

The East African Court of Justice as a Pivotal Institutional Pillar of Cross Border Justice

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List of Abbreviations

BAT - British American Tobacco

EAC – East African Community

EACJ - East African Court of Justice

EACSOFF - East African Civil Society Organisations' Forum

ILC – International Law Commission

URA - Uganda Revenue Authority

USD – United States Dollar

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1. Introduction

The East African Court of Justice (the **EACJ** or the **Court**) was established in November 2001 under the auspices of the Treaty for the Establishment of the East African Community (the **EAC Treaty**).¹ The Court, which is temporarily based in Arusha, Tanzania, celebrated its 20th anniversary since its inception in November 2021. Originally, the EACJ had one chamber, and this was amended in March 2007 by the creation of an Appellate Chamber making the EACJ a two-chamber Court.² The EACJ's fundamental responsibility is to ensure the adherence to law in the interpretation and application of and compliance with the EAC Treaty.

Since its inception, the prevailing belief has been that the purpose of the EAC Treaty in establishing the EACJ has been limited to it being a 'trade and investment' court. Evidently, 3 out of the 4 major stages of the East African Community (**EAC**) regional integration under the EAC Treaty involves trade and economic integration – the customs, common market, and monetary union stages. The limits of the jurisdiction of the EACJ have been a key point of controversy within the legal profession, not only within the Community, but also international law scholars.

The EACJ has been a pillar of cross border justice for litigants who have sought wrongs committed under the EAC Treaty addressed. The Court has heard claims from private litigants' resident in the Partner States bringing claims against other Partner States as well as suing their own States. The latter has been the predominant feature with claims brought before the Court that have a human rights and rule of law character.

¹ Treaty for the Establishment of the East African Community, <https://www.eacj.org/?page_id=33> accessed on 22 October 2021.

² Article 23, Treaty for the Establishment of the East African Community, <https://www.eacj.org/?page_id=33> accessed on 22 October 2021.

As earlier stated, the EAC was established as a vehicle for promoting trade and economic links among the Partner States. However, the EACJ, since inception, has routinely engaged in work pertaining to the protection and promotion of human rights. This has been regardless of the fact that the founding instruments provides that its human rights jurisdiction will be determined at a *'suitable subsequent date'* once Partner states *'conclude a protocol to operationalise the extended jurisdiction'*.³

As James Thuo Gathii provides, the EACJ's redeployment from being a predominantly trade to human rights court is in direct contrast to the European model on which the EAC Treaty is based; and is indicative of an institutional flexibility than has not nearly been possible in international courts elsewhere.⁴ That by defying the distinct compartmentalization of trade and human rights courts, the EACJ is part of a movement of African international courts that have broken the post-second world war distinction of separate courts for trade, on the one hand, and for human rights, on the other.⁵

As part of the celebrations of the 20th Anniversary of the Court, this paper seeks to show, by a review of various EACJ's jurisprudence, how the EACJ has used its regional position as a pivotal institutional pillar in the promotion of cross border justice – which in effect, promotes the fundamental⁶ and operational⁷ principles of the EAC under the EAC Treaty. In particular, this paper will focus on resulting progressive jurisprudence emanating from the Court in making determinations relating to the promotion of the fundamental principle of rule of law, with particular focus on the promotion and protection of human and people's rights. This paper will also briefly look into an EACJ decision which has upheld the promotion of export-oriented

³ Article 27(2), Treaty for the Establishment of the East African Community, <https://www.eacj.org/?page_id=33> accessed on 22 October 2021.

⁴ Gathii J, The Promise of International Law: A Third World View, 2020 Grotius Lecture, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509> accessed on 29 October 2021, pg. 9.

⁵ Ibid, pg. 10.

⁶ Article 6, Treaty for the Establishment of the East African Community, <https://www.eacj.org/?page_id=33> accessed on 29 October 2021.

⁷ Article 7, Treaty for the Establishment of the East African Community, <https://www.eacj.org/?page_id=33> accessed on 29 October 2021.

economy within the EAC as envisaged by the EAC Treaty⁸ by promoting the free movement of goods within the EAC.

We have divided this paper into 5 parts, namely:

- a. part one which is this introduction;
- b. part two, which summarises the jurisdiction of the EACJ as enshrined in the EAC Treaty;
- c. part three looks into decisions by the EACJ which have led to the promotion of the rule of law and protection of human and people's rights (within the limits set out in the Treaty and without the express authority of a Protocol to that effect) as well as the promotion of free movement of goods within Partner States;
- d. part four analyses the implications of the EACJ's progressive jurisprudence in the promotion of cross border justice in the EAC; and finally,
- e. part 5 concludes and provides the way forward.

2. An Overview of the EACJ's Jurisdiction

The EACJ Treaty provides the EACJ with jurisdiction “**over the interpretation and application**” of the EAC Treaty (emphasis added).⁹ The EACJ Treaty clothes the EACJ with original, appellate, human rights and other jurisdiction, as will be determined by the EAC Council Partner from time to time.

As regards disputes which may be brought before the EACJ, the EACJ has the jurisdiction to hear and determine:

- a. disputes involving a Partner State's failure to fulfil its Treaty obligations, or infringement of Treaty provision(s), including the legality of any law or action of the Partner State which does not conform to the Treaty; or where a Partner State refers the

⁸ Article 7(1)(c), Treaty for the Establishment of the East African Community, <https://www.eacj.org/?page_id=33> accessed on 29 October 2021.

⁹ Article 27, Treaty for the Establishment of the East African Community, https://www.eacj.org/?page_id=33 accessed on 29 October 2021.

matter directly to the Court¹⁰— after the Council of Ministers has failed to resolve the dispute.¹¹

- b. references by legal persons (i.e., entities other than human individuals) or natural persons (individuals) who are resident in any Partner State, who wish to challenge the legality of actions of a Partner State or of the Community as infringing the EAC Treaty.¹²
- c. disputes between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations.¹³
- d. disputes involving the Community, the Partner States, or others regarding the EAC Treaty or a commercial contract, if the dispute is submitted to the Court under a special arbitration agreement or arises out of an arbitration clause contained in a contract or agreement conferring such jurisdiction on the Court;¹⁴ and
- e. requests made to the Court by the Partner States' national courts for preliminary rulings on the interpretation of the EAC Treaty.¹⁵

With the EAC Treaty's objectives overtly commercial and economic, one would not be mistaken to observe that the EACJ's jurisdiction is primarily related to the resolution of commercial and trade related disputes.¹⁶ Indeed, the issue relating to expanding the Courts jurisdiction as envisaged under Article 27 was up for debate in November 2013 at the 15th Ordinary Summit of the EAC's Heads of State. Under the Communique of the Summit Meeting, a decision was made to defer conferring the EACJ with jurisdiction over human rights and to instead consult with the

¹⁰ Article 28, Treaty for the Establishment of the East African Community, https://www.eacj.org/?page_id=33 accessed on 29 October 2021.

¹¹ Article 29, Treaty for the Establishment of the East African Community, https://www.eacj.org/?page_id=33 accessed on 29 October 2021.

¹² Article 30, Treaty for the Establishment of the East African Community, https://www.eacj.org/?page_id=33 accessed on 29 October 2021.

¹³ Article 31, Treaty for the Establishment of the East African Community, https://www.eacj.org/?page_id=33 accessed on 29 October 2021.

¹⁴ Article 32, Treaty for the Establishment of the East African Community, https://www.eacj.org/?page_id=33 accessed on 29 October 2021.

¹⁵ Article 34, Treaty for the Establishment of the East African Community, https://www.eacj.org/?page_id=33 accessed on 29 October 2021.

¹⁶ Article 27, Treaty for the Establishment of the East African Community, https://www.eacj.org/?page_id=33 accessed on 22 October 2021.

African Union on the matter.¹⁷ The Summit did however extend the court's jurisdiction over trade and investment cases as well as cases arising under the EAC's Monetary Union treaty.

3. Jurisprudential Analysis of EAC Decisions which have promoted Cross Border Justice

i. Decisions which promote human and peoples' rights in the EAC

As we have established in this paper, the EACJ was primarily conceived as a trade and investment Court. The Court has heard various cases instituted by Applicants aggrieved by infringements by Partner States of the principles governing the established free trade zone established within the EAC.

One notable example is the case of *British American Tobacco (U) Ltd v the Attorney General of Uganda*.¹⁸ In this case, the Ugandan Excise Duty Amendment Act, 2017 (the **Amendment Act**) introduced designated differential excise duty rates for cigarettes locally manufactured in Uganda and for imported cigarettes. Under the Amendment Act, imported cigarettes attracted a higher excise duty rate than locally manufactured cigarettes.

The Uganda Revenue Authority (**URA**) applied domestic law to interpret the words "*import*" as used in the Amendment Act to include cigarettes manufactured in other EAC countries including Kenya. As such, British American Tobacco (**BAT**) Uganda was subjected to the higher excise duty rate on importation of cigarettes from its sister company, BAT Kenya. Aggrieved by this differential treatment and discrimination by the Ugandan government with respect to goods originating from EAC Partner States, BAT Uganda lodged a reference before the EACJ challenging the Amendment Act and the legality of taxes assessed by the URA under its interpretation of the Amendment Act.

¹⁷ Communiqué of 15th Ordinary Summit Meeting
<<http://repository.eac.int/bitstream/handle/11671/546/Annex%20VI-COMMUNIQUE%20OF%20THE%2015TH%20ORDINARY%20SUMMIT%20OF%20HEADS%20OF%20STATE.pdf?sequence=1&isAllowed=y>> accessed on 22 October 2021.

¹⁸ British American Tobacco (U) Ltd v The Attorney General of the Republic of Uganda, Reference No 7 of 2017
<<https://www.eacj.org/?cases=reference-no-7-of-2017-british-american-tobacco-u-ltd-vs-the-attorney-general-of-uganda>> accessed on 1 Nov 2021.

In its determination, the First Instance Division of the EACJ found Uganda violated Article 75(6) of the Treaty and Article 15 of the Customs Union Protocol by introducing and applying discriminatory administrative measures on goods originating from other EAC Partner States. The First Instance Division further held that Uganda violated Article 6(1) of the Common Market Protocol by limiting free movement of BAT's goods; and the URA misconstrued the term "import" as used in the Amendment Act by failing to apply the definition of import in the Treaty and Customs Union Protocol – as goods manufactured within the EAC are not imports.

However, more significantly for this part of the paper is the evident expansion of the limits of the EACJ's jurisdiction to incorporate human right claims which has established the role of the Court as an avenue for seeking justice for citizens of the Partner States against wrongs committed by the Partner States themselves. We provide below an exposition on a select number of cases that have been instituted before the EACJ in which its jurisdiction over human rights issues has been contested.

a) James Katabazi and 21 Others v. Secretary General of the EAC and the Attorney General of the Republic of Uganda.

The *James Katabazi*¹⁹ case was one of the earliest cases in which the Court adopted a human rights jurisdiction. In this case, fourteen of the applicants (the **Applicants**) before the Court were detained on treason charges in 2004. On 16 November 2006, the Ugandan High Court in a ruling granted bail to the Applicants. Immediately after the ruling was delivered, the High Court building was surrounded by security personnel who prevented the Applicants from leaving, took them into custody and thereafter brought them before the Court Martial.

On 24 November 2006, the Applicants were convicted by the General Court Martial on additional charges of unlawful possession of firearms and terrorism. Despite the ruling by the Ugandan

¹⁹ EACJ First Instance Division, Ref. No. 1 of 2007 <<https://www.eacj.org/wp-content/uploads/2012/11/NO. 1 OF 2007.pdf>> accessed on 24 October 2021.

Constitutional Court that the security personnel's interference was unconstitutional, the Ugandan government allowed the Applicants to remain in jail.

The Applicants submitted to the EACJ that by its actions, the Ugandan government violated the rule of law, thus violating the EAC Treaty. They additionally submitted that the rule of law principle requires that public affairs are conducted in accordance with the law and decisions of the Court are respected, upheld, and enforced by all agencies of the Government and citizens. They contended that the actions of the Partner State of Uganda and its agencies were in blatant violation of the Rule of Law and contrary to the EAC Treaty's fundamental principles.

The Applicants argued the invasion of the High Court premises by armed men to prevent the enforcement of the Court's decision granting bail, and their re-arrest and incarceration constituted an infringement of the EAC Treaty, and that the Secretary General of the East African Community was required to have investigated this violation.

The Court addressed itself to the question of whether it possess a human rights jurisdiction and provided as follows:

"... Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No, it does not have. ... It very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights per se..."

However, the Court held that while it does not have jurisdiction over human rights violations, it may still consider cases if they fall under one of the provisions of Article 27(1), which sets out the jurisdiction of the Court, even if it also includes a human rights violation. In doing so, the Court provided as follows:

".... However, let us reflect a little bit.... Article 6 sets out the fundamental principles of the Community which governs the achievement of the objectives of the Community, of course

*as provided in Article 5 (1). Of particular interest here is paragraph (d) which talks of the rule of law and the promotion and the protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. Article 7 spells out the operational principles of the Community with the undertaking by the Partner States in no uncertain terms of Sub-Article (2): The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, **the rule of law**, social justice and **the maintenance of universally accepted standards of human rights**. (Emphasis supplied)..."*

The Court further provided that a fundamental role of the Court is to interpret the Treaty,²⁰ which includes 'respect for the rule of law' as provided under Article 6(d) of the Treaty. The Court stated that the overriding consideration of the rule of law is that both the rulers and the governed are equally subject to the same law of the land. It was the role of the Ugandan judiciary to check the executive and protect the rule of law, and the intervention of the armed security agents violated the principle of the rule of law under the EAC Treaty.

Additionally, the Court found fault with the Secretary General of the EAC citing as follows:

"...the powers that the Secretary General has under Article 29 are so encompassing and are pertinent to the advancement of the spirit of the re-institution of the Community and we dare observe that the Secretary General ought to be more vigilant than what his response has portrayed him to be...the moment this application was filed ...he then became aware, and if he was mindful of the delicate responsibilities he has under Article 29, he should have taken the necessary actions under that Article. That is all that the complainants expected of him: to register with the Uganda Government that what happened is detestable in the East African Community..."

²⁰ Article 27 (1) Treaty for the Establishment of the East African Community, <https://www.eacj.org/?page_id=33> accessed on 22 October 2021.

The Court therefore came to the finding that the Reference succeeded but did not proceed to award any form of damages.

b) Plaxeda Rugumba v. Secretary General of the EAC and the Attorney General of the Republic of Rwanda²¹

This was a dispute that was first heard before the First Instance Division and subsequently heard by the Appellate Division. This dispute was unique because it brought to the fore some limitations that exist given that there is no Protocol that provides for detailed rules as to the operationalisation of the EACJ's human rights jurisdiction. The Court stayed true to its objective of maintaining progressive jurisprudence by relying on the African Charter on Human and Peoples' Rights as provided under Article 6 (d) of the Treaty while being very careful not to impute overtly non-existent provisions within the meaning of the Treaty such as the doctrine of exhaustion of local remedies.

(i) First Instance Division

In this case, the Applicant, the sister of Lieutenant Colonel Seveline Rugigana Ngabo, submitted to the Court that the Rwandan government committed human rights violations when her brother was arrested and detained without trial. He was held in custody without justification from 20 August 2010 to 28 January 2011, and no information on Lieutenant Ngabo, or any details concerning his detention, was given to his family. Further, he had not been formally charged in court and his wife could not file for his release because her efforts in doing so led to harassment, forcing her to go into hiding.

The Applicant argued that the arrest and detention of her brother without trial and Rwandan authorities' failure to investigate constituted breaches of the Community's good governance and human rights principles under Articles 6(d) and 7(2) of the EAC Treaty.

²¹ EACJ First Instance Division, Reference No. 8 of 2010 <<https://www.eacj.org/wp-content/uploads/2012/11/Plaxeda-Rugumba-2010-8-judgment-2011.pdf>> accessed on 24 October 2021.

The Attorney General of the Republic of Rwanda submitted that the Court lacked jurisdiction to deal with human rights claims and has no jurisdiction to hear claims that are pending before a lawful Court in Rwanda and which Court is yet to issue a verdict on the said matter. It was further contended that the EACJ should only be considered as a Court of last resort when National Courts are unwilling or unable to render justice to the people in their various jurisdictions.

The First Instance Division found that the Rwandan government had breached principles of good governance and rule of law under the Treaty, and that these provisions also included jurisdiction to interpret whether the State had promoted or protected human and peoples' rights in accordance with the African Charter of Human and Peoples Rights.

Rwanda submitted that the Court lacked jurisdiction to deal with human rights claims and has no jurisdiction to hear claims that are pending before a lawful Court in Rwanda and which Court is yet to issue a verdict on the said matter. Rwanda further contended that the EACJ should only be considered as a Court of last resort when National Courts are unwilling or unable to render justice to the people in their jurisdictions.

In determining the question of jurisdiction, the First Instance Division relied on the decision in the *James Katabazi case*. It held that the key issue brought before it was whether Rwanda breached the principles of good governance, democracy, rule of law, social justice, and the maintenance of universally accepted standards of human rights as set out under Article 6(d) and 7(2) of the Treaty.

The First Instance Division held that it would be absurd and a complete dereliction of its oath of office to refuse to do so long as the aforementioned principles are part of the EAC Treaty. Additionally, the First Instance Division maintained that while it was not its responsibility to interpret the enforcement of any human right available for it would *obviously have no jurisdiction* (emphasis added) that the Court *could only make certain declarations* (emphasis added) within the mandate of the Court, of which jurisdiction exists.

The First Instance Division further held that the Applicant was not barred for a failure to exhaust all local remedies – a requirement under customary international law, as there is no such requirement to exhaust local remedies under the EAC Treaty. Furthermore, the remedy she was seeking could not be granted by any court in Rwanda because the EACJ is the only Court with the jurisdiction to hear a claim that alleges a violation of the EAC Treaty. In this regard therefore, the Court provided as follows:

‘...the invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States hence the words that Partner States must bind themselves to the “adherence to the principles of democracy, the rule of Law ...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...”’.

Therefore, the Court made a declaration that the Acts carried out by the Rwandan government were an infringement of the principles that human rights ought to be protected and promoted within the Community.

(ii) Appeal²²

The Attorney General of Rwanda lodged an appeal against the ruling by the First Instance Division, arguing that the EACJ had no jurisdiction to hear the case, as the Respondent had not exhausted all local remedies available, and that the arrest of the Respondent’s brother did not amount to a human rights violation because it was done pursuant to Rwandan law.

The Appellate Division found that although the EACJ does not yet have jurisdiction to adjudicate disputes concerning human rights per se, Article 6(d) of the EAC Treaty and Article 6 of the African Charter allow the Court to assert jurisdiction over this claim. The fact that Lieutenant Ngabo was

²² EACJ Appellate Division, Appeal No. 1 of 2012 <<https://www.eacj.org/wp-content/uploads/2012/11/Appeal-No-1-of-2012.pdf>> accessed on 24 October 2021.

held without justification for 5 months was not in dispute, as the Rwandan government had stipulated that his detention was in accordance with Rwandan national law. However, the Appellate Division found that his incommunicado detention was not transparent, and thus amounted to violations of Articles 6(d) and 7(2) of the Treaty (rule of law, good governance, transparency, and human rights).

On the issue of the exhaustion of local remedies, the Appellate Division considered that this was a rule of customary international law. It recognised that while the Court could be flexible and purposeful in the interpretation of the principle of the exhaustion of local remedies the Court, it must be careful not to distort the express intent of the EAC Treaty. In this regard, therefore, the Appellate Division upheld the decision of the First Instance Division.

c) Martha Wangari Karua v the Attorney General, Republic of Kenya²³

This recent decision takes the limits of the Court's human right jurisprudence a step further from the *Plaxeda Case* above. This is because the First Instance Division of the Court not only made declaratory order regarding violation of the rights of the Applicant but also awarded general damages as compensation for the wrongful act committed by the Respondent State against the Applicant's fundamental right under the EAC Treaty.

The Applicant's Reference to the court was premised on the failure by Kenya, through acts and omissions of its judicial organ to abide by the fundamental and operational principles of good governance, rule of law, democracy, and human rights as enshrined under articles 6(d) and 7(2) of the EAC Treaty.

On 8th August 2017, the Applicant participated in the Kenyan General Election as a gubernatorial candidate of Kirinyaga County and lost. Dissatisfied with the election results, she lodged an election petition challenging the election. The petition was preliminarily struck down by the High

²³ EACJ First Instance Division, Ref No. 20 of 2019 < <https://www.eacj.org/wp-content/uploads/2020/12/JUDGMENT4.pdf> > accessed on 25 October 2021.

Court of Kenya on grounds relating to its compliance with Kenyan electoral laws. The Applicant challenged the High Court's decision before the Court of Appeal which agreed with her position and remitted the matter back to the High Court for determination on the merits.

The High Court rendering its decision on the merits dismissed the petition. Aggrieved by the High Court decision, the Applicant sought redress from the Court of Appeal but lost on both a point of law and the substantive grounds of Appeal. The Court of Appeal held that the High Court lacked the jurisdiction to hear the Election Petition after the lapse of the six-month period for hearing petitions as prescribed by law. The Supreme Court upheld the decision of the Court of Appeal.

The Applicant submitted that whereas the Elections Act does indeed restrict the hearing and determination of election petitions to six months from the date of filing, and another six months for determination of appeals, the law is silent on timelines for the hearing of remitted petitions upon successful appeal.

On its part, the Respondent contested the jurisdiction of the EACJ to entertain appeals from the decision of domestic courts. It submitted that the Court lacks jurisdiction in so far as the Applicant seeks to have the Court sit in appellate jurisdiction over a decision of the apex municipal court in Kenya.

In making its determination, the First Instance Division cited, as persuasive authority, the decision reached by the Appellate Division in the case of *The East African Civil Society Organisations' Forum (EACSOFF) vs The Attorney General of the Republic of Burundi & Others*,²⁴ where it pronounced itself as follows:

"... The Reference before the Trial Court was not a further appeal from the Decision of the Constitutional Court of Burundi. It was a reference on the Republic of Burundi's international responsibility under international law and the EAC Treaty attributable to it

²⁴ EACJ, Reference No 2 of 2015, <<https://www.eacj.org/?cases=east-african-civil-society-organisations-forum-eacsoff-v-attorney-general-of-the-republic-of-burundi>> accessed on 25 October 2015

by reason of an action of one of its organs, namely the Constitutional Court of Burundi. The trial court had a duty to determine this international responsibility and in so doing, it has a further duty to consider the internal laws of the Partner State and apply its own application thereof to the provision of the Treaty...”.

In adopting a similar finding, the First Instance Division held that it was well within the purview of its mandate to interrogate the decision of the Supreme Court of Kenya, not as an appellate court, but with a view to determine whether the Supreme Court of Kenya’s decision was arrived at in compliance with the EAC Treaty.

Additionally, the Court addressed itself as to the decision of the Supreme Court on whether it was an infringement of the Applicant’s right to access to justice and fair trial contemplated in the rule of law principle under Article 6(d) of the EAC Treaty. The Applicant had contended that the Supreme Court ought to have considered a six-month period for cases remitted on appeal to avert the absurdity of rendering nugatory her right of appeal.

The Court held that from an access to justice perspective, the impugned Supreme Court decision was deeply troubling. This was supported by the position that in the first instance, the Applicant had a right of appeal from the High Court’s decision and the Court of Appeal was also within its remit to overturn the High Court decision and refer the matter back for a decision on the merits. With the High Court unable to determine the matter within the time fixed by statute, her appeal was rejected on grounds of being out of time – thus prejudicing the Applicant.

The significant contribution made in the *Martha Karua Case* regarded the remedies that the Court granted to the Applicant. In arriving at a decision to award general damages, the Court provided that the full effectiveness of EAC Laws requires the Court to grant effective relief in the breach of such law. Otherwise, such laws would be not more than pious platitudes. The Court cited Article 35 and 36 of the International Law Commissions’ Articles on State Responsibility to

include reparation and compensation as remedies in international law.²⁵ The Court proceeded to grant the claim for compensation for the damage caused as a result of the wrongful act to the tune of USD 25,000 with simple interest at 6% until full payment.

ii. Decision which upheld the promotion export-oriented economy within the EAC as envisaged by the EAC Treaty by promoting the free movement of goods within the EAC

a) **British American Tobacco (U) Ltd v the Attorney General of Uganda (supra)**

b) **Kioo Limited v Attorney General, Republic of Kenya²⁶**

This case was instituted on the back of the Republic of Kenya's (hereinafter **Kenya**) enactment into law of the Business Laws (Amendment) Act, 2020 on 18 March 2020 which had introduced excise duty at the rate of 25% on imported glass bottles irrespective of origin.

Kioo Ltd, a company domiciled in the United Republic of Tanzania (**Tanzania**) that is engaged in the manufacture of container glass for soft drinks, beer and the food industry sought interim orders against Kenya on the newly introduced excise duty on imported glass bottles.

Kioo submitted to the Court that imposition of excise duty on glass imported from EAC Partner States has the effect of discriminating against its glass products as against like glass products manufactured in Kenya. This, in their submission, would render their glass products exported to Kenya uncompetitive in the Kenyan market. Kenya, in its defence submitted that the measure was a safeguard measure within the domestic glass manufacturing industry intended to contain the effect of cheap imported glass product.

The EACJ in arriving at its conclusion to grant the interim orders provided that the issues raised by the Applicant were indeed weighty issues that called for a determination of non-

²⁵ ILC, *Articles on State Responsibility*

<https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 25 October 2021

²⁶ EACJ First Instance Division, Ref No. 13 of 202 <<https://www.eacj.org/wp-content/uploads/2020/11/RULING.pdf>> accessed on 25 October 2021.

discriminatory safeguard measures within the letter of the Treaty, Customs Union, and Common Market Protocols. Additionally, the Court provided that should it not grant the interim orders, irreparable injury would be occasioned upon the Applicant adversely impacting its business operations in a manner that could not be adequately compensated by an award of damages.

The Kioo Reference (which is still ongoing) is an interesting dispute as it is one of the few References which have been filed by a resident of one EAC Partner State (in this case Tanzania) against another EAC Partner State (in this case Kenya). As is evident from the decisions above, a vast majority of References filed at the EACJ relate to disputes between one EAC Partner State and its residents.

4. Implications of the EACJ's progressive jurisprudence in the promotion of cross border justice in the EAC

As has been evidenced above, the EACJ in progressively expanding the limits of its overt jurisdiction under the EAC Treaty has been debated by scholars and there seems to be emerging two contesting ideas on its implications. On the one hand, the creeping jurisdiction of the EACJ into human rights can be risky as the resulting judicial innovation/activism without express treaty provisions will result in the Court's decisions being disregarded and backlash against the Court will ensue.²⁷ Contrastingly, others would view the expansion of the Court's jurisdiction as one that is progressive and seeks to ensure that rule of law, good governance and human rights are integral pillars of the economic integration objectives of the Community.

Recently, the progressive jurisprudence emanating from the EACJ has been received favourably by national courts, who have relied on the decisions as persuasive authority. For instance, the Kioo ruling (*supra*) was relied upon by Hon. Justice Mrima of the High Court, Constitutional and Human Rights division, in granting interim conservatory orders,²⁸ relied on the Kioo ruling to find

²⁷ Africa's post-colonial history has witnessed a tradition of strong executive branches, weak judiciaries, and a reluctance on the part of political leaders to openly challenge the actions of other African governments.

²⁸ Petition No. E258 of 2021 – Okiya Omtata Okioti v the Hon. Attorney General of the Republic of Kenya.

that the impugned amendments in question were weighty as there was a possibility of them brewing conflict within the EAC Partner States. The Judge held as follows:

“...In undertaking such a consideration, there are several issues which come to the fore...Four, there is a threat to the relations between Kenya and the other East African Community countries pursuant to a decision by the East African Court of Justice on the imposition of a 25% tax on imported glass products...Indeed the matter is very unique in several ways including the rejection by the Ministry of National Treasury and Planning to impose the tax in issue and the possibility of brewing conflict with other member states within the East African Community...”

Similarly, the Kenyan National Assembly took a positive note of the ruling in Kioo Ltd case as during the Committee Stage of the Finance Bill, 2021 (the **Bill**), the National Assembly Committee proposed the introduction of a proviso to the Excise Duty Act, 2015 to the effect that glass bottles imported from any of the countries within the East African Community will not be subjected to the 25% excise tax, which is the subject of the Kioo Reference. This proposal was approved by the National Assembly and was introduced in the Finance Act, 2021, which commenced on 1 July 2021.

However, not all decisions by the EACJ are received favourably by EAC Partner States, as backlash against the EACJ for making a ruling that was unfavourable to a Partner State is nothing new. To illustrate, Kenya was instrumental in the first raft of amendments that were made to the EAC Treaty to curb the expansive jurisdiction of the EACJ within 5 years of its inception. Kenya, in the first election of members to the East African Legislative Assembly (hereinafter **EALA**) had divided the seats among its political parties in accordance with their respective strength in Parliament. Prof Anyang Nyong’o in the case of **Anyang Nyong’o v Attorney General of Kenya**,²⁹ challenged Kenya’s decision on the basis of Article 50 of the EAC Treaty which requires an election for seats

²⁹ Reference No 1 of 2006 <https://www.eacj.org/wp-content/uploads/2012/11/EACJ_Reference_No_1_2006.pdf> accessed 28 October 2021.

in the EALA. Article 50 provides that the nine members elected should “represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State”.³⁰ Subsequently, the EACJ issued an interim ruling pending the hearing and determination of the suit, barring EAC officials from recognizing Kenya’s EALA nominees. This decision by the Court was not taken well by the Kenyan government and it consequently began a campaign to kill the sub-regional court and exert greater control over its judges.

As Alter et al provide, two aspects of the ruling were important in driving Kenya’s furious backlash.³¹ On the one hand, Kenya viewed the decision as an unwelcome external interference in a sensitive domestic political dispute. On the other hand, Kenya objected to the Court’s conclusion that its interpretation of the EAC Treaty binds national courts and that the standing and exhaustion of domestic remedies doctrines did not bar the Court from hearing suits from private litigants.³²

Kenya ultimately succeeded in making amendments to the EAC Treaty that curbed the EACJ’s authority. As Alter et al provide, Kenya’s treaty revision proposal had various goals: to pressure the judges to avoid further adverse rulings in the Nyong’o case, to restrict the Court’s ability to hear cases from private litigants, to establish an appellate chamber staffed by pro-government jurists and to create a procedure to remove judges for misconduct.³³

Consequently, the Kenya-led amendments introduced an Appellate Division, added new grounds for removing or suspending EACJ judges due to allegations of ‘misconduct’ in their home

³⁰ Article 50, Treaty for the Establishment of the East African Community<https://www.eacj.org/?page_id=33> accessed on 22 October 2021.

³¹ J. Alter, J Gathii and L Helfer, ‘Backlash against International Courts in West, East and Southern Africa: Causes and Consequences Karen’, The European Journal of International Law, Vol 27(2) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship> accessed on 28 October 2021.

³² Ibid, pg. 302.

³³ Ibid, pg. 304.

countries and provided for a two-month time limit for private litigants to file complaints challenging national actions or decisions that are contrary to the Treaty.³⁴

These amendments seemed to work in Kenya's favour in the case of ***Independent Medico Legal Unit v Attorney General of Kenya***.³⁵ This case involved the forcible disappearance, torture, and execution of approximately 3,000 Kenyan residents of Mt Elgon by Kenyan governmental authorities between 2006 and 2008. The Applicants alleged that the failure of the Kenyan government to take measures to prevent, investigate and punish those responsible for the acts constituted a violation of international human rights conventions, the Kenyan Constitution and the EAC Treaty. The EACJ, on a challenge to its jurisdiction over human rights cases held that it would not abdicate its human rights jurisdiction under the Treaty. More importantly for this case is the holding by the First Instance Division regarding the newly introduced time limitation. The complaint arose in 2008, therefore the Respondents submitted that it was barred by the limitation of time.

Article 30 (2) of the EAC Treaty provides that proceedings: 'shall be instituted within two months of the enactment, publication, directive, *decision or action complained of*, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be' (emphasis added).

The First Instance Division, in holding against the statutory time limitation provided that the matters complained of are failures in a whole *continuous chain of events* (emphasis added) from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations.

³⁴ Articles 26(1), 26(2), 27(1), 30(2) Treaty for the Establishment of the East African Community <https://www.eacj.org/?page_id=33> accessed on 25 October 2021.

³⁵ Reference No 3 of 2010, <<https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-3-of-2010-Independent-Medical-Legal-Unit-Vs-The-Attorney-General-of-the-Republic-of-Kenya-4-Others.pdf>> accessed 29 October 2021.

However, the Appellate Division overturned the holding by the First Instance Division on the time limitation.³⁶ The Court, in construing the time limitation strictly held that the Applicants became aware of Kenya's failure to take measures to prevent the human rights violations at the earliest, in 2006 and at the latest, in February 2009, which was at least one-and-half years before the Reference was brought. This decision was a direct consequence of two amendments Kenya introduced: the time limitation as well as the Appellate Division.

5. Conclusion and the Way Forward.

This paper sought to provide an exposition of the role the EACJ has played as a pivotal institutional pillar of cross border justice with an analysis of the progressive jurisprudence emanating from the Court on the place of its jurisdiction over human rights and the promotion of an export-oriented economy within the EAC.

The celebration of the Court's 20th anniversary is a celebration of its strength at withstanding backlash against member States, its' commitment to furthering justice and enshrining the principles of rule of law and human rights as foundational pillars of the Community. These principles are integral to the socio-economic development underpinning the integration agenda of the Community. There can be no equitable development without the protection of the fundamental rights and freedoms of the citizens of the Partner States.

If the Court's experience of 20 years since its inception is anything to stand by, the future of the Court as a pivotal pillar of cross border justice ought to be a positive one. However, nothing in the future is guaranteed. The Court does not operate in a vacuum. Domestically within the Partner States, the principle of judicial independence has been facing attacks as executive overreach has sought to exert control over judicial officers.³⁷

³⁶ Attorney General of Kenya v Independent Medical Legal Unit, Appeal No 1 of 2011 <<https://www.eacj.org/wp-content/uploads/2012/11/appeal-no-1-of-20112.pdf>> accessed 29 October 2021.

³⁷ Kenya is a key example. See, Imanyara G, The State of Judicial Independence in Kenya: A Persistent Concern, *The Elephant* <<https://www.theelephant.info/op-eds/2021/07/30/the-state-of-judicial-independence-in-kenya-a-persistent-concern/>> accessed 29 October 2021. For Rwanda, see, Human Rights Watch, Independence of the Judiciary, <<https://www.hrw.org/reports/2008/rwanda0708/8.htm>> accessed 29 October 2021.

The EACJ, as has been established in this paper has not been and will not continue to be immune to the influences of the Partner States. The role of other actors is especially integral in not only maintaining the role of the Court as a legitimate forum to address wrongs committed under the Treaty but also to ensure that the respect for human rights guides the actions of the State actors. These other actors, as recognised under the Treaty include the Secretariat of the EAC, civil society groups as well as the citizens of the Partner States.

Most importantly, recognition ought to be given to civil society groups and residents of the Partner States who have recognised the role the Court can play in granting them redress for wrongs they have suffered thereby granting the Court an opportunity to assert its place as a legitimate forum for obtaining justice.

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