AN EVALUATION OF THE HUMAN RIGHTS JURISDICTIONAL OVERLAP IN THE EAST AFRICAN REGION

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Declaration

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

Signed: .....faithkering.....

Date: .....30/07/2021.....

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

Signed:.....Mabuti Mutua.....

James Mabuti

(For Patricia Ouma)

Abstract

Even though the EACJ has no explicit human rights jurisdiction, a creative interpretation of the EAC Treaty has enabled EACJ judges to hear matters involving human rights. This has led to the creation of an overlap in the human rights jurisdictions of the EACJ and national courts, due to lack of official delineation of their various roles. This overlap has worsened relations between the EACJ and the EAC Partner States. Through a comparative research with the CJEU, this research argues that in order for this issue to be solved, the EACJ should acquire an explicit human rights jurisdiction.

List of Abbreviations

CAEA: Court of Appeal for East Africa

CJEU: Court of Justice of the European Union

EAC: East African Community

EACJ: East African Court of Justice

EALA: East African Legislative Assembly

ECtHR: European Court of Human Rights

EEC: European Economic Community

EU: European Union

IC: International Court

TEU: Treaty on European Union

UN: United Nations

List of Cases

East African Court of Justice

Attorney General of the Republic of Uganda v Tom Kyahurwenda (2014), EACJ.

Democratic Party v The Secretary General of the EAC (2014), EACJ.

East African Law Society and 4 Others v the Attorney General of Kenya and 3 Others (2007), EACJ.

Independent Medical Legal Unit v Attorney General of Kenya (2012), EACJ.

James Katabazi v Secretary General of the EAC (2007), EACJ.

Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda, EACJ.

Republic v Michael Kamaliza and others (1970), CAEA.

East African Region

Uganda v Gurindwa Paul Tumusiime (2011), High Court of Uganda.

Court of Justice of the European Union

Costa v ENEL (1964), CJEU.

J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities (1974), CJEU.

Stauder v City of Ulm (1969), CJEU.

Stefano Melloni v Ministerio Fiscal (2013), CJEU.

Van Gend en Loos v Nederlandse Administratie der Belastingen (1963), CJEU.

European Region

Frontini v Minister delle Finanze (1974), Italian Constitutional Court.

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970), German Federal Constitutional Court.

List of Legal Instruments

Charter of Fundamental Rights of the European Union, 7 December 2000.

Constitution of Burundi (2018).

Constitution of Kenya (2010).

Constitution of Rwanda (2003).

Constitution of Tanzania (1977).

Constitution of Uganda (1995).

EAC Human and Peoples' Rights Bill (2011).

European Convention on Human Rights, 3 September 1953, CETS No. 194.

Treaty Establishing the European Economic Community, 1 January 1958.

Treaty for the establishment of the East African Community, 30 November 1999.

Treaty of Lisbon, 1 December 2009.

Treaty on European Union, 1 November 1993.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Problem

The present East African Community (hereafter EAC) is a revival of the defunct EAC (1967 to 1977). The formal and social integration of the EAC can be traced back to the construction of the Kenya-Uganda railway, and to various colonial institutions including the Customs Collection Centre for Uganda in Mombasa, the East African Currency Board and the Postal Union, the Court of Appeal for East Africa, the Customs Union for Uganda, Tanganyika and Kenya and the East African High Commission.[1]

The defunct EAC was formed in 1967 through the Treaty for the East African Cooperation which was signed by three East African nations—Kenya, Tanzania, and Uganda.[2] The three nations decided to work together on a wide range of economic and social matters.[3] The judicial arm of the defunct EAC was the Court of Appeal for East Africa (hereafter CAEA), the first International Court (hereafter IC) in East Africa.[4]

The CAEA acted as a court of appeal for the three partner states. It had the mandate to hear and determine civil and criminal appeals from the High Courts of the partner states. However, its mandate was limited in that constitutional and election petitions were under the jurisdiction of the High Courts of the partner states.[5] The CAEA was generally thought to have 'done a good job in East African days in developing the jurisprudence'.[6]

The defunct EAC collapsed in 1977 for various reasons.[7] The CAEA consequently ceased to exist. The partner states amended their Constitutions to provide for Courts of Appeal in response to the legal *lacuna* that was created. Kenya passed the Appellate Jurisdiction Act. The three partner states

[1] Masinde W and Omolo C, 'The Road to East African Integration' in Ugirashebuja E, Ruhangisa J, Ottervanger TR, Cuyvers A (eds), *East African Community law: Institutional, substantive, and comparative EU aspects*, Brill Nijhoff, 2017, 15.
[2] Masinde W and Omolo C, 'The Road to East African Integration', 15.
[3] Masinde W and Omolo C, 'The Road to East African Integration', 16.
[4] Taye M, 'The role of the East African Court of Justice in the advancement of human rights: Reflections on the creation and practice of the Court' 27 *African Journal of International and Comparative Law* 3, 2019, 360.
[5] Okolla H, 'Human rights jurisdictional overlap between the East African Court of Justice and the national courts' Unpublished, University of Nairobi, Nairobi, 2017, 13-14.
[6] Taye M, 'The role of the East African Court of Justice in the advancement of human rights', 361.
[7] The 1999 Treaty in the Preamble points to 'lack of strong political will, lack of strong participation of the private sector and civil society in the cooperation activities, the continued disproportionate sharing of benefits of the Community among Partner States due to the differences in their levels of development and lack of adequate policies to address the situation'.

have subsequently developed their judicial structures further, with Kenya and Uganda both having Supreme Courts.[8] The courts of the partner states have jurisdiction over human rights matters.[9]

The present EAC was formed through the *Treaty for the Establishment of the East African Community* (1999) [hereafter the Treaty]. The partner states include the three original partner states, and other countries which have been granted membership, Burundi, Rwanda, and South Sudan.[10] Other countries such as the Democratic Republic of Congo have requested membership. The EAC is made up of 7 organs, including the East African Court of Justice (hereafter EACJ).[11]

The EACJ is the judicial branch of the EAC. The EACJ was inaugurated in 2001 and received its first case in 2005. During the treaty-making process, the EACJ's design and jurisdiction was a contentious issue. Civil Society groups and lawyers wanted a Court of Appeal, like the CAEA, with an extensive jurisdiction including on human rights.[12] The Partner States on the other hand disagreed; they wanted the EACJ to have very limited jurisdiction. The treaty negotiations eventually resulted in the limitation of the EACJ's jurisdiction and the postponement of human rights jurisdiction.[13]

The Treaty provides for the jurisdiction of the EACJ over interpretation and application of the Treaty. This does not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.[14] It consists of a First Instance Division and an Appellate Division. The First Instance Division has jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division, any matter before the Court in accordance with the Treaty.[15] Cases can be referred by the partner states, the Secretary General and by legal and natural persons. Decisions of the Court on the interpretation and application of the Treaty have precedence over decisions of national courts on a similar matter.[16]

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[8] Okolla H, 'Human rights jurisdictional overlap between the East African Court of Justice and the national courts', 14.
[9] For example, the Constitution of Kenya (2010) provides in Article 165 for the jurisdiction of the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.
[10] Preamble, *Treaty for the establishment of the East African Community*, 30 November 1999.
[11] The other organs are the Summit, the Council of Ministers, the Coordinating Committee, Sectoral Committees, the East African Legislative Assembly, and the Secretariat.
[12] Taye M, 'The role of the East African Court of Justice in the advancement of human rights', 364.
[13] Taye M, 'The role of the East African Court of Justice in the advancement of human rights', 364 – 366.
[14] Article 27 (1), *Treaty for the establishment of the East African Community*.
[15] Article 23, *Treaty for the establishment of the East African Community*.
[16] Article 33, *Treaty for the establishment of the East African Community*.

The EACJ at first did not play any role regarding human rights. Article 27 (2) of the Treaty postponed the EACJ's human rights jurisdiction until a future protocol is promulgated. The Draft Protocol on extending the jurisdiction of the EACJ has never been approved. Nevertheless, the EACJ progressively disposed human rights cases by creatively interpreting Article 6(d)[17] and 7(2)[18] of the Treaty. This approach has been criticised by the Partner States who argue that the EACJ is exceeding its mandate. The EACJ has subsequently, despite backlash, decided on a number of human rights cases.

The two major issues arising out of this situation are, firstly, the existence of a parallel jurisdiction over human rights between the EACJ and national courts. This leads to confusion, conflict, and forum shopping, where plaintiffs may deliberately pick the court most favourable to them.[19] Secondly, this is exacerbated by the lack of a requirement to exhaust all local remedies before seeking redress in the EACJ, which causes overlap and confusion and may lead to conflicting judgements.

This relates to a larger issue within the EAC. The EAC Treaty provides for a wide and ambitious array of integration goals[20], including an eventual federation, but fails to effectively empower the community institutions.[21]

In contrast, the European Union (hereafter EU) started with modest integration goals but with effective implementation instruments. The EU and its court the Court of Justice of the European Union (hereafter CJEU) have managed to strike a balance and clearly delineate their roles from those of the national courts. This is because, among other reasons, the EU is considered to be an autonomous legal order.

1.2 Statement of the Problem

The Treaty provides for the initial jurisdiction of the EACJ over matters relating to its interpretation. It postpones the EACJ's jurisdiction over human rights and other matters until

[17] 'The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include… good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.'

[18] 'The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.'

[19] Law Information Institute, -< https://www.law.cornell.edu/wex/concurrent_jurisdiction> on 25 March 2020.

[20] Preamble, *Treaty for the establishment of the East African Community.*

[21] Milej T, 'What is wrong about supranational laws? The sources of East African Community Law in light of the EU's experience' 75 *Heidelberg Journal of International Law*, 2015, 605.

a further date. However, the EACJ has creatively interpreted the Treaty giving itself implied jurisdiction over human rights matters. This, together with a lack of a requirement to exhaust local remedies, has caused an overlap in the jurisdiction of the EACJ and the jurisdictions of national courts with regard to human rights matters. This overlap causes confusion, conflict, and forum shopping.

The roles of the EACJ and national courts have to be clearly defined and delineated. This will not only promote the effective functioning of all these institutions but will also promote effective integration of the EAC as a whole.

1.3 Justification of the Study

This study is relevant for the effective integration of Partner States. It adds to the body of literature concerning the human rights jurisdiction of the EACJ, specifically on the way forward for the court. The findings of this study may potentially be of use to both the national courts and the EACJ in clarifying their powers and jurisdictions so that conflict, confusion, and forum shopping may be effectively handled.

1.4 Aim and Objectives

The aim of this study is to evaluate whether the jurisdictional conflict between the EACJ and national courts can be solved by implementing the EU model through a comparative study of the EACJ and the courts of the EU. The objectives it achieves in order to do so are:

i. To examine the human rights jurisdiction of the EACJ, including its history
ii. To analyse the relationship between the EACJ and national courts, focussing on human rights jurisdictions
iii. To assess the development and functioning of the CJEU in comparison to the EACJ
iv. To evaluate the application of this in the context of the human rights jurisdiction of the EACJ.

1.5 Research Questions

1.5.1 Primary Research Question

Does the EACJ's judicial activism in hearing cases involving human rights matters lead to an overlap in its jurisdiction and that of the national courts of the EAC's Partner States?

1.5.2 Secondary Research Questions

a. Why do States delegate their functions by creating human rights tribunals and what ensures their compliance to the judgements of these tribunals?

b. What is the history and nature of the EACJ's human rights jurisdiction and what is the relationship between the EACJ and national courts concerning human rights jurisdiction?
c. How has the CJEU developed and how does it function? How does it compare to the EACJ?
d. What lessons can the EACJ learn from this and how can they be applied?

1.6 Hypothesis

The EACJ has jurisdiction over human rights matters. This jurisdiction runs parallel to the jurisdiction of national courts over the same matters. This causes confusion and conflict. Member states of the EU have managed to strike a balance and clearly delineate their roles from those of their national courts. Studying how they managed this and applying their model would help in solving the issues within the EACJ.

1.7 Research Methodology

The research methodology used in this study is doctrinal, desktop research, involving analysis of both primary and secondary sources of law. These include treaties, national constitutions, case law, books, journal articles, theses, and dissertations.

This study also uses comparative research. Comparative legal research is important as law does not exist in a vacuum. In order to understand law, even within one country, one must look beyond its boundaries, and even beyond one's own time.[22] Due to globalisation, a lot of scholarly legal research often requires comparing one's own legal system to another one.[23] This also extends to regional legal structures. The institution chosen for this study is the EU. This is because, other than the reasons stated in the background, the EU is one of, if not the, most successful and widely known regional bodies. Additionally, the EU region is considered to have a good track record in human rights matters, and a part of this can be attributed to the symbiotic relationship of the EU national courts with the CJEU.

1.8 Literature Review

1.8.1 History of the EACJ's Jurisdiction

In order to determine why the EACJ's jurisdiction is as it is now, it is important to also look into the history of the defunct EAC and its court, the Court of Appeal for East Africa (CAEA).

[22] Gordley J, 'Comparative legal research: Its function in the development of harmonized law' 43 *American Journal of Comparative Law*, 1995, 555.
[23] Van Hoecke M, 'Methodology of comparative legal research', Law and Method, 2015.

Most of the intensive information on these is found in articles written in the 1970s. Katende and Kanyeihamba discuss the functioning of the CAEA and its relationship with the EAC Partner States.[24]

The jurisdiction of the EACJ has been a major study area. It is generally agreed upon that the EACJ has implied jurisdiction over human rights matters. Gathii argues that the rise of human rights case law in the EACJ represents a significant instance of building and forging judicial autonomy that derives from the entrepreneurship, resourcefulness, and creativity of the judges on the court.[25] Milej discusses the features of the EACJ's human rights jurisdiction and the functions it can reasonably perform.[26] Taye analyses the creation of the EACJ and the drafting history of Articles 6(d) and 7(2), arguing that the participation of lawyers and civil servants was essential for the inclusion of these clauses.[27] Taye also argues that the composition of the court at the beginning – made up of a significant number of human rights judges – influenced the eventual judicial activism of the court.[28]

Possi argues that Article 27 (2) places the EACJ in a precarious position and prevents it from effectively protecting human rights. [29] Possi also analyses the factors that undermine the effectiveness of the EACJ, one of them being the politicised environment of the court.[30] He argues that this should be reduced and overcome.

Lando also analyses the EACJ's jurisdiction, from the point of view of determining what effect the EACJ's human rights practice has domestically. Lando argues that while the EAC's effort in human rights have had some effect domestically, this is limited by, among other factors, lack of an explicit jurisdiction for the EACJ.[31]

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[24] Katende J and Kanyeihamba G, 'Legalism and Politics in East Africa: The dilemma of the Court of Appeal for East Africa' 43 *Transition,* 1973
[25] Gathii J, 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy'.
[26] Milej T, 'Human rights protection by international courts – what role for the East African Court of Justice?' 26 *African Journal of International and Comparative Law* 1, 2018, 108 – 129.
[27] Taye M, 'The role of the East African Court of Justice in the advancement of human rights'.
[28] Taye M, 'Human Rights, the Rule of Law and the East African Court of Justice: Lawyers and the emergence of a weak regional field', iCourts Working Paper Series Number 189, 2020 - <https://ssrn.com/abstract=3552608>
[29] Possi A, 'Striking balance between community norms and human rights: The continuing struggle of the East African Court of Justice' 15 *African Human Rights Law Journal* 1, 2015, 192-[ii]
[30] Possi A, 'The East African Court of Justice: Towards effective protection of human rights in the East African Community', Published, University of Pretoria, Pretoria, 2014.
[31] Lando V, 'The domestic effect of the East African Community's human rights practice' Published, University of Pretoria, Pretoria, 2017.

These papers are important for charting the history of the EACJ. The papers and the cases that are analysed in the study also provide an avenue for charting the development and application of the human rights jurisdiction of the EACJ.

1.8.2 Overlap

The overlap is not as widely written on. In her thesis, Okolla argues that there is a human rights jurisdictional conflict between the EACJ and national courts, and that this puts the two parties on a collision course.[32] However, Okolla's thesis does not go into detail on the human rights jurisdictional conflict itself or the background factors influencing it. This research therefore improves on past research by providing more detail on the overlap in human rights jurisdiction and the factors behind it. Additionally, Okolla's thesis argues for the adoption of a local remedies clause, while this research argues against it as it would create an obstacle for East African people to obtain justice. This research provides different recommendations.

1.8.3 The CJEU

Helfer and Slaughter thoroughly define effective supranational adjudication and jurisdiction and provide a 'checklist' for effective supranational adjudication and jurisdiction, giving the CJEU as one of the organisations that has been able to achieve this. [33] Defeis presents the history of the CJEU's human rights jurisdiction and points out how this helped to improve human rights observance in the region in addition to how the court can improve itself.[34] Judge Dimitrakopoulos analyses how national courts respond to conflicts between national laws and EU law or CJEU decisions.[35]

Concerning comparison between the EU and the EACJ, Milej examines the system of sources of law in the EAC, drawing comparison to the EU. Milej suggests that the initial commitment of the partner states to a people-centred integration requires introducing more elements of supranationalism to the EAC framework.[36] The textbook 'East African Community Law' also contains several chapters which analyse various institutions of the EAC, including the EACJ,

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[32] Okolla H, 'Human rights jurisdictional overlap between the East African Court of Justice and the national courts' Unpublished, University of Nairobi, Nairobi, 2017.
[33] Helfer L, Slaughter A, 'Toward a Theory of Effective Supranational Adjudication' 107 *Yale Law Journal* 2, 1997.
[34] Defeis, E, 'Human Rights and the European Court of Justice: An Appraisal', 31 *Fordham International Law Journal* 5, 2007.
[35] Dimitrakopoulos I, 'Conflicts between EU law and national constitutional law in the field of fundamental rights' <http://www.ejtn.eu/PageFiles/17318/DIMITRAKOPOULOS%20Conflicts%20between%20EU%20law%20and%20National%20Constitutional%20Law.pdf>.
[36] Milej T, 'What is wrong about supranational laws? The sources of East African Community Law in light of the EU's experience' 75 *Heidelberg Journal of International Law*, 2015, 579 – 617.

in comparison to institutions of the EU. This is with the reason that the EU majorly influenced the creation of the EAC, with several EU bodies having direct counterparts in the EAC.[37]

1.9 Limitations

This study may be limited by the use of the EU as the comparative institution, considering the differences in history and culture of the two regional bodies. For example, the EU is made up of mostly civil law countries while the original three Partner States of the EAC are common law countries. Differences in development and resources are also not as pronounced in the EU as compared to the EAC.

1.10 Chapter Breakdown

Chapter 1 – Introduction and Background

This chapter introduces and gives a background to the study. This is by briefly looking at the history of the EAC and the EACJ to determine the statement of the problem. The chapter then provides the objectives of the study and the research questions before providing the research methodology and literature review.

Chapter 2 – Theoretical Framework

This chapter presents and explains the theoretical framework of the study and how it relates to the topic of the study. It examines several theories in relation to delegation and compliance by States to human rights tribunals.

Chapter 3 – Human Rights Jurisdiction of the EACJ

This chapter gives a brief history of the human rights jurisdiction of the EACJ, analyses key human rights case law from the EACJ and outlines how the EACJ exercises its human rights jurisdiction. It also presents an analysis of the jurisdictional overlap between the EACJ and national courts on human rights matters.

Chapter 4 – The EU

This chapter assesses the development and functioning of the EU and its courts. It gives a breakdown of the relationship between the courts and the national courts of the EU member states. It does this while contrasting and comparing with the EACJ and pointing out the lessons that may be learnt by the EACJ.

[37] *East African Community law: Institutional, substantive, and comparative EU aspects*, Brill Nijhoff, 2017.

Chapter 5 – Findings, Recommendations and Conclusion

This chapter will conclude the study by summarising the findings, recommendations and giving a conclusion.

CHAPTER 2: THEORETICAL FRAMEWORK

2.1 Introduction

The theoretical framework of a research paper gives the context for the research and provides its conceptual basis.[38] For this research, the theoretical framework used involves theories analysing the relationship between states and international tribunals, specifically international human rights tribunals. These theories try to explain why states delegate by creating human rights tribunals. They also evaluate what, after delegation, ensures states' compliance to the judgements of the tribunals. These theories are used to explain why giving the EACJ a clear, explicit jurisdiction over human rights would be good for not only the citizens of the Partner States, but also for the EACJ and the Partner States themselves.

2.2 Theoretical Framework

2.2.1 Constrained Independence Theory

The proponent of this theory is Laurence Helfer. This theory argues that, essentially, the enhanced legitimacy that states earn for setting up tribunals which may rule against them outweighs the costs involved.[39]

The theory was formulated to try to make sense of the increasing number of international tribunals being created by states, the increasing recognition of the jurisdictions of these tribunals, the active utilisation of these tribunals by states and private parties and the independence of these tribunals from the states that created them.[40] This seems incongruous with the interests of rational, interest-maximising states. 'States that make such delegations constrain their sovereignty by giving judges or tribunal members the authority to decide that its domestic laws and practices are inconsistent with its international law obligations'.[41]

However, delegating dispute settlement authority to independent decision makers may further government interests rather than undermine them.[42] Independent tribunals ensure that states adhere to their commitments. They perform informational functions and determine a state's reputation for honouring its promises to other states.[43] 'Being identified as having violated international law is costly for a state because it leads to a loss of reputation in the eyes of both

[38] Taekema S, 'Theoretical and normative frameworks for legal research: Putting theory into *practice' Law and Method*, 2018, 1.
[39] Helfer L, 'Why states create international tribunals: A theory of constrained independence' 23 *International Conflict Resolution*, 2006, 280.
[40] Helfer L, 'Why states create international tribunals', 253-255.
[41] Helfer L, 'Why states create international tribunals' , 256.
[42] Helfer L, 'Why states create international tribunals', 257.
[43] Helfer L, 'Why states create international tribunals', 257.

its counterparty and other states' and this affects the ability of states to enter into future agreements with other states. 'By increasing the probability of both material sanctions and reputational harm, international tribunals raise the cost of violations, thereby increasing compliance and enhancing the value of the agreement for all parties'.[44]

The theory also stipulates that judges are part of a global "community of law" – a community of domestic courts and international tribunals that helps to shield judges from overtly political influences.[45] The tribunal's strategic space lies between the mechanisms of state regulation and the global community of law.

With regard to the EACJ, Partner States giving up a part of their human rights jurisdiction in order to give the EACJ an explicit human rights jurisdiction would be the price they would need to pay in order to achieve integration. The Partner States would gain the benefit of increased credibility in the international community, and the EACJ would be able to properly decide on human rights matters and set the tone for human rights in the region.

2.2.2 The Altered Politics Framework

This theory is propounded by Karen Alter.[46] Under this framework, rather than limiting state power, "new style" international tribunals—those with compulsory jurisdiction and access for nonstate actors—extend their own power.[47] These international tribunals consider litigant interests, rather than government preferences. In fact, they may adjudicate cases in which governments are reluctant participants. States in this instance delegate because of the increased credibility they gain in the eyes of other actors, which helps when it comes to matters such as foreign investments. Additionally, governments may want external pressure in order to be able to adopt laws that are controversial domestically.[48]

This theory argues that international tribunals influence governments through the alliances that the international tribunals build with "compliance constituencies".[49] Compliance constituencies usually consist of bodies with the power to choose compliance and put pressure on governments to comply. These include civil society groups, members of administrative agencies and even parts of the government such as the military and the judiciary. The

[44] Helfer L, 'Why states create international tribunals', 263.
[45] Helfer L, 'Why states create international tribunals', 269.
[46] Alter K, *The new terrain of international law: Courts, politics, rights*, Princeton University Press, Princeton, 2014.
[47] Gathii J, 'Mission creep or a search for relevance', 287.
[48] Alter K, *The new terrain of international law: Courts, politics, rights*, 65.
[49] Gathii J, 'Mission creep or a search for relevance', 288.

international tribunals therefore influence politics by 'drawing on the autonomy of law, specifying what the law requires, creating legal remedies, and building legal and political constituencies that co-opt the international tribunal's definition of legality'.[50]

The altered politics argument suggests four necessary conditions for international tribunals to alter domestic and international politics: (1) litigants must be able to seize the court; (2) actors within states must care about legality; (3) entrepreneurs must invoke a court and help build a compliance constituency; (4) international rules must enjoy the political support of constituencies that have power.[51]

In the context of the EACJ, giving the court an explicit human rights jurisdiction would improve adherence to human rights in the region. Under this theory, national courts and the EACJ would be able to rely on each other, backing up each other's judgements. This would then compel the executive arm of government to respect and promote human rights in order to maintain their international reputation and credibility. It would also create an environment that would enable the formation of a regional human rights body of jurisprudence which would further the conformance to human rights in the region. Essentially, it would give human rights a better place in the political framework of the Partner States.

2.2.3 Institutionalism

The institutionalist theory falls under the rational choice school of thought.[52] According to the institutionalist theory, states are rational actors that act on the basis of self-interest. The international system is anarchical, and compliance to international treaties is determined by power relations between states. However, cooperation is possible. Institutions play a big role in influencing cooperation.

Institutionalists believe that 'rules and norms developed by international institutions or "regimes" could alter the process of decision making in a state, thereby creating incentives for compliance with international law'.[53] Therefore, states comply with international law because it is in their interest to do so within the framework of international cooperation. Certain desired outcomes may only be achieved through cooperation.

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[50] Alter K, *The new terrain of international law: Courts, politics, rights*, 67.
[51] Alter K, *The new terrain of international law: Courts, politics, rights*, 62.
[52] Ayeni V, 'Why states comply with decisions of international human rights tribunals: A review of the principal theories and perspectives', 10 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 1, (2019), 3.
[53] Ayeni V, 'Why states comply with decisions of international human rights tribunals', 4.

An explicit human rights jurisdiction would, of course, strengthen the EACJ as a human rights body and as a court. As a stronger institution, the EACJ would be able to ensure that the Partner States comply with their human rights obligations. Additionally, this would enhance the reputations of the EAC Partner States, therefore they would also gain something from it.

2.2.4 International Tribunals as Trustees

Under this theory, judges are not merely agents of their appointing authorities, but are rather professionals that bring their own legitimacy and authority to international tribunals.[54] Trustees are: (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary.[55] Trustees' decisions become part of the political process, thereby changing the nature of the political game.

The EACJ having an explicit human rights jurisdiction would also empower judges to make decisions that uphold the human rights of the citizens of the Partner States of the EAC. It would encourage people to bring cases to the EACJ for judgement (the EACJ's caseload is currently relatively light). As mentioned, this would change the nature of politics in the region and compel governments to be more considerate of human rights.

2.3 Conclusion

This chapter sought to answer the first research question by analysing various delegation and compliance theories and their application within the EAC. Through these theories, the importance of a clear and explicit human rights jurisdiction to the promotion of human rights in the EAC as a whole can be seen. In essence, delegation by Partner States to the EACJ would benefit both parties and enhance observance of human rights in the region. Additionally, Partner States would be compelled to follow the decisions of the EACJ in order to continue enjoying the benefits of compliance.

Under the constrained independence theory, the cost of achieving full integration would be for the Partner States to give up some of their human rights jurisdiction to the EACJ. The altered politics framework suggests that collaboration between the EACJ and compliance constituencies such as national courts would give human rights a better place in the East African political framework, and this collaboration would be achieved through giving the EACJ an explicit human rights jurisdiction.

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[54] Gathii J, 'Mission creep or a search for relevance', 284.
[55] Gathii J, 'Mission creep or a search for relevance', 284.

The institutionalism theory argues that an explicit human rights framework would strengthen the EACJ, thereby strengthening the EAC itself, thereby ensuring better respect for human rights. Theorising international tribunals like the EACJ as trustees puts EACJ judges in the position to make decisions that would alter the nature of politics of the region. Thereby, having an explicit human rights jurisdiction would enable EACJ judges to change the politics of the region, with regard to human rights, for the better.

CHAPTER 3: THE EACJ

3.1 Introduction

This chapter will look into the history of the human rights jurisdiction of the EACJ, starting from the days of the Court of Appeal for East Africa. It will then look at the relationship between the EACJ and national courts, and the overlapping jurisdiction between the two. It will then conclude with the impact of this overlap from the viewpoint of the position of the Court, on the Court itself and on the EAC in general.

3.2 History of the Human Rights Jurisdiction of the EACJ

3.2.1 The Court of Appeal for East Africa (CAEA)

The CAEA was first established during the colonial times to decide on appeals from the High Courts of British Protectorates and Colonies in East Africa.[56] In the post-colonial period, the 1967 Treaty for East African Co-operation provided for the creation of the Court of Appeal of East Africa, with jurisdiction to hear and determine appeals 'from the courts of each Partner State as may be provided for by any law in force in that Partner State and shall have such powers in connection with appeals as may be so provided'.[57] Katende and Kanyeihamba argue that the decision to keep the CAEA was motivated by various factors, including administrative expediency, staffing problems and financial considerations. However, the determination of its powers and jurisdiction were the results of political motivation.[58]

In the post-colonial period, judges of national courts faced political pressure from the executive. If they made judgements against the executive, they faced the fear of dismissal, forced resignation or being "exiled" to positions where they were unlikely to make political decisions.[59] The CAEA, on the other hand, was a supranational organisation free from the day-to-day political pressures of national courts and owed no allegiance to any individual state.[60] This made it harder for states to put pressure on it. However, they were not completely free from governmental pressure. This was because the limits of the court's jurisdiction, and its existence itself, depended on the states.[61]

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[56] Masinde W and Omolo C, 'The Road to East African Integration', 15.
[57] Art 80, 81, *Defunct EAC Treaty*.
[58] Katende J and Kanyeihamba G, 'Legalism and Politics in East Africa: The dilemma of the Court of Appeal for East Africa' 43 *Transition,* 1973, 44.
[59] Katende J and Kanyeihamba G 'Legalism and Politics in East Africa', 45.
[60] Katende J and Kanyeihamba G 'Legalism and Politics in East Africa', 45.
[61] Katende J and Kanyeihamba G 'Legalism and Politics in East Africa', 45.

The CAEA did make judgements against the states. The Partner States had provisions in their Constitutions preventing the court from interpreting their constitutions. However, the court occasionally decided on cases which involved interpreting the constitutions of the Partner States. In *Otoi v Uganda*, the court justified such by arguing that:

> '…it had the duty to hear appeals involving the application of Uganda law which is founded on the Constitution, and that it is inevitable when hearing such appeals to get involved, directly or indirectly, in questions dealing with the interpretation of the Constitution; that Parliament which created this duty has, however, also seen fit to fetter the court's power with constitutional limitations with regard to the interpretation of the constitution; and that the observance of these limitations would make it impossible for the court to carry out its duty'.[62]

Essentially, the court's argument was that in order to effectively perform its functions, it would at times need to ignore the limitations placed upon it.[63] However, the court did not always ignore such limitations. It tended to ignore them when the party bringing the case was an individual or individuals against a state organ, being referred to by one of its presidents as "the last bastion in the defence of the freedom of the individual".[64]

The court nevertheless had to be cautious of governments' reactions when reaching their decisions in politically-charged cases. In *Republic v Michael Kamaliza and others*, the CAEA acquitted three politically important figures who had been convicted of treason by the Tanzanian High Court.[65] Following the decision, one of the appellants was re-arrested and detained and two months later, an Act was passed which prevented the CAEA from hearing appeals from cases where a person has been charged with 'treasonable felony, misprision, promoting war-like undertakings, inciting mutiny, helping soldiers or police officers to mutiny or desert, helping prisoners of war to escape, or of offences in the National Securities Act'.[66]

From the above, it can be seen why during the drafting of the EAC Treaty, the Partner States did not want a CAEA-style court which would hold them to account on their actions towards their citizens. Additionally, it explains the reluctance to extend an official human rights jurisdiction to the EACJ.

[62] Katende J and Kanyeihamba G 'Legalism and Politics in East Africa', 46.
[63] Katende J and Kanyeihamba G 'Legalism and Politics in East Africa', 46.
[64] Katende J and Kanyeihamba G 'Legalism and Politics in East Africa', 47.
[65] Katende J and Kanyeihamba G 'Legalism and Politics in East Africa', 48.
[66] Katende J and Kanyeihamba G 'Legalism and Politics in East Africa', 54.

3.2.2 The EACJ

The EAC is unique amongst regional treaties for its inclusion of aspects of the public, including civil society groups, in the drafting process.[67] This had a major impact on the inclusion of certain articles in the Treaty, as will be illustrated below.

As mentioned in the introduction, during the drafting process, civil society groups and lawyers wanted a Court of Appeal, like the CAEA, with an extensive jurisdiction including on human rights.[68] The Partner States on the other hand disagreed; they wanted the EACJ to have very limited jurisdiction. However, the negotiators acknowledged that the justice systems in the Partner States had taken different directions and hence the CAEA could not be resurrected. Additionally, new court hierarchies had been adopted. In the end, the treaty negotiations resulted in the limitation of the EACJ's jurisdiction and the postponement of human rights jurisdiction.[69]

Despite this failure, lawyers and civil rights group were still able to influence the provisions on the fundamental and operational principles of the Treaty. The Draft Treaty provided for respect for human rights and the rule of law as requirements for joining the EAC.[70] These requirements were however not extended to the original three Partner States. Therefore, lawyers and civil society groups pressed for the inclusion of similar provisions requiring the Partner States to respect human rights and the rule of law, and to broaden the principles included in the Treaty in general.[71] This is what led to the inclusion of Articles 6 (d) and 7 (2) in the Treaty.

While the EAC Treaty does not give the EACJ explicit human rights jurisdiction, it does give it initial jurisdiction over the 'interpretation and application of the Treaty'.[72] It also provides that the EACJ shall have such other original, appellate, human rights and other jurisdiction, to be determined by the Council at a suitable subsequent date. This extension would be operationalised through a Protocol.[73] Until this moment, a protocol extending the human rights

[67] Taye M, 'The role of the East African Court of Justice in the advancement of human rights', 364.
[68] Taye M, 'The role of the East African Court of Justice in the advancement of human rights', 364.
[69] Taye M, 'The role of the East African Court of Justice in the advancement of human rights', 365.
[70] Ebobrah, 'Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and challenges', 17 *African Journal of International and Comparative Law* 79, 2009, 88–89.
[71] Taye M, 'The role of the East African Court of Justice in the advancement of human rights', 366.
[72] Article 27, *Treaty for the establishment of the East African Community*.
[73] Article 27, *Treaty for the establishment of the East African Community*.

jurisdiction of the EACJ has not been passed. The Treaty also does not contain a bill of rights but relies on other treaties such as the African Charter on Human and Peoples' Rights.[74]

The EACJ has, however, developed an implied human rights jurisdiction through case law. This was effected through a creative interpretation of Article 6 (d) [Fundamental Principles] and Article 7 (2) [Operational Principles] of the Treaty.

Article 6 (d) provides for the fundamental principles that govern the achievement of the objectives of the EAC by the Partner States. These include good governance which comprise of adherence to the rule of law, and 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights', among others.

Article 7 (2) requires the Partner States to 'abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'.

These provisions have empowered the EACJ to listen and decide on cases involving human rights infringements. Lawyers have also used these provisions to litigate cases at the EACJ. Therefore, lawyers and civil society groups have had a major role in the 'creation and institutionalization of the court' through participation in the drafting process and litigation.[75] This was also enabled by the constitution of the court, which was made up by judges who had extensive experience in the field of human rights law.[76]

The first case whereby the EACJ exercised this creative interpretation was the *Katabazi* case.[77] This case involved 14 applicants who had been detained on treason charges in 2004. In 2006, they were finally granted bail. However, before they could leave, the court building was surrounded by security personnel who took them into custody. They were then convicted on additional charges of unlawful possession of firearms and terrorism in a Martial Court. The Constitutional Court ruled that the interference was unconstitutional, but the Ugandan government continued to hold the applicants in custody. In their complaint, the applicants

[74] Article 6 (d) of the EAC Treaty provides for fundamental principles including "the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".
[75] Taye M, 'The role of the East African Court of Justice in the advancement of human rights', 367.
[76] Taye M, 'Human Rights, the Rule of Law and the East African Court of Justice: Lawyers and the emergence of a weak regional field', iCourts Working Paper Series Number 189, 2020, 14 - <https://ssrn.com/abstract=3552608> on 28 October 2020.
[77] *James Katabazi v. Secretary General of the EAC*, EACJ.

argued that the Ugandan government and the EAC were violating the rule of law, thereby violating the Treaty.[78]

The Court held that while it does not have human rights jurisdiction *per se*, this does not preclude it from exercising its jurisdiction to interpret the Treaty under Article 27 (1) just because 'the Reference includes allegations of human rights violations'.[79] Hence, the court found Uganda in violation of the principles of good governance enshrined in Articles 6 (d) and 7 (2). This ruling laid the foundations for several other human rights cases to be brought to the court based on violation of the principles of good governance.[80]

3.3 Overlapping Jurisdiction

Overlapping jurisdiction is jurisdiction that 'can be exercised simultaneously by more than one court over the same subject matter and within the same territory'.[81] Rules of jurisdiction exist to reduce, while not entirely eliminating, instances of overlaps.[82]

From the above discussion, it is evident that the EACJ had developed an implied human rights jurisdiction through a creative interpretation of Article 6 (d) and Article 7 (2) of the Treaty. Additionally, in *Democratic Party v The Secretary General of the EAC*, the Appellate Division of the EACJ ruled that it has 'jurisdiction to interpret the African Charter on Human and Peoples' Rights in the context of the [EAC] Treaty'.[83] Due to the lack of official jurisdiction, the human rights jurisdictions of the EACJ and the various national courts are not delineated, which may lead to judicial overlap.

Moreover, the Treaty provides that EAC 'organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty'.[84] However, in *Uganda v Gurindwa Paul Tumusiime*, the Ugandan High Court held that this primacy of EAC law does not extend to Constitutions.[85] Therefore, while there have been no other similar decisions in the other Partner States, the general position is that within the national

[78] Open Society Justice Initiative, *Human Rights Decisions of the East African Court of Justice*, 2013, 3.
[79] Binda E, 'The Legal Framework of the EAC', in Ugirashebuja E, Ruhangisa JE, Ottervanger TR, Cuyvers A (eds), *East African Community law: Institutional, substantive, and comparative EU aspects*, Brill Nijhoff, 2017, 113.
[80] Binda E, 'The Legal Framework of the EAC', 113.
[81] https://definitions.uslegal.com/o/overlapping-jurisdiction/ on 18 September 2020.
[82] Mills A, 'Rethinking jurisdiction in international law' 84 *British Yearbook of International Law* 1, 2013, 188.
[83] *Democratic Party v The Secretary General of the EAC* (2014), EACJ.
[84] Article 8(4), *Treaty for the establishment of the East African Community*.
[85] *Uganda v Gurindwa Paul Tumusiime* (2011), High Court of Uganda.

framework, the Constitutions have primacy while Community law is second in the hierarchy.[86] This is important to consider since the Constitutions of Partner States have the Bill of Rights, which contains protection for human rights.[87]

The Constitutions also set out the organs responsible for handling human rights matters in the countries. For example, in Kenya, the High Court has the jurisdiction to determine whether a right or fundamental freedom provided for in the Bill of Rights (Chapter IV of the Constitution) has been denied, violated, infringed, or threatened.[88] Magistrates' Courts have the jurisdiction to hear and determine claims relating to violation of the freedom from torture and the freedom from slavery.[89]

Therefore, by hearing matters involving human rights, especially without an explicit jurisdiction, the EACJ seems to be performing a role reserved for national courts. The Court hears matters that national courts are also empowered to hear, with seemingly no difference between their roles. While the EACJ hears the cases from the lens of violation of the principles in the Treaty, it does listen to cases directly from individuals, similarly to the national courts. In *Plaxeda Rugumba*, the Rwandese government brought up the defence of non-exhaustion of local remedies (which was dismissed) because the case that was brought before the EACJ was one that could also have been handled by a national court.[90]

Additionally, one of the reasons that the Partner States gave for denying the EACJ human rights jurisdiction was the possibly of overlapping jurisdictions.[91]

Furthermore, the EACJ has acknowledged that it has concurrent jurisdiction with the national courts with regard to application of the Treaty. In *East African Law Society and 4 Others vs the Attorney General of Kenya and 3 Others*, the Court observed the need to amend the new proviso that was introduced in Article 27(1) on Jurisdiction of the Court that states "…provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner State". The court stated that the proviso should also be read together with Article 30(3) that provides

[86] Lando V, 'The domestic effect of the East African Community's human rights practice' Published, University of Pretoria, Pretoria, 2017, 98.

[87] I.e., Chapter 4 Constitution of Kenya; Chapter 4 Constitution of Uganda; Chapter 1, Part 3 Constitution of Tanzania; Title 2 Constitution of Rwanda etc.

[88] Article 165, *Constitution of Kenya* (2010).

[89] Section 8, *Magistrates' Court Act* (2015).

[90] *Plaxeda Rugumba v. Secretary General of the EAC and Attorney General of Rwanda*, EACJ.

[91] Possi A, 'The East African Court of Justice: Towards effective protection of human rights in the East African Community', Published, University of Pretoria, Pretoria, 2014, 126.

"The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State". It should also be read together with 33(1) "Except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national court of the Partner States". The EACJ has expressed the need to amend the Treaty in order to clear the confusion.[92]

On top of this, the Treaty does not contain any requirement to exhaust local remedies before submitting an application. The EACJ confirmed in the *Plaxeda Rugumba* case that the Treaty 'provides no requirement for the exhaustion of local remedies as a condition for accessing the EACJ'.[93] This is another aspect of the EACJ's commitment to 'a people-centred and market driven cooperation' as enshrined in Article 7 (1) (a). While the lack of a local remedies rule is meant to open up the court for any resident of a Partner State, it also creates a situation where a party can bring a case to both the EACJ and the national court.

However, the presence of the 2 month rule somewhat mitigates this. This rule restricts accessibility to the EACJ by establishing a two - month time limit for individuals to lodge their complaints before the EACJ.[94] Any proceeding that is to be instituted before the EACJ must take place within two months of the enactment, publication, directive, decision or action complained of, or the day on which the complainant became aware of the matter complained about.[95] While this may help with mitigating the overlap, as Possi says, a time limitation of two months is unrealistic in a society such as that in the EAC, where many people are not aware of their rights and have little prospects of accessing justice.[96] As the EACJ applies this rule restrictively, it may inhibit access to justice which would go against the principles set out in the Treaty.[97]

3.3.1 Impact of the overlap

This overlap has caused tensions between the EACJ and the Partner States, with the Partner States considering the EACJ's continued deliberation of human rights-related matters as an

[92] Ruhangisa J, 'The scope, nature and effect of EAC law' in Ugirashebuja E, Ruhangisa JE, Ottervanger TR, Cuyvers A (eds), East African Community law: Institutional, substantive, and comparative EU aspects, Brill Nijhoff, 2017, 158.
[93] *Plaxeda Rugumba v. Secretary General of the EAC and Attorney General of Rwanda*, EACJ.
[94] Art 30(2), *Treaty for the establishment of the East African Community*.
[95] Art 30(2), *Treaty for the establishment of the East African Community*.
[96] Possi A, 'The East African Court of Justice', 219.
[97] Possi A, 'The East African Court of Justice', 219.

infringement of their sovereignty. The Partner States regularly use the defences of lack of jurisdiction and non-exhaustion of local remedies as a defence.

Additionally, the overlap has led to legal uncertainty and confusion. Some judges of the EACJ, especially those serving in the First Instance Division, have been more active in engaging in judicial activism while those in the Appellate Division are sometimes more restrained, in order to appease Partner States. For example, in the *Independent Medical Legal Unit* case, the First Instance Division confirmed its jurisdiction to hear a matter involving the disappearance, torture, and execution of upwards of 3,000 Kenyan residents of Mt. Elgon District by Kenyan government authorities.[98] The Appellate Division later sided with the defendant and overturned the First Instance Division's decision, stating that the First Instance Division had not adequately explained how this particular case fell within one of its jurisdictional bases.[99]

This is further worsened by the fact that the EACJ has not yet been able to properly establish its legitimacy and authority in the region. For example, many people many do not know of the human rights practice of the EACJ and are thus not able to take full advantage of it.[100] Additionally, the EACJ has not been able to fully establish its legitimacy and authority because the Partner States have shown that they are willing to put restrictions on the EACJ if they consider that the EACJ is exceeding its mandate. For example, while the *Anyang' Nyong'o* case was not a human rights case, it had implications on the human rights practice of the EACJ.[101] The 2-month rule and the two-tier system of this court were introduced as a result of this case. Additionally, with regards to the EAC Human and Peoples' Rights Bill, Possi mentions that after the passing of the Bill, it is unclear whether the EALA even advanced the Bill to be approved by the Heads of States.[102] This shows differences between not just the EACJ and the Partner States, but also between the EALA and the Partner States regarding the human rights practice of the EACJ.

One of the ways to do this would be through preliminary rulings. Article 34 of the EAC Treaty provides that when a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of the Treaty, that court or tribunal shall, if it

[98] *Independent Medical Legal Unit v Attorney General of Kenya* (2012), EACJ.
[99] *Independent Medical Legal Unit v Attorney General of Kenya* (2012), EACJ.
[100] Possi A, 'The East African Court of Justice', 66.
[101] *Anyang' Nyong'o and others v Attorney General of Kenya* (2006), EACJ.
[102] Possi A, 'An appraisal of the functioning and effectiveness of the East African Court of Justice', 21 *Potchefstroom Electronic Law Journal*, 2018, 25.

considers that a ruling on the question is necessary to enable it to give judgment, request the EACJ to give a preliminary ruling on the question.

Preliminary rulings are an important tool in ensuring harmonisation of laws in regional organisations. However, they have not taken off in the EAC. Only 2 cases have so far been directed to the EACJ for preliminary ruling. One of them, a Kenyan case, was stayed because the judge who made the request for preliminary ruling had been removed from office.[103] The court stated that it would wait for further instruction from the High Court, but none have been given to date. The other case was Ugandan, *Attorney General of the Republic of Uganda v Tom Kyahurwenda*, where the court was required to determine whether national courts have the jurisdiction to interpret the EAC Treaty. The EACJ distinguished between application and interpretation of the Treaty, stating that while interpretation is the preserve of the EACJ, national court can determine matters to do with application of the Treaty.[104]

One of the reasons why the use of preliminary rulings has not taken off in the region could be that on top of the Partner States having established human rights systems, however good or bad, the EACJ lacks an established human rights catalogue. The EACJ adjudicates human rights matters based on ensuring adherence to the principles enshrined in the EAC Treaty, but the Treaty itself is not a human rights instrument. In 2012, the East African Legislative Assembly passed the EAC Human and Peoples' Rights Bill.[105] However, the Bill has not until this moment become a Community Act as it has not been approved by the Heads of States as per Article 62 (2) of the Treaty. If this had happened, the EACJ would have immediately had the authority to adjudicate human rights matters. Additionally, this would have implications regarding primacy of laws.

Another way would be through use of EACJ rulings in national courts. However, so far this has only seemed to happen in some Ugandan cases. Additionally, while the judges in these cases may refer to cases decided by the EACJ, they avoid referring to the human rights aspects of the cases.[106]

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[103] Lando V, 'The domestic effect of the East African Community's human rights practice' Published, University of Pretoria, Pretoria, 2017, 59.
[104] *Attorney General of the Republic of Uganda v Tom Kyahurwenda* (2014), EACJ.
[105] East African Legislative Assembly, 'Bill on human rights is passed by EALA'- <https://www.eala.org/index.php?/media/view/bill-on-human-rights-is-passed-by-eala> on 26 October 2020.
[106] Lando V, 'The domestic effect of the East African Community's human rights practice', 144.

Therefore, the overlap further weakens the position of the EACJ in the region. This in turn weakens the EAC itself.

This does not mean that the EACJ should not have an explicit human rights jurisdiction. The importance of the regional courts like the EACJ to the promotion of human rights cannot be overstated. First, they are considered to be better than international courts in promoting human rights because of the common history, practices and values usually observed in regional organisations.[107] Moreover, the ultimate goal of the EAC is a federation. This means that human rights integration and harmonisation is even more important. The EACJ is the body that is best-positioned to achieve this.

3.4 Effect on Integration

The overlap has the effect of threatening integration in a region where it has already been hard enough to effect integration. The EACJ and the national courts regularly have conflicts over the EACJ's continued hearing of matters involving human rights without an explicit jurisdiction. It further worsens the relationship between Partner States and the EACJ. By weakening the EAC, it threatens the future of integration in the region.

3.5 Conclusion

This chapter sought to answer the second research question – on the history of the human rights jurisdiction of the EACJ and the overlapping jurisdiction between the EACJ and national courts. It found that the experiences of the CAEA had a hand in the Partner States' decision to deny the EACJ human rights jurisdiction. By going ahead and hearing human rights cases, a situation is created whereby there is overlapping jurisdiction between the EACJ and national courts on human rights. This overlap has the effect of further weakening the position of the EACJ.

[107] Possi A, 'The East African Court of Justice', 100.

CHAPTER 4: THE COURT OF JUSTICE OF THE EUROPEAN UNION

4.1 Introduction

This chapter consists of a comparative study of the EACJ with the Court of Justice of the European Union. It looks into the history of the CJEU with regards to human rights and the relationship between the CJEU and the national European courts, while comparing and contrasting with the EACJ.

This research uses the CJEU as a comparative study for a number of reasons. As mentioned in the introduction, the EU is the oldest, most successful, and widely known regional organisation. Therefore, many regional organisations including, the EAC, have taken inspiration from it and modelled their institutions after it. Additionally, the CJEU and the EACJ are similar in that they are both courts that were initially intended to preside over mostly economic matters but developed a human rights practice through creative interpretation of their founding treaties. Further, the CJEU has been able to create a largely harmonious and symbiotic relationship with national courts.

4.2 The Court of Justice of the European Union

The CJEU is the 'final arbiter in disputes arising from the EU Treaties and the legislation based upon them'.[108] Its jurisdiction is compulsory.[109] It also has the general responsibility to ensure that in the interpretation and application of the Treaties, the law is observed.[110] At first, the CJEU (then called the European Court of Justice – ECJ) mainly dealt with economic matters, since human rights were already being addressed in other platforms, e.g., the ECtHR and the UN. Inevitably, the court ended up ruling on some human rights matters, especially those related to economic and labour rights.[111]

The CJEU was established by the Treaty of Rome. At first, it was no different from other international courts like the International Court of Justice. In order to get to the point where it is at now, the challenge facing the CJEU was the penetration of the national legal system.[112] To achieve this, the CJEU took advantage of a relatively obscure provision of the Rome Treaty, Article 177. This Article provided that the CJEU had the competence to make preliminary

[108] Arévalo, L, 'Adjudication of international disputes in Europe: The role of the European Court of Justice and the European Court of Human Rights', 2006, 3.
[109] Arévalo, L, 'Adjudication of international disputes in Europe', 3.
[110] Arévalo, L, 'Adjudication of International Disputes in Europe', 4.
[111] Defeis, E, 'Human Rights and the European Court of Justice: An Appraisal', 31 *Fordham International Law Journal* 5, 2007, 1106.
[112] Helfer L, Slaughter A, 'Toward a theory of effective supranational adjudication', 291.

decisions concerning the validity and interpretation of acts of the institutions of the EEC. Therefore, any court of a member state could refer a case involving such issues to the CJEU. Moreover, national courts of last resort (e.g., Supreme Courts) had to refer cases raising questions of European law to the CJEU. This provision was meant to ensure that the different countries in the EEC did not develop different interpretations of the Treaty and EEC legislation.[113]

The CJEU went a step further and used this provision to create the doctrine of "direct effect". As per this doctrine, certain provisions in the Rome Treaty were held to be directly applicable to individuals within national legal systems. Hence, individuals within the states could use these provisions in national courts against national provisions contrary to EEC law, and the national court would then refer such cases to the CJEU for judgement.[114] This was the ruling in the *Van Gend en Loos* case.[115] The doctrine of direct effect led to increased referrals by the national courts to the CJEU. Through the national courts, the CJEU gained a domestic enforcement mechanism for its judgements.[116]

The CJEU also proclaimed the doctrine of supremacy. In *Costa v ENEL*, the CJEU established the principle of supremacy of European law over domestic law.[117] This established a new legal order above the state and was meant to ensure that European law could not be overruled by national laws. In reaching this judgement, the court relied on two principles. The first was the "duty of loyalty" which required all member states to take all appropriate measures to ensure fulfilment of the EEC's tasks.[118] This was a provision in Article 171 of the Rome Treaty. The second principle was the duty to 'abstain from any measure which could jeopardise the attainment of Treaty objectives.[119]

From the above, a similarity between the CJEU and the EACJ can be observed. Both courts started out without an explicit human rights jurisdiction but developed one through creative interpretation of their respective treaties.

After the CJEU had affirmed the two doctrines, but refused to examine the competency of its decisions with the national and constitutional law of Member States, concerns were expressed

[113] Helfer L, Slaughter A, 'Toward a theory of effective supranational adjudication', 292.
[114] Helfer L, Slaughter A, 'Toward a theory of effective supranational adjudication', 292.
[115] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963), ECJ.
[116] Helfer L, Slaughter A, 'Toward a theory of effective supranational adjudication', 293.
[117] *Costa v ENEL* (1964), CJEU.
[118] Defeis, E, 'Human Rights and the European Court of Justice', 1109.
[119] Defeis, E, 'Human Rights and the European Court of Justice', 1109.

by Member States about the effect that such decisions would have on the protection of constitutional values such as fundamental rights.[120] Their argument was that if European law were to prevail even over domestic constitutional law, it would become possible for it to breach fundamental rights.[121] In order to avert this possible risk, the constitutional courts of some Member States, such as Germany and Italy, adopted decisions in which they asserted their power to review European law in order to ensure its consistency with constitutional rights.[122] Another issue that was brought up by Germany was that since the EEC Treaty lacked substantial human rights provisions, the transfer of power from their national legal system to the EEC 'had to be measured against domestic constitutional provisions'.[123]

In reaction to this, the CJEU made a number of rulings declaring that the Treaty did contain protection for "fundamental rights".[124] In *Stauder v Ulm*, the CJEU acknowledged that human rights protection was one of the unwritten principles of the Treaty.[125] In *Nold v Commission*, the CJEU held that 'in addition to constitutional provisions, rights found in international agreements which the member states were a party to are relevant in the Court's analysis' (e.g. ECHR, UDHR, UN Charter etc).[126] These rulings were eventually incorporated into future treaties, such as the, the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter.[127] The Amsterdam Treaty also provided that 'the Union shall respect fundamental rights, as guaranteed by the European Convention ... as they result from the constitutional traditions common to the Member States, as general principles of Community law'.[128]

Hence, both the CJEU and the EACJ had to go through some hoops in order to establish their legitimacy in their respective regions, especially concerning their ability to listen to human rights cases. The CJEU has been more successful in this regard. One of the factors that could be pointed out as the cause of this is the ages of the courts – the CJEU has existed for more

[120] European Parliament, 'The protection of fundamental rights in the EU', https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu on 28 October 2020.
[121] European Parliament, 'The protection of fundamental rights in the EU', https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu on 28 October 2020.
[122] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970), German Federal Constitutional Court; *Frontini v Minister delle Finanze* (1974), Italian Constitutional Court.
[123] Defeis, E, 'Human Rights and the European Court of Justice', 1110.
[124] Defeis, E, 'Human Rights and the European Court of Justice', 1110.
[125] *Stauder v City of Ulm* (1969), CJEU.
[126] *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* (1974), CJEU.
[127] Defeis, E, 'Human Rights and the European Court of Justice, 1110.
[128] Defeis, E, 'Human Rights and the European Court of Justice, 1112.

than 50 years and has had more time to cement its power as compared to relatively much younger EACJ. Additionally, one of the factors that many scholars point to is the level of respect given to human rights in EU governments as compared to governments in other regions, in this case the East African region.[129]

Despite hearing matters involving human rights, both courts state that they are not human rights courts. On the part of the EACJ, this makes sense as they do not have an official human rights jurisdiction. On the part of the CJEU, this is more to do with the court's hesitation to assume its full role as a human rights court and the lukewarm enthusiasm from legal community in general.[130]

The EU Charter of Fundamental Rights was proclaimed in Nice in 2000, amended and proclaimed again in 2007.[131] It came into direct effect with the adoption of the Lisbon Treaty in 2009, as provided for by Article 6(1) Treaty on European Union (TEU), thereby becoming a binding source of primary law. The Charter was first proclaimed in order to provide an 'internal' scrutiny mechanism at the EC level to allow for a preliminary and autonomous judicial check by the CJEU.[132] This is unlike the EAC, whereby the EAC Human and Peoples' Rights Bill was passed in the EALA but never signed into law.[133]

4.3 CJEU & National Courts

The courts perform different functions, which reduces overlap. The CJEU interprets EU law to make sure it is applied in the same way in all EU countries and settles legal disputes between national governments and EU institutions. It also may be used by individuals, companies, or organisations to take action against an EU institution. National courts ensure protection of human rights enshrined in both national laws and European laws.[134]

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[129] Helfer L, Slaughter A, 'Toward a theory of effective supranational adjudication', 293.
[130] Sarmiento D, 'A Court that Dare Not Speak its Name: Human Rights at the Court of Justice', https://www.ejiltalk.org/a-court-that-dare-not-speak-its-name-human-rights-at-the-court-of-justice/ on 15 December 2020.
[131] European Parliament, 'The protection of fundamental rights in the EU', https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu on 28 October 2020.
[132] European Parliament, 'The protection of fundamental rights in the EU', https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu on 28 October 2020.
[133] Possi A, 'An appraisal of the functioning and effectiveness of the East African Court of Justice', 25.
[134] European Parliament, 'The protection of fundamental rights in the EU', https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu on 28 October 2020.

One major difference between the CJEU and the EACJ is that the CJEU mainly makes preliminary rulings and listens to cases against EU institutions, while the EACJ mainly listens to cases from individuals against state organs.[135] Therefore, not only does this reduce overlap, but it also reduces friction between the EU and the Member States. While there is still friction, it is not as much as the friction between the EAC and the Partner States. However, access to the EACJ for individuals is important and shutting the doors to them would deny them the justice they may not be able to get in their national judicial systems.

In the EU, European law has primacy. Article 6 (3) of the Treaty on European Union provides that 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. In implementing EU law, national authorities and courts can apply national standards of protection of fundamental rights, as long as the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.[136]

This is unlike in the EAC, where the community law only has primacy in matters concerning the community law. Often, the community law has to conform to or be made to conform to national laws, opposite to the situation in the EU. Further, concerning the courts themselves, primacy of EU law enables the CJEU to be able to streamline human rights practices in the region through preliminary rulings, ensuring that the Member States meet EU standards on human rights. The EACJ, on the other hand, can only make judgements on human rights matters through creative interpretation of the Treaty, since the primacy of EAC law is limited.

Moreover, in the EU, there is a baseline below which national systems are not to infringe, as highlighted above. National standards of human rights can be applied, as long as the interpretations of the CJEU on the ECtHR and EU law are not compromised. This is quite the opposite in the EAC, where regional standards of human rights have not been established, and further, the regional court lacks an explicit human rights jurisdiction to enforce these standards. On top of this, the EACJ is the entity that has a baseline below which it should not infringe is the EACJ, which can only interpret the Treaty.

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[135] European Parliament, 'The protection of fundamental rights in the EU', https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu on 28 October 2020.

[136] *Stefano Melloni v Ministerio Fiscal* (2013), CJEU.

While both courts are politicised to different extents, the CJEU has been able to, over the years, establish enough legitimacy and authority to overcome this politicisation. As established in the previous chapter, the EACJ has not yet established enough legitimacy and authority in human rights to do this. This politicised environment is what gives rise to actions such as withholding of explicit human rights jurisdiction for the EACJ by the Partner States.

In the case where conflicts arise between national courts and the CJEU when it comes to interpreting EU law, a judge in a national court may have four different options. The first is to interpret and apply constitutional rules in a way which is friendly to or in harmony with EU law, as interpreted by the CJEU.[137] The second is to interpret EU law in accordance with national constitutional law.[138] The judge could also refer a preliminary reference attempting to convince the CJEU to qualify or change its existing case law, in a way that affirms the compatibility of a national constitutional rule with EU law.[139] The final option would be non-compliance with the CJEU; this does not happen often but it does happen.[140]

4.4 Impact on Integration

The good relationship between the European national courts and the CJEU has played a big role in promoting European integration. Due to preliminary rulings and the doctrines of direct effect and supremacy, the court has been able to make sure that EU laws are applied uniformly in the EU, promoting legal harmony which further improves integration.

However, European integration has faced some major challenges in recent times due to *Brexit* and the general rise of right-wing nationalism. During the *Brexit* referendum, the constraints that EU law puts on domestic policy were widely discussed, as policy attempts to restrict EU migrants' access to benefits in the UK were heavily constrained under CJEU case law.[141] This is therefore an example of the practices of the CJEU negatively impacting integration.

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[137] Dimitrakopoulos I, 'Conflicts between EU law and national constitutional law in the field of fundamental rights' <http://www.ejtn.eu/PageFiles/17318/DIMITRAKOPOULOS%20Conflicts%20between%20EU%20law%20and%20National%20Constitutional%20Law.pdf> on 16 December 2020, 6.

[138] Dimitrakopoulos I, 'Conflicts between EU law and national constitutional law in the field of fundamental rights', 7.

[139] Dimitrakopoulos I, 'Conflicts between EU law and national constitutional law in the field of fundamental rights', 8.

[140] Dimitrakopoulos I, 'Conflicts between EU law and national constitutional law in the field of fundamental rights', 9.

[141] Blauberger M and Schmidt S, 'The European Court of Justice and its political impact' 40 *West European Politics* 4, 2017, 918.

4.5 Conclusion

This chapter answers the third and fourth research questions – on the history and experiences of the CJEU as compared to the EACJ and what the EACJ can learn from the CJEU. It shows that in comparison to the EAC, the EU has achieved a deeper level of integration. The actions of the CJEU, in partnership with the ECtHR and national courts, were instrumental in this. Among these were the development of the doctrines of direct effect and supremacy. While the EAC Treaty does provide for direct effect, EAC law does not have the same level of supremacy that EU law has over domestic law, and therefore the EACJ does not have the same level of supremacy that the European courts have in Europe. This is worsened when considering that unlike the European courts, the EACJ does not have an official jurisdiction on human rights matters. Therefore, there are higher possibilities of concurrent jurisdiction and overlapping judgements.

However, this does not mean that the EACJ should blindly institute similar bodies or try to emulate the CJEU. Account should be taken of the different histories and experiences of the regions.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter will conclude the research by restating and giving an answer to the research questions in addition to summarising the main points of the research. It will then give some recommendations based on the research done.

5.2 Conclusion

The first research question involved a perusal of the relationship between States and international human rights tribunals. Specifically, this involved an examination of theories on why States delegate by forming international tribunals and afterwards, why they comply with the decisions of these tribunals. Through these theories, the importance of a clear and explicit human rights jurisdiction to the promotion of human rights in the EAC as a whole can be seen. In essence, delegation by Partner States to the EACJ would benefit both parties and enhance observance of human rights in the region. Additionally, Partner States would be compelled to follow the decisions of the EACJ in order to continue enjoying the benefits of compliance.

The second research question required looking into the history of the EACJ and the CAEA. This research found that the EACJ's jurisdiction was limited for a several reasons. First, the Partner States resisted the idea of a court similar to the CAEA, wanting a court with limited jurisdiction that would not hold them to account for their actions towards their citizens. Secondly, the Partner States had already developed their own appeal structures following the collapse of the original EAC, nullifying the need for a regional appeals court. Thirdly, the Partner States stated that one of the reasons that the Partner States gave for this limitation was in order to avoid overlap with national courts. However, through creative interpretation of Articles 6 (d) and 7 (2) of the EAC Treaty, the EACJ started deciding on cases involving human rights violations in 2007 with the *Katabazi* case.

Further, the second research question involved looking at the possibility of overlap between the human rights practices of the EACJ and national courts and thus possible conflict. The research found that there is an overlap in their roles, considering that they both have the jurisdiction to hear matters relating to the application of the Treaty. Additionally, the Court listens to cases directly from individuals and lacks an exhaustion of local remedies clause. While this is mitigated by the 2-month rule, the research points out the problems that arise from this rule. The research also links this overlap to the relative weakness of the EACJ in terms of

establishing its legitimacy. It therefore deduces that the overlap undermines the authority of the EACJ and the EAC in general.

The third research question required a comparative study between the EACJ and the CJEU. While there are several similarities between the two, the CJEU has been more able to create a harmonious and working relationship with national courts. This is due in part to the primacy of EU law over national laws. The EU Member States and their courts are required to implement EU standards with regards to fundamental rights. This is reinforced by the existence of the EU Charter of Fundamental Rights. Another reason for this is that the court takes a more cautious approach when it comes to human rights, mainly listening to preliminary hearings and cases against EU bodies. It has also existed for much longer, thereby having more time to cement its authority.

The above tied into the fourth research question, which concerned the lessons that the EAC could draw from the experience of the CJEU. The main lesson drawn was that the EACJ's human rights jurisdiction should be clearly expressed. In order to make this jurisdiction effective, the EACJ should cement its primacy over human rights in the region in order to effectively ensure the protection of human rights. Additionally, the EACJ and national courts should cooperate in the form of preliminary hearings. Otherwise, the research concluded that the CJEU and the EACJ are different courts in different regions and that lessons from the CJEU should not be applied in East Africa without considering these differences.

5.3 Recommendations

5.3.1 Extension of human rights jurisdiction

The EAC Treaty envisages the deepest form of integration – a political federation. The steps to this include the formation of Customs Union, a Common Market, a Monetary Union, before the ultimate formation of a political federation. All these require the protection of human rights and the EACJ is the best suited organisation to protect them. While all the EAC Partner States are members of the African Union, the EAC is the best suited organisation to protect human rights in the region since it is in a better position to understand the human rights contexts and peculiarities of the East African Region. Therefore, it is only right that the EACJ, as the judicial organ of the EAC, has human rights jurisdiction to effectively protect human rights in the region. This is also backed up by the fact that a large percentage of the court's practice consists of human rights cases. In order to make the court more effective in handling these cases, human rights jurisdiction should be extended.

As mentioned in Chapter 3, while issues of overlap cannot be fully resolved, rules of jurisdiction can help to reduce them. As illustrated in Chapter 4, the form of practice of the different courts also helps in this. Therefore, while the overlap between the EACJ and the national court further weakens the court, carefully negotiated human rights jurisdiction could help to strengthen it and delineate the roles of the different courts. This would also, of course, prevent the Partner States from using Article 27 (2) and a possible overlap as an escape route.

Specifically, regarding practice, the court could be structured to mainly hear preliminary rulings regarding human rights matters and human rights cases in which integration is a major factor, for example cases regarding free movement in the region. In the meantime, the court should be more cautious and avoid provoking the Partner States.

5.3.2 Approval of the EAC Human and Peoples' Rights Bill

In order to make the EACJ even more effective, the EAC Human and Peoples' Rights Bill should be approved. This is an important asset to have for the EACJ to be able to harmonise human rights laws in the region. Currently, the EACJ relies on ensuring that principles of the Treaty are followed. A specific human rights instrument would strengthen the EACJ's rulings. It could also encourage more referrals of hearings for preliminary jurisdiction. This would further encourage legal harmonisation in the region.

5.3.3 Lessen tensions between the Partner States and the EACJ, including other EAC Bodies

Tensions between the Partner States and the EACJ are not conducive to the integration process. They are also not conducive to the court itself, since it relies to some extent on the Partner States for its duties and power. The EACJ also exists in a very politicised environment, which is caused by and exacerbates these tensions. Therefore, some measures have to be taken by the court to deal with this environment. These may include writing credible and well-reasoned decisions while taking care not to raise the hackles of the Partner States too much.[142] Additionally, the court should, in exercising judicial activism, try to keep the Partner States in mind – they should not go too far too fast. Further, the court should strengthen its relationship with compliance constituencies such as legal practitioners, judges, and magistrates by holding seminars and workshops.[143]

[142] Possi A, 'The East African Court of Justice', 329.
[143] Possi A, 'The East African Court of Justice', 329.

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