Human Rights protection by international courts – What role for the East African Court of Justice?

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I. Introduction

In the recent years, the tribunals of the African regional economic communities (RECs) started trying more human rights cases. Taking the East African Court of Justice (EACJ) as a case study, the present paper aims at establishing what functions those tribunals can fulfil as human rights courts. Originally conceived as an organ dealing with trade, investment and economic integration,[1] the EACJ became one of key actors of Human Rights protection in the East African region. But what are its particular strengths? What is the added value of its jurisprudence as compared to other judicial organs? Which functions can it perform reasonably? These are the questions, which the present paper seeks to explore. The various functions that the EACJ could reasonably perform are discussed in the second part of the paper, whereas the first part sets out the basic features of EACJ's human rights jurisdiction.

II. Features of the EACJ's Human Rights Jurisdiction

A. Implied jurisdiction

The Treaty establishing the East African Community (EAC-Treaty) lacks an unequivocal provision providing for the EACJ's jurisdiction in Human Rights matters. Article 27 (1) EAC-Treaty generally confers upon the EACJ the jurisdiction over "the interpretation and application of this Treaty", which, however, does not contain a Bill of Rights. Further, although Article 27 (2) EAC-Treaty stipulates that the Court shall have "at a suitable subsequent date" *inter alia* also appellate and human rights jurisdiction to be operationalized by the Partner States in a separate protocol; such protocol has not yet been concluded.

The substantive provisions on which the EACJ's human rights jurisprudence is based are limited to a set of general principles enunciated in Article 6 and Article 7 EAC-Treaty. Article 6 lists "fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States"; those principles include, according to Article 6 (d) EAC-Treaty, "good governance including adherence to the principles of democracy, the rule of law, account ability, transparency, social justice, equal

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[1] J. Gathii, Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy, *24 Duke Journal of Comparative and International Law* (2013-2014): 249-296, p. 261.

opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights". According to Article 7 (2) "the Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights".[2]

In the human rights cases brought to the EACJ, the respondents repeatedly challenged its human rights jurisdiction, but the Court dismissed those objections every time. The landmark decision was made in the Katabazi case of 2007.[3] The EACJ established its jurisdiction in human rights matters by reference to the above-mentioned provisions, also invoking cooperation in "judicial and legal affairs" (Art. 5 (1) EAC-Treaty) as an integration objective.[4] With regard to the issue of the protocol to be concluded according to Article 27 (2) the EACJ generally held that "it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation".[5]

Summarizing its position on this point in the Mohochi case six years later, the EACJ's First Instance Division suggested that the exception of Article 27 (2) EAC-Treaty does not refer to any provisions of the EAC-Treaty, as none of those might be designated as human rights provisions; the EACJ links the term "human rights […] jurisdiction" as used in the aforementioned provision to jurisdiction over human rights treaties, underlining that the EAC-Treaty does not belong to this category.[6] Consequently, the court construes the term human rights jurisdiction quite narrowly, as a direct application of human rights treaties; the examination of alleged infringements of Articles 6 (d) and Articles 7 (2), even if those provisions allow for the application of human rights instruments by virtue of reference – the Court expressly quotes the African Charter on Human and Peoples' Rights[7] - is not regarded as exercising human rights jurisdiction. The rationale of a distinction between the direct application of human rights instruments, to which the EACJ is *not* entitled, and the application by virtue of reference, which does fall under the Court's jurisdiction, remains unclear; a *lege artis* teleological interpretation of the provisions on jurisdiction requires the Court to clarify this point. Further, the Court extensively argues that Articles 6 (d) and Article 7 (2) enumerate judiciable legal principles rather than mere policy objectives.[8]

The very fact of failure to conclude a protocol extending the EACJ's jurisdiction to the human rights matters was also subject to the Court's scrutiny. In the Sitenda Sebalu case decided in 2011, the applicant sought to file an appeal with the EACJ against judgements

[2] There is also a catalogue of principles governing cooperation on political matters set out in Article 123. However, the EACJ quite rightly denied their direct applicability, since according to Article 123 (5) EAC-Treaty, they must be operationalized by the Council – the policy organ of the Community comprising the representatives of the Partner States governments (Article 14 EAC-Treaty). See *The Attorney General of the Republic of Uganda v Tom Kyahurwenda*, EACJ App. Division, Case stated No. 1 of 2014, paras 72-73. All cases of the EACJ are available at www.eacj.org (accessed 3 Feburary 2017).

[3] *James Katabazi and 21 Others v Secretary General of the East African Community and The Attorney General of the Republic of Uganda*, EACJ Ref. No. 1 of 2007.

[4] *Ibid.*, p. 15.

[5] *Ibid.*, p. 16.

[6] See *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*, EACJ Ref. No. 5 of 2011, paras. 28-29.

[7] *Ibid.*, para. 30.

[8] *Ibid.*, paras. 36 et seq., see also *AG of Uganda v. Kyahurwenda*, para. 66, with further references.

of Ugandan courts; the appeal was based on alleged violations of electoral law, but it was rejected due to the lack of jurisdiction. The applicant complained that although Article 27 (2) EAC-Treaty provided for an addition of appellate and human rights jurisdiction, the jurisdiction had not yet been extended and the delay was not justified. The EACJ held that the undue delay in extending its jurisdiction through adoption of the necessary Protocol violates the principle of good governance enshrined in Article 6 (d), 7 (2) and also 8 1(c) EAC-Treaty which imposes upon the Partner States an obligation to abstain from measures likely to jeopardise the achievement of the objectives or the implementation of the provisions of the Treaty.[9] It pointed out that "the court is a primary avenue through which the people can secure not only proper interpretation and application of the Treaty but also effective and expeditious compliance therewith"[10] and declared that "quick action should be taken by the East African Community in order to conclude the protocol to operationalise the extended jurisdiction of the East African Court of Justice under Article 27 of the Treaty." As said, this never happened.

In 2013, deciding upon a new submission of the same applicant, the EACJ handed down another judgement on the issue. It held that the failure to implement its previous judgement constitutes an infringement of various EAC-Treaty provisions, *inter alia* those of them reaffirming the principles of the rule of law and good governance, as well as contempt of the Court.[11] The EAC Secretary General was ordered "to take action to expeditiously implement the [2011] judgment". At the time of writing, this judgement remained unimplemented

B. Standard of review - Separate causes for action

The jurisdictional approach outlined above is quite controversial and it is perhaps for this reason that the case law of the EACJ sometimes lacks precision when it comes to defining the causes of action. The court tends to make only general references to Articles 6 (d) and 7 (2) or to the "principles" enunciated in those articles,[12] thus suggesting that the applications are reviewed against those principles taken as a whole.

The EACJ's take on the causes of action also triggered some doubts among the commentators. A. Possy seems to argue that the First Instance Division is more progressive, as it would refer explicitly to the protection of human rights, while the Appellate Division would link the Court's jurisdiction to other principles enshrined in Articles 6 (d) and 7 (2), e.g. good governance or democracy, insisting that those principles are distinct and separate from the protection of human rights.[13] This does not necessarily have to be the case. In the Rugumba decision,[14] the Appellate Division reiterated its position adopted earlier in the in the ILMU case[15] suggesting that the

[9] *Hon. Sitenda Sebalu v The Secretary General of the East African Community and Others*, EACJ Ref. 1 of 2010, p. 42.
[10] *Ibid.*, p. 41.
[11] *Hon. Sitenda Sebalu v The Secretary General of the East African Community*, EACJ Ref. 8 of 2012, para. 84.
[12] *The Attorney General of the Republic of Rwanda v Plaxeda Rugumba*, EACJ App. Division, Appeal No. 1 of 2012, paras 29 and 32
[13] A. Possy, Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice, 15 *African Human Rights Law Journal* (2015): 192-213, p. 207.
[14] *AG of Rwanda v Plaxeda Rugumba*, para. 27.
[15] *Attorney General of the Republic of Kenya v Independent Medical Legal Unit*, EACJ App. Division, Appeal No. 1 of 2011, p. 12.

human rights violations may be a cause for reference to the EACJ, so long as they correspond to a violation of the EAC-principles enumerated in articles 5, 6 and 7 of the Treaty. In such a case, a human rights violation amounts to a Treaty infringement, upon which the Court has jurisdiction; in this context, the Court pointed out that "it is not the violation of human rights under the Constitutions and other Laws of [the Partner State] or of the international Community, that is the cause of action in the Reference at hand."[16] It is the EAC-Treaty itself.

Despite this clarification, the EACJ shows some reluctance in invoking the principle of human rights protection; it rather choses to rely on other EAC principles, such as democracy, good governance or the rule of law. For example, in the Burundian Journalists Union case, the Court cites multiple sources to prove that freedom of press and freedom of expression are essential components of democracy.[17] In Gasutwa et al case involving interference of the government with the internal affairs of political parties,[18] the EACJ does not refer to any human rights standards e.g. the freedom of association, but rather looks into the compatibility of the measures taken with the Burundian law, namely with a provision in the constitution dealing with "the system of political parties". [19] As the applicants made only a very general allegation of "infringement of Articles 6 (d) and 7 (2) of the Treaty",[20] it was for the EACJ to specify the standard of review. The court pointed out that it was his task to examine, whether "the decision complained of was taken in conformity with the laws of Burundi",[21] as it would otherwise run "afoul of the principles of rule of law and good governance enshrined in the Treaty".[22]

C. Doctrines used

Since the EAC-treaty lacks written human rights standards, the Court resorts to constitutional doctrines of sometimes extremely varied origins. For instance, with respect to the freedom of speech, it refers to the US doctrine of market place of ideas combining it with the proportionality and reasonableness test used in Europe; the Court seems to suggest that the government may control what information and ideas may be brought to the market place, if the restrictions are proportionate and reasonable.[23] In the Mohochi case, the denial of entry of a Kenyan citizen to Uganda and his subsequent deportation were reviewed against the due process standards; the EACJ used the Black's Law Dictionary as a source of due process standards quoting the due process definition contained therein.[24] This definition was further refined by references to Article 54 of the Common Market Protocol[25] and one judgement of the CJEU.[26] . In the Katabazi case, the

[16] *Ibid.*, confirmed by *AG of Rwanda v Plaxeda Rugumba*, para. 27.
[17] *Burundian Journalists Union v The Attorney General of the Republic of Burundi*, EACJ Ref. No. 7 of 2013, paras. 75- 80.
[18] *Bonaventure Gasutwa et al. v The Attorney General of the Republic of Burundi*, EACJ Ref. No. 13 of 2014. The applicants complained of an order by the Minister of Home Affairs of Burundi which prevented legally elected members of the one of political parties' central committee from holding a meeting.
[19] *Gasutwa v AG of Burundi, para.* 55.
[20] *Gasutwa v AG of Burundi, paras.* 19-20.
[21] *Gasutwa v AG of Burundi, para.* 59.
[22] *Gasutwa v AG of Burundi, para.* 58.
[23] *Burundian Journalists Union v AG of Burundi*, para. 98.
[24] *Mohochi v. AG of Uganda*, para. 72.
[25] *Ibid.,* para. 73.
[26] *Ibid.,* para. 75.

Court does not shy away from looking up in the Wikipedia for a definition of the rule of law; it goes on to cite locally published edited volumes, a case decided by British House of Lords and another one of the Kenyan Court of Appeals; the facts of the case are compared to a Nigerian case decided by the African Commission on Human Rights (AComHPR).[27] Conversely, there are instances, in which a more explicit recourse to the comparative method could have produced promising results. In the Sitenda Sebalu decisions, responding to the lack of implementation of the Court's judgement and failure of the Partner States to conclude a protocol extending the EACJ's jurisdiction to human rights matters, the EACJ could have resorted to the ECHR's Airey judgement. In this case, the European Court famously held that the European Convention "is not intended to guarantee rights that are theoretical or illusory but those that are practical and effective".[28] True, the EAC-Treaty is not a Human Rights convention. But the EACJ also held that the community principles provided for in Articles 5, 6 and 7 script, transform and fossilize the responsibilities of the Partner States to their citizens.[29] And if so, how can one claim that those responsibilities are only illusory? An Airey-like approach would enable the EACJ to establish the effectiveness of the Treaty provisions as a guiding principle for the interpretation of the EAC-Treaty, when the responsibilities of the Partner States towards their citizens are at stake.

D. Actio popularis/public interest litigation

The EAC-Treaty does not make individual references to the EACJ conditional on any personal grievance of the claimant. The Treaty adopts this position basing on historical experience.

Traditionally, judicial remedies for human rights violations are available only for those who have standing. Accordingly, the individual complaint with the ECtHR is available only for victims of such violations.[30] Under the traditional common law approach, the claimant must have had a grievance of his own to be granted a relief by a court.[31] The various pieces of the British legislation generally require the applicant to show sufficient interest in the matter to which the application relates. From the early eighties, the courts started to interpret this requirement more liberally, looking more into the abuse of public authority, rather than the involvement of a personal right.[32] However, when it comes to exercise of public authority, the applicant must still show that she is "directly affected" or at least have a "reasonable concern".[33] Similarly, referring to the "cases and controversies" requirement of the US constitution, the US Supreme Court held that "a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[34] The court went on to explain that the litigant is not supposed to raise somebody else's rights; and as for general grievances, they are more appropriately addressed by the representative branch.[35]

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[27] See *Katabazi v Secretary General*, pp. 18 et seq.
[28] *Airey v. Ireland*, ECtHR Appl. No. 6289/73, para. 24.
[29] *AG of Rwanda v Plaxeda Rugumba*, para. 27, *AG of Kenya v Independent Medical Legal Unit*, p. 12.
[30] See Art. 34 ECHR.
[31] See M. Supperstone and J. Gondie, *Judicial Review*, Butterworths (1992), p. 329.
[32] [2003] NICA 14, para. 15.
[33] [2014] EWHC 2371 (Admin), paras. 13 et seq. with further references.
[34] *Allen v. Wright*, 468 U.S. 738.
[35] *Allen v. Wright*, 468 U.S. 751.

While the British courts tend to relax their take on to the conditions of standing, the EAC-Treaty does away with the standing requirement altogether. Article 30 para. 1 only requires that the person who files a reference with the EACJ is a resident of a Partner State; she does not have to be personally aggrieved in any way. Dealing with the matter in the Anyang Nyong'o case, the EACJ held that "It is important to note that none of the provisions in the three Articles requires directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference. We are not persuaded that there is any legal basis on which this Court can import or imply such requirement into Article 30."[36] The court rejected the respondent's argument, that an individual petition cannot be filed in the public interest only.[37] Clearly, it can.

The trends in relaxing the orthodox common law position with regard to the *locus standi* must be seen in the light of the doctrine of Public Interest Litigation (PIL), which refers to the use of court action to attain the goals of social justice.[38] According to J. Oloka-Onyango, the PIL is based on three hypotheses:

"The first theory states that PIL improves access to justice for marginalised and vulnerable communities. The second posits that PIL develops the overall state of legal protection in a country by eliminating bad law and fostering legal review. A third hypothesis is that PIL raises awareness and debate about a particular issue of general public concern, while also helping to reduce political tension and resolve social conflict".[39]

Most obviously, lowering the threshold for standing encourages the PIL, easing the access to the courts.[40] This is also the crucial element of the PIL advancement India in the early eighties, where it is believed to have been court-driven.[41]It was the case law of the Supreme Court of India, which recognized standing also in case of parties who are not affected or aggrieved by the measures, which they seek to challenge in the court.[42]

In East Africa, there are numerous historical examples of cases, in which the judiciary used the narrow interpretation of *locus standi* to deny judicial protection in cases involving violations of human rights and rights of indigenous communities.[43] Also, the record of the representative branches in addressing general grievances is not outstanding, as the very idea of popular representation was under challenge during the authoritarian rule, which in Kenya and Tanzania, as it will be discussed, started coming

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[36] *Prof. Peter Anyang' Nyong'o et al. v Attorney General of Kenya at al.*, EACJ Ref. 1 of 2006, pp. 16-17.
[37] *Anyang' Nyong'o v AG of Kenya*, p. 13.
[38] J. Oloka-Onyango, Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View, 47 *The George Washington International Law Review* (2015): 763-823, p. 763.
[39] Oloka-Onyango, *Human Rights*, p. 764 with further references.
[40] See Y. Yongolo, *Constitutional litigation and judicial approaches during the bill of rights era in Tanzania*, University of Dar es Salaam (2015), pp. 210 et seq. with examples of Tanzanian jurisprudence.
[41] Oloka-Onyango, *Human Rights*, p. 768.
[42] See the landmark case *S.P. Gupta v President of India And Oth*ers, AIR 1982 SC 149. See also Yongolo, *Constitutional litigation*, pp. 14 and 17.
[43] See as an example the case decided in 1989 by the Kenyan High Court *Wangari Maathai v Kenya Times Media Trust Ltd* [1989] eKLR, further Oloka-Onyango, *Human Rights*, pp. 773, 786 and 792. As the author claims, "no other principle had as strong an influence on the limits on access to the courts than that of *locus standi*", Oloka-Onyango, *Human Rights*, see also 776, also PLO Lumumba and L. Francheschi, *The Constitution of Kenya, 2010. An Introductory Commentary*, Strathmore University Press (2010), p. 139.

to an end only in the late eighties/early ninities. Accordingly, the legislative amendments introduced in the course of democratisation did away with the strict position on standing. For example, pursuant to Article 26 para. 2 of the Tanzanian Constitution "Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land". The provision was introduced into the constitution together with the Bill of Rights in 1984.[44] In 1995, the High Court of Tanzania referring to the aforementioned developments in the Common Law with regard to standing, held that Article 26 para. 2 incorporates the idea of PIL into the Tanzanian legal system; juxtaposing the said norm with the "common law orthodox position", the High Court highlighted the importance of the PIL in Tanzania using following words:

"By reason of limited resources, the vast majority of our people cannot afford to engage lawyers even where they are aware of the infringement of their rights an the perversion of the Constitution. Other factors could be listed, but perhaps the most painful of all is that over the years since independence, Tanzanians have developed a culture of apathy and silence. This, in large measure, is a product of institutionalized mono-party politics, which in its repressive dimension, like detention without trial, supped up initiative and guts. The people found contentment in being receivers without being seekers"[45]

Similar developments occurred in Uganda and Kenya boosting the PIL in those two countries.[46] Article 50 of the Uganda 1995 constitution provides in explicit terms that "Any person or organisation may bring an action against the violation of another person's or group's human rights". Also Kenya's 2010 constitution expressly allows for instituting of court proceedings by persons acting not necessarily in their own, but in the public interest.[47] Extension of the *locus standi* in the Kenya's 2010 constitution is regarded as a remedy meant to "cure the ills of the past".[48] One may thus conclude that waiving the standing requirement, the drafters of the EAC-Treaty were inclined to move the PIL to an international (regional) level.

And indeed, the human rights jurisprudence of the EACJ is not looked at against the PIL backdrop,[49] but in the case-law of EACJ, there are actually examples of references filed in public interest. There are further references directed exclusively against laws[50] or even amendments of the EAC-Treaty;[51] and there are also cases, in which a reference filed against a domestic law provision of a Partner State is accompanied by prayers for relief concerning individual grievances.[52]

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[44] Act No. 15 of 1984. The Bill of Rights became justiciable only in 1988. See Yongolo, *Constitutional litigation*, pp. 83-87.

[45] *Rev. Christopher Mtikila v. the Attorney General*, High Court of Tanzania, High Court of Tanzania Civil Case No. 5 of 1993 (*Mtikila I*).

[46] For numerous examples from the case-law of the national Courts in the East African region, see, Oloka-Onyango, *Human Rights*, pp. 780 et seq.

[47] See in particular Art. 22 para. 2b of the 2010 Kenyan Constitution. However, the Kenyan courts started relaxing their originally rigid take on the *locus standi* even before the entry into force of the 2010 Constitution. See Lumumba and Franchschi, *The Constitution of Kenya*, p. 139.

[48] Lumumba and Franchschi, *The Constitution of Kenya*, p. 138

[49] See e.g. Oloka-Onyango, *Human Rights*, pp. 801 et seq.

[50] *Burundian Journalists Union v AG of Burundi*.

[51] *The East African Law Society et al. v The Attorney General of Kenya et al*., EACJ Ref. No. 3 of 2007.

[52] *Mohochi v. AG of Uganda*, para. 11. The applicant not only raised a claim that it was contrary to the Treaty provision to refuse him to enter the Ugandan territory, but also claimed the same in a separate

As the EACJ argues in the East Africa Law Society case,[53] the lack of standing requirement reflects the intent, "to ensure that East Africans for whose benefit the Community was established participate in protecting the integrity of the Treaty," Similarly to the EU,[54] the individuals are thus positioned as one of the guardians of the Community law implementation. However, as the EAC lacks a robust supranational oversight organ comparable to the European Commission, the role of individuals is even more significant.[55]

E. Local remedies rule

The applicants do not have to exhaust domestic remedies before submitting a case to the EACJ. As the court's Appellate Division pointed out in the Rugumba case, "unlike other legal regimes in this field, the EAC Treaty provides no requirement for exhaustion of local remedies as a condition for accessing the East African Court of Justice."[56]

The EACJ's dumping of the local remedies rule is in line with its previously endorsed generous interpretation of the Treaty's rule on standing. In both cases, the court resorts to the principle of "people-centred and market-driven co-operation" enshrined in Article 7 (1) a of the EAC-Treaty.[57] This is the principle, which the EACJ invoked in the 2008 East Africa Law Society case to illustrate the significant role that individuals are supposed to play in upholding the Treaty provisions.[58]It consequently also seems to imply that the conditions on individual access to the EACJ should not be handled restrictively. The people-centeredness is thus the idea, which underlies the elevation of the PIL to the regional level.

Since there is no requirement of exhaustion of local remedies, the EACJ is sometimes the first judicial organ, before which the issue of compatibility of domestic laws with the EAC-Treaty is raised. When this happens, those laws are not tested in specific factual settings and the EACJ's judgement is thus not based on individual cases, whose facts have been scrutinised by the national courts. As a result, the EACJ tends to make very general and authoritative statements; the proportionality test is sometimes hardly more than a simple allegation.[59] Unlike the ECtHR, whose rulings concern individual violations and the opinions on the compatibility of legal provisions with the ECHR standards are only incidental, the EACJ – most probably inspired by the PIL concept – takes no difficulty in pronouncing itself on the whether a legal provision in itself contravenes human rights standards.[60] However, in doing so, it encounters difficulties, which are

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prayer, with regard to the discretionary powers granted upon immigration officers by the relevant Ugandan law.

[53] *The East African Law Society v AG of Kenya*, p. 14. In the same judgement the court points out that „Article 30 entrenches the people's right to participate in protecting the integrity of the Treaty." (p. 30).

[54] CJEU Case 26/62, *Van Gend en Loos*.

[55] The access of individuals to the CJEU is very limited. According to Article 263 of the Treaty on the Functioning of the European Union they may challenge the legality of the Acts of the European Union, but they must demonstrate that the act in question is of "direct and individual concern" to the plaintiff.

[56] *AG of Rwanda v Plaxeda Rugumba*, para. 39, see also *Anyang' Nyong'o v AG of Kenya*, p. 21.

[57] *The East African Law Society v AG of Kenya*, p. 15.

[58] See supra note 53.

[59] Where is the violation of the freedom of the press when the Council can only act in the event of abuse by the particular journalist? Freedom of the press has never been an absolute right in any democracy and the present limitation is reasonable and justifiable. (*Burundian Journalists Union v AG of Burundi*, para. 92).

[60] *Burundian Journalists Union v AG of Burundi*, para. 99.

pushed aside by means of reference to the burden of proof. Accordingly, the Court refused to rule on the allegedly excessive powers of Burundian National Communications Council with regard to accreditation and withdrawal of accreditation for journalists, as the applicants failed to provide information on how those powers are amenable to abuse. On the other hand, in Mohochi case, where the court could deal with tangible facts of a specific individual case (refusal of entry to Uganda, detention and sending back of a Kenyan national), it refused to rule on the conformity of the relevant sections of Ugandan immigration law with the EAC-Treaty. The EACJ held that there is no need for such ruling, since those sections were *ipso facto* inoperable with regard to the nationals of other Partner States to the extent, as they are not compatible with the treaty standards.[61] Instead, the court reviews the measures taken by the Ugandan authorities individually against the applicant directly against the human standards.

F. Time limits

Article 30 (2) EAC-Treaty imposes a short time limit to submit a case: It is only 2 months starting from "the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant". The Treaty did not provide for this from the very beginning; it was introduced as a part of a treaty amendment package constraining EACJ's jurisdiction, a package that was meant as a rebuke after the Court's decision in Anyang Nyango case, in which the EACJ ruled that Kenya's procedure to elect the members of the East African Legislative Assembly was not compatible with the requirements of the EAC-Treaty.[62]

The EACJ handles this time limit restrictively, as it explicitly and after a thorough examination turns down the concept of a "continuing violation",[63] endorsed by the AComHPR [64] but also for example by the ECtHR. [65] Given the EACJ's generous interpretation of Article 30's EAC-Treaty with regard to standing and the local remedies rule, the restrictive stance on the issue of time limits comes rather as a surprise. However, one has to bear in mind that the ECHR assumes a "continuing violation" – for example in cases in which access to a property is unlawfully denied for some time – only when no remedies against such violation were available.[66] Given the direct access to the EACJ which does not require the exhaustion of local remedies, as is the case of the ECHR,[67] the rationale for the extension of the time limits is not the same, as there will be always one remedy available, namely a direct recourse to the EACJ itself.

G. Burden of Proof

[61] *Mohochi v. AG of Uganda*, paras. 119-121.
[62] The amendments were declared incompatible with the EAC-Treaty in the EALS case, but never taken back. See *The East African Law Society et al. v AG of Kenya*, further also Gathii, *Mission*, p. 268.
[63] *Attorney General of Uganda v Omar Awadh and 6 Others*, EACJ Appeal No. 2 of 2012, paras 31 et seq. with further references.
[64] *J.E Zitha & P.J.L.Zitha v Mozambique*, AComHPR Communication No. 361/08, paras 87 et seq. with references to the case law of various international tribunals. All AComHPR Communications are available at www.achpr.org.
[65] *Sabri Güneş v Turkey*, ECtHR Application No. 27396/06, para. 54 with further references.
[66] *Ibid.*
[67] See Article 35 (1) ECHR.

In the Burundian Journalists Union case, the Court refused to rule on the proportionality of fines that were claimed to be "disproportionally harsh", pointing out that the applicants failed to make a comparative analysis of offences in Burundian Criminal Law.[68] In doing so, the EACJ ultimately shifted the burden of proof to the applicants. Similarly, in the Gasutwa et al. case, in which the EACJ was to rule on the conformity of the governments' measure with the national law, the court dismissed the application on the basis of "lack of sufficient supporting evidence" claiming that it is "incumbent upon the applicants to bear the risk of failure of proof".[69]

It is quite surprising that the applicant has to bear such a high burden of proof in cases, in which she claims to be a victim of a human rights violation inflicted upon her by mightier state machinery. The ECtHR, for example, can take evidence *ex officio*.[70] And once the state takes measures interfering with a particular ECHR right– e.g. with a freedom of speech or freedom of association – it is for the respondent state to establish that the interference is "necessary in a democratic society"[71] adducing "relevant and sufficient" reasons to justify the same.[72] The Kenyan High Court[73] and the Tanzanian High Court[74] take similar position with regard to the fundamental rights enshrined in the Bill of Rights forming part of Kenyan and Tanzanian constitution respectively.

The different approach taken by the EACJ may be regarded as a consequence of the confusion regarding the basis of the EACJ's jurisdiction in human rights matters, and most particularly of the court's reliance on "other causes for action" which was referred to in the previous sections. Accordingly, the Gasutwa case is decided on general references to Art. 6 para. 2 and 7 para. 2 of the EAC-Treaty;[75] at some point, specific reference is made to the principles of good governance and the rule of law, but not to the principle of human rights protection.[76] Had the EACJ based its decision on the freedom of association,[77] it would have been for the government to explain that the interference with this freedom is justified and, more specifically, that it satisfies the requirement of legality. A similar argument could be made with regard to the decision in the Burundian Journalists Union case, which relied chiefly on the principle of democracy, rather than on the freedom of speech as such.[78] The handling of the burden of proof by the EACJ illustrates the impact the confusion about the source of jurisdiction has on the court's case law.

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[68] *Burundian Journalists Union v AG of Burundi*, paras. 115-116.
[69] *Gasutwa v AG of Burundi*, para. 59.
[70] See Rule A1 of the Annex to the Rules of Court as of 1 January 2016, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.
[71] See Art. 8 (2), Art. 9 (2), Art. 10 (2) and Art. 11 (2) ECHR.
[72] See *Döring v Germany*, ECtHR Application No. 50216/09.
[73] *Kenya Bus Service Ltd & another v Minister for Transport & 2 others,* [2012] eKLR, para. 48.
[74] *Christopher Mtikila v Attorney General*, High Court of Tanzania Misc. Civil Cause 10 of 2005, (Mtikila II).
[75] *Gasutwa v AG of Burundi,* para. 57.
[76] *Gasutwa v AG of Burundi, para.* 58.
[77] Articles 6 para. 2 and 7 para. 2 of the EAC-Treaty taken together with Article 10 para. 1 of the Banjul-Charter.
[78] *Burundian Journalists Union v AG of Burundi*, paras. 46, 67 and most notably 71 ("From the submissions above, it is clear that the Applicant and the Amici have taken the view that, looking at the freedom of the press and freedom of expression as vital components of every democracy, the Press Law does not meet that test and more so, in spirit and content, is a violation of Articles 6(d) and 7(2) of the Treaty.").

H. Declaratory nature of judgements

The court judgements in human rights cases are declaratory judgements; the EACJ declared that there was an infringement or a violation of the Treaty. Even though in Plaxeda-Rugumba case, the applicant sought "any other relief as the Court may deem fit to grant",[79] the EACJ did not go beyond the mere declaration of an infringement.[80] In the Burundian Journalists Union case the court directed the respondent state to take measures in accordance with Article 38 para. 3 EAC-Treaty to implement the judgement. A compensation for injuries resulting out of a violation of Articles 6 (d) and 7 (2) EAC-Treaty or a "just satisfaction" – similarly to Article 41 ECHR[81] – has up to now neither been awarded nor sought.

The EAC-Treaty also does not offer any explicit basis for compensation and satisfaction claims. While Article 27 (1) establishes jurisdiction over "interpretation and application" of the Treaty, the individuals may file a reference with a view to determining whether the Partner States' action is lawful or infringes the Treaty[82]; similarly, the references by the Partner States[83] and the Secretary General[84] may relate to the question whether the Partner States fulfilled their obligations under the Treaty or infringed its provisions. Article 38 (3) EAC-Treaty sets out only a general obligation to "take, without delay, the measures required to implement a judgement". There is only one hint in the treaty that the judgements may go beyond mere declarations of compatibility with it: According to Article 44 EAC-Treaty, an EACJ judgment, "which imposes a pecuniary obligation on a person" shall be executed pursuant to the rules of civil procedure of the Partner State concerned. This provision, however, does not establish any basis for a pecuniary claim, but rather presupposes the existence of such a basis in the domestic law. And there still remains the question, if a Partner State, which violates human rights, may be regarded as a "person" within the meaning of the said norm.

Nevertheless, once a violation of the EAC principles as stipulated in Articles 6 (d) and 7 (2) EAC-Treaty has been declared by the Court, there is nothing in the Treaty barring the successful applicant from suing the Partner State concern for compensation before its national courts; in the Kyahurwenda case, the EACJ held:

"This Court is of the view that national courts and tribunals are entitled to examine the facts of each case as against the Treaty provisions in order to determine whether or not there is a breach. Where a breach is established, it is for the national courts to determine whether there was damage, and what reliefs and remedies are justifiable and commensurate with the loss."[85]

This statement applies all the more to cases, in which not a national court, but the EACJ, being the principal judicial organ of the community, determined the breach.

[79] *Plaxeda-Rugumba v The Secretary General of the East African Community*, EACJ Ref. No 8 of 2010, para.4.
[80] *Ibid.*, para. 44.
[81] However, in this regard one has to bear in mind that the EAC-Treaty is not designed as a human rights treaty, but as a comprehensive instrument of regional integration.
[82] Article 30 (1) EAC-Treaty.
[83] Article 28 (1) EAC-Treaty.
[84] Article 29 (1) EAC-Treaty.
[85] *AG of Uganda v. Kyahurwenda*, para. 75.

Conclusively, the victims of human rights violations, which were determined by the EACJ, are entitled to seek compensation in the national courts.

III. Role of the EACJ with regard to Human Rights protection within the EAC

A. Functions of international judicial organs

The international judicial organs originate from arbitration bodies whose sole aim was to resolve disputes arising between states.[86] A similar dispute resolution competence regarding disputes between individuals and the states related to the obligations the states have towards individuals under the public international law is still not widespread. Such competence can be established for arbitral tribunals in investment disputes.[87] The idea of a tribunal resolving a dispute between an individual and a state over allegations of a human rights violation on equal footing is realised only in some systems of human rights protection. Adversary judicial proceedings between the state and an individual can be instituted before the European Court of Human Rights, even if such proceedings were not initially envisaged.[88] Individuals may directly access the African Court of Human and People Rights, but only, if the State Party concerned made a special declaration accepting the court's competence to hear individual cases.[89] At the time of writing there were only very few such declarations and even the Protocol was ratified only by roughly a half of the African Union member states.[90] An individual complaint cannot be lodged with the Inter-American Court of Human Rights; the cases are submitted either by the Inter-American Commission on Human Rights or by the state concerned. [91]Under the ICCPR for example, an individual communication may be lodged with the Human Rights Committee only if the state concerned ratified the First Optional Protocol;[92] the decisions handed down by the Human Rights Committee, although modelled after judicial decisions are not binding and the procedure only has a rudimentary resemblance to a judicial process. [93] Despite all efforts, the individual complaints procedures before the UN-bodies are still constructed more as petitions constituting a source of information for the Human Rights Protection bodies rather than judicial dispute resolution mechanisms.[94] To sum up, in a comparative perspective, the concept according to which individuals can sue a state for a human rights violation before the EACJ is still to be seen as quite progressive.

Secondly, the international adjudication strengthens the international rule of law and it does so in a twofold way. On one hand, an international tribunal is usually competent to establish via a binding decision, that a state has violated its obligations under the Public

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[86] T. Milej, *Entwicklung des Völkerrechts. Der Beitrag internationaler Gerichte und Sachverständigengremien*, De Gruyter (2014), pp. 42 et seq.
[87] See e.g. Chapter IV of Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), available at icsidfiles.worldbank.org.
[88] Milej, *Entwicklung*, pp. 154 et seq.
[89] See Article 5 (3) and Article 34 (6) of the Protocol.
[90] The data is available at www.acfpr.org.
[91] Art. 61 (1) of the American Convention on Human Rights, available at cidh.oas.org.
[92] Art. 1 of the First Optional Protocol to International Covenant on Civil and Political Rights, available at www.ohchr.org.
[93] Milej, *Entwicklung*, p. 194
[94] *Ibid.*

International Law; as the states are generally keen on preserving the reputation of being law-abiding, they will be more willing to respect their international obligation, if the-compliance is likely to be denunciated by an international tribunal ("mobilization of shame").[95] Thus, the fact that the breaches of the EAC-Treaty obligations can be denounced in a judicial process strengthens the credibility of the commitments enshrined therein. On the other hand, international tribunal's case-law facilitates the states' compliance with international obligations; according to T. Guinsberg, the judicial decisions by resolving disputes set out "focal points" conveying to the states information on how to comply with the international law under the circumstances of a given case.[96] The bigger the body of case law is, the more information it conveys and the clearer are the expected patterns of behaviour. In this way, the steering capacity of law is increased.

The aforesaid "focal points" are a core element of the development of the Public International Law by international tribunals, also simply referred to as judicial law-making.[97] This is the third function of international judicial bodies recognized on the establishment of the Permanent Court of International Justice (PCIJ) after the WW1 at the latest; the judicial law making capacity is a principal added value of permanent judicial bodies as compared to *ad hoc* arbitration.[98] Obviously, not all "focal points" are regarded as acceptable forms of judicial law making under the Public International Law; what is seen as acceptable or not is a reflection of what the legal theory views as legitimate judge-made law under the Common Law and Civil Law systems. Accordingly, judicial law making is regarded as legitimate, if it follows certain pattern defined by the application of sound interpretative methods as codified in the Vienna Convention on the Law of Treaties and recognized judicial doctrines, the independence of adjudicators, the observance of judicial procedure, the linkage to specific facts of the case and the observance of precedence.[99]

B. Remedying the Human Rights violations

The EACJ may be first and foremost looked at as an institution providing effective remedies in individual cases of human rights violations. In this way, the regional court would fill a gap that emerges between the national courts and the African System of Human Rights protection. On the one hand, the position of the EACJ is weakened by the fact that its human rights jurisdiction is only implied, but on the other hand, the EAC-Treaty reinforces it embracing the PIL and doing away with the local remedies rule; the

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[95] L. R. Helfer, Constitutional Analogies in the International Legal System, *37 Loyola of Los Angeles Law Review* (2003): 193-237, p. 223; Milej, *Entwicklung*, p. 329, B. Simma, *From Bilateralism to Community Interest in International Law*, 250 Recueil des Cours (1994): 217-377, p. 243,

[96] T. Ginsburg, Bounded Discretion in International Judicial Law Making, *45 Virginia Journal of International Law* (2004-2005): 631-673, pp. 643-645.

[97] *Ibid.*, but see already H. Lauterpacht, *The Development of International Law by the International Court*, Stevens & Sons Ltd. (1958), p. 155.

[98] See Milej, *Entwicklung*, pp. 51 et seq. According to the opinion of L. Oppenheim voiced in 1912, the permanent international judiciary would contribute to the clarification of open legal questions through binding precedence which ensures the continuity of judicial law making. See L. Oppenheim, The future of international law, Clarendon Press (1921), pp. 46-48 (American edition of a book published in Germany in 1921). The PCIJ made indeed a significant contribution to the development of the Public International Law, especially in its formative years until 1930, See O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary*, CUP (2005), p. 401.

[99] Milej, *Entwicklung*, p. 644.

dispute resolution competence of the EACJ, unlike the similar one of the ECtHR,[100] is thus not of a subsidiary character.

As compared to the regional system of Human Rights Protection based on the African Charter on Human and People's Rights (ACHPR), the main advantage of the EACJ is its accessibility. The most striking difference is the local remedies rule: Even if the AComHPR does not handle this requirement very restrictively, the local remedies must still be exhausted before the Commission can consider a communication from an individual.[101] Moreover, the AComHPR does not make binding determinations of human rights violations; the individual communication procedure ends only with a "recommendation" of a non-binding character.[102] The recommendations can become binding after being included in the Commission's report on its activities; this report is to be submitted to the African Union Assembly of Heads of State, which may adopt it and make decisions.[103] Binding judgements can also be made by the African Court of Human and People's Rights (ACtHPR).[104] However, the accessibility of this court is quite limited. Article 5 (1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights does not list individuals as subjects who are entitled to refer a case to the court and according to Article 2, the court's role is to complement the mandate of the Commission.

By the time of establishment of the EACJ, the usefulness of the national courts as protectors of human rights was also questionable, as was generally the respect for judicial work and judiciary. [105] In the recent history of East Africa, the judiciary generally failed to enforce human rights and challenge the one party rule; the cases of striking down of laws were rare and the independence of the judiciary was an issue.[106] As observed by J. Oloka-Onyango, the tradition of a subdued judiciary is traceable back to the colonial times, when it considered itself as an appendage to the executive; its objective was to assist the executive carry out the colonial powers' policies rather than take a stand for the rights of indigenous people.[107] In addition, in the beginnings of independence, the judiciary was still perceived as an instrument of colonial subjugation: the bench was composed almost exclusively of the representatives of the past colonial masters, their tenure being secured by the colonial legislation still in force. On independence, it was thus for the executive power to pursue the liberation and development agenda. But at the beginning of the new millennium, when abuses of the executive power were evident, the East Africans were looking for a judicial power which was not tainted by the not-so-glamorous record of the national judiciaries, one capable of taking a pro-active stance and effectively protect their rights against the arbitrariness of the government, a judicial power to which PIL suits could be brought. Those are the

[100] See *Sabri Güneş v Turkey*, para. 54.
[101] See Article 56 (5) ACHPR, *Ouko v Kenya*, AComHPR communication 232/99. For a detailed discussion see also K. Kufuor, *The African Human Rights System. Origin and Evolution*, Palgrave (2010), p. 94.
[102] Article 53 ACHPR.
[103] See Article 54 ACHPR and Article 9 (1b) of the Constitutive Act of the African Union.
[104] See Article 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.
[105] For Kenya, see Lumumba and Francheschi, *The Constitution of Kenya*, p. 137 and pp. 475 et seq., for Tanzania Yongolo, *Constitutional litigation*, p. 382
[106] Lumumba and Francheschi, *The Constitution of Kenya*, p. 137, Gathii, *Mission*, p. 272, Oloka-Onyango, *Human Rights*, p. 775
[107] Oloka-Onyango, *Human Rights*, p. 774.

expectations, which the EACJ, being a new court outside of the worn out and obscure structures was well equipped to meet.

Is it still the case?

National courts of the EAC Partner States do have power to strike down laws[108] and the instances in which they use those powers have become more frequent. In the case of Julius Ishengoma Francis Ndyanabo for example, the Tanzanian Court of Appeals, alluding to case law of the European Court of Human Rights[109] declared the Tanzanian constitution to be a "living instrument". The constitutional provisions on fundamental rights – the Court continued – "have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail". Having said this, the Court invalidated a provision that made an electoral petition dependent on a security for costs of 5 Million Tanzanian Shillings. This is a sum, as the Court noted, for which a civil servant working on a minimum wage would have to work eight years. The court concluded that this requirement impeded access to justice.

Also the High Court of Kenya[110] quashed a statutory provision on the reason of violation of the right of access to justice, a fundamental right enshrined in Article 48 of the Kenyan Constitution. According to the challenged statute, court proceedings against the government could not be instituted unless the government was given a thirty days prior notice in relation to those proceedings. Having comparatively scrutinized legal developments in selected common law jurisdictions, the High Court suggested that Kenya did not keep pace with the law reforms undertaken elsewhere, aiming at facilitation of the access to justice;[111] the notice requirement would cause hardship to ordinary citizens.[112] Finally, the Court also did not hold back from expressing its discontent with the lack of the government's timely response to the plaintiff's submission:

"The Office of Attorney General is a constitutional office with special responsibilities under Article 156(4) particularly representing the national government in court. By virtue of Article 156(6), the Attorney General is required to promote, protect and uphold the rule of law and public interest. It is imperative that in proceedings such these that the voice of the Attorney General is asserted in order to assist the court. Failure to take this responsibility seriously by that office and its officers is a dereliction of duty. I shall say no more."[113]

Those examples of the courts' pro-active stance cannot divert from the fact that establishing a robust judiciary is a still on-going struggle. Accordingly, the High Court of

[108] E.g. for Kenya see in particular: Articles 22, 23 and 165 (1) d of the 2010 Kenyan Constitution; for Tanzania, see Article 30 (3) of the Tanzanian Constitution and Articles 4 and 13 of the Basic Rights and Duties Enforcement Act – BRADEA (Act 33 of 1994); The High Court of Tanzania also assumed jurisdiction over constitutionality of amendments to the Constitution, see *Mtikila v Attorney General* (Mtikila II) and *infra* fn. 114.

[109] *Loizidou v Turkey (Preliminary Objections),* ECtHR Application No. 15318/89, para. 71.

[110] *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR.

[111] *Ibid.*, para. 33.

[112] *Ibid.,* para. 38.

[113] *Ibid.*, para. 49. The quoted provisions are those of the 2010 Constitution of Kenya.

Tanzania saw its rulings on unconstitutionality of statutes thwarted by the parliament enacting adverse constitutional amendments; the High Court explicitly condemned this action and declared the Acts of Parliament amending the constitution unconstitutional (!).[114] And these days, various EAC Partner states are still in a state of governance crisis, which involves de jure or de facto scrapping of presidential term-limits (Burundi, Rwanda) or lack of the same (Uganda), internal armed conflicts (South Sudan, Burundi and to a lesser extent Uganda), corruption, threats to the media, bans on political rallies and accusations of electoral fraud.[115] This crisis affects not only the access to national courts, but also the implementations of EACJ judgements. It shows, however, that the EACJ still has a role to play as an institution, denouncing human rights violations even within its limited powers.

C. Strengthening the rule of law and development of the Human Rights Standards

The role of the EACJ as an institution strengthening the international rule of law and setting Human Rights standards is determined by the nature of cases it decides. A look at the Court's docket reveals that what the EACJ is doing is not a fine-tuning of the human rights standards or policing minor deviations from them. Rather, the Court is busy denouncing bold human rights violations. The ground-breaking Katabazi case for instance, concerned criminal suspects released by the High Court of Uganda on bail and rearrested contrary to the Court's order, while security forces surrounded the Court premises. The suspects were not released despite a decision of the Constitutional Court, which ruled that the actions of security forces were unconstitutional.[116] The entire EACJ's reasoning aims at establishing an obvious fact that the executive branch is under the duty to abide the courts' decisions.[117] In other cases, the EACJ established a duty to inform a person to be deported on the reasons of deportation,[118] basic standards for protection of journalistic sources[119] and reaffirmed the doctrine of proportionality[120]. In Rugumba case, the Appellate Division even explicitly qualifies holding a person incommunicado for 5 months without judicial order as an "obvious breach" of the EAC-principles.[121]

When it thus comes to the strengthening of the credibility of the human rights commitments as enshrined in Articles 6(d) and 7(2) of the EAC-Treaty, the function actually performed by the EACJ resembles to some extent the function ascribed to the

[114] In 1994, The High Court of Tanzania held that also independent candidates, i.e. candidates do not belong to any political party, have a constitutional right to run for presidency of the country (Mtikila I judgement, see fn. 45). It was in "response" to this judgement, that the Tanzanian parliament amended the constitution banning candidates not fielded by political parties from the presidential race. In 2006, the High Court quashed those amendments arguing that the constitutional amendments may not alter the basic structure or essential features of the Constitution and thus may not impose disproportionate limits on the representative democracy (Mtikila II). See also Yongolo, *Constitutional litigation*, p. 213.

[115] The media reports across the region are numerous, as an example see only "Breadth versus depth: Why East African Community is doomed", The EastAfrican, 2 December 2016.

[116] *Katabazi v Secretary General*, p. 2.

[117] *Katabazi v Secretary General*, p. 23.

[118] *Mohochi v. AG of Uganda*.

[119] *Burundian Journalists Union v AG of Burundi*, paras. 109-111. Under the relevant Burundian law, the journalists were obliged to reveal their sources to "competent authorities", if the information concerned was related to „State security, public order, defence secrets and the moral and physical integrity of one or more persons".

[120] *Burundian Journalists Union v AG of Burundi*, para. 85.

[121] *AG of Rwanda v Plaxeda Rugumba*, para. 29

ECtHR in its early formative days. The ECtHR was originally designed as a "conscience of Europe" which rings alarm bells, once the democracy is in danger.[122] The EACJ itself explicitly admitted that the role of its human rights jurisdiction is to deter the breaches of the EAC-Treaty including the adherence to the principle of human rights protection. [123] It can however achieve it only through the already mentioned "mobilisation of shame". Yet, given the failure to implement the Sitenda Sebalu judgements in particular, and to adopt the Protocol on the EACJ's human rights jurisdiction, it seems at least questionable, if the "mobilisation of shame" actually deters the Partner States from violating the Treaty obligations. A remedy here could be to strengthen the enforcement mechanism; for instance, it could help authorise the EACJ to grant compensation or a just satisfaction[124] in case of a Treaty violation. And also, this solution would create an incentive for individuals to bring EAC-Treaty infringements to the EACJ, currently a rather underused court. The EACJ itself hints in this direction, suggesting that the compensation could be claimed in the national court once a treaty violation is established. Granting the EACJ the power to grant pecuniary redress on its own would require the EAC Partner States amend the treaty to this effect.

Another way to strengthen the credibility of the Treaty commitments – including the adherence to the Human Rights protection principle – would be to enhance the Treaty's relevance within the domestic legal systems – or as L. Helfer terms it – the Treaty's "embeddedness"[125]. An important step in this direction was made in the Kyahurwenda judgement, in which the Court confirmed the direct effect of the EAC-Treaty[126] doing away with some ambiguities in this regard.[127] And it is where further steps would not necessarily require Treaty amendments, but rather more effective use of the existing mechanisms, in particular the preliminary reference procedure pursuant to Article 34 of the EAC-Treaty. This instrument combined with the EACJ's power to review the Partner States' legislation against the Treaty standards allows the regional court to forge *de facto* alliances with national judiciaries of the Partner States that aim at remedying the shortcomings in the compliance with the Human Rights standards.[128] Such alliances proved successful in the history of the European system of human rights protection. Those were cases in which a particular issue was brought by an individual to the attention of the ECtHR and a national court, in particular to the constitutional court of a State party to the convention; both jurisdiction could refer to each other's judgements making them mutually supportive: the authority and the persuasiveness of arguments derived out of different texts – the constitution and the convention – was enhanced and the pressure on the national legislator whose actions were taken under continuous

[122] See Council of Europe (ed.), *Collected Edition of the `Travaux Preparatoires' of the European Convention on Human Rights*, Volume 2, Brill Nijhoff (1975), p. 174.
[123] *Plaxeda-Rugumba v The Secretary General*, p. 41.
[124] See Art. 41 ECHR.
[125] L. Helfer, Redesigning the European Court of Human Rights (ECtHR): Embeddedness as a Deep Structural Principle of the European Human Rights Regime, 19 *European Journal of International Law* (2008): 125-159, pp. 140 et seq.
[126] *AG of Uganda v. Kyahurwenda*, para. 54.
[127] See generally T. Milej, What is wrong about supranational laws? The sources of East African Community law in light of the EU's experience, 75 *Heidelberg Journal of International Law* (2015): 579-617.
[128] W. Sadurski, Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the accession of Central and East European States to the Council of Europe, and tye Idea of Pilot Judgements, *EUI Working Papers*, LAW 2008/33, p. 22, see also L Helfer and A. M. Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 *Yale Law Journal* (1997): 273-391, p. 289, Milej, *Entwicklung*, p. 507.

scrutiny of two courts was intensified.[129] In the East African context such cooperation is even easier to achieve: Once a human rights issue arises in a national court, this court, by virtue of the preliminary reference – not provided for in the ECHR – could use the EACJ's authority to support its decision.

Given the generous regulations on the access to the EACJ, the subsequent actions taken by the national government on the issue thus decided could be subjected to the continuous monitoring by both courts. This is what happened in the Hutten-Czapska case decided by the ECtHR in 2005;[130] this judgement was a follow-up of the decision of the Polish Constitutional Tribunal which had ruled five years earlier that certain provision of the Polish land reform legislation infringed upon the property rights guaranteed by the Polish constitution. Deciding on an individual complaint of an aggrieved proprietor, the ECtHR declared that Poland violated Article 1 of Protocol 1 to the ECHR, which also guarantees the right to property. The ECtHR reached its decision relying extensively on the reasoning of the Polish Constitutional Tribunal. And because the subsequent Polish legislation failed to adequately implement the judgements, both courts were seized on the issue on further occasions, until the Polish legislator remedied the infringement of the property rights.[131]

This kind of mutual reassurance between the EACJ and the national courts could be particularly fruitful in the present situation, in which the former has only an implicit human rights mandate and the latter are struggling to reassert their position vis-à-vis the executive power after years of subjugation. In addition, this kind of "embeddedness" could help the EACJ to establish itself as an intellectual hub for the PIL and infuse into the EAC some sense of community, based on certain principles affirmed in its case law and developed in cooperation with the national courts. In doing so, the judiciary would make an important contribution to creating an East African "community based on the rule of law".[132]

Finally, there is a need to have a body of case law spelling out some human rights law principles in the regional context. This need for coherent human rights jurisprudence is demonstrated by the EACJ's choice of sources for citation. Those sources are very diverse. As already noted, the EACJ looked up for the due process definition in a Law Dictionary; it also looked for a rule of law definition in Wikipedia. As for now, the EACJ's case law is a melting pot of different doctrines. And as the standards which the EACJ has established up to date hardly ever go beyond what is already firmly settled as basic requirements of the rule of law and Human Rights, there should no fear that the East African human rights standards would differ from what is established under the AChHPR. Consequently, at this point, there is only little risk of undermining the

[129] Sadurski, *Partnering with Strasbourg*, p. 21.
[130] *Hutten-Czapska v Poland* (Grand Chamber Judgement of 22 February), ECtHR Application No. 35014/97.
[131] On the "Hutten-Czapska" saga, see Sadurski, *Partnering*, pp. 16 et seq., see in particular *Hutten-Czapska v Poland* (Grand Chamber judgement of 19 June 2006), Application No. 35014/97.
[132] This term (originally in German: "Rechtsgemeinschaft") was coined with regard to the European Community by Walter Hallstein and picked up by the European Court of Justice in 1985, see Case 294/83, *Les Verts*, para 23. In the Katabazi case, the EACJ pointed out that legal integration is also what the EAC aims at. On this note, the rule of law, being pursuant to Article 6(d) of the EAC-Treaty one of the EAC's fundamental principles, could also be looked at as an integrating factor, once a body of human rights case law emerges. *Katabazi v Secretary General,* p. 15.

coherence of human rights jurisprudence.[133] A lack of locally established jurisprudential human rights standards is more of a challenge than their abundance and threat of contradictory interpretations.

IV. Conclusion

The EACJ has a role to fulfil, in terms of offering an effective remedy to the victims of human rights violations, strengthening the commitment of the EAC Partner States to the human rights principles and defining them so as to address the needs of East Africans. Even if the protocol extending the EACJ's jurisdiction to the human rights cases is not yet in place and its lack complicates the adjudication, the EAC-Treaty creates a legal framework, which allows the court to take up this role. The court is conceived as a public interest litigation organ, it is easily accessible and can partner with the national judiciary. Its success will depend on whether it can win the trust of East Africans, as it is for them to decide, if they bring their predicaments before it.

[133] On the fragmentation of international law in Africa, see K. J. Alter, L. R. Helfer and J. R. McAllister, A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, 107 *American Journal of International Law* (2013): 737-779, p. 778 with further references.

