogue. Civil society should seek and utilise opportunities for dialoguing with the Summit and the Council, despite these organs' reticence to open their doors to such participation. Stakeholders should take better advantage of the EALA and the EAC Secretariat which, as the preceding chapters have shown, are more disposed towards engagement.³⁴ In this regard, it seems, for example, that stakeholders have not supported the EALA adequately by impressing on the Summit the need for it to assent to bills on human rights passed by the EALA. While undertaking these tasks, civil society should recognise that the success or otherwise of the regional integration agenda will be determined by the extent to which its benefits can be communicated to non-state actors.³⁵

4.9 Additional tactical considerations

A number of other suggestions were made by the KHRC Convening:

1. Civil society and individual activists should take up existing statutory spaces for civic engagement and public participation within the EAC and the wider African human rights system. They should, in this regard, exploit existing or new strategies, including public petitions, urgent alerts, alternative reporting and development of soft law instruments.
2. Rule of law mechanisms should be strengthened by providing operational and financial independence for EAC organs, national judiciaries, national human rights institutions and other access to justice mechanisms at the most local of levels.
3. Litigants must continue to file triable human rights cases before the EACJ to enliven human rights concerns and encourage innovative interpretations of the EAC Treaty. Litigants and others should keep in mind that apart from proffering remedies to individual litigants, litigation is a tool of advocacy and dialogue with the state and society at large. Litigation may yield incremental advancement of human and peoples' rights in a manner that may be consolidated.

³⁴ Most recently, the Secretary-General of the EAC has established an EAC desk for civil society and interest groups. – 'EAC Integration is on Course Despite Hurdles – Sec Gen', *The Star* (23 August 2021) <https://www.the-star.co.ke/news/big-read/2021-08-23-eac-integration-is-on-course-despite-hurdles-sec-gen/>

³⁵ Samuel Ojo Oloruntoba, *Pan Africanism, Regional Integration and Development in Africa* (Springer 2020) chapter 1.

4. Human rights protection and accountability may be expanded through peer-to-peer accountability, exemplified by the African Peer Review Mechanism operating at the continental level.³⁶

5 Final word

Finally, therefore, how does this publication advance the discourse on ensuring the respect for and practice of human and peoples' rights in the EAC?

The overall objective of the publication was to locate human and peoples' rights within the EAC's integration agenda, assess the prospects for its successful implementation and make concrete recommendations on how to carry it forward.

The case that this publication has made is the following:

1. That the EAC's economic and political integration must be buttressed by respect for human rights, and that human and peoples' rights play a central role in realising Africa's vision of sustainable development, peace and security.
2. That civil society possesses both patent and latent obligations and influence which it must leverage towards integration of human rights in the EAC's agenda, and that civil society must continue playing an unerringly pivotal role by providing technical support and advocacy, but also by urging, encouraging and chivvying key actors.
3. That while the EAC possesses adequate human rights norms and standards for ensuring the human rights of its citizens, drawn among others from AU human rights instruments, its institutions need to be refashioned to provide citizens of the EAC with more effective redress for human rights violations.
4. That even where the EAC may opt to develop new rights instruments, such as a bill of rights, this should happen organically, and it should not weaken the overall human rights norms and standards already in place at the continental level.
5. That the dearth of political will, resource bottlenecks and other limited institutional and administrative capacities should spur stakeholders including civil society to work even harder to embed human rights in the agenda and practice of the EAC. This means adopting an integrated approach to the advocacy for an improved EAC human rights framework; strengthening existing civil society coordination efforts such as the East African Civil Society Organisations' Forum (EACSOFF); and engaging in acts of solidarity and support for each other's human rights causes at a country level.
6. That, ultimately, the EAC must be made to work in the interest and for the benefit of the people. The definitive success or failure of the EAC's integration agenda will rest on its impact on the daily realities of the people, and safeguarding human and peoples' rights is integral to that impact. Therefore, stakeholders should ensure that the EAC establishes a verifiable human rights action plan permeating all aspects of the integration agenda. That plan should be anchored on meaningful/effective public participation that is respectful of civic space, provides sufficient platforms for engagement with duty-bearers and has effective avenues for redress.

³⁶ Supra from notes on file with author.



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