An Appraisal of the Functioning and Effectiveness of the East African Court of Justice

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Abstract

This contribution reflects on the functioning of the East African Court of Justice (EACJ) and judges its effectiveness by assessing the Court's role of ensuring adherence to, the application of and compliance with the East African Community (EAC) Treaty. The EACJ became operational on 30 November 2001, following its inauguration after the swearing in of its judges and the Registrar. During this initial stage of the Court's existence there were indications that the EACJ was failing to stamp its authority on the activities of the Community. The main reason for this failure is the existence of gaps in the EAC Treaty, which prevent the EACJ from effectively discharging its functions. In addition, as shown in this article, the EACJ has been delivering judgements on the grounds of doubtful authority which has gradually diminished the Court's legitimacy. Given its relevance to the EAC, this may therefore be the time to audit the EACJ's functioning and reflect on whether it is moving in the right direction. The hypothesis of this article is that the EACJ has been struggling to establish its authority in the region, mostly in the areas of human rights, the rule of law and good governance. In tracing its history so far it is easy to discern its strategic attempts at judicial law-making to arrogate to itself the role of the protector of human rights. While it is acknowledged that the EACJ is increasingly receiving cases of a divergent nature, most of these cases have had little influence on the integration project or are outside the scope of its mandate.

Keywords

East African Court of Justice; functioning; effectiveness.

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1 Introduction

The East African Court of Justice (EACJ) came into being on 30 November 2001, after an inauguration ceremony that signified the commencement of operations of the East African Community's (EAC) judicial organ.[1] Not much happened during the Court's infancy. It was not until 2005 that the EACJ received its first case - four years down the line since its inception. Being the judicial arm of the EAC, the EACJ is important to furthering the EAC project. As per article 23 of the EAC Treaty, the EACJ is entrusted with the role of ensuring adherence to, the application of and compliance with the EAC law. In fulfilling this initial mandate, the EACJ is expected to shape the EAC integration project. The only way the EACJ can be influential is by having its decisions complied with by the Member States, as well as by amending some of the EAC Treaty provisions which circumscribe the accessibility and availability of justice before the EACJ.

So far the EACJ has attempted to fulfil its mandate by adjudicating on a diverse range of issues, ranging from trade,[2] human rights,[3] the free movement of persons,[4] environmental law,[5] to disputes involving EAC employees,[6] and to matters concerning the election of members of the East African Legislative Assembly (EALA).[7] Despite the strides it has made, the Court continues to encounter difficulties which are preventing it from fulfilling its duties, particularly those directly touching on the

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1 EACJ date unknown http://eacj.org/?page_id=19. The inauguration ceremony included the swearing in of EACJ Judges and the first Court Registrar.

2 *Modern Holdings (EA) Limited v Kenya Ports Authority* Ref No 1/2008 (11 February 2009); *Alcon Intl Ltd v Standard Chartered Bank of Uganda* Ref No 6/2010 (2 September 2013).

3 *EALS v Attorney General of Burundi* Ref No 1/2014 (15 May 2015); *Democratic Party v Secretary General of the EAC* Appeal No 1/2014 (28 July 2015); *Tusiime v Attorney General of Uganda* Ref No 11/2013 (7 August 2015); *Rugumba v Attorney General of Rwanda* Appeal No 1/2012 (21 June 2012).

4 *Mohochi v Attorney General of Uganda* Ref No 5/2011 (17 May 2013).

5 *ANAW v Attorney General of Tanzania* Appeal No 3/2010 (26 April 2012). For a general discussion of the case also see Gathii 2016 *Chi J Int'l L* 386-438.

6 *Amudo v Secretary General of the EAC* Appeal No 4/2014 (30 July 2015).

7 *Anyang' Nyong'o v Attorney General of Kenya* Ref No 1/2006 (29 March 2007); *Komu v Attorney General of Tanzania* Ref No 7/2010 (26 September 2014).

integration project. Tracing back the history, the EACJ is trying to emulate the defunct East African Court of Appeal (EACA), established during the days of the former EAC.[8] The EACA had jurisdiction to determine only civil and criminal appeals originating from the decisions of the national courts of the then EAC Member States.[9] Its case law is highly appreciated by legal practitioners and jurists across the EAC region even today. Understandably, the current EACJ would not want to fall short of the legacy of its predecessor.

The current EACJ was established at the time of the proliferation of international adjudicatory bodies during the 1990s. Currently the EACJ serves the EAC, which is an intergovernmental organisation consisting of six countries. South Sudan has recently acceded to the EAC Treaty and become the most recent member,[10] joining Burundi, Kenya, Rwanda, Tanzania and Uganda. The admission of South Sudan into the bloc was received with mixed feelings. This is because, without a doubt, the Country's economic and political condition as well as its track record in governance, human rights and the rule of law (which are key tenets for inviting a new member into the EAC) invites many questions on its admission.

Regional integration in East Africa dates back to 1967, when the former EAC was established.[11] The 1967 Co-operation collapsed due to economic and political differences among the then Member States. Being aware of the importance of regional integration, the EAC was re-established in 1999 through the signing of the Treaty Establishing the EAC.[12] The EAC Treaty, to which the Member States have consented,

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8 The former EAC was established in 1967 and collapsed after ten years of existence.

9 The EACA could handle only appeals, on both civil and criminal matters, except for constitutional matters and the offence of treason for Tanzania.

10 EAC 2016 http://www.eac.int/news-and-media/statements/20160415/communique-signing-ceremony-treaty-accession-republic-south-sudan-east-african-community. The admission of South Sudan into the EAC was questioned by the applicants in *Walusumbi v Attorney General of Uganda* Ref No 8/2013 (27 February 2015). The matter came about due to the norms established by art 3 of the *East African Community Treaty* (1999), which lay down criteria for a country to be considered eligible to join the EAC. It is highly doubtful that South Sudan satisfies the criteria listed.

11 Birmingham 1969 *Va J Int'l L* 408-443; Orloff 1968 *Orloff 1968 Colum J Transnat'l L* 302-332.

12 The EAC Treaty was signed on 30 November 1999 and entered into force on 7 July 2000. By then the Community had been established by the three original Member States - Kenya, Tanzania and Uganda. Burundi and Rwanda acceded to the EAC Treaty on 18 June 2007 and effectively joined the Community on 1 July

features the EACJ as an international court.[13] The current EAC has a range of objectives in the social, political, cultural, economic and legal contexts.[14] Eventually, Member States aim to attain political federation.[15] Achieving that goal will require a robust judicial body capable of resolving integration disputes, amongst others; in this case, the EACJ.

The EAC is one of many Integration projects across the globe. Regionalism in Africa has been relatively fruitful. Initiatives for regional integration in Africa gathered pace after the formation of the Organisation of African Unity (OAU) in 1963.[16] This initiative began with the establishment along geographical lines of regional blocs in the form of economic communities.[17] RECs or sub-regional organisations have since concerned themselves with the implementation of regional agendas. Prior to the 2000s, RECs were established to advance the underperforming African economy. After the end of the Cold War and with the new emphasis on the rule of law, good governance and human rights global ideals, Africa had to re-assess itself. This resulted in institutional transformation as well as legal reforms. The OAU was transformed into the African Union (AU) in 2002, and at the same time, the sub-regional blocs reinvigorated themselves in alignment with the new vigour in the world order. They established judicial organs able to conduct checks and balances in their organisational activities. Sub-regional courts such as the EACJ are now playing different roles in strengthening regional integration within their respective groupings. They are expected to be instrumental in improving trade relations in their communities. In addition, human rights and the rule of law have emerged as major issues of contention in these courts. One of the factors that has led to the establishment of sub-regional groupings across the globe has been the acceptance that their judicial bodies may adjudicate human rights disputes.[18]

2007. South Sudan acceded to the Treaty on 15 April 2016 and become a full Member on 15 August 2016.

13 Article 9(1)(f) of the EAC Treaty.

14 Article 5 of the EAC Treaty.

15 Article 5(2) of the EAC Treaty.

16 The OAU was established on 25 May 1963 and was replaced by the AU on 9 July 2002, after the adoption of the Constitutive Act of the AU. For an overview of African regional integration initiatives, see Hailu 2014 *Mizan L Rev* 299-332.

17 After the establishment of the OAU, sub-regional groupings started to emerge. These include: the EAC (1967), the Economic Community of West African States (ECOWAS) (1975) and the Southern Africa Development Coordinating Conference (SADCC) (1980).

18 For example, see Murungi and Gallinetti 2010 *SUR - Int'l J Hum Rts* 119-143.

Contemporary scholarship dealing with the functions of sub-regional courts notes that the adjudication of human rights is one of their desirable functions, but it is becoming common to find these courts struggling under the burden of having to deal with a multiplicity of matters in addition to those initially entrusted to them.[19] As a result, they have not been able to stamp their authority on their respective communities in matters of either trade or human rights. Most RECs have become economically oriented institutions and are missing out on advancing their communities in important matters such as democracy, good governance and human rights.

This contribution revisits the EACJ's functioning and effectiveness. In doing so, the legal challenges affecting the functioning and effectiveness of the Court are identified. Thus, the article is divided into four sections. The first section is an introductory section that sets out the scope and purpose of the article. The second section gives an insight into the EACJ, revealing the Court's structure, composition and functioning. In this section, the legal challenges hindering the EACJ in its attempts to effectively discharge its duties are addressed. The third section of this article captures the issues mostly dealt with by the EACJ from its inception to present. This is an important part of the article, where the Court's progress is put to test. In the process, legal issues concerning the EACJ's functioning and effectiveness are addressed. Then, the fourth section of this contribution provides some concluding remarks.

2 The EACJ: An emblem of EAC integration

The EACJ has a separate existence within the EAC institutional architecture. It is a judicial instrument modelled to "ensure the adherence to the law in the interpretation and application of and compliance" with the EAC Treaty.[20] It is this function that the EACJ has not performed satisfactorily, as a result of the lack of a clear jurisdictional mandate and a machinery capable of enforcing its decisions.

The disputed 2007 Treaty amendments structured the EACJ into two layers – the First Instance Division (FID) and the Appellate Division (AD).[21] The establishment of the AD at that time was greeted with suspicion. It is widely known that the EAC Treaty amendments were the outcome of

19 See Possi 2015 *AHRLJ* 192-213.

20 Article 23 of the EAC Treaty.

21 Article 23(3) of the EAC Treaty. Matters from the FID are appealed to the AD, subject to art 35A of the Treaty.

Kenya's retaliation against the EACJ decision in *Anyang' Nyong'o v Attorney General of Kenya.*[22] The restructuring of the Court aimed at giving Kenya the chance to appeal the Anyang' Nyong'o decision.[23] During the early days of the AD's functioning, it was easy to recognise its regulatory role over the FID. This statement may be harsh, but it is made on the basis of the AD reasoning on appeals originating in the FID. As will be shown in this article, the AD has taken a more conservative approach to matters concerning the Court's time limitation rule and allegations relating to human rights, thus retreating from the more progressive approach adopted the FID. It was the AD that declined to uphold the well-established doctrine of continuing violation, which was initially invoked by the FID to condone the infringement of the time-limit rule for instituting a case**.** However, the AD remains an important avenue for litigants who wish to exhaust the available remedies within the EAC judicial realm. It is also acknowledged that the new set of EACJ judges has shown signs of being more pro-active than their predecessors. Notably, in *DP v Secretary General of the EAC*[24] the AD pronounced that the EACJ may receive human rights cases and adjudicate them based on the human rights norms provided in the EAC treaty.[25] It appears, then, that the future at the AD may be brighter than the present, as far as the progressive interpretation of the EAC treaty is concerned.

The Court is composed of not more than fifteen judges: ten in the FID and five in the AD.[26] They are appointed by the Summit - the topmost political organ of the EAC.[27] It appears that the composition of the EACJ judges is structured on the basis of nationality among the Member States. With South Sudan being in the mix, an amendment to the EAC Treaty looks certain in relation to the future composition of AD judges. It is unclear how the set of five judges will be apportioned to six Member States, all of which are determined to be represented on the AD. Perhaps a future solution

22 *Anyang' Nyong'o v Attorney General of Kenya* Ref No 1/2006 (29 March 2007).

23 For a discussion on the controversial 2007 EAC Treaty amendments, see Onoria 2010 *J Afr L*; Alter, Helfer and McAllister 2013 *AJIL;* Van der Mei 2009 *ZaöRV.*

24 *Democratic Party v Secretary General of the EAC* Appeal No 1/2014 (28 July 2015). On the case and the significance of the judgment, see s 3 of this article.

25 See Possi 2016 https://africlaw.com/2016/02/01/its-official-the-east-african-court-of-justice-can-now-adjudicate-human-rights-cases/#more-1048.

26 Article 24(2) of the EAC Treaty.

27 Article 24(1) of the EAC Treaty. The criteria for appointing EACJ judges are common to almost all international courts. As for the criteria to serve as a judge to the EACJ, one has to be: "… [a person] of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence in their respective Partner States".

would be to consider having a minimum number instead of a maximum number of judges, so as to accommodate any other state coming into the EAC. On the administrative side, the EACJ is headed by the President, who is also the central figure in the AD. In the Divisions, the President is assisted by the Vice President in discharging the duties of the AD, while the Principal Judge and the Deputy Principal Judge oversee the FID.

An international court, like any national judiciary, must be independent and impartial, and should be able to rely on rules securing the tenure of its judicial officers. Unfortunately, the EAC Treaty does not adequately warrant the tenure of its judges. This leads to questions over the EACJ's independence and impartiality. A mechanism needs to be put in place with regard to the appointment and removal of EACJ judges. At present, as already said, the Summit is solely responsible in that regard. Instead, there should be an independent body commissioned to appoint and discipline judges. It is odd to attempt to rely, in this modern age, on a flimsy rule describing one of the grounds leading to the removal of a judge from office as being "… inability to perform the functions of the office for any reason …".[28] A judicial officer cannot and should not be removed from office simply for "any reason". Well codified and justifiable grounds should be formulated to discipline judges. It should be recalled that the rules governing the removal of EACJ judges were given as part of the intimidation strategy for the hasty 2007 amendments. The circumstances in which the amendments to the Treaty took place suggest that the rules were meant to intimidate the then judges. The amended rules have been in operation since then.

Regarding the seat of the EACJ, it is yet to be determined by the Summit. The Court has been operating in Arusha, Tanzania, since its inauguration. It is housed in a dedicated wing in the multimillion dollar EAC complex. Given such massive investment as well as the length of time for which it has been operating, there is no genuine reason to move the Court away from Arusha. Besides, other organs are permanently stationed in the city. Also, moving the EACJ to another site would undercut the whole notion of Arusha's being the EAC's and Africa's capital hub for justice.

The first case received by the Court was *Calist Mwatela v EAC*,[29] in which two Community organs engaged in a power struggle. Members of the EALA brought the matter to the EACJ, questioning the act of the Council in

28 Article 26(b)(i) of the EAC Treaty.
29 *Calist Mwatela v EAC* App No 1/2015 (31 October 2007).

promulgating fifteen Protocols directly connected to EAC integration issues without involving the EALA.[30] The case was definitive in establishing the extent of the EACJ's authority, as the Court was asked to decide a dispute between a legislative and an executive organ of the Community, both of which were influential. This case did not touch on the interests of Member States directly, which probably made the EACJ sufficiently confident to resolve the matter. The institution of the case by EALA members was significant, as it acknowledged the existence of the EACJ and recognised it as an important forum in which to address integration problems. In a real sense, this established a pattern for strengthening the political legitimacy of the EACJ.

The real test of the EACJ's resilience came in the *Anyang' Nyong'o* case.[31] The applicants successfully challenged the election of nine EALA Members from the Kenyan National Assembly.[32] The decision of the EACJ in this case led to a significant transformation of the nature of the EACJ thereafter. Shortly after the Court found Kenya to be in breach of article 50 of the EAC Treaty, Member States went on to amend the EAC Treaty.[33] The main outcome of the *Anyang' Nyong'o case* was the disputed EAC Treaty amendments.[34] The amendments undermined the authority of the Court by establishing a two-layer court structure, establishing a time limit for the institution of cases, and attacking the security of tenure of the judges. The effects of having a time limit and an appellate chamber can easily be seen in the current functioning of the EACJ. Comments suggest that the 2007 EAC treaty amendments "have significantly affected the Court's subsequent trajectory".[35] The case was not the only one to be brought to the EACJ challenging article 50 of the EAC Treaty.[36]

A great deal has happened since the *Anyang' Nyong'o* case. The EACJ is getting busier and its registry docket continues to receive cases touching different legal issues. Essentially, there is a sense of growth in the Court's stature. The Court has grown in terms of experience. The quality of its judgments is fairly steady. However, the Court's human rights jurisdiction

30 Article 48 of the EAC Treaty establishes the EALA.

31 *Anyang' Nyong'o v Attorney General of Kenya* Ref No 1/2006 (29 March 2007).

32 For a general discussion on this case see Onoria 2010 *J Afr L* 74-94; Van der Mei 2009 *ZaöRV* 410-413.

33 Van der Mei 2009 *ZaöRV* 413-418.

34 See *EALS v Attorney General of Kenya* Ref No 3/2007 (31 August 2008).

35 Alter, Gathii and Helfer 2016 *EJIL* 294.

36 See for example, *Komu v Attorney General of Tanzania* Ref No 7/2010 (26 September 2014); *Katuntu v Attorney General of Uganda* Ref No 5/2012 (23 November 2013).

remains problematic and, as will be shown, matters touching on business are few and far between. Nevertheless, the importance of the EACJ in the EAC integration project is widely accepted. The chief grounds for judging the Court to be a success are the strength of its case law. The EACJ decisions have provided guidance which has led to a transnational legal effect within the region's legal fraternity.

2.1 Jurisdiction

After the above overview of the EACJ's institutional architecture, this subsection proceeds by reflecting on the scope of the Court's jurisdiction. The Court's initial mandate is itself a matter of discussion, particularly as to the extent it can preside over the founding principles of the EACJ. Also, as shown below, given its jurisdictional scope, the EACJ does not adequately play its supervisory role in relation to its Member States, which consequently undermines the Court's effectiveness.

It is fair to say that the EACJ's jurisdiction has been the focal point of discussion since its inception. The reason for this is the scope of the Court's jurisdiction, which is seen by many to be narrow. The nature of the cases adjudicated by the Court so far has mostly had to do with the governing principles of the EAC Treaty, particularly those provided under articles 6(d) and 7(2). Commercial actors have virtually boycotted the EACJ as a result of the Court's early decisions on trade. The long-awaited Protocol to extend the Court's jurisdiction was expected to address these key issues and hence to improve the Court's functioning. However, as will be seen in this article, despite the fact that the newly adopted Protocol has emerged after a long period of pressure from EAC citizens that the jurisdiction of the EACJ be expanded, the Protocol has really not introduced any new feature(s) into its work. As per article 27 of the EAC Treaty, the EACJ's jurisdiction is to be expanded in phases.[37] The article reads as follows:

> 1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty.
>
> 2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.

The above provision implies that appellate functions, and human rights and any other areas of jurisdiction could be expanded upon the adoption

37 Ojienda 2004 *EAJHRD* 95.

of a new Protocol. The provision also holds out the possibility of expanding the "original" mandate of the Court. On 20 February 2015 the Summit endorsed the Protocol for expanding the EACJ's jurisdiction pursuant to article 27(2) of the EAC Treaty. The Protocol claims that when it enters into force it will expand the Court's already existing jurisdiction in trade and investment matters, arising out of the implementation of the Customs Union, the Common Market and the Monitory Union Protocols.[38] The Protocol awaits ratification, which was directed to be finalised by 30 November 2015.[39] At the time of the preparation of this article, Rwanda is the only Member State that has ratified the Protocol. It is submitted that the new Protocol does not present new features in the work of the Court. It was expected that it would at least expand the original mandate, even if only by allowing the EACJ to interpret the domestic laws of the Member States.

The EACJ already had jurisdiction in interpreting trade and investment issues arising from the Customs Union and Common Market Protocols. According to the *Vienna Convention on the Law of Treaties*, a treaty can be "… in a single instrument or in two or more related instruments …".[40] EAC protocols are "related instruments" to the EAC Treaty and are within the range of the EACJ's jurisdictional mandate. This interpretation is also supported by article 151(4) of the EAC Treaty. The provision establishes that protocols constitute an integral part of the Treaty. The EACJ consolidated this position in *EALS v Secretary General of the EAC*.[41] In this case the parties contested over the EACJ's jurisdiction in interpreting the Customs Union and the Common Market Protocols. The EACJ reaffirmed its supremacy by holding that it does not require an extension of its jurisdiction as provided by article 27(2) of the EAC Treaty to exercise jurisdiction over the two Protocols. In the same fashion, the Court should preside in any matter arising out of the Monetary Union Protocol.

Clearly, the new Protocol has not received widespread support from the stakeholders in the region. Little about it has been disseminated. The EACJ itself is not taking the lead in informing the public about the significance of the new Protocol. Most likely, the content in the Protocol makes uninteresting, as it does not contain any new feature(s). The new

38 Article 3(1) of the *Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice* (2015) (the EACJ Protocol).

39 Mwanza 2015 https://www.tralac.org/discussions/article/7126-the-eac-court-s-jurisdiction-over-investment-matters-and-what-it-means-for-the-community-s-legal-instruments.html.

40 Article 2(a) of the *Vienna Convention on the Law of Treaties* (1969).

41 *EALS v Secretary General of the EAC* Ref No 1/2011 (14 January 2013) 21-23.

Protocol is not what civil society and activists across the region had been campaigning for, including the Court itself. The first few years of the EACJ's existence were characterised by numerous workshops and meetings with the purpose of inducing the Member States to conclude a protocol to grant authority in matters pertaining to human rights to the EACJ and its appellate division.[42]

Strategic litigation was deployed in a couple of instances to push for the extension of the Court's jurisdiction. The first attempt was made in 2010, when a concerned citizen of the EAC, Mr Sebalu, sought for a speedy determination of the Zero Draft Protocol that would make the EACJ have an appellate as well as a human rights mandate, as provided under article 27(2) of the EAC Treaty.[43] Inspired by the former EACA, Mr Sebalu approached the EACJ after losing an election petition at the Court of Appeal in Uganda, where he could not seek further legal remedy of appeal. Knowing that the EACJ does not have an appellate jurisdiction, Sebalu asked it to make a declaration that the delay in expanding the jurisdiction of the EACJ to appellate jurisdiction was contrary to the principles of good governance and the rule of law, to which EAC member states had bound themselves.[44]

Being aware of the delay, the Court stated that the prolonged process was a breach of the Community's principle of good governance.[45] Shortly after, Mr Sebalu sought for the Court's assistance on the topic of compliance with the decision, after the Council of Ministers adopted a zero draft of the then envisaged Protocol different from the one that had given the EACJ the jurisdiction in human rights as well as an appellate court.[46] Eventually the EACJ found that non-compliance with the decision of the first *Sebalu case* was contrary to the founding principles of the EACJ.[47]

The adoption of the new Protocol has a history of its own. In 2004 Member States came up with a Zero Draft Protocol for extending the jurisdiction of the EACJ that initially provided for a human rights and appellate mandate for the EACJ.[48] The so-called Zero Draft Protocol did not get far. Member States expressed their discontent about the EACJ's having an appellate and human rights mandate. Subsequently, a new version of the Protocol

42 Ruhangisa 2011 http://eacj.org/2014/docs/EACJ-Ten-Years-of-Operation.pdf 26.
43 *Sebalu v Secretary General of the EAC* Ref No 1/2010 (30 July 2011) 1-3.
44 *Sebalu v Secretary General of the EAC* Ref No 1/2010 (30 July 2011).
45 *Sebalu v Secretary General of the EAC* Ref No 1/2010 (30 July 2011) 42.
46 *Sebalu v Secretary General of the EAC* Ref No 8/2012 (22 November 2013).
47 *Sebalu v Secretary General of the EAC* Ref No 8/2012 (22 November 2013) 38.
48 Bossa 2006 *EAJHD* 31.

was prepared and presented before the Sectoral Council on Legal and Judicial Affairs. The decision to come up with this Protocol was reached in 2013, when the Summit approved the Council's recommendation to extend the EACJ jurisdiction in trade and investment issues only, leaving human rights issues to the AU and national institutions.[49] Article 27(2) of the EAC Treaty gives the Council discretion to determine the scope of EACJ jurisdiction as it deems necessary at a particular time. The Council is not compelled to give the EAC human rights or an appellate jurisdiction. As such, the latest Protocol can be used by Member States as a shield from the series of *Sebalu* cases. However, the Council was expected to develop a more enterprising protocol than the one recently adopted. It was expected that the new Protocol would address longstanding challenges facing the EACJ such as the security of tenure of the court judges, the admissibility requirements, and the challenges in enforcing the Court's judgment. In adopting this Protocol, the EAC States have missed an opportunity to improve the functioning of the EACJ.

Looking at other forms of EACJ jurisdiction, they are clear and more progressive. Like most other contemporary international courts, the EACJ has gone beyond the old model of international judicial bodies, which were primarily created to settle disputes between states.[50] A number of key players can subscribe to the Court for remedies. The EACJ can adjudicate cases referred by Member States when other Member States or organs or institutions of the Community fail to meet the obligations provided by the EAC Treaty.[51] The Secretary General may also refer to the EACJ a Member State's contravention of the EAC Treaty.[52] The Secretary General can make such a reference only after consulting with the defaulting state and the Council, as provided by article 29 of the EAC Treaty. Significantly, natural and legal persons can access the EACJ.[53] Individuals are entitled to question the legality of any Act, regulation, directive, decision or action of a Member State or an institution which goes contrary to the EAC Treaty.[54] Individuals also need not demonstrate specific interest when instituting a case.[55]

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49 EAC 2013 http://repository.eac.int/handle/11671/546 16.

50 There is, however, a retreat in some of the REC courts, such as the SADC Tribunal, which has a Protocol restricting individual access and deals with disputes involving states only. See Jonas 2013 *IHRLR* 294-321.

51 Article 28(1) of the EAC Treaty.

52 Article 29 of the EAC Treaty.

53 Article 30 of the EAC Treaty.

54 Article 9 of the EAC Treaty distinguishes organs and institutions of the EAC. As per art 9(1), the organs of the EAC are: the Summit, the Council, the Co-ordination

Individuals are able to seek the services of the EACJ like any other subjects of the Court. However, article 30 does not allow individuals to challenge acts of the EAC organs, which is yet another example of how the EACJ's jurisdiction is circumscribed. Apart from dealing with individuals, the EACJ can handle matters of dispute between the Community and its employees,[56] matters originating from an arbitration clause agreement, and special agreements binding the disputing parties where there is a clause conferring jurisdiction on the Court.[57] In ensuring consistency in interpreting the EAC Treaty, the EACJ makes preliminary rulings when a matter of concern appears before a national judicial body. When faced with a question regarding an interpretation of the EAC Treaty, a national court may refer the matter to the EACJ for interpretation.[58] This requirement is discretional. Also, the EACJ can give an advisory opinion upon being requested by the Summit, the Council or a Member State whenever there is a question of law arising from the EAC Treaty.[59] Advisory opinions are determined by the AD of the Court.[60]

In ensuring that the EAC integration becomes a reality, the Court's role is key. It is the Court's stripped mandate of ensuring compliance to the EAC Treaty that will drive EAC integration forward. The Court is expected to effectively assert its authority in all matters concerning EAC integration, without limitations.

Notwithstanding the fact that its importance is now accepted, there remain genuine concerns about its role and some of the challenges that it has had to face from time to time. For instance, while individuals enjoy "direct

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Committee, the Sectoral Committees, the EACJ, the EALA, the Secretariat; and such other organs as may be established by the Summit. Under art 9(3), institutions of the Community shall include: "… the East African Development Bank established by the Treaty Amending and Re-enacting the Charter of the East African Development Bank, 1980 and the Lake Victoria Fisheries Organisation established by the Convention (Final Act) for the Establishment of the Lake Victoria Fisheries Organisation, 1994 and surviving institutions of the former East African Community shall be deemed to be institutions of the Community and shall be designated and function as such". Also see *Modern Holdings (EA) Limited v Kenya Ports Authority* Ref No 1/2008 (11 February 2009).

55 Van der Mei 2009 *ZaöRV* 429.

56 Article 31 of the EAC Treaty.

57 Article 32 of the EAC Treaty. See *Alice Nayebare v EALS Arbitration* Cause No 1/2012.

58 Article 34 of the EAC Treaty.

59 Article 36 of the EAC Treaty. Also see *Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion* Opinion No 1/2008; *Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion* Opinion No 1/2015.

60 Rule 75(4) of the *East African Court of Justice Rules of Procedure* (2013).

access" to the Court, the issue of the time limitation for filing a case is still a matter of discontent.

2.2 The draconian two-month rule: An obstacle to accessing justice

Article 30(2) of the EAC Treaty requires complaints to be filed before the EACJ within two months of the enactment, publication, directive, decision or action that contravenes the EAC law, or of the day on which a particular breach has come to the knowledge of the complainant.[61] The provision is exclusively intended to restrict applications brought by individuals. Other organs and institutions with *locus* to the Court are not bound by article 30(2). While the insertion of article 30 is seen as a progressive step towards permitting individuals to have direct access to the EACJ, the time limit imposed under article 30(2) is radical and is an attempt to discourage individuals from accessing the Court. The EACJ, in particular the AD, is conservative in interpreting the two-month rule. The leading case on the rule is *Attorney General of Uganda v Omar Awadh.*[62] In this case the EACJ took the position that the strict application of the two-month rule is necessary for the purpose of legal certainty. The AD established that it could not uphold the principle of continuing violation since it is a human rights principle, and the Court does not have the jurisdiction to deal with human rights cases.[63] The AD narrowly associated the continuing violation doctrine with human rights alone, while the doctrine can be supported whenever there is a breach of the rule of law, such as in the matter of unlawful detention.

The strict application of article 30(2) is causing many references to fail before their merits are considered because they exceed the time limit.[64] In the case of continuing violations such as enforced disappearances and arbitrary detention, the EACJ has rejected requests to extend the time for submitting a claim, contrary to what is provided under Rule 4 of the EACJ Rules.[65] Without concrete reasoning, the EACJ defends itself by claiming

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61 Article 30(2) of the EAC Treaty.

62 *Attorney General of Uganda v Omar Awadh* Appeal No 2/2012 (15 April 2013) para 51.

63 *Attorney General of Uganda v Omar Awadh* Appeal No 2/2012 (15 April 2013) para 52.

64 For example, *Mureithi Wa Nyambura v Attorney General of Uganda* Ref No 11/2011 (24 February 2014); *Ndayizamba v Attorney General of Burundi* Ref No 3/2012 (28 March 2014); *Ruhara v Attorney General of Burundi* Ref No 4/2014 (7 August 2015).

65 *IMLU v Attorney General of Kenya* Ref No 3/2010 (29 June 2011); Appeal No 1/2011 (15 March 2012); *Mureithi Wa Nyambura v Attorney General of Uganda* Ref

that the Treaty does not empower it to stretch the two-month time limit. This is what the EACJ takes as a precedent when declining to uphold the continuing violation doctrine:

> … nowhere does the Treaty provide any power to the Court to extend, to condone, to waive, or to modify the prescribed time limit for any reason (including for "continuing violations").[66]

The current position of the EACJ is contrary to the spirit of the EAC Treaty pertaining to sustaining the rule of law and social justice. The two-month period applies only after a complainant becomes aware of the alleged violations.[67] The period for the applicant to acquire knowledge is not limited, and the grace period "can be as long as it takes for the complainant to be possessed of the requisite knowledge".[68]

In early cases where the time limit was in contention, the FID condoned the applications of applicants who filed their cases well beyond the two-month window. In *IMLU v Attorney General of Kenya*,[69] a reference filed in 2010, the applicant took Kenya to the EACJ concerning the violence that took place in Mount Elgon between 2006 and 2008 in the aftermath of the election. The applicant accused the government of Kenya of failing to take any administrative, judicial or other measures to prevent or punish the perpetrators. The allegations made were framed to preserve the rule of law, good governance and justice, which are not disqualified by a statutory limit.[70] The respondent disputed the admissibility of the case, arguing that the case had been submitted outside the two-month limitation period as provided under article 30(2) of the Treaty. After considering the arguments of both parties, the FID stated the following:

> It is our considered view, that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations. We find that such action or omission of a Partner State cannot be limited by mathematical computation of time.[71]

Being dissatisfied with the ruling of the FID, the Attorney General of Kenya filed an appeal, where his main argument was that the case was time-

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No 11/2011 (24 February 2014); *Francois v Attorney General of Burundi* Ref No 8/2011 (28 February 2014).

66 *Attorney General of Uganda v Omar Awadh* Appeal No 2/2012 (15 April 2013) para 59.

67 *IMLU v Attorney General of Kenya* Appeal No 1/2011 (15 March 2012) 16.

68 *IMLU v Attorney General of Kenya* Appeal No 1/2011 (15 March 2012) 16.

69 *IMLU v Attorney General of Kenya* Ref No 3/2010 (29 June 2011).

70 *IMLU v Attorney General of Kenya* Ref No 3/2010 (29 June 2011) 9.

71 *IMLU v Attorney General of Kenya* Ref No 3/2010 (29 June 2011) 10.

barred as provided for under article 30(2) of the EAC Treaty. The AD overruled the previous reasoning and struck out the reference by holding:[72]

> The Court below could not rule otherwise on the face of the explicit limitation in article 9(4) to the effect that the Court must act within the limits of its powers under the Treaty. It follows, therefore, in our view, that this Court is limited by article 30(2) to hear References only filed within two months from the date of action or decision complained of, or the date the Claimant became aware of it … there is no enabling provision in the Treaty to disregard the time limit set by article 30(2). Moreover, that article does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit … The reason for this short time limit is critical – it is to ensure legal certainty among the diverse membership of the Community.

The AD observed that the matter was time-barred, as the respondents had become aware of the violations through various widely publicised reports between 2006 and 2009, while the Reference was filed in 2010. The Court stressed that article 30(2) of the EAC Treaty should be interpreted in terms of its literal meaning and that the provision did not make any express provision for the concept of continuing violations. The Court was also of the view that it had no powers to extend the two-month period stipulated under the Treaty, as its powers were limited by article 9(4).

Another case was *Rugumba v Attorney General of Rwanda*.[73] The applicant accused the Government of Rwanda of impugning the founding principles provided in the EAC Treaty by unlawfully arresting and detaining one Seveline Rugiga Ngabo from 20 August 2010 to 28 January 2011. The applicant further asserted that while the reference was filed on 8 November 2010, the detention of Seveline Rugiga Ngabo lasted up until 28 January 2011, and therefore, since the detention was continuous, the time limitation clause imposed under article 30(2) of the EAC Treaty could not be invoked.[74] The FID upheld its previous decision in the *IMLU* case by stating that:

> … [W]here issues in contest are criminal in nature and the action complained of is continuous (such as detention), it would be against the principles known to the rule of law to dismiss the complaint on the basis of strict mathematical computation of time.[75]

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72 *IMLU v Attorney General of Kenya* Appeal No 1/2011 (15 March 2012) 16.

73 *Rugumba v Attorney General of Rwanda* Ref No 8/2010 (30 November 2011).

74 *Rugumba v Attorney General of Rwanda* Ref No 8/2010 (30 November 2011) 11.

75 *Rugumba v Attorney General of Rwanda* Ref No 8/2010 (30 November 2011) 28.

The Court also held that the applicant had filed the application within time. The decision was later reaffirmed by the AD but not on the basis of the continuation of events rule. The AD found that the applicant acquired knowledge of the matter alleged within two months of the claim being brought to the Court. By strictly applying the two-month rule, the EACJ had disregarded its own jurisprudence in the *EALS v Attorney General of Kenya* case,[76] when it called for a purposeful interpretation approach to the EAC Treaty as opposed to a restrictive and literal approach. It is submitted that article 9(4) of the EAC Treaty does not prevent the Court from adopting a purposeful interpretation of the Treaty. Also, the Court could have invoked its inherent powers so as to promote justice, which it did not opt to do.

As it stands, the two-month rule prevails and is strictly applied by the EACJ, which in the end restricts the Court's supervisory role in matters which might have significant interest in the EAC. Further, the *Omar Awadh* decision has served and will continue to be a point of reference in future cases. The rule is a persisting hurdle to litigants. The EACJ can still adopt the continuing violation doctrine, courtesy of Rules 1 and 4. The former establishes the inherent power that the EACJ has, and the latter enables the Court to extend the time of proceedings.

The challenge to the legality of article 30(2) could easily be anticipated. In *Steven Dennis v Attorney General of Burundi*[77] the applicant, who had been unable to challenge his expulsion from Tanzania to Rwanda, resorted to challenging the sixty days' time limit in filing a case before the EACJ. The applicant was of the view that article 30(2) denies individuals access to justice and is contrary to the principles under articles 6 and 7 of the EAC Treaty. The FID declined to accept that the sixty days rule contradicted EAC principles yet also paradoxically advised that the matter should be brought to the attention of Member States, as the rule was contrary to the people-centred and market-driven cooperation as provided under article 7(1)(a) of the EAC Treaty.[78]

It is argued that article 30(2) should be interpreted on the basis of its original purpose. The following are reasons for saying so.

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76 *EALS v Attorney General of Kenya* Ref No 3/2007 (31 August 2008).

77 *Steven Dennis v Attorney General of Burundi* Ref No 3/2015 (31 March 2017).

78 *Steven Dennis v Attorney General of Burundi* Ref No 3/2015 (31 March 2017) 29-30.

First, before the flawed 2007 Treaty amendment, the absence of article 30(2) allowed private litigants to play their roles in EAC integration without restriction. In fact, the provision as it stands is discriminatory, as it is applicable only to private litigants and not to others who can access the EACJ, such as the EAC Secretary General.

Second, private litigants are key in spearheading the goal of integration through litigating on matters directly associated with integration. The strict application of article 30(2) ensures that private litigants will not easily access the EACJ, eventually denying them access to justice. In a society such as that of the EAC, where most indigents are illiterate and legal services are scarce, a time-window of sixty days is minute. One could take about six months and more to gather evidence, while jotting-down pleadings and seeking legal assistance, even if one were aware of the applicable legal procedures or even of the existence of an integration court such as the EACJ.

Third, since its inception the Court has failed to attract traders due to the shortcomings in its remedial powers and other related pitfalls. As long as there is only a two months' period in which a complaint may be lodged before an integration court, traders in the region will keep on boycotting the Court and find other more favorable avenues of redress. Thus, by literally interpreting article 30(2) the Court makes it highly unlikely that traders will bring their commercial disputes forward for resolution. The liberal interpretation of the provision might attract such litigants in the region.

2.3 Judgments, compliance and execution

The most generic challenge faced by many international courts is the level of obedience by their member states. The EACJ is not an exception to this general observation. Essentially, international courts are influential only when their decisions are easily complied with and executed by states. If not, as with the case of the EACJ, then, such an international court will always be on the brink of being toothless and ineffective.

At the end of each reference, the EACJ delivers a judgment. It also issues interim orders carrying a status similar to that of a court judgment.[79] Member States as well as the Council are bound to implement EACJ judgments without delay.[80] But there are no established mechanisms to

79 Article 39 of the EAC Treaty.
80 Article 38(3) of the EAC Treaty.

ensure compliance in the event that a state refuses to implement a decision. Since 2005 the EACJ has dealt with more than 190 matters. What is intriguing in those judgments is tracking the extent to which they have been met with compliance. Member States have not been sanctioned when they have failed to comply with the EACJ's decisions. It is a matter of fact that the nature of EACJ judgments is declaratory, and this tends to attract non-compliance. The best the Court can offer is to declare violations of the law, give orders for injunctive relief, and award costs to the successful applicants.[81] The costs order depends on the nature of the case. Public interest cases do not attract costs orders.

The EACJ does not offer damages or compensation. Declining to award damages discourages litigants from the commercial sector. There is no excuse for EACJ to keep acknowledging its inability to award damages without doing anything about it. There is no provision in the Treaty explicitly permitting or not permitting the EACJ to award damages/compensation, but it has opted not to award any damages. In contrast, it awards damages in employment cases.[82]

Perhaps it is too critical of the Court to say that it missed an opportunity in the process of adopting the new Protocol. The EACJ seem to be contented with its inability to award damages, and also with its lack of enforcement mechanisms. This critique is based particularly on the cases in which applicants genuinely sought damages. The Court sees such cases as not being tortious or contractual in nature, and hence does not award damages.[83] In the *Sebalu* case[84] the EACJ stated that:

> The EACJ is a legitimate avenue through which to seek redress, even if all the Court does is to make declarations of illegality of the impugned acts, whether of commission or omission.

While the EACJ claims to be disabled from awarding damages, the EAC Treaty provides a means of executing a pecuniary judgment against an individual.[85] The provision assumes that the Court awards damages. If the Court imposes a pecuniary obligation, the judgment holder has to follow the laws of the civil procedure of the state where the execution is to take place. In essence, the Treaty does not provide the means of enforcing the

81 *Ndorimana v Attorney General of Burundi* Ref No 2/2013 (28 November 2014).
82 *Amudo v Secretary General of the EAC* Appeal No 4/2014 (30 July 2015).
83 *Kahoho v Secretary General of the EAC* Appeal No 2/2013 (9 November 2015) para 83.
84 *Sebalu v Secretary General of the EAC* Ref No 1/2010 (30 July 2011) 41.
85 Article 44 of the EAC Treaty.

Court's judgment when a state is in breach of the EAC Treaty. The Treaty does not recognise individuals (such as EAC employees) as offenders or as being respondent parties in a case. It is only states and EAC organs and institutions that qualify as such. The provision for enabling claims of pecuniary obligation against individuals in the EAC Treaty is therefore redundant.

Little is known about the extent of compliance with the EACJ's decisions. One could correctly characterise the EACJ's decisions as being academic. But the EACJ is essential for the survival of the EAC, and the efficiency of the EAC Treaty depends on the EACJ's effectiveness. Without effective enforcement mechanisms, the EACJ will have little impact on the Community. The challenges encountered when enforcing the decisions of the EACJ might be caused by problems that involve some of the most delicate aspects of international law: that is, states' ignorance in responding to international law.

The enforcement of a judgment of a court is an important stage in any litigation process. When a court judgment is enforced, that marks the end of a dispute. A dispute does not end merely with a court judgment. When a court judgment is finally executed, the execution saves the court from the embarrassment of having merely issued a written judgment. The successful execution of a judgment is the result that any litigant would seek and, in respect of the judgments that the EACJ has delivered so far, there has been only one complaint of non-compliance, which was in the *Sebalu case* described above. It is within the Office of the Secretary General that compliance with EACJ decisions should be tracked. In all fairness, the Office is seen to underperform in this respect. Admittedly it is very much occupied with the overall supervision of the wellbeing of the Community. Giving it the task of tracking compliance with EACJ judgments would be to overwhelm it with work.

Having most of the EACJ's judgment delivered in a declaratory form will certainly not induce Member States to fear noncompliance. That is why the EACJ is struggling to stamp its authority on the region.

3 Disputes determined by the EACJ

This section identifies the nature of the cases that have most frequently featured before the EACJ, and the manner in which they have been dealt with by the Court. In the process of doing this, the legal challenges associated with the Court's functioning and effectiveness are identified.

Cases involving the principles of the Treaty, particularly those touching on human rights, the rule of law and good governance have been prominent in the EACJ. A very minimal role has been played by cases featuring issues of trade, the customs union and the common market. Notably, the aspects chosen are not the only subjects of disputes adjudicated by the EACJ. As stated at the beginning of this article, EACJ has been engaged in different issues in its quest to strengthen the EAC project in the exercise of its adjudicative powers.

When one looks at the objectives of the EAC one realises that the perception that RECs are institutions focused on economic issues only should be reconsidered. The EAC Treaty, for example, has expansive objectives. The Treaty establishes a customs union, a common market, subsequently a monetary union, and ultimately a political federation with a diverse range of objectives, as indicated above.[86] The process of achieving the targeted goals will always be accompanied by different kinds of disputes. When that happens, REC courts such as the EACJ come into play by resolving the disputes and clearing the way for a smooth integration process. Issues of upholding Community principles, free movement and trade have been chosen as topics for discussion in reflecting below on the role of the EACJ in advancing EAC integration.

Given the broad scope of the EAC objectives, it is unlikely that the Court will deal with the following issues only.

3.1 Community principles

The principles of the Community are declared in the EAC Treaty. They have been the basis for the cause of action against Member States in all cases submitted to the EACJ so far. To that effect, the EACJ has upheld the Community principles within fair margins. Contrary to the expectations of its architects, over time the EACJ has robustly been able to hold Member States responsible for violating the EAC Treaty. The decision portal section of the EACJ's website reveals that most of the Court's decisions concern Community principles, particularly those mentioned under articles 6 and 7 of the EAC Treaty. The principles most frequently in consideration are the rule of law, good governance and human rights. Litigants, practitioners and civil society have been pressing for the EACJ to have a human rights mandate for quite some time. It must be acknowledged that the Court has to a degree arrogated to itself the role of

86 Article 5(2) of the EAC Treaty.

being a human rights protector. In the *DP case*[87] the EACJ stated as follows:

> The wording '…in accordance with the provisions of the [ACHPR]', creates an obligation on the EAC Partner States to act in good faith and in accordance with the provisions of the Charter. Failure to do so constitutes an infringement of the Treaty. Such violation can be legally challenged before the [EACJ] by virtue of its jurisdiction ... Articles 6(d) and 7(2) of the Treaty empower the [EACJ] to apply the provisions of the Charter, the Vienna Convention, as well as any other relevant international instrument to ensure the Partner States' observance of the provisions of the Treaty, as well as those of other international instruments to which the Treaty makes reference. The role of the Court in the instant Reference, was to ascertain the Partner States' adherence to, observance of, and/or compliance with the Treaty provisions – including the provisions of any other international instruments which are incorporated in the Treaty, whether explicitly [as in Article 6(d)], or implicitly [as in Article 7(2)].

The above decision is the most recent in which the EACJ has in a real sense made a declaration on a human rights violation. The decision came from the AD of the Court, which had previously been reluctant to adopt a more straightforward approach to interpreting the human rights norms provided in the EAC Treaty. However, little has been heard from human rights stakeholders in celebration of this latest decision. Hopefully, this is not a sign that the public has lost interest in the EACJ. EACJ judges and the Office of the Registrar were instrumental in advocating that the Court be given an explicit human rights jurisdiction.[88] This advocacy has recently become less vocal. The reason for this may be the change in the person of the Registrar, the officer responsible for the administration of the Court. It is through the Office of the Registrar that all outreach programmes conducted by the Court are administered. Presumably the new Registrar does not strive for the adoption of a human rights approach.

Since the EACJ's inception, the Court's human rights role has been a subject of debate as to whether it is mandated to adjudicate human rights disputes.[89] This is caused by article 27(2) of the EAC Treaty, which seems to expressly limit the EACJ to adjudicating human rights cases until a protocol to that effect is adopted. Uncertainty about the Court's human

87 *Democratic Party v Secretary General of the EAC* Appeal No 1/2014 (28 July 2015) para 63-64.

88 Gathii 2013 *Duke J Comp & Int'l L* 259. At 260, Gathii appreciates that: "[EAC] judges and registrars have engaged in earnest efforts to develop, cultivate, build, and justify the EACJ's relevance and its place within the EAC's integration agenda: in essence, building its political legitimacy. In doing so, the judges and registrars of the court have grounded themselves within a powerful network of lawyer associations and pro-democracy civil society groups".

89 Gathii 2013 *Duke J Comp & Int'l L* 249-296.

rights role was clear from the early days of its operations. A clear illustration of the cloud of ambiguity surrounding the EACJ's human rights jurisdiction appeared in *Katabazi v Uganda*,[90] when the Court held:

> 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 [before the Court] includes allegation[s] of human rights violation.[91]

> [T]he intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the court decision is the comer stone of the independence of the judiciary which is one of the principles of the observation of the rule of law.[92]

The above statements by the EACJ seem not to have been clearly understood by many litigants. It has been taken for granted that the EACJ can hold states accountable for human rights violations, even when it lacks an explicit mandate to that effect. Looking closely at the decision, it was not crafted on the basis of human rights. Nevertheless, post-*Katabazi* cases submitted to the EACJ have opened the floodgates to human rights allegations against Member States.

Prior to the *DP case* the position of the EACJ, specifically the AD, was that the Court would adjudicate on a matter containing human rights allegation only if the application contained a cause of action distinct from human rights.[93] Such a cause of action could be the rule of law, democracy, or good governance. Notwithstanding the precedent in the *DP case*, the EACJ still lacks an explicit human rights authority. The decision alone cannot justify the EACJ's receiving and deciding human rights cases, as the Treaty does not allow the Court to do so. The *DP* decision comes from the wisdom of the judges and not from clearly provided letters of the law.

A digest of human rights-like decisions of the EACJ may give the impression that the EACJ is adopting a judicial law-making strategy in adjudicating human rights matters. This could on the one hand be celebrated by regional human rights activists, while on the other hand it might undermine the Court's legitimacy, particularly in the opinion of the prescribing Member States. When courts expand their mandate beyond what is prescribed, concerns of legitimacy arise.[94] Distinctive academics

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90 *Katabazi v Uganda* Ref No 1/2007 (1 November 2007).
91 *Katabazi v Uganda* Ref No 1/2007 (1 November 2007) 15-16.
92 *Katabazi v Uganda* Ref No 1/2007 (1 November 2007) 23.
93 *IMLU v Attorney General of Kenya* Appeal No 1/2011 (15 March 2012).
94 Helfer and Alter 2013 *Theo Inq L* 488.

such as Gathii describe the EACJ as "an important human rights court".[95] There is a tendency of sub-regional courts to involve themselves in adjudicating human rights, the rule of law and good governance principles, but amongst them all the Court of Justice of the Economic Community of the West Africa is the only REC Court that does not enjoy the privilege of having a clear human rights mandate.[96] The Protocol that ought to give the EACJ an explicit human rights jurisdiction is limited to trade issues only.[97] The other sub-regional court, the Southern African development Community Tribunal, which was purposed to uphold the norms of the Southern African Development Community Treaty, has literally been abandoned.[98] It is therefore conceded that article 27(2) provides an indication that the EACJ's human rights jurisdiction was not meant by Member States to feature in the current scope of the Court's mandate. The EACJ, therefore, cannot be classified as a human rights court.

In 2012, there was a glimmer of hope for human rights activists in the region, when the EALA passed a Human Rights Bill.[99] The aim of the Bill was to end the ambiguity surrounding article 27(2) of the EAC Treaty, by giving effect to human rights norms in the Treaty. It is unknown whether the Bill was submitted to the Heads of State as directed under article 62(2) of the EAC Treaty. There is little information about the current status of Bill. Most likely, the EAC Treaty's provisions on how such matters are to be taken forward are being ignored, for the following reasons. Member States have the liberty to assent to or withhold assent to a Bill passed by the EALA,[100] subject to the prescribed procedures. As indicated above, it is mandatory for the EALA Speaker to submit any passed bill to the Heads of State. Bills should be approved by Heads of State within three months

95 Gathii 2013 *Duke J Comp & Int'l L* 250.

96 Article 3(4) of the *Supplementary Protocol Amending Protocol Relating to the Community Court of Justice* (2005). For an understanding of the ECOWAS Court and its human rights jurisdiction see Alter, Helfer and McAllister 2013 *AJIL* 737-779.

97 See the *Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice* (2015), adopted on 20 February 2015.

98 The SADC Tribunal was suspended in 2010 as a result of its controversial ruling in 2008, which found Zimbabwe in violation of arts 4 and 5 of the SADC Treaty, after implementing policies that led to the expropriation of private land without compensation. See *Mike Campbell (Pvt) Ltd v Zimbabwe* SADC (T) 02/2007 (28 November 2008); also see Nathan 2013 *Hum Rts Q* 870-892; De Wet 2013 *ICSID Review* 1-19; Cowell 2013 *HRLR* 153-165; Meckler 2016 *NYU J Int'l L & Pol* 1007-1038. SADC States then came up with a new tribunal with a mandate limited to the adjudication of disputes between Member States only. Individual access has sadly been removed.

99 EALA 2012 http://www.eala.org/media/view/bill-on-human-rights-is-passed-by-eala.

100 Article 63(1) of the EAC Treaty.

of being passed by the EALA.[101] If it is not, the bill should be referred back to the EALA for reconsideration, accompanied with reasons for its rejection. Then the Assembly will re-consider and re-submit the bill to the Heads of State for approval.[102] At this point, if any Member State declines to assent to the re-submitted bill, then the bill lapses.[103] None of these steps were followed after the Human Rights Bill was adopted by the EALA. This constitutes an infringement of the EAC Treaty. It is likely that the EALA was not dancing to the same tune as the EAC Heads of State on the issue of human rights. It is clear that if the Bill were to succeed, the EACJ would automatically have found itself to have no option but to adjudicate on human rights matters.

Evolution towards a strong EAC depends on adherence to the rule of law, good governance, and the principles of democracy and human rights. Proponents of a human rights mandate for the EACJ would argue that the Court is fully entitled to adjudicate human rights in accordance with articles 23 and 27 of the Treaty. Views that progressive EAC integration will depend on the realisation of human rights could also be advanced in support of an EAC human rights jurisdiction. It is commonly acknowledged that the protection of fundamental rights is an indispensable element of the modern international system. However, the EACJ lacks the necessary features to be a human rights protector. Nevertheless, the reality is that the Court seems to be unable to resist receiving cases which contain human rights allegations, as long as the provisions of the Treaty are enriched with human rights obligations.[104]

Apart from the principles of human rights, the rule of law and good governance, the EACJ has settled disputes concerning other principles linked with the EAC integration process, including the principles of variable geometry and subsidiarity. The principle of variable geometry allows member states in an integration bloc to implement integration projects at a different pace among themselves. States within an integration arrangement are allowed to move forward with integration activities, while leaving others to join later. As with the principle of subsidiarity, the EAC Treaty fails to clearly define the scope and applicability of the principle of

101 Article 63(2) of the EAC Treaty.
102 Article 63(3) of the EAC Treaty.
103 Article 63(4) of the EAC Treaty.
104 For instance, in one of the latest cases determined by the EACJ, Burundi's media law was found to be contrary to the EAC principles, as it bars journalists from reporting on certain issues and requires the sources to be state institutions. *See Burundi Journalists Union v Attorney General of Burundi* Ref No 7/2013 (15 May 2015).

variable geometry. The Treaty recognises the principle as a policy tool of "... flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds".[105] On a quick reading of the Treaty, the principle clashes with the requirement of consensus in the decision-making process within the Summit[106] and the Council of Ministers.[107] This was evident when the Council of Ministers approached the EACJ to seek clarity on the scope of the application of the variable geometry principle within the EAC.[108]

It was clear that even the top officials of the Community could not grasp the nature and scope of one of the founding principles of the Community, a principle derived from their own wisdom. In the quest for an advisory opinion, the EACJ was in general called upon to clarify the application of the principle of variable geometry vis-à-vis the requirement of consensus in the decision-making process of the EAC**.** The Court was of the view that, if diligently applied, the principle of variable geometry is in harmony with consensus, when deliberating on integration decisions.[109] In clarifying, the EACJ had this to say:[110]

> The Court finds that the principle of variable geometry, as its definition suggests, is a strategy of implementation of Community decisions and not a decision-making tool in itself. [...] The Court is of the opinion, therefore, that the principle of variable geometry can comfortably apply, and was intended, to guide the integration process and we find no reason or possibility for it to conflict with the requirement for consensus in decision-making.

3.2 Free movement of persons

Freedom of movement in the common market stage of integration is a "hybrid legal right" which is a "central pillar of all regional integration

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105 Article 1 of the EAC Treaty. The variable geometry principle is also described under art 7(1)(e) of the EAC Treaty as "... the Principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds".

106 Article 12(3) of the EAC Treaty.

107 Article 15(4) of the EAC Treaty. Further, art 2(2) of the *Protocol on Decision Making by the Council of the East African Community* (2001) provides that the decision of the Council is by simple majority, without disclosing the kinds of decisions to be reached by a simple majority.

108 *Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion* Opinion No 1/2008.

109 *Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion* Opinion No 1/2008 29.

110 *Matter of a Request by the Council of Ministers of the EAC for an Advisory Opinion* Opinion No 1/2008 33.

systems".[111] Both the EAC Treaty and the EAC Common Market Protocol provide for the right to the freedom of movement of persons.[112] While from one point of view the free movement of persons is treated as a scheme for bolstering trade between nations, from another the effective implementation of the policy reflects full citizenship within an integration scheme. The ultimate goal of the EAC is to attain political federation, an apex stage of integration that requires the full implementation of the free movement policy.[113] The Common Market Protocol requires Member States to guarantee the entry and exit of EAC citizens without a visa. A citizen from one EAC country can enter and stay in another EAC country for a renewable period of six months.[114] The only exception is that individuals may be denied entry on security, health and policy grounds.[115] In addition, any entry restriction imposed on an individual by a state should be communicated to the previously exited state.[116]

The EACJ has dealt with three matters so far on the right to free movement.[117] The leading precedent out of the three cases is the *Mohochi* case.[118] Samwel Mohochi, a Kenyan lawyer and human rights activist, arrived at Entebbe Airport in April 2011 as part of a team from the Kenyan chapter of the International Commission of Jurists. Airport immigration officials permitted the rest of the team to enter, but not Mohochi, who was refused entry to Uganda. The officials detained Mohochi for some hours and then placed him on an airplane returning him to Kenya, after sending Kenya Airways a "Notice to Return or Convey Prohibited Immigrant". Mohochi was never informed of the reasons for his being denied entrance into Uganda, if any.[119] Mohochi turned to the EACJ, accusing Uganda of being in violation of the right to free movement as provided by the EAC Treaty,[120] in particular the Common Market Protocol.[121] In addition

111 Helfer 2015 https://ssrn.com/abstract=2653124 6.

112 The *Protocol for the Establishment of the EAC Common Market* (2009), adopted on 20 November 2009, and entered into force on 1 July 2010.

113 Article 5(2) of the EAC Treaty. EAC integration is to take place in phases. The first phase was the Customs Union, the second is the Common Market, which will be followed by a Monetary Union, and eventually by a political federation.

114 Article 7.2 of the EAC Common Market Protocol.

115 Article 7.5 of the EAC Common Market Protocol.

116 Articles 7.5 and 7.8 of the EAC Common Market Protocol.

117 *Mohochi v Attorney General of Uganda* Ref No 5/2011 (17 May 2013).

118 *Mohochi v Attorney General of Uganda* Ref No 5/2011 (17 May 2013).

119 *Mohochi v Attorney General of Uganda* Ref No 5/2011 (17 May 2013) para 2-5.

120 Artcile 104 of the EAC Treaty states: "[The] Partner States agree ... to achieve the free movement of persons".

121 Article 7.1 of the Common Market Protocol states" "The [Member States] hereby guarantee the free movement of persons who are citizens of the other [Member States]".

Mohochi relied on the fundamental principles established by the EAC Treaty, including his human rights as provided by the African Charter. Since the reference made mention of a human rights violation, an objection to the Court's human rights jurisdiction was inevitably raised. The EACJ reiterated that article 27(2) of the EAC Treaty does not intend in any way to limit the Court from interpreting and applying any provision of the EAC Treaty, including all provisions making reference to human rights.[122]

Three issues were determined on merit: the conformity to the EAC Treaty with Uganda's sovereignty to deny entry to nationals of other EAC countries for security reasons; the requirement to inform Mohochi of the reasons that led to his being denied entry into Uganda; and whether the act of arresting, detaining and expelling Mohochi contravened the EAC Treaty and the Protocol, which provide for the right to free movement. During the hearing of the case the Attorney General of Uganda submitted that Uganda is an independent state and not submerged by the establishment of the EAC.[123] This submission by the Attorney General might be a reflection of the ignorance of Member States of the legal regime of the EAC.

Like all EAC States, Uganda has given the EAC Treaty the force of law in its territory.[124] Thus, the EACJ acknowledges Uganda to be a sovereign state and has the "power to deny entry to … citizens of EAC Partner States". But the power is to be exercised "in accordance with the law", including Community laws governing the right to freedom of movement. The EACJ went on to hold that:

> Sovereignty, therefore, cannot not 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.

When summing up, the Court found that the actions of the immigration officials had been in violation of the freedom of movement of the applicant, which constitutes part of the foundational principles of the Common Market Protocol, and of article 104 of the Treaty.[125] In addition, the EACJ granted Mohochi's requests for declaratory relief, including a declaration that Uganda's *Citizenship and Immigration Control Act* was "rendered

122 *Mohochi v Attorney General of Uganda* Ref No 5/2011 (17 May 2013) 26.
123 *Mohochi v Attorney General of Uganda* Ref No 5/2011 (17 May 2013) 45.
124 Section 3(1) of the *East African Community Act*, 2002 of Uganda provides that "the Treaty as set out in the Schedule to this Act shall have force of Law in Uganda".
125 *Mohochi v Attorney General of Uganda* Ref No 5/2011 (17 May 2013) para 112.

inoperative and ha[s] no force of law" to the extent that the Act conflicts with EAC free movement rules.[126] The EACJ further found Uganda to be in breach of articles 104 of the Treaty and Article 7(6) of the Protocol.

Mohochi's case came up in the context of the two bombing attacks in Kampala that killed 74 people on 11 July 2010.[127] The terrorist group, Al-Shabaab, claimed responsibility. Following the attacks, Ugandan officials arrested a number of suspects from Kenya. During the trial the suspects' counsel, Al-Amin Kimath, was detained after his visit to Uganda, where he was to appear on behalf of his clients, the suspects.[128] Al-Amin Kimath is a renowned human rights activist from Kenya, whose detention was widely condemned by a number of organisations and individuals including Mohochi. It is believed that Uganda targeted Mohochi because of his support for the campaign to free Kimath.[129]

Under similar circumstances, Mbugua Mureithi Wa Nyambura was a member of the legal team, including Kimath, that was instructed to represent the terror suspects. After landing in Uganda Nyambura was arrested at gunpoint, harassed, imprisoned with his clients for two days, and then expelled from the country without being given any explanations. In his quest to seek redress before the EACJ, in the matter between *Nyambura v Attorney General of Uganda*,[130] Nyambura was unable to meet the Court's two months threshold for filing a case.[131] Inspired by the decision in the *Omar Awadh case*, where the AD completely shut the door on any hopes of extending the time limit, it was held that:

> … [T]he principle of legal certainty requires strict application of the time-limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend, to condone, to waive, or to modify the prescribed time limit for any reason (including for 'continuing violations').[132]

EALS v Attorney General of Burundi[133] is the most recent EACJ matter dealing with the right to freedom of movement. Distinct from the two previous cases, in which the applicants had been denied entrance into

126 *Mohochi v Attorney General of Uganda* Ref No 5/2011 (17 May 2013) para 130. Also see *Citizenship and Immigration Control Act* 5 of 2009.
127 Helfer 2015 https://ssrn.com/abstract=2653124 16.
128 Helfer 2015 https://ssrn.com/abstract=2653124 17.
129 Helfer 2015 https://ssrn.com/abstract=2653124 17.
130 *Mureithi Wa Nyambura v Attorney General of Uganda* Ref No 11/2011 (24 February 2014).
131 *Mureithi Wa Nyambura v Attorney General of Uganda* Ref No 11/2011 (24 February 2014) 18.
132 *Attorney General of Uganda v Omar Awadh* Appeal No 2/2012 (15 April 2013) para 59.
133 *EALS v Attorney General of Burundi* Ref No 1/2014 (15 May 2015).

another country, this case is about an applicant's being restricted from moving outside his country. The regional Bar Association represented the applicant, Isidore Rufyikiri, who was the President of the Bar Association of Burundi. The applicants challenged the prosecution before the Anti-Corruption Court, disbarment from the Roll of Advocates, and the prohibition on Rufyikiri's travelling outside Burundi on the grounds that these actions were contrary to the EAC Treaty.[134] Rufyikiri was restrained from travelling by the order of the Public Prosecutor.[135]

The EACJ found that due process had not been carried out in prosecuting Mr Rufyikiri before an Anti-Corruption Court, disbarring him from the Table of Barristers and prohibiting him from travelling outside Burundi, which actions were in violation of the founding principles of the EAC.[136] What is significant in this Court's decision is the directives issued. The directives were for implementing the judgment by commanding Burundi to ensure the implementation of the judgment, as well as tasking the Office of the Secretary General to oversee the whole implementation process.[137] The EACJ normally issues declaratory orders but does not give any compliance directives.

In summary, the cases handled by the EACJ on free movement do not amount to a success story. They are a reflection of the challenges faced by litigants in terms of accessibility, the scope of the Court's interpretive mandate, and the nature of the remedies granted to successful applicants.[138] It has been submitted that the EACJ's scope of interpreting its role in ensuring free movement is narrow.[139]

3.3 Limited role in trade

There is little to not about the EACJ's engagement in commercial matters. Commercial law advocates have refrained from litigating in the EACJ on matters concerning trade. Such restraint is contrary to the major purpose of EAC integration, which is largely trade oriented, beginning with a customs union, proceeding to a common market, and culminating in a monetary union. Despite the fact that trade is a priority, the prevailing legal infrastructure on business law within the EAC is still very much national,

134 *EALS v Attorney General of Burundi* Ref No 1/2014 (15 May 2015) para 21.
135 *EALS v Attorney General of Burundi* Ref No 1/2014 (15 May 2015) paras 93-96
136 *EALS v Attorney General of Burundi* Ref No 1/2014 (15 May 2015) para 151.
137 *EALS v Attorney General of Burundi* Ref No 1/2014 (15 May 2015) paras 121(I) and (II).
138 See Helfer 2015 https://ssrn.com/abstract=2653124 6.
139 Nalule 2016 http://jura.ku.dk/icourts/ 16.

which could be one of the factors discouraging traders from resorting to the EACJ.[140] There have also been attempts by individuals to seek damages[141] and declarations on the violation of Treaty principles[142] against their respective governments in matters relating to business.

Another factor to take into account could be the EACJ's jurisdictional mandate and the nature of its judgment. The Court's lack of remedial power in awarding damages may be a reason why it is not preferred by the business sector for resolving their business disputes.[143] The EACJ does not grant damages, unlike national courts. As to accessibility, the EACJ cannot receive cases between individuals (legal and natural persons). The EACJ can only find the conduct of governments and EAC institutions to be inconsistent with the EAC Treaty or its Protocols.[144] The remedial nature and the scope of the accessibility could account for the rarity of the submission of trade cases to the Court.

The very first trade case dealt with by the EACJ was the *Modern Holdings* case.[145] The applicant was aggrieved by the respondent – the Kenyan Port Authority - after it refused to clear and release consignments imported through its port, contrary to the spirit of the EAC Treaty and the *East African Community Customs Management Act* and Regulations. The EACJ reasoned that the duty to ensure "the development of efficient and profitable sea port services" as provided in the EAC Treaty[146] lies purely with Member States.[147] An attempt by the claimant to hold Kenya accountable for not creating legal avenues for filing a similar case at the national level had proved futile. The applicant had not included the Attorney General of Kenya in the case, leading to the Court's dismissing the case on the grounds of a want of proper parties.

In the *Alcon Intl Ltd* case the EACJ was asked to interpret the EAC Treaty and the Customs Union and Common Market Protocol in a matter that involved cross-border investment.[148] Alcon Intl Ltd, a Kenyan registered

140 Gathii 2016 *Law & Contemp Probs* 49.
141 *Ndorimana v Attorney General of Burundi* Ref No 2/2013 (28 November 2014).
142 *Kyarimpa v Attorney General of Uganda* Appeal No 6/2014 (19 February 2016).
143 Gathii 2016 *Law & Contemp Probs* 45.
144 Article 28 of the EAC Treaty.
145 *Modern Holdings (EA) Limited v Kenya Ports Authority* Ref No 1/2008 (11 February 2009).
146 Article 93 of the EAC Treaty.
147 *Modern Holdings (EA) Limited v Kenya Ports Authority* Ref No 1/2008 (11 February 2009) 11.
148 *Kyarimpa v Attorney General of Uganda* Appeal No 6/2014 (19 February 2016) 6. Initially, this case was dismissed by the FID. The matter was later re-instated by

company, sued the Ugandan Government, Standard Chartered and the National Social Security Fund, both registered in Uganda. The matter arose after Standard Chartered Bank issued a bank guarantee to Alcon Intl Ltd which later successfully received an $8million arbitral award from the Ugandan high court and the court of appeal. The award was later denied by the supreme court of Uganda, causing the applicant to seek rescue from the EACJ's.[149] Before the EACJ, the case against Standard Chartered Bank was dismissed on the premise that it was not an appropriate party to the case, and the claims against Uganda were also dismissed on the grounds that the cause of action advanced by the applicant occurred prior to the entry into force of the Common Market Protocol.

International courts have a role in building their own reputation. The cases described above lead to the hypothesis that initially commercial actors across the region had faith in the Court. The cases brought were purely trade disputes. Unfortunately, none of the trade cases was decided on merit. The EACJ thereby "built a wall" guarding itself against the ingress of commercial actors from across the region. These were among the early cases taken to the Court. The Court somehow missed the opportunity to encourage commercial actors to take their cases to it by applying the Treaty strictly. There had been a chance for the Court to hold governments accountable for failing to create a suitable business environment. That opportunity was spurned.

4 Conclusion

This article has audited the functioning of the EACJ since its existence, and projects its effectiveness in the coming years, based on the Court's emerging jurisprudence and the prevailing provisions affecting it. Therefore, this article concludes that the EACJ is falling short of its authority in matters directly linked to EAC integration, such as trade. The shortcomings are caused by the existence of gaps in the EAC Treaty and the narrow interpretation of the role of the EACJ. Consequently, the EACJ has failed to establish its role in shaping the EAC.

On a positive note, there is evidence of variety in its actions, which covers the scope of EAC integration ambitions.[150] One notable feature of the

the Appellate Division on the ground that the First Instance Division did not determine the main jurisdiction issue.

149 Gathii 2016 *Law & Contemp Probs* 52.

150 Gathii 2016 *Law & Contemp Probs* 37-62.

EACJ so far has been its attempt to develop an authority of its own. It is acknowledged that human rights is an important ingredient in any integration aspiration. However, much needs to be accomplished if the EACJ is to adequately protect human rights. So far the EACJ has been found wanting when exercising its interpretive jurisdiction due to the ambiguity of its role in human rights.[151] While the EACJ has been trying to protect human rights, its legitimacy in adjudicating such matters is highly questionable. Upon consideration of its initial jurisdiction, its admissibility rules and the status of its judgment, it must be concluded that EACJ is scarcely a potent protector of human rights. For example, a human rights Court cannot succeed if there is a strict application of a time limitation clause like that to be found in article 30(2) of the EAC Treaty. A consideration of its human rights decisions exposes the Court's reliance on the rule of law and the principles of good governance as instruments pertaining to violations of rights. Nevertheless, the EACJ's lack of authority in matters pertaining to human rights should not undermine the relevance of human rights in the EAC integration project. Traditionally, human rights were never an integration issue.[152] The law has evolved, and now integration laws recognise human rights as an important ingredient in any integration arrangements.

On trade, which is at the heart of the EAC project, integration laws, including EAC law, are not designed to regulate daily activities in the business sector.[153] As a result, business actors resort to national law or any other relevant law in resolving trade disputes. As shown above, the EACJ has not played a meaningful role in trade issues. Much of the blame can be placed on the Court's limited jurisdictional scope and remedial authority as well as its lack of compliance mechanisms. The newly adopted Protocol could have addressed these issues, but the opportunity was wasted by Member States. This might give rise to the perception that the Member States are not ready to see the EACJ as effectively authoritative. As long as these constraints persist, the EACJ will not be used by commercial actors. The cross-border activities in the region constantly trigger disputes, mostly on business matters, which the EACJ cannot adequately deal with at the moment.[154] Also, major integration projects such as roads, ports, railways, oil, gas and minerals are underway and are likely to give rise to disputes.

151 See Possi 2015 *AHRLJ* 192-213.

152 Onoria 2010 *Afr J Int'l & Comp L* 167.

153 Gathii 2016 *Law & Contemp Probs* 49.

154 MCIArb 2016 http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/.

If one were to grade the performance of the EACJ, the grade would be "average". Much of the Court's time has been spent on establishing its own human rights practice. But it is only the Court's strategy in this regard that has been widely appreciated, not its decisions. The new Protocol does not give the EACJ an explicit human rights mandate. Instead, the Member States have drafted a Protocol that claims to extend the EACJ's authority on trade and investment matters,[155] a mandate which the Court has under article 23 and 27 of the EAC Treaty. The Protocol has not dealt with some of the major challenges associated with the working of the EACJ. To sum up, apart from its being praised as a human rights lobbyist, the EACJ's lack of authority has made it impossible for it to achieve anything of substance in the period since its establishment.

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[155] Such a mandate will enable the EACJ to effectively implement Chapter 12 of the EAC Treaty, establishing the basis for cooperation in investment and industrial development within the region.

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List of Abbreviations

AD	Appellate Division
AHRLJ	African Human Rights Law Journal
Afr J Int'l & Comp L	African Journal of International and Comparative Law
AJIL	American Journal of International Law
AU	African Union
Chi J Int'l L	Chicago Journal of International Law
Colum J Transnat'l L	Columbia Journal of Transnational Law
DP	Democratic Party
Duke J Comp & Int'l L	Duke Journal of Comparative and International Law
EAC	East African Community
EACA	East African Court of Appeal
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
EALS	East African Law Society

EAJHRD	East African Journal of Human Rights and Democracy
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
FID	First Instance Division
HRLR	Human Rights Law Review
Hum Rts Q	Human Rights Quarterly
IHRLR	International Human Rights Law Review
IMLU	Independent Medical Legal Unit
J Afr L	Journal of African Law
Law & Contemp Probs	Law and Contemporary Problems
Mizan L Rev	Mizan Law Review
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
OAU	Organisation of African Unity
REC	Sub-regional organisation
SADC	Southern African Development Community
SADCC	Southern Africa Development Coordinating Conference
SUR - Int'l J Hum Rts	SUR - International Journal on Human Rights
Theo Inq L	Theoretical Inquiries in Law
UN	United Nations
Va J Int'l L	Virginia Journal of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht