



Strathmore
UNIVERSITY

**THE ROAD TO CERTAINTY: DEMARCATION OF THE EAST AFRICAN COURT
OF JUSTICE'S JURISDICTION**

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Declaration

I, BARCLAY KIBOI MOMANYI, do hereby declare that this research is solemnly my original work and to the best of my knowledge and belief, it has not been previously, in part or in entirety been submitted to any other university for a degree or a diploma. Other works cited are accordingly acknowledged.

Signed: *Barclay*

Date: 28/07/2021

This dissertation has been submitted for examination with my approval as a University supervisor.

Signed: *Mabuti Mabuti*

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(On behalf of Miss. Patricia Ouma).

Abstract

Since the amendment of the EAC Treaty in 2007, the EACJ lacks the jurisdiction to preside over human rights matters. This is due to the unwillingness of the partner states to give up on their sovereignty and to be supervised by a higher Court. Consequently, the EACJ judges have been left exercising judicial activism in some cases while others judicial restraint. As a result, this has led to legal uncertainty as litigants are unable to predict the admissibility status of their petitions and denial of access to justice due to fear of the Court declaring it lacks jurisdiction or the illegitimacy from its judgement. This dissertation examines the EACJ jurisdiction regarding human rights matters and concludes it lacks. Relying on decided cases by the Court, interpretation by relevant scholars, and comparative analysis using the ACHPR, the dissertation finds that the EACJ lacks a well-defined human rights jurisdiction while the ACHPR has a comprehensive jurisdictional and admissibility framework. The research concludes that the EACJ should emulate from the ACHPR when coming up with a jurisdictional protocol to enable legal certainty and access to justice. Moreover, the research recommends that an extended jurisdictional protocol regarding human rights is imperative to legal certainty and access to justice. Consequently, the partner states should ratify an extended jurisdictional protocol that promotes human rights protection that is also in line with margin of appreciation doctrine and principle of subsidiarity.

List of cases

African Commission on Human and Peoples' Rights v Kenya, ACHPR, Judgement of 26 May 2017.

Anyang' Nyong'o and 10 others v Attorney General of The Republic of Kenya and 5 others (2006) EACJ.

Burger King Corporation v John Rudzewicz (1985), The Supreme Court of the United States.

Burundi Journalists Union v Attorney-General of the Republic of Burundi (2014) EACJ.

Centre for Minority Rights Development (Endorois) v Kenya, ACmHPR.

Civil liberties organization v Nigeria, ACmHPR, comm 45/90, Activity report.

Competence of the General Assembly for the Admission of a State to The United Nations, Advisory opinion, ICJ, 1950, 5.

Corfu Channel Case (United Kingdom v Albania); Assessment of Compensation, ICJ Reports, 1949, 244.

Dawda Jawara v. The Gambia, Communication comm Nos. 147/95 and 149/96, Activity report.

Democratic Party v Secretary General of the East African Community and 4 Others (2015) EACJ.

East African Law Society and 4 others v Attorney General of Kenya and 3 others (2008) EACJ.

East African Law Society v Attorney-General of Burundi and the Secretary General of the East African Community (2014) EACJ.

Garreth Anver Prince v South Africa, ACmHPR, Comm. 255/2002, 18 Activity report, (2004).

Independent Medico Legal Unit v Attorney General of Kenya (2011a), EACJ.

Independent Medico Legal Unit v Attorney General of Kenya (2011b) EACJ.

Institute for human rights and development Africa (IHRDA) and open society justice initiative on behalf of children of Nubian in Kenya v. the government of Kenya, ACERWC, comm no. 002/2009, Activity report.

International Shoe v Washington (1945), The Supreme Court of the United States.

James Katabazi and 21 others v Secretary of East Africa Community and Another (2007) EACJ.

Martha Karua v Attorney General of Kenya, Reference No.20 of 2019 EACJ.

Martha Karua v Independent and Boundaries Commission & 3 others (2018) eKLR.

Martha Karua v Independent and Boundaries Commission & 3 others (2019) eKLR

Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others [2018] eKLR

Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR

Pennoyer v Neff (1878), The Supreme Court of The United States.

Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda(2011c), EACJ.

Sitenda Sebalu v Secretary General of EAC, East African Court of Justice, (2011), EACJ.

South West Africa cases (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections, ICJ Reports 1962, 319.

List of legal instruments

East African Community, *Protocol on the establishment of the East African Community common market*, 20 November 2009.

East African Community, *The Treaty for the Establishment of East African Community*, 30 November 1999, ISBN: 9987 - 666-01-9.

Organisation of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 I.L.M. 58.

Protocol to the African Charter on human and peoples' rights on the establishment of an African Court on human and peoples' rights, 10 June 1998.

Rules of Procedure of the African Commission on Human and Peoples' Rights.

List of Abbreviations

ACHPR- African Court of Human and People's Rights.

ACmHPR- African Court of Human and People's Rights

EAC- East African Community.

EACJ- East African Court of Justice.

EALA- East African Legislative Assembly.

ECHR- European Court of Human Rights.

ICJ- International Court of Justice.

NGO- Non-Governmental Organisation.

VCLT- Vienna Convention of Law Treaties.

1. CHAPTER ONE

1.1 Background to the study:

The current East African Community was formed by three original states namely, Kenya, Uganda and Tanzania after ratifying the Treaty for the establishment of the East African Community.¹ This was the second time the state parties had agreed to cooperate on various levels after the parties agreed to dissolve the Treaty for the East African Co-operation in 1977.²

The thought of forming and integrating East Africa is dated before the colonialism after the secretary of colonies Fredrick Lugard opined that he could foresee the day that the federation of East Africa will come into existence.³ The construction of the Kenya-Uganda railway, the establishment of the customs collection centre, the establishment of the East African Currency Board, the Court of Appeal for Eastern Africa among other things during the colonial period saw the need of the newly independent states to integrate and sign a treaty to establish the East African Cooperation in 1967.⁴ The treaty was dissolved due to *inter alia* lack of a strong political will, lack of strong participation of the private sector and the civil society in the cooperation activities, disproportionate sharing of benefits among the member states as other states were more developed than others and they lacked policies to address the situation.⁵

Afterwards the partner states agreed to mediate and in the mediation agreement, they decided to explore and identify future areas of cooperation. This consequently led to the formation of permanent Tripartite Commission (hereafter the tripartite commission) among the former member states responsible for the coordination of economic, social, political and cultural activities among the states.⁶ Subsequently, in 1997, the heads of states agreed for the tripartite commission to commence negotiation of a treaty after reviewing the progress made by the commission in the integration of the states.⁷

On 30th November 1999, the partner states signed the treaty for the establishment of the East African Community.⁸ The partner states agreed to integrate *inter alia* in having a common

¹ East African Community, *The Treaty for the Establishment of East African Community*, 30 November 1999, ISBN: 9987 - 666-01-9.

² Preamble, *The Treaty for the Establishment of East African Community*.

³ Njenga L, Legal Status of The East African Community, 22 (3), *Rudin Journal Law*, 2018, 371.

⁴ Preamble, *The Treaty for the Establishment of East African Community*.

⁵ Preamble, *The Treaty for the Establishment of East African Community*.

⁶ Njenga L, Legal Status of The East African Community, 375.

⁷ Preamble, *The Treaty for the Establishment of East African Community*.

⁸ Preamble, *The Treaty for the Establishment of East African Community*.

market by establishing the East African Customs Union and a Common Market. In the preamble, the partner states were determined to strengthen their economic, social, cultural, political and other ties to fasten development. Apart from that, the partner states were to strive to achieve good governance, which includes *inter alia*, the adherence to the principles of democracy, rule of law, accountability, promotion and protection of human rights.⁹

The jurisdiction of the East African Court of Justice (hereafter the Court) was curtailed by an amendment by the partner states in 2006 and 2007.¹⁰ This was after the *Anyang' Nyongo case* where the Court opined that the process of nominating members to the East African Legislative Assembly (hereafter the EALA) was flawed in substance and procedure hence granted an injunction for the EALA not to recognise the members.¹¹ Aggrieved by the decision, the Republic of Kenya lobbied other partner states and made amendment to *article 27* and *article 30* of the treaty by enacting a proviso to the articles.¹²

According to *article 27* of the EAC treaty, the EACJ has the jurisdiction over the interpretation and application of the treaty.¹³ However, the same article has a proviso that the court's jurisdiction to interpret shall not apply to jurisdiction conferred to organs of member states. Furthermore, the Court has original, appellate, human rights and other jurisdictions as to be determined by the council through a protocol on a subsequent date to operationalise the extended jurisdiction.¹⁴ This is yet to be operationalised because the negotiated protocol has been lagging since 2004 due the party states not willing to give up their sovereignty.¹⁵ Additionally, *article 30* of the same treaty provides a limitation of the Court's jurisdiction over matters brought by natural persons that have been reserved under the treaty to an institution of a partner state.¹⁶

Consequently, this has led to judges to exercise both judicial restraint and judicial activism in their rulings. The concept of judicial activism is when the courts stray beyond the traditional confines placed by statute.¹⁷ It is where the judges act as quasi-legislators by legislating from

⁹ Article 6 (d), *The Treaty for the Establishment of East African Community*.

¹⁰ Article 27 and 30, *The Treaty for the Establishment of East African Community*.

¹¹ *Prof Peter Anyang, Nyongo and 10 others v The Attorney General of the Republic of Kenya and 5 others*, (2006) EACJ.

¹² Article 27 and 30, *The Treaty for the Establishment of East African Community*.

¹³ Article 27(1), *The Treaty for the Establishment of East African Community*.

¹⁴ Article 27(2), *The Treaty for the Establishment of East African Community*.

¹⁵ *Sitenda Sebalu v Secretary General of EAC & Attorney General of the Republic of Uganda* (2011b) EACJ.

¹⁶ Article 30(3), *The Treaty for the Establishment of East African Community*.

¹⁷ Talmadge P, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22, *Seattle Law Review*, 1999, 697.

the bench.¹⁸ On the other hand, judicial restraint is when judges refrain from acting as quasi legislators and act within the confines to be found in statute.

Some have expressly stated that the Court does not have jurisdiction to hear human rights matters,¹⁹ while others try to circumvent *Article 27* and confer themselves with jurisdiction.²⁰ In the famous *Katabazi case*, the Court opined that it cannot be deterred from the interpretation of *article 27* even after confirming that it lacked the jurisdiction to hear human rights issues.²¹ Moreover, the principle of rule of law is often intertwined with human rights to exercise jurisdiction over the matters.²² This has over the years led to litigants framing their human rights issues to intertwine with the principles of rule of law and democracy in order for the Court to exercise judicial activism.²³ Martha Karua is the latest petitioner who tried to frame the issues of her petition in a similar manner.²⁴

These disparities have led to the desire of legal certainty regarding human rights jurisdictional framework. Legal certainty is an action that is regulated in simple, stable and not changing unpredictably throughout time.²⁵ Lack of jurisdictional certainty leads to the litigants being denied their right to access justice, which was envisioned by the partner states in the preamble of the treaty. Access to justice is the empowering of an individual or a group to enforce the law which depends on their knowledge of their rights and access to tools to enforce those rights affordably and effectively.²⁶

The interpretation of a legal instrument like the EAC treaty should be done in a manner that does not only promote its principles but also depicts its actual nature. Scholars in this field have generally come to the same conclusion that as it stands, the Court does not have the jurisdiction to preside over human rights matters while a few have contrary opinions after reading the EACJ judgements.²⁷ After the *Katabazi case*, scholars such as Possi believed the

¹⁸ Kmiec K, The Origin and Current Meanings of Judicial Activism, 92(5), *California Law Review*, 2004, 1471.

¹⁹ *James Katabazi and 21 others v Secretary of East Africa Community and Another* (2007) EACJ.

²⁰ *Democratic Party v Secretary General of the East African Community and 4 Others* (2015) EACJ.

²¹ *James Katabazi and 21 others v Secretary of East Africa Community and Another* (2007) EACJ.

²² *James Katabazi and 21 others v Secretary of East Africa Community and Another* (2007) EACJ.

²³ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2011c), EACJ.

²⁴ *Martha Karua v Attorney General of Kenya*, Reference No.20 of 2019.

²⁵ Braithwaite J, Rules and principles: A theory of legal certainty, 27, *Australian Journal of Legal Philosophy*, 2002, 52.

²⁶ Sabatino C, Access to justice: the people's principle, 43(4), *Journal of the American Society on Aging*, 2019, 6.

²⁷ Possi A, The East African Court of Justice; towards effective protection of human rights in the East African Community. LLD Thesis, University of Pretoria, South Africa, published LLD Thesis, University of Pretoria, 2014.

Court can exercise judicial activism concerning human rights matters even though they lack the extended jurisdiction.²⁸

Even with the extended protocol by the council of ministers underway, not all the human rights will be heard by the EACJ. This is due to the reservations put by the partner states in *article 27* and *30* where the Court is not allowed to exercise jurisdiction where the human rights issue is conferred to the organ of the partner states. This creates a further uncertainty as there is no guide to what falls in the realm of the EACJ jurisdiction and what is conferred in the organs of the partner states.

1.2 Statement of Problem

An imperative question in law is whether a court has the jurisdiction to preside over a matter. Jurisdiction is the power of a court or a tribunal to determine a matter.²⁹ A citizen in a partner state to the EAC treaty is supposed to have a right to file a petition on the grounds of violation of human rights. Therefore, a petitioner should be able to predict and know whether their petition will be admissible in the Court based on a well-established extended jurisdiction rule.

Currently, the EACJ lacks a well-defined protocol in dealing with the extended jurisdiction of the Court with regards to human rights matters. As a result, respondents in human rights petitions have always objected and questioned the Court's jurisdiction to entertain those matters.³⁰ Some judges in other cases have exercised judicial restraint interpreting that the Court does not confer jurisdiction to hear human rights as the protocol for extending jurisdiction is yet to be concluded.³¹ On the other hand, some judges have exercised judicial activism by using *Article 6 (d)* as read with *Article 23* and *27* of the Treaty which requires the adherence to human rights as per the *African Charter on Human and People's Rights* so as to justify their hearing of such matters.³²

This lack of a protocol that extends the court's jurisdiction creates legal uncertainty hence litigants cannot clearly determine whether the court has the jurisdiction to preside over their cases. Consequently, litigants may be denied access to justice as they may file a petition that has aspects of human rights matters and after a preliminary hearing or at any time during the

²⁸ Possi A, *The East African Court of Justice; towards effective protection of human rights in the East African Community*. LLD thesis, University of Pretoria, South Africa, published LLD Thesis, University of Pretoria, 2014.

²⁹ *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR

³⁰ *Anyang' Nyong'o and 10 others v Attorney General of The Republic of Kenya and 5 others* (2006) EACJ.

³¹ *James Katabazi and 21 others v Secretary of East Africa Community and Another* (2007) EACJ.

³² *Democratic Party v Secretary General of the East African Community and others* (2015) EACJ.

hearing of the petition, the Court may rule that it does not have jurisdiction. Moreover, both parties to the petition might lose tremendously in time and finances, as the Court might not reimburse the expenses incurred in the petition.

1.3 Justification of the Study

This study has both academic and judicial relevance. From the academic perspective, it will contribute to the understanding and ongoing debate on the Court's jurisdiction to hear human rights matters precisely political rights. Judicially, it shall try to provide certainty on how to interpret *article 27* of the Treaty. This will also contribute to consistency in the interpretation of *article 27* whereby there seemed to be evidence of lack of it.

1.4 Primary and Secondary Objectives of the Study

The study is aiming at:

- 1) Achieving legal certainty concerning human rights matters in the East African Community treaty.
- 2) Outlining the possible criteria for human rights extended jurisdiction of the East African Court of Justice.
- 3) Outline the possible scope to the extended jurisdiction.

1.5 Secondary Objectives

- 1) To assess how the EACJ has handled jurisdictional issues in the past.
- 2) To assess how other regional courts like the African Court of Human and People's Rights have handled jurisdictional matters.
- 3) To assess the challenges or shortcomings that surround the formulation of the protocol for extended jurisdiction and its implementation.

1.6 Research questions

- 1) Does the EACJ have a well-defined jurisdictional framework regarding human rights matters?
- 2) How has the EACJ handled jurisdictional issues in the past?
- 3) How do other regional courts handle jurisdictional matters?
- 4) What criteria should be used to identify jurisdiction conferred by the treaty to organs of the partner states in the proposed protocol?

1.7 Hypothesis

The study is based on a hypothesis that;

- 1) The EACJ does not have a well-established jurisdictional framework.
- 2) Determining the extended jurisdiction of the Court concerning human rights may achieve legal certainty.
- 3) Legal certainty may promote the access to justice.

1.8 Literature Review

The EACJ jurisdiction with regard to human rights has been a bone of contention in the legal field. Judges have been put to task to interpret the article with regards to the whole treaty and they have arrived at different conclusions depending on the case before them.³³ Consequently, this has led to scholars and academic writers who have an interest in the field to try to analyse and give their opinions about the jurisdiction of the court. Comparative analysis has been used by different scholars while others have tried to use the different rules of interpretation for coherence in their studies.

Different schools of thought emerge on how to interpret the treaty. Others are more inclined towards the textualist approach while others are inclined towards the purposive or teleological interpretation. Moreover, others are inclined towards the founding fathers' approach while others are inclined towards temporal approach.³⁴

Fitzmaurice,³⁵ developed six principles of interpretation of statutes from case law in the early 1950s. According to principles of *textuality or actuality*, treaties are to be interpreted as they stand and on the basis of their actual text. On the principle of *natural and ordinary meaning* developed by *Competence of Admission case*,³⁶ states that interpretation be given preference to the normal and typical meaning of the words in context. Third principle is the principle of *integration* whereby treaties are to be read with reference to object and purpose. This was seen in the *South-West Africa case*.³⁷ Fourthly, the principle of *effectiveness* whereby treaties are to

³³ *James Katabazi and others v Secretary of East Africa Community and Another* (2007) EACJ and *Sitenda Sebalu v Secretary General of EAC & Attorney General of the Republic of Uganda* (2011b) EACJ.

³⁴ *Travaux Préparatoires* of treaties.

³⁵ United Nations, *The Yearbook of the International Law Commission, Documents of the ninth session including the report of the Commission to the General Assembly*, 1957, UN Doc A/CN.4/SER.A/1957/Add.1.

³⁶ *Competence of the General Assembly for the Admission of a State to The United Nations*, Advisory opinion, ICJ, 1950, 5.

³⁷ *South West Africa cases (Ethiopia v South Africa; Liberia v South Africa)*, preliminary objections, ICJ Reports 1962, 319.

be interpreted with reference to their declared or apparent objectives and purposes. This was applied in many cases *inter alia*; *Corfu channel case* and *Reparation of injuries case*.³⁸ Fifthly, the principle of *subsequent practice* which looks at the way the treaty has been applied or operationalised by the parties. Lastly, the principle of *contemporaneity* whereby it states that treaties are to be interpreted according to the meaning they possessed at the conclusion of the treaty. The study is using the first and second principle as a mechanism to interpret jurisdictional matters.

Dórr and Schmalenbach,³⁹ in giving a commentary about *article 31* of the Vienna Convention of Law of treaties recognised that the article provides the general rules on how treaties are to be interpreted. This is seen whereby the multiple rules of interpretation developed are to give precedence to the objective and purpose of the treaty to be interpreted. Moreover, they recognised that the article was formulated after the report by *Fitzmaurice* which was discussed agreed to by the International Law Commission and the United Nations General Assembly. The study is using the rules of interpretation outlined in the Vienna Convention on the Law of Treaties to interpret the EAC treaty.

Smith,⁴⁰ in his review of interpretation of jurisdiction and textualism he opined that judges have always used a narrow or a minimalist interpretation when interpreting matters of jurisdiction. He used the textualist judges like *inter alia*; Justice Scalia, Justice Thomas and justice Chief Justice Roberts to expound on this point who in their judgements have restrained themselves from a broad way of interpretation. Textualists are of the opinion that when interpreting statutes, the courts must seek and abide by the public meaning of enacted text understood in context. For Justice Scalia, he states that modern textualist inquiry is an objectified intent-an intent that a reasonable person may gather from the text of the law. In other words, the legislative plain meaning takes precedence and the legislators' intent is irrelevant to them. Moreover, even when their jurisdiction as provided by statute might be ambiguous, the textualists often decline to usurp jurisdiction basing on the grounds that the court lacks jurisdiction to grant relief.⁴¹

³⁸ *Corfu Channel Case (United Kingdom v Albania); assessment of compensation*, ICJ Reports, 1949, 244.

³⁹ Schmalenbach K and Dorr O, Article 31. General rule of interpretation, 2017 https://www.researchgate.net/publication/278716719_Article_31_General_rule_of_interpretation, 24th March 2020.

⁴⁰ Smith P, Textualism and Jurisdiction, 108, (8), *Colombia Law review*, 2008, 1916.

⁴¹ Smith P, Textualism and jurisdiction, 1916.

Bloom,⁴² in using the literature of Mary Twitchell on the distinction of various types of jurisdiction and their interpretation,⁴³ was of the view that the interpretation of the jurisdiction of the court can take an expansive approach to avoid the traditional way of interpretation. He conceded that when a court lacks power to adjudicate or grant relief, the court should not usurp powers but when the subject- matter jurisdiction as defined by statute is ambiguous, a purposive interpretation should be adopted. This is by looking at the intention of the legislator when making the statute.

Regarding interpretation of the East African Treaty, Ruhangisa,⁴⁴ has outlined how the EACJ has played an interpretative role in different case laws. He cited the *Independent Medical Legal Unit case*, which interprets *Article 30(2)* of the Treaty whereby the 2 months-time limitation can be stretched when there is a continuous violation of human rights. Moreover, he stated that the delayed extended jurisdiction is due to absence of political will between the partner states. This has consequently crippled the court from hearing human rights matters. He also talks about a hierarchy in the laws whereby the East African Treaty laws rank higher than national law. Moreover, he opined that the EACJ is not bound by decisions of other regional or national courts and they are only considered persuasive authority.

Possi,⁴⁵ held a view that currently the human rights disputes are not adjudicated by the EACJ as it lacks the extended jurisdiction. He was of this view after examining the decisions emanating from the Court of cases that containing human rights disputes have been given trivial weight. He also contrasted with the opinion of Gathii,⁴⁶ who was of the view that despite the EACJ being established for trade disputes, it has found room for human rights due to the nature of EAC integration.

Lando,⁴⁷ concurs with the opinion of *Possi* whereby the court lacks express jurisdiction to adjudicate human rights matters. He also used the *Katabazi* case where the courts opined that they will not relinquish their mandate of interpretation of the treaty merely because the matters

⁴² Bloom F, Jurisdiction noble lie, 61 (5), *Stanford Law review*, 2008, 977.

⁴³ Twitchell M, Myth of Jurisdiction 101 (3), *Harvard law Review*, 611.

⁴⁴ Ruhangisa E, The Nature, Scope and Effect of EAC law, In Ugirashebuja E, Ruhangisa E, and Ottervanger T, *East African Community Law*, 1st ed, Brill, Leiden; Boston, 2017, 144.

⁴⁵ Possi A, The East African Court of Justice; towards effective protection of human rights in the East African Community. LLD thesis, University of Pretoria, South Africa, published LLD Thesis, University of Pretoria, 2014.

⁴⁶ Gathi J, Mission creep or a search for relevance: The East African Court of Justice's human rights strategy, 24, (249), *Duke Journal of Comparative and International Law*, 2013.

⁴⁷ Lando V, The Domestic effect of the East African Community's human rights practice, LLD Thesis, University of Pretoria, South Africa, Published, 2014.

referred to are human rights violations. This implies that the Court can interpret matters regarding the interpretation and application of the treaty and it will not shy away from conducting its matters merely because the issue might have human rights aspects.

Apiko,⁴⁸ apart from using case law to expound on whether the EACJ has jurisdiction, she outlined the mischief around the amendments of the treaty and the politicisation of the Court by partner states. This is seen to arise from the *Anyang Nyongo* case whereby Kenya was dissatisfied with the ruling of the Court on jurisdiction and decided to formulate amendments, which were also passed without participation of other stakeholders.⁴⁹ She also opined that in *Democratic party case*,⁵⁰ the Courts were ready to exercise judicial activism so as to interpret human rights matters by use of the African Charter as spelled out in *Article 6 (d)* of the Treaty. The Court in *Sitenda Sebalu case*,⁵¹ was also of the view that regional integration would be served if the court was to adjudicate on human rights issues.

In conclusion, various scholars and judges have tried to provide insight of how to interpret treaties to be precise, *article 27* of the East African treaty. Most of them have concluded that the EACJ does not have express jurisdiction to adjudicate on human rights matters. This is after using the principles of interpretation established by *Fitzmaurice* and the *Vienna Convention on the Law of Treaties*.

Currently, the scholars of this field have not provided criteria for the making of the proposed protocol for the extension of human rights jurisdiction. Bearing in mind states are unwilling to give up some of their sovereignty, the partner states will be reluctant to make a protocol. Moreover, the current scholars are talking about the human rights generally and have failed to focus on specific rights that are to be protected or which generational rights to be adjudicated upon by the EACJ. Therefore, the interpretation of articles of treaties should be guided by the principles of interpretation and judges should shy away from a minimalist interpretation.

1.9 Research Methodology

The study uses doctrinal methodology. This is by the qualitative approach whereby I shall carry out desktop research to collect both primary and secondary resources of study. The research

⁴⁸ Apiko P, Understanding The East African Court of Justice: The hard road to independent institution and human rights jurisdiction, 2017, https://ecdpm.org/wp-content/uploads/EACJ-Background-Paper-PED...cached_24th_March_2020.

⁴⁹ *Anyang' Nyong'o and 10 others v Attorney General of The Republic of Kenya and 5 others* (2006) EACJ.

⁵⁰ *Democratic Party v Secretary General of the East African Community and others* (2015) EACJ.

⁵¹ *Sitenda Sebalu v Secretary General of EAC & Attorney General of the Republic of Uganda* (2011b) EACJ.

shall include review of relevant treaties *inter alia*, The Treaty for the Establishment of East African Community, The Vienna Convention on Laws of Treaties and the United Nations Charter. Moreover, it shall look into the Constitution of Kenya, other relevant statutes, regional treaties, books, journal articles, newspaper articles, decided cases, dissertations, thesis and other online resources. Furthermore, comparative analysis between the EACJ precedent and the African's Court is used concerning jurisdictional matters. Analysis will be done, and the relevant information will be depicted in the subsequent chapters.

1.10 Limitations of the Study

The research methodology adopted by this study is limited to published materials. This include both primary and secondary sources. Therefore, the generalised conclusion of the study is from a small sample of sources. Consequently, this study tends to build up on findings that are small, precise, narrow and not generalizable knowledge. Moreover, this study does not intend to use quantitative approach, which include taking a survey, going to the field, using questionnaires and structured observation due to limited time of conducting research.

1.11 Chapter Breakdown

The study consists of five chapters. The first chapter introduces the following issues by *inter alia* background, statement of problem, the research objective, research questions, hypothesis, aims of the study, research methodology, literature review and limitations of the study. The second chapter consist of the theoretical framework, which include *inter alia* the bad man theory and how it is used to yarn for legal certainty and how subject-matter jurisdiction expounds on the jurisdiction of the court to hear human rights matters. It also lays down the legal framework that consists of statutes, treaties, constitutions that the author rely upon in the study. The third chapter consist of the interpretation of the treaty with regards to jurisdiction of human rights it also consists of analysing case law emanating from the EACJ court criticizing and applauding some of the decisions. The fourth chapter tries to look into how other regional courts like the African Court and the European Court of Human Rights (hereafter the European Court) have interpreted the jurisdictional issues and examine their jurisdictional framework. Lastly, the fifth chapter consists of conclusions and recommendations whereby the author is to develop criteria for identifying human rights that are to be included in the extended human rights protocol and the ones to be left to the partner states.

1.12 Chapter summary

This chapter has provided a background of the problem being tackled in this dissertation. It has tested the first hypothesis, which is; the EACJ has no well-established jurisdictional framework over human rights matters.

The chapter has shown that there is legal uncertainty with regards to the EACJ jurisdiction which has led to the admissibility of petitions containing human rights aspects while others the court has declared it does not have the jurisdiction. The chapter has shown in its justification why it is prudent to have legal certainty concerning jurisdiction. Moreover, the chapter has provided the research methodology used to achieve the research objectives and answer the research questions. Through the literature review, the chapter has tried to show that the existing knowledge in the field is limited to generalising human rights that need to be adjudicated in the sub-regional level and emphasized on the need to carry out the study.

2.0 CHAPTER TWO: THEORETICAL FRAMEWORK

2.1 Introduction

This chapter aims at providing a depiction in which we can understand the consequences of lack of a definite jurisdiction concerning human rights matters in the EAC. The chapter shall first layout the foundations of jurisdiction and link it with the specific jurisdictional theory to examine whether the EACJ should have human rights jurisdiction. The two main principles used are *inter alia* principle of subsidiarity and margin of appreciation doctrine to evaluate whether by limiting the jurisdiction promotes integration as envisioned by the partner states to the EAC treaty. Moreover, in a bid to show the imperative nature of legal certainty, this chapter shall evaluate the bad man theory and using its principles outline the consequences of legal uncertainty.

2.2 Jurisdiction theory

The first theory, jurisdiction, has been developed through caselaw over the years. It all stems from legal jurisdiction whereby a court or a tribunal has power to hear a matter, reach a judgement, declare a winner, and assign a punishment.⁵² A court without jurisdiction lacks the power to determine a particular matter and order appropriate remedies. Subsequently, jurisdiction is divided into two: general jurisdiction and specific jurisdiction. General jurisdiction, as defined by *Mary Twitchell* means when a court asserts jurisdiction based on affiliations between the forum and one of the parties without regard to the nature of the dispute while specific jurisdiction is when court asserts jurisdiction based on affiliations between the forum and the controversy.⁵³

Apart from that, personal jurisdiction developed. It opined that whether a particular court may enter judgement against a particular defendant in a particular case depended on territorial contacts, valid contracts, party consent or adjudicative burdens but never on the substance.⁵⁴ This theory was also developed in *Pennoyer v Neff*,⁵⁵ whereby it stated that every state have exclusive jurisdiction and sovereignty over persons and property within its territory and no state can exercise direct jurisdiction and authority over persons or property without its territory. Another determinant of jurisdiction was established in

⁵² Bloom F, Jurisdiction's noble lie, 61 (5), *Stanford Law review*, 2009, 977.

⁵³ Twitchell M, Myth of Jurisdiction 101 (3), *Harvard law Review*, 1988, 611.

⁵⁴ Bloom F, Jurisdiction noble lie, 977.

⁵⁵ (1878), The Supreme Court of The United States.

International Shoe Company v Washington,⁵⁶ whereby they established that a court has to determine whether the exercise of jurisdiction was fair, given the nature and quality of the defendant's forum activities and their relationship to the dispute.

2.2.1 Subject-matter jurisdiction

Lastly, subject-matter jurisdiction was developed and posed the question whether a particular court has authority to resolve a particular type of suit. The answer depends on substantive law, party citizenship and the basis of the litigants' claims. An example of a source is a treaty, the Constitution, statutes, or any agreement (arbitration clauses). Thus, subject matter jurisdiction using the two principles shall try to examine whether human rights matters should be either in the realm of national courts or the EACJ.

2.2.2 Principle of subsidiarity

This is a principle that was first established by a Jurisconsult of the ECtHR stating that 'it is the task of ensuring respect for the human rights enshrined in the convention lies firstly with the authorities of the partner states rather than the court itself. The Court is to only intervene where domestic authorities fail in that task.'⁵⁷

African Commission dealing with an appeal with regards to freedom of religion used the same principle.⁵⁸ The principle was argued by the respondent that it should distribute or delimit powers of the national authorities of state parties to the African Charter and the African Charter itself. This implies that the national organs or authorities should have the initial responsibility to protect and guarantee human rights of their citizens within their domestic legal system and should decide on appropriate means of implementation. Therefore, the African Commission should construct their role as subsidiary, narrowly and supervisory to only reviewing a state's choice of action against the provisions of the African Charter. In other words, the African commission should not usurp the jurisdictional mandate of interpretation and application placed on the national courts.

The principle can be implied from the intentions of the state parties to the EAC treaty.⁵⁹ Through the amendment of the Treaty, the parties tried to limit the subject-matter jurisdiction of the EACJ by enacting a provision which states that the EACJ would not have

⁵⁶ (1945), The Supreme Court of the United States.

⁵⁷ Jurisconsult, Interlaken follow-up: Principle of subsidiarity, 2010, www.echr.coe.int/Documents/2010_Interlaken , 19 August 2020.

⁵⁸ *Garreth Anver Prince v South Africa*, ACmHPR, Comm. 255/2002, 18 Activity report, (2004).

⁵⁹ Article 27 and 30, *The treaty for the establishment of the East African Community*.

jurisdiction for matters reserved by the treaty to an institution of a partner state.⁶⁰ However, an explicit jurisdictional provision of what is reserved for the organs of the partner states has yet to be concluded. Human rights matters fall under this category thus leading to litigants to be denied access to justice in the sub-regional level. Courts are to determine subject-matter jurisdiction questions first in most cases or at any time during the proceedings even when an objection is not raised.⁶¹ This will enable access to justice and if the jurisdiction question is assertive, the decision of the court may be enforced.

2.2.3 Margin of appreciation doctrine

As argued by the *Garreth case*, the doctrine is because of the principle of subsidiarity. It is the discretion that a state authority can have concerning the implementation and application of domestic human rights norms.⁶² The discretion is based on the domestic state's knowledge of the society, needs, economic, political and legal issues and they can strike a balance between competing rights which sometimes shape the society. The African Commission accepted that the national state has better knowledge of their domestic rights and their implementation. However, it stated that it would not be ousted its mandate of monitoring and overseeing the implementation of the African Charter.

On the long road to certainty in the jurisdictional framework of the EACJ, the limitations intended to be put by the partner states should not oust the jurisdiction of the EACJ concerning human rights matters. It is prudent to acknowledge that the partner states have a better disposition of the human rights norms according to the needs of their society. However, the EACJ should be granted explicit mandate to protect and uphold the human rights of citizens of the partner states when the partner state fails to do so. This will consequently lead to the achievement of integration as envisioned by the treaty.

The subject-matter jurisdiction is relevant in this study as the court has to determine whether it has jurisdiction to hear human rights issues raised by the petitioner. The answer will be crucial in the disposition of the suit as held by Justice Nyarangi in the *Owners of motor vessel 'Lillian S' case*, if they lack jurisdiction, the judges must down their tools.⁶³ The EACJ is encouraged to follow suit as for them to create legal certainty in matters concerning human rights.

⁶⁰ Article 30(3), *The treaty for the establishment of the East African Community*.

⁶¹ Bloom F, *Jurisdiction noble lie*, 988.

⁶² *Garreth Anver Prince v South Africa*, ACmHPR, Comm. 255/2002, 18 Activity report, (2004).

⁶³ *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR

2.3 Bad man theory

In writing the Path of the Law, Oliver Wendell Holmes tried to make it clear that morality and the law are two distinct fields.⁶⁴ Consequently, he formulated the bad man theory.⁶⁵ If one wants to know the law and nothing else, one has to look at it from a bad man's perspective. The bad man theory is whereby a man looks at the law from various perspectives. From a business perspective, a bad man is a man who does not care about the ethical rules which are believed and practised by the neighbours but is nevertheless likely to care a good deal to avoid being required to pay money in the form of fines.⁶⁶

The bad man is only concerned about the penalties imposed by statute in case of breach of a certain law. Since he only cares about the material consequences, the knowledge he acquires from the law enables him to predict the consequences and help him to act or as a deterrence. Fidelity to the law by this man is not driven by finding it in himself good to do so but the consequences of the breach. Order is achieved if both the bad man and the good man abide by the law. Therefore, predictability of the outcome concerning human rights jurisdiction and the knowledge of the cost to be incurred when petitioning the EACJ might enable access to justice.

The EACJ is longing for certainty of its jurisdiction towards human rights issues. This shall help both the bad man and the good man to predict their outcomes even before filing a petition. Material consequences like the cost incurred in the petition might encourage or discourage a petitioner to litigate. With regards to this study, jurisdiction and admissibility are imperative preliminary issues which can determine the case without the Court adjudicating on the merits. The gravity of a case being dismissed on jurisdictional grounds will not only be a financial detriment to the parties in a petition, but also their denial to the seat of justice as their issues were not heard. Therefore, it is imperative for a law to be in place to guide not only the litigants but also the judges.

2.4 Conclusion

The chapter has tried to show that access to justice and legal certainty may be achieved in having a clear jurisdictional framework concerning human rights. Examining the subject matter jurisdiction theory, the chapter has shown that the human rights as the subject of

⁶⁴ Holmes O, The Path of Law, 10(457) *Havard Law Review* (1897), 2.

⁶⁵ Holmes O, The Path of Law, 2.

⁶⁶ Holmes O, The path of law, 3.

jurisdiction has not yet been granted to the EACJ. However, in the consideration of the extended jurisdictional protocol, it is imperative for the treaty to recognise the role of the national courts have in the determination of human rights issues based on their peculiar circumstances in each jurisdiction. Moreover, the EACJ is to have a supervisory mandate to see if the certain types of human rights are going to be upheld by the domestic organs of the partner states. Lastly, using the bad man theory, the chapter has shown the imperative nature of legal certainty in the promotion of access to justice.

3.0 CHAPTER THREE: UNDER THE EACJ: A THEATRE OF HUMAN RIGHTS LITIGATION

3.1 Introduction

This chapter tests the hypothesis: The EACJ does not have a well-established jurisdictional framework regarding human rights issues. The chapter will subject the hypothesis to the precedent set by the court since its formation. An analysis of case law is going to exhibit how in some petitions, judges have creatively handled the human rights jurisdictional matters whereas in some, judges have restrained themselves. Because of the varying judgements, the analysis shall prove the hypothesis that legal certainty is lacking in the sub-regional court and is consequently leading to denial of access to justice. Moreover, it is going to show the lack of well-defined human rights jurisdictional matters acts as an impediment towards integration yearned for by the partner states during the signing of the treaty. Lastly, the chapter concludes by opining that discreet interpretation of the treaty whereby judges exercise judicial restraint in jurisdictional matters concerning human rights might achieve the desired legal certainty and consequently consistency.

3.2 Judicial activism v judicial restraint: An analysis of the interpretation of human rights matters in the EACJ

As per article 5 of the EAC treaty, the partner states aimed at promoting cooperation in all fields *inter alia*; political, economic, social, cultural, security and in legal affairs for mutual benefits.⁶⁷ In a bid to achieve these objectives, fundamental principles including good governance by adhering to principles of democracy, the rule of law, promotion and protection of human rights were to act as a guidance.⁶⁸ Moreover, the successive article reiterated the same whereby the partner states are to adhere to the principles of good governance and observance of human rights.⁶⁹ However, the protection of human rights issues is still in murky waters as the conclusion of the protocol extending the jurisdiction of the EACJ towards human rights matters is pending.⁷⁰ Judges have tried to interpret this article fashionably as seen in the subsequent paragraphs.

⁶⁷ Article 5, *the Treaty for the Establishment of East African Community*.

⁶⁸ Article 6(d), *the Treaty for the Establishment of East African Community*.

⁶⁹ Article 7(2), *the Treaty for the Establishment of East African Community*.

⁷⁰ Article 27(2), *the Treaty for the Establishment of East African Community*.

3.2.1 Judicial activism

As defined in the background of the study, judicial activism is when the court or a tribunal strays away from traditional constraints placed by statute or contract.⁷¹ Observing the human rights jurisprudence, judges have creatively conferred themselves with human rights jurisdiction to rule over the matters. The subsequent paragraphs shall evidently outline this trend.

Often in exercising their judicial function, the EACJ has tended to exercise their mandate out of the confines of express obligation. This is whereby they exercise their interpretive mandate on human rights, which the partner states expressly intended for the determination of its jurisdiction on a later date. Consequently, this has led to litigants continuing to frame their issues as per article 6(d) of the treaty hoping that the Court shall extend their hand of mercy and grant them their desired reliefs.⁷² In the *locus classicus* Katabazi case,⁷³ the High Court of Uganda granted bail to fourteen accused persons charged with the offence of treason. During the implementation of the order, the security officials affiliated to Ugandan military re-arrested the accused persons and additionally charged them in a court martial with unlawful possession of weapons. The applicants challenged the re-arrest, detention and military charges as being contrary to the principles enshrined in the EAC treaty.⁷⁴

The respondents raised a preliminary objection asserting that the issues before it were of human rights nature and as per article 27(2) of the Treaty, the extended jurisdiction was yet to be concluded. The Court in examining the question of jurisdiction, it opined that it did not have jurisdiction to preside over human rights matters. However, it asserted that though it will not assume jurisdiction to adjudicate human rights disputes, it would not abdicate from exercising its jurisdiction of interpretation conferred to it under article 27(1) of the treaty merely because the reference contains human rights violations.⁷⁵

Furthermore, the Court opined that it could not shy away from its obligation of ensuring that the partner states adhered to the rule of law.⁷⁶ In conclusion, the court insisted on the need of partner states to abide by the decisions of the Court to further the principle of rule of law, which

⁷¹ Talmadge P, *Understanding the Limits of Power*, 697.

⁷² *Martha Karua v Attorney General of Kenya* (Reference No.20 of 2019) EACJ.

⁷³ *James Katabazi and others v Secretary of East Africa Community and Another* (2007) EACJ.

⁷⁴ They had violated the principle of good governance, rule of law and human rights as per Article 6(d), *the Treaty for the Establishment of East African Community*.

⁷⁵ *James Katabazi and others v Secretary of East Africa Community and Another* (2007) EACJ.

⁷⁶ Article 23, *the Treaty for the Establishment of East African Community*.

the Ugandan government contravened.⁷⁷ The decision is considered as the gateway to judicial activism in the EACJ.⁷⁸ Some scholars have considered it as extreme judicial activism by the Court usurping legislative functions where there is an express exclusion of their jurisdiction.⁷⁹ Here lies a paradox; the EACJ has a mandate under article 27(1) of the treaty to interpret the treaty while article 27(2) limits their powers to adjudicate on matters containing human rights aspects. Therefore, the express mandate of the Court does not cover the range of its roles.⁸⁰

After the decision, the EACJ faced another contentious matter in *Plaxeda Rugumba case*.⁸¹ The case brought on behalf of Rugumba's brother, a Rwandese national whom the Rwandese government arrested and held *incommunicado* for five months. The applicant alleged that Lieutenant-Colonel Ngabo was not formally charged in a court of law and her attempts to file an application for *habeas corpus* were futile as the Rwandan government harassed her.

It was on this underpinning that she brought the application to the EACJ praying for a declaration that the Rwandese government has violated the principles outlined in articles 6(d) and 7(2) of the EAC treaty.⁸² The applicant argued that the arrest and detention without trial of her brother was an infringement to the principle of good governance, rule of law and violation of human rights that the treaty demanded from the partner states.⁸³ The respondent raised a preliminary objection that the EACJ did not have jurisdiction to preside over the matter, as the application was time barred and the applicant did not exhaust all local remedies.⁸⁴ In quashing the argument by the respondent, the Court opined that it did have jurisdiction to interpret the provisions of articles 6(d) and 7(2) of the EAC treaty. Moreover, the Court asserted that it had the interpretative jurisdiction to evaluate whether a partner state had promoted and protected the human rights as enshrined in the ACHPR as provided in article 7(2) of the treaty but lacked the enforcement jurisdiction.⁸⁵ It opined that 'the invocation of the provisions of the ACHPR was not merely decorative of the Treaty but were meant to bind the partner states.'⁸⁶

⁷⁷ *James Katabazi and others v Secretary of East Africa Community and Another* (2007) EACJ.

⁷⁸ *James Katabazi and others v Secretary of East Africa Community and Another* (2007) EACJ.

⁷⁹ Ebobrah S, Litigating Human Rights before the sub-regional courts, 17(1) *African journal of International and Comparative Law*, 2009, 82.

⁸⁰ Liza C, East African Court of Justice and Human Rights Jurisdiction: Drawing the line, 3(1), *Strathmore Law Review*, 2018, 11.

⁸¹ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2011c), EACJ.

⁸² *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2011c), EACJ.

⁸³ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2011c), EACJ.

⁸⁴ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2011c), EACJ.

⁸⁵ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (ref No.8 of 2010) EACJ.

⁸⁶ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (ref No.8 of 2010) EACJ.

The Rwandese government appealed the decision challenging the jurisdiction of the EACJ to entertain human rights matters. In reaffirming its jurisdiction, the appellate Court used *Katabazi* case to opine that while the Court lacked express human rights jurisdiction, it shall not abdicate its interpretative jurisdiction merely because the allegations had aspects of human rights violations.⁸⁷ The first instance of the case shed some light on the various types of jurisdiction whereby it affirmed that it had the interpretative jurisdiction concerning human rights violations but lacked the enforcement jurisdiction. The fundamental query that the Court has yet to answer is whether the Court has the declaratory jurisdiction after exercising their interpretative jurisdiction.

A court exercises different types of jurisdiction. These include interpretive or adjudicative jurisdiction, declaratory jurisdiction and the enforcement jurisdiction. An interpretive jurisdiction is the power of the court to interpret the provisions of a statute or a treaty.⁸⁸ Apart from that, declaratory jurisdiction is power of a court to make orders that are legitimate (declaratory orders).⁸⁹ Lastly, enforcement jurisdiction is the power of the winning litigant to implement the decision of the court.⁹⁰ In international law, consent by the partner states is fundamental in the exercise of various jurisdictions. The EAC treaty gives the EACJ an express mandate to interpret the application of the treaty. However, this mandate does not extend to human rights matters.⁹¹ Therefore, the Court has the interpretive, declaratory and enforcement jurisdiction concerning all other matters in the treaty except human rights matters.⁹² The lack of the various jurisdictions concerning human rights implies that the declaratory orders from the court are illegitimate and consequently unenforceable.

Judicial activism witnessed in *Independent Medical Legal Unit* case is another instant of the Court taking a purposive interpretation. The applicants alleged the Kenyan government orchestrated acts of torture, execution, inhumane and degrading treatment of three thousand residents of Mount Elgon. The respondents questioned the jurisdiction of the Court asserting that the allegations were violations of human rights. Once again, the Court in the first instance reiterated that lack of express human rights jurisdiction did not preclude them carrying out their

⁸⁷ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2012) EACJ.

⁸⁸ Mehren A and Trautman D, Jurisdiction to adjudicate: A suggested analysis, 79(6), *Harvard Law Review*, 1966, 1126.

⁸⁹ Mehren A and Trautman D, Jurisdiction to adjudicate, 1126.

⁹⁰ Akehurst M, Jurisdiction in International law, 46, *British Yearbook of International Law*, 1973, 233.

⁹¹ Article 27(2), the Treaty for the Establishment of the East African Community.

⁹² East African Community, *Protocol on the establishment of the East African Community common market*, 20 November 2009.

interpretative mandate of the treaty.⁹³ Moreover, the EACJ had the same assertion in the *Democratic Party case* where they unequivocally held that it had the interpretative jurisdiction of provisions of the African Charter, reaffirming its provision as a normative source of law in the EAC's legal framework.⁹⁴

Lastly, the EACJ has exercised extreme judicial activism in *Burundi Press Law case*.⁹⁵ The application arose from the amendment of the Burundian press law of 27 November 2003 that unjustifiably limited the freedom of the press and the freedom of expression, which was integral to democracy. The applicants averred that the limitations enacted contravened the Burundi's obligations under articles 6(d) and 7(2) of the Treaty. Therefore, the applicant prayed for a declaration that the restriction was an infringement to the freedom of the press and freedom of expression.⁹⁶ Moreover, the applicants prayed for the Court to order the Burundi government either to repeal the press law or to amend the contravening provisions to be in line with the Treaty.

The respondent asserted that the law was consistent with the EAC treaty and parliament had exercised their delegated duty to come up with laws that reflect the will of the people. Moreover, they argued that a similar matter was before the Burundian Constitutional Court and it will be premature for the EACJ exercise its interpretative jurisdiction, as the latter court was the only one with the mandate to determine the legality of the statute.

The EACJ observed that democracy is a fundamental tool of achieving accountability and transparency that are enshrined in articles 6(d) and 7(2) of the Treaty. This democracy must include the freedom of the press so that to achieve accountability and transparency. Therefore, the Court declared that some provisions of the Press law contravened articles 6(d) and 7(2) of the EAC treaty, to the extent that it required the journalists to disclose their informants and unreasonably restricted the journalists from disseminating information about the stability of the Burundian Currency.⁹⁷ The Court also required Burundi to take measures without delay, as per article 38(2) of the Treaty to implement the decision.⁹⁸

The judgement depicted an instance where the Court used other principles of article 6(d) of the EAC treaty *inter alia*: democracy, accountability and transparency to arrive at its decision. The

⁹³ *Independent Medico Legal Unit v Attorney General of Kenya* (2011a), EACJ.

⁹⁴ *Democratic Party v Secretary General of the East African Community and others* (2015) EACJ.

⁹⁵ *Burundi Journalists Union v Attorney-General of the Republic of Burundi* (2014) EACJ.

⁹⁶ *Burundi Journalists Union v Attorney-General of the Republic of Burundi* (2014) EACJ.

⁹⁷ *Burundi Journalists Union v Attorney-General of the Republic of Burundi* (2014) EACJ.

⁹⁸ *Burundi Journalists Union v Attorney-General of the Republic of Burundi* (2014) EACJ.

Court also declares some of the provisions of the Press laws are inconsistent with the EAC treaty and require the government to implement its decision. The Court exercises its interpretative jurisdiction correctly concerning the principles outlined in article 6(d) of the Treaty. However, the claims brought to the Court contained aspects of human rights violations, which the Court did not have jurisdiction over.⁹⁹ The Court lacks interpretative, declaratory and enforcement jurisdiction when it comes to human matters.¹⁰⁰ By it creatively interpreting and declaring that certain provisions of the Press Law are inconsistent with the treaty goes against the principle of subsidiarity as the confinement of power was in the Burundian Constitutional Court to determine the legality of the domestic statute.¹⁰¹

Judicial activism has a notion of creating false hope to litigants. Litigants see its portrayal when the EACJ purports to exercise declaratory jurisdiction that it explicitly lacks leading to denial of access to justice. It also impedes on the achievement of integration yearned by partner states as their intention was to extend the jurisdiction of court concerning human rights on a later date. Moreover, it derails the observance of rule of law, good governance and democracy as exercising artificial powers is a deterrent to rule of law.

3.2.2 Judicial restraint

As much as the EACJ has exercised judicial activism in most of its cases, there are a handful of cases which the Court has exercised judicial restraint. The literal interpretation of the Treaty desired in these cases was as result of the Court not intending to act beyond their traditional constrains placed by the Treaty. The subsequent paragraphs shall outline the ways that Court has promoted judicial restraint.

In *Independent Medical Legal Unit*, appeal case,¹⁰² the government of Kenya approached the appellate Court of the EACJ arguing that the trial Court did not have jurisdiction to preside over the subject matter, as it was time barred. After evaluation, the appellate court sided with the Kenyan government as the information about the violations were widely circulated to the public hence the possibility of knowledge by applicants. Moreover, it in arriving at its decision, it opined that the violations were not continuous. The Court also opined that they do not have express or implied jurisdiction to extend the two months period as per the treaty. This is after been guided by the oral submission of applicant stating that an appeal court is limited to points

⁹⁹ Article 27(2), *the Treaty for the Establishment of East African Community*.

¹⁰⁰ Article 27(2), *the Treaty for the Establishment of East African Community*.

¹⁰¹ Article 27(1) *the Treaty for the Establishment of East African Community*.

¹⁰² *Independent Medico Legal Unit v Attorney General of Kenya* (2011b) EACJ.

of law and cannot reopen or reevaluate evidence.¹⁰³ In this appeal, the Court used a strict interpretation of article 30(2) of the EAC treaty. The decision differs from *Plaxeda Rugumba's* appeal case as the government of Rwanda failed to prove that the information about the applicant's brother whereabouts were in the public domain.¹⁰⁴

In *Rufyikiri case*,¹⁰⁵ the East African Law Society on behalf of Mr. Isadore Rufyikiri made an application against the Republic of Burundi to the EACJ. Mr. Rufyikiri at the time was the President of the Burundi Bar Association as well as the Burundi Centre for Arbitration and Conciliation (CEBAC). Mr. Rufyikiri was prosecuted on the charges of corruption in Burundi's national courts that eventually led to his disbarment and imposition of a travel ban. The Applicant argued before the EACJ that his prosecution for corruption, disbarment from the roll of advocates and imposition of a travel ban were all not procedural and were in breach of articles enshrined in articles 6(d) and 7(2) of the EAC treaty. The applicant prayed for several reliefs *inter alia*: the prosecution, the disbarment from the roll of advocates and the imposition of a travel ban were a violation of the EAC treaty.

In its defence, the government of Burundi asserted that the travel ban imposed on the applicant was due to the fears of being a flight risk. Moreover, the government averred that the applicant had been disbarred in accordance with their national laws as he had violated his oath as an advocate by making statements that were prejudicial to national security.

The Court evaluated the relevant laws of Burundi and concluded that the Prosecutor General had the powers to investigate and prosecute any person suspected of corruption hence held that there was no violation of the EAC treaty.¹⁰⁶ On disbarment, after evaluating the relevant national statutes, the Court opined that there was a flaw in the due process as the Prosecutor General proceeded to the Court of Appeal. Before the expiry of the statutory 60-day period within which the Bar Council was required to exercise its disciplinary process over Mr. Rufyikiri. However, the Court refrained from quashing the Court of Appeal's decision as it opined that making such an order would be acting outside its jurisdiction as provided in article 27(2) of the EAC treaty.¹⁰⁷ The judicial restraint exercised in this case was a promotion of

¹⁰³ *Independent Medico Legal Unit v Attorney General of Kenya* (2011b) EACJ.

¹⁰⁴ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2012) EACJ.

¹⁰⁵ *East African Law Society v Attorney-General of Burundi and the Secretary General of the East African Community* (2014) EACJ.

¹⁰⁶ *East African Law Society v Attorney-General of Burundi and the Secretary General of the East African Community* (2014) EACJ.

¹⁰⁷ *East African Law Society v Attorney-General of Burundi and the Secretary General of the East African Community* (2014) EACJ.

principle of subsidiarity whereby a regional court shall not exercise its powers when the treaty explicitly outlined the national courts to exercise the jurisdiction. Moreover, the case furthered the promotion of article 30 of the EAC treaty.¹⁰⁸

3.3 Legal Certainty v Legal Consistency: An examination of the decided cases and other surrounding factors.

Based on the analysis above, one can infer that the question of jurisdiction in the EACJ lacks clarity. The lack of consistency per se of the Court when faced with the question of human rights jurisdiction has led to legal uncertainty concerning this subject matter. When exercising judicial activism, the Court has evidently taken an oblique approach in tackling the matter by determining other principles of article 6(d) of the treaty, which intertwine with human rights aspects. On the other hand, when exercising judicial restraint, the Court took a literal rule interpretation to confine itself from usurping powers of either the national Courts or acting beyond their mandate as per the EAC treaty.

Different scholars have opined differently concerning the Court's human rights jurisdictional framework. In a bid to advocate for judicial activism, some scholars annotate that the jurisdictional provision is not clear and a gap-filling approach is essential.¹⁰⁹ Others have opined that the lack of an explicit jurisdictional framework concerning human rights inhibits deeper integration in the EAC especially where the nationals of the partner states have failed to get a recourse in their national courts.¹¹⁰

Currently, the EACJ lacks jurisdiction concerning the human rights matters. The intention of the partner states was to conclude an extended protocol on a later date. A protocol adopted in the year 2014 concerning article 27(2) of the EAC treaty deliberately excluded human rights jurisdiction. The partner states argued that they have already acceded to the African Charter therefore, the African Court is to handle any human rights violation from the partner states.¹¹¹ This is a cunning way of the partner states to escape accountability of a superior court. The Courts have interpreted that trying to limit the jurisdiction of the court goes against the principle of supremacy of the court concerning national courts.¹¹² In *Sitenda Sibalu's case*,¹¹³ the Court

¹⁰⁸ Article 30(2), *the Treaty for the Establishment of East African Community*.

¹⁰⁹ Chula L, *The East African Court of Justice and Human Rights Jurisdiction*, 14.

¹¹⁰ Possi A, *East African Court of Justice: Towards effective protection of Human Rights in the East African Community*, 17, *Max Planck Yearbook of United Nations Law*, 2014, 17.

¹¹¹ East African Community, Report on the 13th Meeting of the Sectoral Council on Legal and judicial affairs and report 16th Meeting of the Sectoral Council on Legal and judicial Affairs REF EACJ/ SCLJA/ 16/2014.

¹¹² *East African Law Society and 4 others v Attorney General of Kenya and 3 others* (2008) EACJ.

¹¹³ *Sitenda Sebalu v Secretary General of EAC, East African Court of Justice*, (2011) EACJ.

opined that respondent should take quick action to operationalise the extended jurisdiction of the under article 27 of the treaty.

In paying a closer look at the judgements, the Court has consistently stated that while it does not have jurisdiction to determine human rights issues per se, the Court has the interpretative jurisdiction under the EAC treaty.¹¹⁴ A microscopic view shows that the judges tend to tread softly in drawing their reasoning by use of the African Charter or by use of principles such as rule of law and good governed enshrined in the treaty.¹¹⁵ However, this consistency is yet to yield legal certainty as exercise of extreme judicial activism has led to litigants to file petitions to the Court underpinning their arguments on article 6(d) and 7(2) of the treaty seeking various declarations which might not be in the ambit of the Court's jurisdiction.¹¹⁶

3.4 Conclusion

Coherence in the interpretation of jurisdictional matters concerning human rights is desirable for the achievement of legal certainty. Judges should refrain from exercising judicial activism on matters concerning human rights as in the absence of express jurisdictional provision; the court's decision is invalid *ab initio*. Moreover, the judges should take into consideration the intentions of the partner states when arriving at a decision to further the spirit of integration. The achievement of access to justice depends on the realization of legal certainty by the Court. The enforcement of the decisions from the Court meets low resistance once the Court acts within its traditional confines placed by the Treaty. Therefore, regarding human rights as the subject matter jurisdiction, it is prudent to exercise judicial restraint.

¹¹⁴ Courts using the landmark *James Katabazi and 21 others v Secretary of East Africa Community and Another* (2007) EACJ to exercise judicial activism.

¹¹⁵ Possi A, East African Court of Justice, 21.

¹¹⁶ *Martha Karua v Attorney General of Kenya*, (Reference No.20 of 2019) EACJ.

4.0 CHAPTER 4: THE AFRICAN COURT: LITIGATING HUMAN RIGHTS IN THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

4.1 Introduction

This chapter examines how other regional courts have dealt with jurisdictional issues. The chapter shall precisely focus on the African Court of Human Rights (hereafter the African Court or the Court) which was formally the African Commission on Human and Peoples Rights (hereafter the African Commission or the Commission). The chapter tests the hypothesis of; having a well-defined jurisdictional framework with regards to the African Court result in legal certainty and legal consistency. Firstly, the chapter establishes the legal framework in the African regional court and the African Commission. Consequently, it proceeds to differentiate between jurisdiction and admissibility by the Court and how the distinct principles affect the access to justice by litigants. Additionally, it further dissects the jurisdiction doctrine by expounding on the various types of jurisdiction in the African Court and how the EACJ may emulate from this regional Court. Moreover, the chapter proceeds to evaluate how the African Court has dealt with not only jurisdictional issues but also admissibility issues and if their interpretation has led to the desired legal certainty. Lastly, the chapter correlates the jurisprudence with the current situation in the EACJ and how the ideal situation might be achievable in each subtopic.

4.2 The jurisdictional and admissibility framework of the African Court

Before the formation of the African Court, the African Commission was the focal point for the interpretation of the African Charter.¹¹⁷ Member states could submit communications to be considered by the Assembly and the communications to be presented to the African Commission depended on the majority vote by the member states.¹¹⁸ Moreover, human rights communications were subjected to admissibility test outlined in *Article 56* of the Charter for the Commission to establish that the communication is *bona fide*. However, in the inception of the African Court, the Commission became inferior to the African Court. The ratification of a protocol gave the Court the mandate to interpret and rule on human rights matters.¹¹⁹

¹¹⁷ History of the African Commission, Article 45, *African Charter*.

¹¹⁸ Article 55, *African Charter*.

¹¹⁹ *Protocol to the African Charter on human and peoples' rights on the establishment of an African Court on human and peoples' rights*, 10 June 1998.

The protocol outlines various rules to be followed. Through its preamble, the protocol tries to outline its intention to uphold and promote human rights by member states. For ensuring compliance, it outlines that the African Court has the jurisdiction to preside over all cases submitted to it concerning the interpretation and application of the African Charter.¹²⁰ Moreover, the protocol also outlines various entities that access the Court *inter alia*; the African Commission, member states, African Intergovernmental Organisations, Non-Governmental Organisations with observer status before the Commission and individuals.¹²¹ However, Non-Governmental Organisations with observer status before the Commission and individuals may only institute cases before the African Court if the respondent state has made a declaration of accepting the competence of the Court to receive these cases.¹²² This implies that the consent of the respondent state is essential for the African Court to exercise its jurisdiction.¹²³

As earlier established, this comprehensive legal framework with regards to human rights jurisdiction of the EACJ is lacking. Consequently, the EACJ only has the competence of determining whether it has the subject matter jurisdiction but cannot decide on the subject matter. Its purposive interpretation of the treaty as seen, has not yet yielded fruits.¹²⁴

4.3 Jurisdiction v Admissibility: A stream of case law in the African Court

Jurisdiction and admissibility are two fundamental principles to access justice. A preliminary objection on a point of law can be raised at any time of the proceeding on either or both principles and if the court dissents, it consequently disposes of the whole petition. Jurisdiction is the power of the court or a tribunal to adjudicate and make orders from their findings.¹²⁵ On the other side, admissibility is the power of a court or a tribunal to accept the validity of a certain petition, communication or evidence.¹²⁶ A court or a tribunal may have the jurisdiction to preside over a certain matter, but the subject matter may be inadmissible due to lack of following certain rules. Consequently, this may be a hindrance of the achievement of justice as the cases may be disposed at a preliminary stage before the merits of the case may be heard.

¹²⁰ Article 3(1), *Protocol to the African Charter on human and peoples' rights*.

¹²¹ Article 5, *Protocol to the African Charter on human and peoples' rights*.

¹²² Article 34(6), *Protocol to the African Charter on human and peoples' rights*.

¹²³ Article 34(6), *Protocol to the African Charter on human and peoples' rights*.

¹²⁴ The exercise of judicial activism in *inter alia James Katabazi and Others v Secretary of East Africa Community and Another* (2007) EACJ and *Plaxeda Rugumba v Secretary General of EAC and Attorney General of Rwanda* (2011c) EACJ.

¹²⁵ Twitchell M, *Myth of Jurisdiction*, 611.

¹²⁶ *Centre for Minority Rights Development (Endorois) v Kenya*, ACmHPR, 9.

4.4 Case law on admissibility.

Both the African Court and the African Commission have been deciding on these principles for a while. The *locus classicus* case is the *Endorois case* where the Commission decided on the admissibility of the communication. The respondent state, Kenya, raised a preliminary objection during the hearing of the merits to challenge the admissibility of the communication arguing that the applicants had not exhausted local remedies as per *Article 56* of the Charter.¹²⁷ They argued that the case was decided by the high Court of Kenya and the applicants have not yet exercised their right to appeal.¹²⁸ The Court in examining the facts opined that undue delay by the respondent state through emphasis on procedural technicalities hindered the right to access justice therefore it served as an exception towards the general rule.¹²⁹

Several other cases followed. In the *Nubian Children case*, the African Committee of Experts on the Rights and Welfare of the Child (hereafter the African Committee) spent time to define what exhaustion of local remedies entail. In this case, the respondent state raised a preliminary objection that the applicants had not exhausted all local remedies.¹³⁰ The Committee defined local remedy as any domestic legal action that may lead to the resolution of the complaint at the national level. The Committee proceeded to give the rationale for the exhaustion is for them to respect the sovereignty principle and not to give contradictory judgements. Moreover, the Committee referred to their earlier judgements whereby they expounded on the elements of a remedy which include availability, effectivity and sufficiency. A remedy is considered *available* if the complainant can pursue it without impediment, deemed *effective* if it offers a prospect of success and found *sufficient* if it can redress the complaint.¹³¹

The Committee in examining the remedies alleged by the respondent opined that it is not in the best interest of the child to stay in a state of legal limbo for six years without their nationality issues being addressed by the local courts. Purposive interpretation was advanced by the Committee to ensure that the case was admissible even though it was still in the national courts.

However, there are few cases or communications that have been declared inadmissible by the Court. In the *Civil liberties Organisation case*, the African Commission declined to usurp the jurisdiction from the national Court by declaring the communication inadmissible for the claim

¹²⁷ *Centre for Minority Rights Development (Endorois) v Kenya*, ACmHPR, 9.

¹²⁸ *Centre for Minority Rights Development (Endorois) v Kenya*, ACmHPR, 10.

¹²⁹ *Centre for Minority Rights Development (Endorois) v Kenya*, ACmHPR, 11.

¹³⁰ *Institute for human rights and development Africa (IHRDA) and open society justice initiative on behalf of children of Nubian in Kenya v. the government of Kenya*, ACERWC, comm no. 002/2009, Activity report, 6.

¹³¹ *Dawda Jawara v. The Gambia*, Communication comm Nos. 147/95 and 149/96, Activity report, 5.

had not yet been settled by the national court of the respondent state.¹³² Moreover, the African Court later declared the case by the *Anuak Justice Council* was inadmissible as the applicant had not exhausted local remedies.

The EAC treaty tries to give some rules on admissibility and jurisdiction. According to *Article 30(2)* of the treaty, the proceedings of any violations of the treaty should be instituted within two months of the knowledge of the violation.¹³³ As seen before, failure to adhere to the time restrictions might lead the court declaring the proceedings to be admissible. Additionally, the treaty outlines that the court shall lack jurisdiction over matters that have been explicitly reserved for the jurisdiction of partner state.¹³⁴ However, as compared the African Court, a protocol extending the human rights jurisdiction of the EACJ is yet to be concluded. As shown in the previous chapter, this has led to exercise of purposive interpretation which has misguided litigation of human rights matters.

4.5 Case laws on jurisdiction

Many communications and cases have been put forward to the African Commission or Court, but none has expounded on jurisdiction as the landmark case of *African Commission on Human and Peoples' Rights case*.¹³⁵ This case delineated and established the various types of jurisdictions involving human rights violations; material or subject matter jurisdiction, personal jurisdiction temporal jurisdiction and territorial jurisdiction. The various jurisdictions shall be expounded on in the subsequent paragraphs.

4.6 Material or subject matter jurisdiction.

As discussed in chapter two, material or subject matter jurisdiction is the power to preside over the substance in question.¹³⁶ In this context, the subject matter was whether the Court had the jurisdiction to preside over human rights violations. The respondent state raised a couple of preliminary objections arguing that 1) the applicants ought to have drawn the attention of the assembly of heads of states and government once it was convinced that the communication involved serious violations of human rights as per Article 58 of the Charter. Secondly, they argued that the Commission failed to conduct a preliminary examination of its jurisdiction by virtue of *rule 39* and *Article 50*. The Court first differentiated the communication by stating

¹³² *Civil liberties organization v Nigeria*, ACmHPR, comm 45/90, Activity report, 1.

¹³³ Article 30(2), *the Treaty for the establishment of the East African Community*.

¹³⁴ Article 30(3), *the Treaty for the establishment of the East African Community*.

¹³⁵ *African Commission on Human and Peoples' Rights v Kenya*, ACHPR, Judgement of 26 May 2017, 14.

¹³⁶ Bloom F, *Jurisdiction noble lie*, 977.

that *Article 50* of the Charter applied to states only and *Article 55* of the Charter applies to other entities. It further expounded on rule 118 of its rules that gives the commission the power to refer matters to the Court.¹³⁷ Moreover, as per *article 3(1)* of the Protocol, they have the material jurisdiction to preside over any human rights violations protected by the charter or any other human rights instrument to which the respondent is a party. Therefore, the court opined that so long as the rights allegedly violated are protected by the charter or any other human rights instruments ratified by the state concerned, the court will have jurisdiction over the matter.¹³⁸

The EACJ lacks the subject matter jurisdiction as its extension depends on a later date.¹³⁹ Therefore, this has caused weak jurisprudence emanating from the Court as they do not have the power to preside over the merits of the case as compared to the African Court. This has led to the EACJ to be described as a dog without teeth as without power to hear any human rights violation, no remedy can emanate from the Court.

4.7 Personal jurisdiction

This is the capacity of an applicant to institute a proceeding on their behalf or on the behalf of others.¹⁴⁰ In other words, *locus standi*. As per *Article 5* of the protocol, it outlines the natural and legal persons with the capacity to access the Court. The respondent state raised a preliminary objection concerning the *locus standi* of the former applicants who were the *Center for minority Rights Development and minority Rights Group* (hereafter the CEMRIDE) alleging that they did not hold the observer status before the commission.¹⁴¹

The Court held that by the virtue of the respondent being a member state of the African Charter and to the Protocol, the respondent consented to the NGOs and individuals bringing the cases to it.¹⁴² Moreover, the Court also noted that since the application before it was filed by the Commission, pursuant to *article 2* and *5(1)(a)* of the Protocol, the question of whether or not the respondent has made the declaration under *article 34(6)* was irrelevant.

¹³⁷ Rule 118(3) of the *Rules of Procedure of the African Commission on Human and Peoples' Rights* state that “with the establishment of the Court and in application of the principle of complementarity enshrined under article 2 of the protocol, the commission has the power to refer any matter to the Court including matters which reveal a serious or massive human rights violations.”

¹³⁸ *African Commission on Human and Peoples' Rights v Kenya*, ACHPR, 15.

¹³⁹ Article 27(1), the *Treaty for the establishment of the East African Community*.

¹⁴⁰ Article 5, *Protocol to the African Charter on human and peoples' rights*.

¹⁴¹ *African Commission on Human and Peoples' Rights v Kenya*, ACHPR, 17.

¹⁴² Article 5(3) and Article 34(6), *Protocol to the African Charter on human and peoples' rights*.

It is evident that the African Court has a well-defined jurisdictional framework to tackle *locus standi* objections. Though the EAC treaty provide for the *locus standi* of legal and natural persons in article 30(2), the right does not extend to allegations of human rights as the protocol extending its jurisdiction is yet to be concluded. Therefore, the provisions of *locus standi* in the EAC treaty still causes denial of access to justice as it decorative with regards to human rights violations.

4.8 Temporal jurisdiction

This is the power of the Court to preside over a matter if the provisions of time are adhered to. The respondent state raised a preliminary objection towards the temporal jurisdiction of the Court outlining the principle of non-retroactivity in international law. They argued that they ratified the African Charter in 1992 and the protocol in 2004 whereas the alleged human rights violations had occurred before these years. In rebutting the argument, the applicants conceded to the argument however, they stated that it is trite law that when violations alleged under the charter or any other international instruments are continuing, the matter falls within the jurisdiction of the Court. The Court agreed with the applicant and opined that the Court had the temporal jurisdiction.

In the EAC treaty, the time limit for filing an application is within or before two months lapses after being aware of the violations.¹⁴³ The provision works concurrently to issues of temporal jurisdiction and admissibility. However, with the current state of affairs, the provisions might be inapplicable as the Court first lacks the subject matter jurisdiction hence it will not proceed to determine if it does have temporal jurisdiction. As seen above, this leads to denial of access to justice as the litigants' merit applications will not be heard and consequently, no remedy will be derived from the proceedings.

4.9 Territorial jurisdiction

This is the power of the court to preside over a matter since the alleged violations occurred in the respondent's state terrain. Though the respondents did not raise a preliminary objection towards the jurisdiction, the Court went ahead to pronounce that it had the jurisdiction to preside over the subject matter as the human rights violations occurred in the respondent state's jurisdiction.

¹⁴³ Article 30(2), *the Treaty for the establishment of the East African Community*.

The EACJ lacks a comprehensive jurisdictional framework to determine the territorial jurisdiction concerning human rights. Judges in the Court are mandated to interpret other principles of the treaty outlined in *Article 6(d)* of the treaty but not human rights matters.¹⁴⁴ Therefore, their exercise of judicial activism to adjudicate over human rights matters is misinformed as they lack the legal mandate to do so.

4.10 Conclusion

From the analysis above, the depiction of the African Court's legal framework is robust. This is due to not only the enactment of the Protocol that lays out the rules of jurisdiction and admissibility,¹⁴⁵ but also the rules of procedure to further help in adjudication in proceedings.¹⁴⁶ As a result, the Court has interpreted the jurisdictional objections purposively bearing in mind their mandate under the African Charter to enable access to justice to the victims. Indeed, the hypothesis has been proven as the legal consistency seen from the *endorois case* to the *ogiek case* has led to legal certainty concerning jurisdiction and admissibility of human rights matters. Therefore, the promotion of the objectives outlined in the preamble of the African charter is achievable.

The EACJ lacks both the protocol and the rules of procedure. Consequently, the legal uncertainty caused as earlier analysed in chapter three depicts the need for an elaborate jurisdictional framework. The denial of justice concerning human rights matters seems to be the order of the day in the Court as no remedy is derivable. This consequently leads to the derailment of achievement of the treaty objectives. It will be prudent for the partner states to enact a protocol for the extension of human rights jurisdiction to also achieve the desired integration.

¹⁴⁴ Article 27(1), the *Treaty for the establishment of the East African Community*.

¹⁴⁵ *Protocol to the African Charter on human and peoples' rights on the establishment of an African Court on human and peoples' rights*.

¹⁴⁶ *Rules of Procedure of the African Commission on Human and Peoples' Rights*.

5.0 CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides the conclusion of the dissertation. It has four aims. First, it starts by restating the overarching problem that the dissertation tended to unravel. Secondly, it outlines the four main hypotheses that it has developed in a bid to answer the problem under study. Thirdly, the chapter brings to the reader's attention the findings from the hypothesis under study by this dissertation. Lastly, it outlines the recommendations on the way forward for future research.

5.2 Overarching problem

The interest for this dissertation was sparked by the fact that the EACJ lacked the jurisdiction under the EAC treaty to preside over human rights matters. The jurisdiction regarding the subject matter was to be determined later. Consequently, the judges of the Court have been seen to exercise judicial activism in some cases while in some, they have exercised judicial restraint. Therefore, the wishy-washy approach towards jurisdictional matters has caused legal uncertainty and lack of access to justice as the petitions risk being dismissed at the preliminary stage.

5.3 Research questions

The following four research questions were guiding the dissertation in answering the overarching problem. First, whether the EACJ has a well-defined jurisdictional framework regarding human rights matters. Secondly, whether having a well-defined jurisdictional framework in the African Court results in access to justice. Thirdly, whether the jurisdictional and admissibility interpretation by the African Court has led to legal certainty and legal consistency. Lastly, whether by extending the jurisdiction of the EACJ, the Court will achieve legal certainty and legal consistency.

5.4 Findings

- a) The EACJ lacks a well-defined jurisdictional framework regarding human rights matters.**

Indeed, the EACJ lacks a well-defined jurisdictional framework to preside over human rights matters as it was the intention of the partner states to extend the jurisdictional protocol later. This protocol is yet to be concluded as the partner states have been reluctant

to relinquish their sovereignty to a higher supervision. The lack of well-defined jurisdiction has resulted in judges exercising judicial activism while others have exercised judicial restraint as illustrated in chapter three. This has occasioned legal uncertainty and lack of access to justice as litigants are unable to predict the outcome of their case and are at the mercy of the court to exercise judicial activism that lacks legitimacy.

b) Having a well-defined jurisdictional framework concerning the African Court results in access to justice

As depicted in chapter four, having a well-defined jurisdictional framework in the African Court results in legal certainty and legal consistency. The African Court has a protocol that establishes its jurisdictional parameters and the *locus standi* of various applicants. Using various cases, the African Court has distinguished various types of jurisdictions *inter alia*, subject-matter jurisdiction, personal jurisdiction, temporal jurisdiction and territorial jurisdiction. The Court is mandated to examine the various types of jurisdictions using its discretion or by a preliminary objection by the applicants.

Through the jurisdictional evaluation, the African Court has the competence to decide whether it has the jurisdiction to preside over the matter and if the answer is affirmative, the Court may proceed to hear the merits of the case. The imperative nature of the evaluation is brought to light by the guidance of the protocol which outlines the specific parameters which the African Court needs to tread on for them to refrain from excess judicial activism. By presiding over the merits of the case, this has led to access to justice for various human rights litigants. The EAC partner states should try and emulate the African Union member states by concluding an extended protocol for the EACJ to have the powers to preside over human rights matters. This will lead to legal certainty as the court will refrain from excess judicial activism, access to justice as the litigants are assured of the legitimacy of the judgement and easier compliance of partner states to the rendered judgement.

c) The jurisdictional and admissibility interpretation by the African Court has led to legal certainty and legal consistency

Indeed, the jurisdictional and admissibility interpretation by the African Court has led to legal certainty and legal consistency. The distinction between jurisdiction and admissibility has been fundamental in comprehending the access to justice principle. The African Charter outlines rules on admissibility which have been imperative for disposition of cases. Moreover, the rules

on jurisdiction and access to the African Court have been explicitly outlined in the Protocol of the Court.

Judges have purposively interpreted these rules and as a result, achieved legal certainty. Under *article 5* of the Protocol, the protocol has limited the accessibility of the Court by individuals and international organisations who are to only access the Court if the respondent state has made a declaration asserting the competence of the Court to receive their cases.¹⁴⁷ However, the Court has fashionably interpreted the article to give the access to individuals and international organisations by opining that by the virtue of the member state ratifying the African Charter and the protocol, the state consented to the individuals and NGOs to bring the cases to the Court.¹⁴⁸

Apart from that, the rules of admissibility have been interpreted by the African Commission and the African Court. Exhaustion of local remedies has been contentious in the Court as it provides for an exception if the procedure is duly prolonged. The Court has interpreted this provision in many instances as seen in chapter four and have concluded that an applicant may fail to exhaust local remedies if the procedure is unduly prolonged in the member state. Consequently, the interpretation has achieved legal certainty as litigants are able to interpret the law and predict the outcome if they fail to exhaust local remedies in their member states.

On the other hand, the EACJ should extend the protocol granting the Court jurisdiction to preside over human rights matters bearing in mind the following: the rules on personal jurisdiction that grants the *locus standi* NGOs to approach the Court and expound more on the rules of admissibility. As per *Article 30* of the treaty, the rules of admissibility are silent on exhaustion of local remedies and this might cause litigants to fail to exhaust local remedies.¹⁴⁹

d) By extending the jurisdiction of the EACJ, the Court will achieve legal certainty and access to justice

Based on the comparative analysis done in chapter four, the EACJ may achieve legal certainty and legal consistency if the partner states extend the jurisdiction of the Court. The African Court has achieved legal certainty by exercising purposive interpretation on an existing protocol and the African Charter that has led to increment of Access to justice by human rights victims. Moreover, it has a wider scope of jurisdiction regarding human rights which enable

¹⁴⁷ Article 5(3) and 34 (6), *Protocol to the African Charter on human and peoples' rights*.

¹⁴⁸ *African Commission on Human and Peoples' Rights v Kenya*, ACHPR, 17.

¹⁴⁹ Article 30(2), *EAC Treaty*.

the Court to exercise prudent interpretation without being tempted to exercise excess judicial activism.

After deciding on the jurisdiction, the Court may proceed to preside over the merits of the case and consequently issue various orders *inter alia* declaratory and compensatory damages. The orders issued are legitimate which motivate the respondent state to abide by the judgement and the human rights victim to enforce the judgement. On the other hand, the judgements of the EACJ which purport to preside over human rights matters currently lack legitimacy as the Court lacks the jurisdiction to preside and to give orders. Consequently, the human rights victims lack access to justice as the respondents are reluctant to implement an illegitimate judgement.

Therefore, it is prudent for the partner states to extend the jurisdiction of the EACJ to be in line with its international obligation of protecting human rights. As a result, it will create access to justice as judges are to purposively interpret an existing law and make orders after deciding on the merits. Moreover, it will create legal certainty as applicants are able to not only interpret the existing law but also to predict the outcome based on the previous judgements of the Court. Lastly, the protocol shall curtail judges from exercising excess judicial activism and restrict them to the correct interpretation of jurisdictional matters.

5.5 Directing further research

This dissertation has focused mainly on the lack of the jurisdiction of the EACJ to preside over human rights matters and how the conclusion of a protocol may solve this problem. Moreover, it has outlined the effects of lack of the jurisdiction and how other regional courts have handled their human rights matters. It is therefore helpful to directing further research on the criteria used to identify the human rights that are to fall under the national jurisdiction whereas the ones are to fall under the EACJ. The classification should respect the margin of appreciation doctrine and the principle of subsidiarity.

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