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Litigating Human Rights Through the East African Court of Justice: Overview and Challenges

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1.0 Introduction

The East African Community (EAC) is one among the sub-Regional Economic Communities (RECs) in the African region which aimed at fostering regional economic development. The EAC as the RECs in Africa is established under the EAC Treaty, 1999. Currently the community is comprised of six partner states.[2] The partner states are; Burundi, Kenya, Rwanda, South Sudan, United Republic of Tanzania and Uganda.[3] Among other things, the EAC treaty embraces protection and promotion of human rights. It encourages partner states to protect and promote human rights. To achieve objectives of the EAC, there are organs of the community. The East African Court of Justice (EACJ) is one of the key organs mandated to adjudicate cases pertaining to the interpretation of the treaty. This paper intends to present a discussion of challenges undermining effectiveness of the EACJ in protecting and promoting human rights to EAC partner states. The basis of the discussion is that the EACJ is not effective in protecting human rights. It is hampered by a number of challenges in protecting and promoting human rights in the EAC Partner States. This paper presents challenges of the EACJ in terms of; jurisdiction, administration, inadequate funding, operational and the existing mixed legal system of the EAC Partner States.[4]

1.1 What is a Challenge?

The word "challenge" can be defined in many ways depending on the context one is making reference. The author in this paper finds important to define "challenge" within the context of of the challenges that affect the effectiveness of the EACJ in protecting and promoting human rights to the EAC partner states. In line of this argument, Macmillan dictionary of English defines the word "challenge" to mean, something that needs skills and determination to be addressed in order to achieve certain goals.[5] In the present paper, challenges are perceived as difficulties facing the EACJ in protecting and promoting human rights to the EAC Partner States.

2.0 Jurisdictional Challenges of the EACJ

In this paper jurisdiction of the court is referred to mean the power to administer justice with reference to subject matter of the dispute, territorial and pecuniary limits.[6] In the administration of justice through courts of law, the question of jurisdiction is fundamental. If a court administer justice and deliver judgment in a particular case by usurping jurisdiction, such decision becomes a nullity.[7] Considering the importance of jurisdiction, this paper has noted that one of the jurisdictional challenges of the EACJ is the existence of contentious human rights competence of the Court as discussed below.

2.1 Contentious Human Rights Competence of the EACJ

Generally, under the EAC Treaty, the EACJ has no power to hear and determine human rights cases. According to the EAC treaty the powers of the court to hear cases on violation of human rights shall be conferred to the court in the future. The EAC Treaty clearly stipulates that:

> Human rights mandate of the Court shall be conferred upon adoption of a particular Protocol to officiate human rights jurisdiction of the East African Court of Justice.[8]

The dilemma is that, until now the EAC Partner States are yet to adopt Protocol to confer human rights jurisdiction to the EACJ. Although a draft Protocol to extend human rights and appellate jurisdiction of the EACJ has been prepared, no initiative has been taken by the Partner States to ensure that the said draft Protocol is adopted.[9] Therefore, it may argued rightly that the envisaged Protocol is the missing piece in the EACJ's jig-

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[2] The treaty of 30th November, 1999 which came into force on 7th July 2000. The treaty was also amended on 14th December 2006 and 20th August, 2007.

[3] See http://www.eac.int/about/partner-states. Accessed 23rd August, 2017. South Sudan acceded to the treaty on April, 2016.

[4] See Article 5 of the Treaty for the Establishment of the EAC.

[5] http://www.macmillandictionary.com/dictionary/british/challenge_. Accessed on 9th July, 2016.

[6] See Chipete D.B., "*Civil Procedure in Tanzania, A student's Manual*, Dar es Salaam University Press, 2002.p.9.

[7] *Ibid.*

[8] See Article 27(2) of the EAC Treaty. *Op. cit.*

[9] See also Lawena S., "The Human Rights Jurisdiction of the East African Court of Justice: Challenges and Prospects" *Journal of African and International Law*, Vol.6 No.1, 2013, pp.119-190. It is further argued in this study that, although the human rights jurisdiction of

saw puzzle as far as enforcement of human rights through the EACJ is concerned.

The author in this paper reveals that, although initiatives have already been taken, the EAC Partner States have been reluctant to adopt a Protocol which would empower the EACJ to hear and determine human rights cases.[1] Interestingly, although there is no Protocol to give powers to the EACJ to hear human right cases, the Court continues to entertain and hear human rights cases.[2] Notably, this paper agree in principle that the role of the EACJ in protecting and promoting human rights is limited by the existing contentious and undefined human rights competence of the Court.[3] The contentious human rights mandate of the EACJ on human rights issues is also reflected in a number of cases determined by the court. One of these cases is the case of *James Katabazi and 21 others v. the Secretary General of the East African Community and Attorney General (Uganda).*[4] In many of these cases, the Court has acknowledged that for it to hear and determine human rights cases there should be an adoption of a Protocol by the Council of Ministers of the EAC.[5] In James Katabazi's case, the EACJ amplified the issue in the following words:

> It is very clear that human rights jurisdiction requires a determination of the Council of Ministers and conclusion of a Protocol to that effect. Both of those steps have not been taken. Therefore, this court may not adjudicate disputes concerning the violation of human rights per se.[6]

The decision to proceed with hearing Katabazi's case can be regarded as the Court's expression of sympathy towards the applicants. In so doing, the Court made it clear that although it has no express mandate to deal with cases on the violation of human rights, it can nevertheless deal with all matters relating to observance of the rule of law by Partner States. It is evident that the Court was appalled by the failure of the Partner States to adopt a Protocol giving powers to the Court to hear and determine human rights cases.

Plaxeda Rugumba v. The Secretary General of the East African Community and the Attorney General of the Republic of Rwanda[7] is another case which affirms the contentious nature of the human rights mandate of the EACJ. In this reference, the applicant cited the violation of Article 6(d), 7(2) and 30(1) of the EAC Treaty and Rule 24(1) of the EACJ Rules. In the statement of reference, the applicant, who was the elder sister of one *Seveline Rugigana Ngabo*,[8]alleged that her brother was arrested by the agents of the Rwandan government, with his family not being informed of the reasons for such arrest and worse enough the whole family was still in a dark regarding *Seveline Ngabo*'s whereabouts (whether he was dead or not).

It is on the basis of this background that the applicant brought an application before the EACJ for the purpose of protecting the fundamental rights of her brother.[9] The Applicant cited Articles 6(d) and 7(2) of the EAC Treaty in connection with the alleged violation of human rights by the government of the Republic of Rwanda. As in other human rights violation cases the issue whether the EACJ had jurisdiction to determine a case on violation of human rights arose.[10] Accordingly, the Court affirmed its position in the case of Katabazi's.

In contrast, the EACJ took a more liberal approach in the case of *Samuel Mukira Mohochi v. the Attorney General of the Republic of Uganda.*[11] This case was purely a human rights dispute whereby the applicant, while on his official duty in Uganda was arrested, detained and confined. In this case the applicant alleged that he was arrested at Entebbe Airport in Uganda, when he was with his fellow members of the International Commission of Jurists - Kenya Chapter, who wanted to meet the Chief Justice of Uganda. He was arrested by Ugandan Immigration Officers, who declared him as a *persona non grata*, *i.e.* a prohibited immigrant in violation of the

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the East African Court of Justice is limited under Article 27(2) of the Treaty, the Court continues to hear and determine human rights cases on the basis of other provisions of the EAC Treaty, which emphasise the Community's objectives of protecting and promoting human rights.

[1] See also Nsekela R.H, "The Role of the East African Court of Justice in the integration process" a paper presented During the 3rd East African Community Media summit, held at Imperial Royale Hotel, Kampala Uganda, 21st -22nd August, 2009, available at www.eac.int/news/index, where he made similar comments regarding reluctance by the EAC Partner States to adopt a Protocol on human rights jurisdiction to the EACJ. Accessed on 6th February, 2014.

[2] Interview with Justice of the Appellate Division of the EACJ in Arusha, Tanzania, conducted on 5th February, 2014.

[3] Interview with clerks of the EACJ at the First Instance Division and the Appellate Division in Arusha conducted on 5th February, 2014.

[4] Reference No.1 of 2007.

[5] See for instance decision in the cases of James Katabazi and 21 others v. Secretary General of the EAC and Attorney General of Uganda, Reference No.1 of 2007, Plaxeda Rugumba v. Secretary General of the EAC and the Attorney General of the Republic of Rwanda, Reference No.8 of 2010 and Samuel Mukira Mohochi v. Attorney General of the Republic of Uganda, Reference No. 5 of 2011.

[6] *Ibid.* Agoola also argues that "the EAC Treaty, unlike virtually all modern constitutions, does not contain a chapter on human rights. Nonetheless, it contains hints at such rights in a number of provisions." See Agoola J., "Where Treaty Law Meets Constitutional Law: National Constitutions in the Light of the EAC. *Op. cit.*

[7] See Reference No.8 of 2010, *EALS Law Digest*, pp.246-256, available also at www.eacj.org. Accessed on 8th February, 2014.

[8] Ibid. The victim Seveline Rugigana Ngabo during his arrest was serving as a lieutenant in the Rwanda Patriotic Front (RPF).

[9] The judgment in Reference No.8/2010. *Ibid.*

[10] Ibid.

[11] See Reference No.5 of 2011, EALS Law Digest, 2011-2012, pp. 114-140. Judgment delivered on 17th May, 2013. The applicant filed this reference under Article 6(d), 7(2), 27, 30, 38 and 104 of the EAC Treaty, Article 7 of the EAC Common Market Protocol and Rule 1(20 and 24 of the EACJ Rules of Procedure.

rights of East African citizens.[1]

The applicant argued that the act by the Government of Uganda violated basic rights conferred to East Africans under the EAC Treaty. In that regard, he challenged sections 52(a)(b)(c)(d) and (g) of the National Citizenship and Immigration Control Act, which give powers to the Minister and Director of Immigration in Uganda to declare any person as a Prohibited Immigrant,[2] that it is contrary to the spirit of the EAC Treaty. In defence, the respondent argued that such declaration by the Minister could be made without even affording the applicant a right to be heard. The information in this reference further shows that the applicant alleged that the provisions cited by the authorities in the Ugandan laws were inconsistent with the EAC Treaty and violated the principles of rule of law, transparency and human rights.[3]

The pertinent issue in this reference was again the jurisdiction of EACJ in hearing human rights cases, given the fact that the respondent raised a Preliminary of Objection that the case was not justiciable before the EACJ for want of jurisdiction. The basis for the respondent's Preliminary point of Objection was that the applicant's reference was backed up by allegations based on human rights violation which under normal circumstances and in the absence of a clear mandate could not be entertained by the EACJ for determination. In his argument, the respondent cited Article 27 of the EAC.[4] The respondent argued further that the provisions of Articles 6(d) and 7(2) of the EAC Treaty, which the applicant incidentally relied upon, merely constituted the statement of aspirations and policy provisions which are not justiciable before the EACJ.[5]

More interestingly, in determining the Preliminary point of Objection raised by the respondent, the Court adopted the same reasoning adopted in the case of *Katabazi*[6] and the case of *AG of Republic of Rwanda v. Plaxeda Rugumba.*[7] Nevertheless, the court proceeded to hear the case by saying that it cannot refrain from interpreting the EAC Treaty including provisions which guarantee human rights to East Africans.[8]

In all the three cases cited thus far, in relation to the contentious nature of the human rights mandate of the EACJ, the Court maintained that if the framers of the EAC Treaty had intended to take away the jurisdiction of the Court of handling human rights cases, they would have stated so in plain words and in explicit terms under the EAC Treaty.

In my submission in this paper, I would rather re-state the above statement by the Court in the reverse that; if the framers of the EAC Treaty had intended to vest human rights jurisdiction in the hands of the EACJ, they would have stated so in plain words and in explicit terms under the EAC Treaty. As it stands, the framers left a grey area that simply contributes to the present confusion in the handling of human rights violation cases in the EAC. Indeed, so long as it is not explicitly stated under the Treaty, it cannot be said that the EACJ has a categorical jurisdiction to hear and determine cases on the violation of human rights in EAC Partner States.

Moreover, it creates a loophole that the EAC Partner States appear reluctant to plug in. Despite this anomaly, the EACJ have continued to hear human rights cases without the adoption and conclusion of the Protocol as required under the EAC Treaty. This is a bravery act on the part of the EACJ. On the other hand, it represents a grave challenge in the protection and promotion of human rights in EAC Partner States.

Importantly, the EAC Partner States needs to borough best experience from the ECOWAS where in its establishment the ECOWAS Court of Justice had no provision under the ECOWAS treaty vesting the court human rights jurisdiction. The situation changed in 2005 where the court was vested powers to hear human rights cases arising from the ECOWAS member states. This was through the 2005 Supplementary Protocol which amended certain provisions in respect of the Community Court of Justice. For instance the preamble, Article 1, 2, 9 and 30 of the ECOWAS treaty was amended to give powers the ECOWAS court of justice to hear human rights cases.[9]

3.0 Administrative Challenges of the EACJ

Despite jurisdictional challenges, the EACJ also faces a number of administrative challenges which hinder the court in protecting and promoting human rights. These challenges are delay to operationalise human rights jurisdiction of the EACJ, delay to assent to the EAC draft Bill of Rights and failure of the 2013 draft Protocol to address human rights issues, just to mention a few.

[1] *Ibid.*
[2] See Chapter 66 of the Laws of Uganda.
[3] These principles are provided under Article 6(d), 7(2) and Article 104(1) which stipulates for free movement of East Africans within the EAC Partner States.
[4] See Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda, Reference No.5 of 2011.
[5] Ibid.
[6] See Appeal No.1 of 2012. *Op. cit.*
[7] *Op. cit*.
[8] See Katabazi, Plaxeda and Mohochi's case. *Op. cit.*
[9] See the Supplementary Protocol A/SP.1/01/05 of 19th January, 2005.

3.1 Delay to Operationalize Human Rights Jurisdiction of the EACJ

In the 2006-2010 period, one of the East African Community's plans was to deepen and accelerate the integration process among the Partner States in various areas of co-operation.[1] In this regard, the EAC Partner States took necessary steps to ensure its main organs[2] participate fully in expediting the integration process. In the process of effecting this aim, it was planned that in a five (5)-year period (2006-2010) the EACJ should become an effective judicial organ of the Community.[3] To achieve the five-year strategic plan, it was further agreed by the EAC Partner States that efforts towards the adoption of a Protocol for extending the EACJ's appellate and human rights jurisdiction should be accelerated.[4]

Moreover, it was agreed that the Court should be restructured and allowed to have financial autonomy.[5] And, yet there is procrastination. This paper argues that until 2010 (following expiry of the projected five-year strategy), nothing tangible has been achieved by the Community in terms of extending the human rights jurisdiction of the EACJ as required under Article 27(2) of the EAC Treaty. Notably, the EAC Partner States embarked on another Five (5) Years Development Strategy in the 2011/2012 fiscal year, probably to buy more time and evaluate where they had failed in the preceding period. In this new Development Strategy and in respect to the EACJ, the EAC focused on a number of activities with a priority to making the EACJ an effective and vibrant organ of the Community.

Specifically, strategies which were to be accomplished by the EAC in this five-years plan spanning from 2011 to 2016 were again to extend the Court's jurisdiction to cover human rights cases, reviewing and amending the domestic laws of the Partner States to be harmonious with the EAC Treaty and to raise awareness on the existence and role of the EACJ among citizens of the EAC Partner States. To achieve all these objectives, there was also a need to enhance the capacity of the Court in justice delivery.[6]

Moreover, in implementing the said strategic plan, there was a need to draw a clear action plan by the EAC Partner States to include bolstering the structure of the Court under the EAC Treaty and to develop and increase the capacity of human resources of the Court.[7]What remains inescapable is that, the EAC Partner States failed to implement the initially organised five-year strategic plan and have to do much better in this stint of another plan of a similar duration.

The failures to extend EACJ's mandate has attracted criticism from legal scholars, practitioners and human rights activists. The distaste stemming from such a failure can be seen in the case of *Hon. Sitenda Sebalu v. the Secretary General of the East African Community and 3 others,*[8] the applicant filed a reference before the EACJ alleging that the first respondent on behalf of the EAC had unreasonably delayed to convene the meeting of Council of Ministers to operationalise the extended jurisdiction of the EACJ to include appellate and human rights jurisdiction. In this case, the applicant argued that this delay caused by the Secretary General of the Community infringes Articles 6, 7(2) and 8(1)(c) of the EAC Treaty.[9] In the same case, the second respondent was sued on behalf of the Republic of Uganda for contributing to the delay in operationalising the extended jurisdiction by intentionally delaying to submit the country's comments on the draft Protocol.[10] In its decision, the Court held, *inter alia,* that:

> Accordingly, we find that the first and second respondents have not fully discharged their respective obligations regarding the conclusion of a Protocol to operationalise [the] extended jurisdiction of the EACJ.

The court noted further that:

> [The] Applicant's concerns justified as the delay not only hold back and frustrates the conclusion of the Protocol but also jeopardizes the achievement of the objectives and implementation of the provisions of the Treaty and amounts to an infringement of Article 6, 7(2) and 8(1) of the Treaty.[11]

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[1] See the East African Community Development Strategy 2006-2010 (The 3rd EAC Development Strategy) available at www.eac.int/index.php? Option=com_docman&task. Accessed on 4th March, 2017.

[2] Article 9(1) of the Treaty for the Establishment of the East African Community establishes the organs of the Community to include the Summit, the Council, the Coordination Committee, the East African Court of Justice, the East African Legislative Assembly, the Secretariat and such other organs as may be established by the Summit.

[3] See the 3rd EAC Development Strategy.p.50. *Op. cit.*

[4] *Ibid*

[5] *Ibid.*

[6] See the East African Community Development Strategy 2011/2012-2015/2016 (the 4th EAC Development Strategy) available at ww.eac.int/index. P.70. Also available at www.eac.org. Accessed on 4th March, 2017.

[7] *Ibid.*

[8] EACJ Reference No.1 of 2010, EALS Law Digest 2011-2012, p.258.

[9] Article 6 of the Treaty enumerates six(6) fundamental principles of the Community, Article 7(2) provides that 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, and Article 8(1) (c) provide that Partner States shall abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.

[10]EACJ Reference No.1 of 2010, EALS Law Digest 2011-2012, p.258.

[11] *Ibid.*

The delay in extending human rights jurisdiction of the EACJ, as one of the legal challenges facing the Court, has also been noted by Mwapachu who contends that the EACJ's jurisdiction is severely limited to only the interpretation and the application of the EAC Treaty.[1] Mwapachu asserts that:

> Whilst there have been efforts in the past five years to extend the Court's jurisdiction through a protocol, in line with Article 27(2) of the Treaty, support of the Partner State for the Protocol has been weak in the least largely because national politics view the extended jurisdiction of the Court as tantamount to opening up of the floodgates of references and cases particularly those related to alleged human rights violation.[2]

From Mwapachu's view one can infer that the EAC leaders remain fearful in extending the human rights jurisdiction of the Court. It appears that the governments of EAC Partner States dread of being sued for human rights violations. This partly explains the procrastination in the adoption of the Protocol to extend human rights jurisdiction to the EACJ.

However, whatever their motives, failure to sanction the protocol amounts to a departure from the original thinking of the framers of the EAC Treaty. Further, such hesitance tends to hinder the achievement of the rule of law and safeguarding of human rights in EAC.

3.2 The 2013 Draft Protocol Extending Jurisdiction of the EACJ

On 30th November, 2013 the Heads of state of the EAC sitting at Arusha Tanzania approved the Council's recommendation to extend the jurisdiction of the EACJ pursuant to Article 27(2) of the EAC Treaty.[3] Article 2 of the draft Protocol provides that:

The objective of this Protocol is to extend the jurisdiction of the Court to cover trade and investment matters arising out of the implementation of the Protocol on the Establishment of the East African Community Custom Union and the Protocol on the Establishment of the East African Common Market and disputes arising out of the implementation of the Protocol on the Establishment of the East African Community Monetary Union.

In line with Article 2, Article 3(1) of same draft Protocol stipulates that:

The Court shall have jurisdiction over:

> (a) Disputes on trade and investment arising from the implementation of: (i) The Protocol on the Establishment of the East African Community Customs Union; and (ii) the Protocol on the Establishment of the East African Community Common Market. (b) Disputes arising out of the implementation of the Protocol on the Establishment of the East African Monetary Union.

Although the above cited Protocol is an effort towards giving more powers to the court, it is important to emphasize that the signing of this Protocol has ignored the issues of human rights. Logically, there is lack of political will by the EAC Partner States to ensure that the EACJ is vested with powers to hear human rights cases. It is noted further that, lack of express provision which vest human rights jurisdiction to the EACJ fetters the implementations of the Common Markets Protocol. The said Protocol provides rights for the free movement of goods, persons, labour, and rights of establishment, the rights of residence, the free movement of services and the free movement of capital.[4] Thus, effective implementation of these rights needs the EACJ to have human rights jurisdiction.

3.3 Delay to Assent the EAC Draft Bill of Rights

One of the core functions of the EALA is to make and unmake laws of the Community.[5] In discharging this duty, the EALA can debate on various Bills and motions proposed by any member of the Assembly.[6] Once the Bill has been approved by the EALA [it] will be submitted to the Heads of State for assent.[7] In circumstances where the Bill is not assented to by the Heads of State, it will be sent back to the EALA for more discussion and approval and thereafter be re-submitted to the Heads of State.[8] If the Heads of State fail to given assent for the second time when re-submitted such a Bill must lapse.[9]

With regard to human rights protection, on 25th April 2012, the Assembly debated and passed the EAC Human Rights Bill[10] and then waited for the assents of the EAC Heads of State.[1] To-date, the Bill has not been

[1] See Mwapachu V.J., "*Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community*, p.369.
[2] Mwapachu V.J, *Ibid,* p.369.
[3] See the preamble of the Draft Protocol to operationalise the extended jurisdiction of the EACJ, 2014.
[4] See Article 4 of the Protocol on the Establishment of the East African Community Common Market.
[5] See Article 49(1) of the EAC Treaty.
[6] Article 59(1), *Ibid.*
[7] See Article 63(1), *Ibid.*
[8] Article 63(3), Ibid.
[9] Article 63(4), *Ibid.*
[10] See also argument by Hon. Akhaabi and Ngenzebuhoro, members of the EALA in the official report of the proceedings of the East

assented to by the EAC Heads of State. This reluctance constitutes one of the major stumbling blocks in the protection and promotion of human rights in Partner States. The problem is aggravated because the EACJ is the only institution vested with mandate on enforcement of the fundamental rights and freedoms in the EAC.[2]

This paper tries to view a number of reasons to account for why the EAC Heads of State are hesitant to assent to the EAC Draft Bill of Rights. Probably one of the reason is that; the EAC Partner States agreed that the EACJ must not have human rights jurisdiction due to the status of Burundi and Rwanda regarding human rights violation. Frankly speaking, there is persistence of civil wars in the two countries.

Indeed, there is a protracted general animosity the Hutu and Tutsi—dominant ethnic groups—in the two countries, which complicates the stringent application of human rights. In other words, the prevailing situation in Rwanda and Burundi may further delay assenting to the draft EAC Bill of Human Rights by the EAC's Heads of State. Moreover, making the EAC Bill of Rights official would have far-reaching implications for state agencies particularly the police, the army and other coercive state apparatus that at times appear to bend the rules when it comes to human rights. In Tanzania, gender-based violence, child abuse, extra-judicial killings cases are on the increase.[3]

The author in the present paper learned further that, other fundamental reasons for refusal by Partner States to assent to the Bill is that, most of the proposed rights under the Bill have been couched in a Western style. In general terms, do not reflect the EAC traditions and culture.[4] Thus, the EAC leaders fear that if the Bill is adopted it would destroy the East Africans culture. And yet this argument appears flimsy and lacks legal basis as the need to protect human rights in the EAC remains as strong as ever. Therefore, one may rightly contend that the leaders of the EAC Partner States are deliberately dodging the bullet.

4.0 Operational Challenges of the EACJ

Apart from jurisdictional and administrative challenges the EACJ is also hampered by operational challenges. Some of the operational challenges include; *ad hoc* judges of the EACJ, lack of enforcement mechanism of the judgment of the court and language barrier.

4.1 *Ad hoc* Judges under EACJ

The term *ad hoc* judges means judges of the EACJ who work on temporary basis. In 2001, when the EACJ became operational, Judges were appointed and started working on temporary (*ad hoc*) basis. This is in pursuance to Article 140(4) of the EAC Treaty which requires all Judges of the Court to work on *ad hoc* basis. Essentially, Article 140(4) of the EAC Treaty stipulates:

> Until such times as the Council determines that the Court is fully operational, a Judge appointed under Article 24 of this Treaty shall serve on an ad hoc basis. Notwithstanding the provisions of paragraph 5 of Article 25 of this Treaty, the salary and other terms and conditions of service of a Judge serving on an ad hoc basis shall be determined by the summit on recommendation of the Council.

Generally, Article 140(4) of the EAC Treaty as cited above was crafted by the EALA as transitional provision which intended to allow Judges of the EACJ work on *ad hoc* basis. Reading Article 140(4) of the treaty it is undisputed fact that one of the major reasons for ad hoc system was that the EACJ was not in full operational. Despite the major reason pointed above there were also a number of other minor reasons which necessitated the EACJ to operate under such a system. One of the reasons was that, during this period the Court was relatively new and the public was not aware of its existence. In fact, the Court was being implemented on experimental basis. The second reason was that, there were few cases received by the Court during this interim period, hence little workload. The third reason for *ad hoc* system was that, during this period the jurisdiction of the Court was very narrow, hence the court received few cases.[5]

One interpretation of this *ad hoc* arrangement is that most of the EACJ Judges were also committed to their respective countries, where they also served either as Judges of superior courts or as senior servants. This means, they were permanent employees in their home governments, thus working on *ad hoc* basis in the EACJ. Indeed, at the EACJ, they served as part-time Judges, which tended to come into conflict with their permanent engagement back home. After all, the EAC was not their permanent employer and the inescapable fact was that they were serving two masters at the same time[6] or representing two conflicting interests.

African Legislative Assembly, first meeting—fourth session—second Assembly of 25th April, 2012.

[1] According to Article 63(1) of the Treaty, for the Bill to become law, it must receive an assent from the Heads of State.

[2] See again Article 41 of the EAC Draft Bill of Rights, *Ibid*.

[3] See LHRC Bi-annual Tanzania Human Rights Report, 2014, available at http://www.humanrights.or.tz/reports, Accessed on 10th February, 2015. See also LHRC and ZLSC, Tanzania main land and Zanzibar Human Rights Report, 2013. Available at http://www.humanrights.or.tz/downloads/tanzania-human-rights-report-2013.pd, Accessed on 10th February, 2017.

[4] *Ibid*.

[5] The information was gathered from the Principal Judge of the EACJ on 5th February, 2014.

[6] For example, Hon. Mr. Justice Augustino Ramadhan (the United Republic of Tanzania) who served the EACJ between November 2001

Therefore, it is observed that the reason that the EACJ operated under *ad hoc* system due to low number of cases received by the Court cannot be accommodated today. It is an undisputable fact that the EACJ became full operational in 2001 following its official inauguration. The first case was received by the court four (4) years later from its inauguration.[1] It is also true that in the first four (4) years, the Court was also trying to publicise its existence to the people while also preparing some rules and guidelines on how to operate.

Presently, there is an increasing number of cases received by the Court. In terms of figures, the EACJ tenth year report indicates that from 2005 to 2011 only sixty (60) cases were received by the EACJ.[2] Some of the cases were references, claims, appeals and advisory opinions. Out of the sixty (60) cases, twenty-three (23) were references, three (3) were appeals from the FID to the AD, one (1) was a claim, one (1) an advisory opinion and thirty-two (32) were applications.[3] Due to the increase in the number of cases registered at the EACJ, Nsekela says that:

> The only solution is to get the Judges of the First Instance Division at the Headquarters in Arusha. Because the Appellate Division works only if there is work generated from the First Instance Division. But since all that the other Judges, apart from the Principal Judge, are not in Arusha, it means that Appellate Division is not working. Not because there are no cases, there are 109 pending cases, references and applications, but the Judges are not there to handle them.[4]

Generally, in terms of statistics there are increase of cases received by the court every subsequent year. The official EACJ statistics show that from 2005 up to October 2013 the Court had received one hundred and seventeen (117) cases.[5] These cases included forty-six (46) references, two (2) claims, eleven (11) appeals, one (1) advisory opinion, one (1) case stated, one (1) arbitration and fifty-five (55) were applications.[6] Therefore, due to this drastic increase in the number of cases received by the EACJ, it is evident that the *ad hoc* system is no longer in the best interest of justice, and impacting the functioning of the court as follows: -

4.1.1 Impact of *ad hoc Judges* in Dispensation of Justice

4.1.2 Delay in Disposition of Cases by the EACJ

The author in this paper observes that due to the *ad hoc* nature of the EACJ's judges there is an unreasonable delay in the disposition of cases filed before the court. In other words, the *ad hoc* system precludes the timely dispensing of justice by the EACJ. This is because judges takes a long period to hear and dispose of a single case regardless of the nature of that particular case. Of course, it is true that the timeframe for the disposition of one case will vary from one case to another depending on the nature and merit of each case.

For example, in the three (3) appeals received by the court between 2005 and 2011 only one (1) case was determined. Moreover, out of twenty-three (23) references the Court received during the same period only twelve (12) were determined. Other cases remained undetermined as a result of the *ad hoc* nature of the judges. Indeed, eleven (11) references received by the court during this period all remained undetermined.[7] Again, data indicate that, sometimes it took more than eighteen (18) months for the FID of the EACJ to deliver decisions in minor issues like giving a ruling pending determination of the main case.[8] Worryingly, there are many cases facing the same fate as described above.

The application between the *Attorney General of Kenya v. Hon. Peter Anyang'onyong'o and 10 others*[9]is a good example of applications which took a long time before being disposed of. This application was filed on 3 April 2008 under EACJ Rules.[10] The applicant had applied for an order for the extension of time. The order was needed to allow him to file a reference out of time to challenge the decision of taxing officers.[11] Due to the *ad hoc* system of the Court, the ruling on this application became ready for delivery on 16th October, 2009 almost

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and November 2007 at the time he served the EACJ was also Justice of the Court of Appeal of Tanzania and later on became the Chief Justice of the United Republic of Tanzania.

[1] See the case of *Calist Andrew Mwatela and Two others v. EAC*, Reference No.1 of 2005. See also comments by the President of the EACJ, Justice Nsekela, H, during the interview in his office in Arusha Tanzania where he made the following comment: "As you know under the Treaty, the service of the Judges are ad hoc…The rationale for it at that time, back in 1999-2001 when the Treaty was being negotiated and signed, were that there were no difficulties because it was a new Court and it was not known so it was illogical to have all the 15 Judges at Arusha." This interview is also available in JUMUIYA NEWS issue 28. *Op.cit.*

[2] See the EACJ tenth year report. *Op. cit.*

[3] Ibid.

[4] See Nsekela, H., "The Performance of East African Court of Justice in respect of achieving Regional Integration" In Kennedy G, Sippel, H and Ulrike W., (Eds), Process of Legal Integration in the East African Community, pp.129-143.

[5] See the East African Law Society, Law Digest: Judgment and Rulings of the EACJ 2011-2013.

[6] Ibid.

[7] *Ibid.*

[8] *Ibid.*

[9] Application No.4 of 2008. This was an application that the applicant filed a reference before the First Instance Division of the EACJ to challenge the decision of the taxing officer.

[10] See Rule 4, 21(40 and 114.

[11] According to Rule 114 of the EACJ Rules any application to challenge the decision of the tax officer has to be filed within fourteen days (14) from the date when the taxing officer has delivered its decision.

eighteen months from the date when it was filed. This is a travesty of justice if one follows the adage: *Justice delayed is justice denied*.

In addressing the *ad hoc* system challenge, the Council of Ministers of the EAC came up with a directive which required the President and the Principal Judge of the EACJ to take permanent residence in Arusha and start working on a permanent basis.[1] This directive was aimed at enhancing the capacity of the two key leaders of the court in discharging their mandate effectively.[2] This directive did not cover other Judges of the Court who continued to serve the Court on *ad hoc* basis.

4.1.3 Lack of Commitment among Judges

Another negative impact of the *ad hoc* system caused by the increased of cases received by the EACJ was lack of commitment on the part of EACJ judges. In this regard, the respondents reported that, in the public service of the most EAC Partner States, employees are obliged to be committed to their governments. In Tanzania, for example, a public servant is required to be committed to the government and in all his services he or she should endeavour to implement decisions of his or her superiors.[3] Although public servants in Partner States are guided by the Code of Conduct, the commitment of a servant is always a result of many other factors, including moral conduct of a particular employee. In any public service, lack of individual commitment in performing one's obligations within specified timeframe tends to undermine the effective performance of a civil servant.[4] In line with this argument, the paper found that the existence of the EACJ *ad hoc* system has reduced the degree and level of commitment on the part of Judges as EACJ servants.

Such lack of commitment and moral wellbeing on the part of the EACJ *ad hoc* Judges stems from the fact that most of them have more lucrative jobs in their respective home countries. During an interview with one of the Judges of the Court, it emerged that most Judges of the EACJ do not depend on the EAC for their daily livelihood.[5] Instead, they had other sources of income in their respective home countries. In the same vein, one of the EACJ Judges admitted that their daily bread did not depend on working on *ad hoc* basis at the EACJ. Under such circumstances, it becomes increasingly difficult for them to be committed to the functions of the Court. It is also apparent that such Judges are also likely to be less committed and loyal when presiding over cases involving human rights issues. The chances are that they are not likely to disregard their first master (the home employer) to whom they must return after their *ad hoc* tenure has elapsed. Under these circumstances, the Court cannot effectively discharge its role of protecting and promoting human rights.

4.1.4 Difficulty in Planning EACJ Sessions

Planning of the EACJ court sessions is another challenge facing the Court in protecting human rights. As pointed out in this study, most Judges of the EACJ do not reside in Arusha, Tanzania. When in Arusha attending court session, the Judges occupy temporary homes in Arusha during the case session. This paper establishes that due to the *ad hoc* operation nature of the Court, the Principal Judge and the President of the Court find it hard when planning for the court sessions.[6] Before the Principal Judge and the President of the Court plans for a court session, for example, they have to consult the Judges beforehand to ascertain their availability for the case. In other words, ask them whether they were free from other responsibilities in their respective home countries.[7] Thus, if a Judge is occupied by other duties in his home country, attending the EACJ session would be a second priority.[8] Indeed, this is an impediment for the EACJ in protecting and promoting human rights in Partner States.

4.1.5 Conflict of interest

By operating under *ad hoc* basis, the EACJ Judges also occupy other offices in their respective home countries. The author notes that, as a result of judges working under *ad hoc* basis, some of them may have either personal or private conflict of interest when occupying offices as Judges of the EACJ. This may happen in circumstances where his or her country, where he or she is still a servant, is a subject of the EACJ case over which he is presiding. Under this situation, it would be difficult for a Judge to balance his personal interest and do justice as required. In other words, there is a likelihood of favouring his or her home country.

However, things could have been different had the Judges been permanent employees of the EACJ. After all, it is apparent that a conflict of interest is escalated by the existing *ad hoc* system. Also, there is no governing rule

[1] The 24th Ordinary Meeting of the Council was held in Burundi on November 2011, and immediately from 1st July 2012 the President and the Principal Judge became full-time employee based in Arusha. This is recommended in the current study as a greatest achievement in the efforts aimed at enhancing the performance of the Court in the EAC integration process. It is further recommended that, the decision to make the Judge President of the Court and the Principal Judge to permanently reside in Arusha came a little bit late for the effective administration of the Court.

[2] Ibid.

[3] See sub-part 3 of part VII of the United Republic of Tanzania Code of Ethics and Conduct for the Public Service Tanzania. This Code is also available at www.tanzaniaroyalty.com/code-of-ethics-and-business-conduct/ accessed on 24th September, 2016.

[4] *Ibid.*

[5] Interview with one of the Judges at the Appellate Division at Arusha on March, 2014.

[6] Interview with the Secretary to the Principal Judge of the EACJ at Arusha conducted on December, 2013.

[7] Source: This information was obtained on December, 2013 from one of the four staffs of the EACJ interviewed on the effect of *ad hoc* operation of the Judges of the EACJ.

[8] *Ibid.*

either in the EAC Treaty or Protocols adopted thereunder which prohibits a Judge of the EACJ to sit in cases to which their countries have interest or are the parties.[1]

5.0 General Public Awareness about the EACJ

The question of lack of public awareness is the challenge to most of the regional and sub-regional human rights courts. In Europe, for instance, Gibson argues that the ECJ is amongst the regional Courts which are affected by lack of public awareness, which is a serious issue in discharging the court's mandate.[2] Although this court is considered as the oldest regional court, the majority of citizens in the European region are not aware of its existence. Statistics shows that only 4.5 percent of the total population of Europe was aware of its existence.[3] In some countries such as Portugal, Spain and Italy, a majority had never heard of the ECJ's existence. There is also evidence, according to the author, that the Court was moderately well known in several countries. Nearly everyone in Denmark knew something about the Court and in Ireland, while in the Great Britain the level of awareness was fairly substantial.[4]

In this paper, lack of general public awareness was reported as one of the major challenges facing the EACJ in protecting and promoting human rights among EAC Partner States. On general awareness of the EACJ, one of the EACJ Judges had this to say: Despite the [above] described work of the court in advancing the EAC integration, very few people in East Africa know about it, its role and jurisdiction. The Court expects to publicise itself through its decisions over various matters that are brought before it for determination. However, it is very important that the stakeholders know of its existence for first, in order for them to seek its services. This is where the idea of partnership between EAC organs and the media becomes very relevant in the promotion of deeper integration…[5]

In my submission, for the EACJ to discharge its role and functions effectively as stipulated under the EAC Treaty,[6] its existence has to be known by the people in the EAC. The issue of raising people's awareness on the role, functions and general existence of the EACJ is a very important approach aimed at motivating the EAC people to make use of the Court. During field research it was established that the majority of Tanzanians, whose country is one of the EAC Partners, were not aware of the existence of the EACJ. The following section covers this aspect in details.

5.1 Impact of lack of Public Awareness of the EACJ in Protecting Human Rights

This study argues that the objectives behind the establishment of the EACJ could be achieved if members of the public were made aware of its existence, its roles and its functions. If the public is aware of the EACJ existence, the Court would receive more cases from private persons, government institutions and non-governmental organisations seeking for redress as per the EAC Treaty, hence heighten the promotion and protection of human rights.[7] Yet, lack of public awareness on the existence, roles, jurisdiction and functions of the Court hampers the effectiveness of the Court in promoting and protecting human rights in EAC Partner States.

6.0 Lack of Enforcement Mechanism of the Judgement of the EACJ

The enforcement is the process of making sure that something is obeyed or to make sure that someone complies with the law.[8] Interestingly, in the European context the European Court of Human Rights, unlike the EACJ, has a well-defined mechanism for ensuring that high contracting parties undertake to abide by the decision of the Court.[9] The decision of the European Court of Human Rights is always delivered in the form of a declaratory statement.[10] Therefore, the Committee of Ministers have supervisory powers in the general execution[11] and

[1] This information was obtained from interview from human rights practising Advocates in Tanzania and High Court Judges of Tanzania on November, 2016.
[2] See also Gibson L.J. and Caldeira. "The Legitimacy of Transnational Legal Institutions: Compliance, Support and ECJ.
[3] *Ibid.*
[4] *Ibid.*
[5] See Nsekela H., "The Role of the EACJ in the Integration process" a paper for presentation during the 3rd EAC Media Summit, held in Kampala, Uganda on 21st to 22nd August, 2009, pp.1-14. Available at: http://www.news.eac.int/index.php?option=com_docman&task=doc_view&gid=67&Itemid=78. Accessed on 1st January, 2014. See also Nsekela, H., " The Performance of the East African Court of Justice in Respect of Achieving Regional Integration" in Kennedy G., Sippel H, and Ulrike W. (Eds), Process of Legal Integration of the East African Community, Dar es Salaam University Press, 2011, pp.129-144.
[6] See Article 23(1) of the EAC Treaty, *Op. cit.*
[7] See Article 6(d) *Ibid.*
[8] See Collin H.P., *Dictionary of Law*, 4th Edition.
[9] See Article 46(1) of the European Convention on Human Rights. *op. cit.*
[10] See also the decision of the ECtHR in the case of Marckx. V. Belgium, App No. 6833/74 of 1979, which is also cited in Forst D., "The Execution of Judgment of the European Court of Human Rights, available at www.ICL- Journal.com. Accessed on 3rd June, 2014 at 14.00hrs.
[11] See also Collin H.P. op. cit which define execution to mean "the process of carrying out of Court order."

enforcement of its judgment.[1]

If the high contracting parties unreasonably refuses to comply with the judgment of the Court, the Committee of Ministers is required to refer the said judgment to the Court, stating such a refusal by a high contracting state who is a judgment debtor.[2] The implication is that effective mechanism of execution of any Court's judgment is an essential factor in ensuring credibility and the Court performance in its process of ensuring adherence to the law by the contracting parties.[3] Equally, a well-defined enforcement mechanism will build confidence among the final consumers of services delivered by a particular court.

In the East African context, there is no well-defined mechanism of executing a judgment under the East African Court of Justice. It is important at the outset to understand that the execution of the judgment of the EACJ is governed by the rules of civil procedure in force in the Partner State in which the decree holder intends to execute the judgment. In this regard, the EAC Treaty stipulates only for the directives of the rules and regulations to govern execution of the judgment delivered by the EACJ. Moreover, the EAC Treaty is silent on establishing a special institution to be responsible for ensuring compliance by Partner States when it comes to implementation of the Judgment and directives of the EACJ. The absence of a well-defined mechanism for the enforcement and execution of the judgment of the EACJ is considered to be one of the serious challenges facing the EACJ in protecting and promoting human rights.[4]

It is high time now the EACJ should draw best practice from the European Court of Human Rights and define well the mechanism for enforcement of its judgement. This will be milestone towards ensuring that the court as a judicial body in the EAC becomes effective in administration of justice to the EAC Partner States.

7.0 Language Barrier

Apart from the challenges facing the EACJ in protecting and promoting human rights discussed thus far, the Court also faces a problem of bridging in the language gap. In the expanded EAC, there are both English-speaking and French-speaking countries. Yet English language is an official language of the Court,[5] like in the old days when members of the defunct EAC were only Anglophone countries. Besides, the EAC Partner States have different legal systems. Thus, issues like language and different legal systems also hinder the proper functioning of the EACJ in protecting and promoting human rights in EAC Partner States. These two challenges have its basis on the historical background of each EAC partner states.

7.1 Impact of Language Barrier on the Protection of Human Rights

This paper views that, despite the EAC Partner States belonging to different cultural backgrounds, some Partner States have official languages that differ from the official language of the EAC.[6] To be more precise, while the official language of Burundi is Kirundi[7] and French (English is still under the pipeline in becoming an official language), the official languages of Rwanda are Kinyarwanda, French and recently English.[8] The official languages of other EAC founding Partner States of Kenya, Tanzania and Uganda are English and Kiswahili. Yet the official language of the Court is English.

The use of English language in the EACJ processes is a requirement of both the substantive and procedural laws. Every document to be filed before the EACJ must be in English. In the circumstances where it is filed in a language other than English, the document must be interpreted into English. Thus, the requirement that English language is the language of the Court poses a challenge to non-English speaking EAC Partner States, since they face difficulties in switching from their official language to English when filing cases before the EACJ.

During an interview, one of the Judges of the EACJ from a non-English speaking Partner State admitted that, they always face difficulties as Judges when compelled to hear cases in English as most of them were trained either in French, Kirundi or Kinyarwanda.[9] Similarly, litigants and their legal representatives from Burundi and Rwanda face similar problems when they wish to file their case before the EACJ. Generally, for non-English speaking EAC Partner States to understand the language of the EACJ there must be an interpreter to interpret the proceedings and procedures. However, as a matter of fact, variation of languages among Partner States hinders the EACJ from promoting and protecting human rights in countries like Burundi and Rwanda. In terms of

[1] Article 46(2) European Convention on Human Rights. *op. cit.*
[2] Article 46(3) European Convention on Human Rights. *op. cit.*
[3] See also the European Court of Human Rights Committee of Minister's Annual Report, 2011 available at www.coe.int/t/dgh/monitoring/execution/source/publications/cm-annreputed 2011. Accessed on 3rd June, 2014.
[4] Article 44 of the Treaty for the Establishment of the EAC.
[5] Article 46 of the EAC Treaty stipulates that the official language of the Court is English and to that effect all documents to be filed before the Court and the judgment should be in English.
[6] Article 46 of the EAC Treaty. *Op. cit*
[7] See Article 5 of the Constitution of Burundi of 2010.
[8] See http://law.wust.edu/WUGSLR/citationManual/countries/Rwanda.pdf or https://law.wust.ed/ WUGSLR/Citation Manual/countries/Burundi.pdf. Accessed on 21st May, 2016.
[9] Interview with a Judge of the EACJ at Arusha on 6th June, 2016.

language of the EACJ, the EAC can borrow experience from the European Court of Justice, whereby all official languages of the member states are automatically official languages of the ECJ.

8.0 Mixed Legal Systems of the EAC Partner States

Essentially, the EACJ has been fashioned on the basis of the common law legal system, thus making it necessary for Partner States to follow this system.[1] Although the EACJ follows the common law system,[2] the EAC Partner States (Burundi, Kenya, Tanzania, Uganda and Rwanda) belong to different legal systems structured under different judicial hierarchies. This paper finds that both differences in the legal system and judicial hierarchies of the EAC Partner States have an impact on the promotion and protection of human rights by the EACJ. The notable differences in the legal systems and judicial hierarchies among the EAC Partner States in relation to protection and promotion of human rights are presented in two groups for the purpose of clarity: *i.e.* the common law and the civil law legal systems. Burundi and Rwanda have been presented together as they share some common features in terms of their legal system, culture and languages. Similarly, Kenya, Tanzania and Uganda have been grouped together as they belong to the common law legal system.

8.1 Legal System and Judicial Hierarchy in Burundi and Rwanda

Both Burundi and Rwanda are EAC Partner States with small geographical areas.[3]The two EAC Partner States inherited the civil law system, with roots in the Belgian and German civil legal system.[4]The uniqueness of their system is that, it is a more codified body of general principles of laws.[5] Judges of the Courts in Burundi and Rwanda have been vested with more powers to exercise judicial discretion when determining cases which was not always the case under the common law system.[6]

The judicial (Court) system in Burundi is mainly divided into two, namely; the ordinary courts and the specialised courts.[7] The ordinary courts are courts in Burundi which have jurisdiction to entertain normal cases. The ordinary courts, which fall under this category, include the Supreme Court, the Provincial Courts and the Primary Courts.[8] Under specialised courts, Burundi has established about seven (7) courts to deal with special and specified matters. These are the Constitutional Courts,[9] the Anti-Corruption Courts, the Court Martial, the First Instance Court Martial, the Industrial Court,[10] the Administrative Courts and the Commercial Court.[11]

Like Burundi, the structure of courts in Rwanda consists mainly of the ordinary and specialised courts. Both of the two structures are creatures of the Constitution. Hierarchically, the Constitution of Rwanda establishes the Supreme Court, the High Court, the Intermediate Courts and the Primary Courts as ordinary Courts.[12]On other hand, the Gacaca Courts and the Commercial Courts are established as specialised Courts.[13]The Gacaca Courts were established and mandated to hear cases involving high profile personalities implicated in genocide against Tutsis and moderate Hutus as well as crimes against humanity alleged to have been committed between 1 October 1990 and 31 December, 1994.[14] The overriding objective towards the establishment of the Gacaca Courts was the government's commitment in responding to the challenges of human rights violation during the Genocide[15] in Rwanda[16] in which between 500,000 and 800,000 Tutsis and moderate Hutus are believed to have

[1] See also *The News Time*, available at www.nettimes.com.rw/news/views/article-print.php. Retrieved on 16th June, 2016 at 16.34 PM.
[2] Ibid.
[3] For example, the Republic of Burundi has a total are of 25,649 Sq. Km. It shares borders with Tanzania in the Eastern and Southern part and DRC on the Western part. See also www.infoplease.com/country/burundi:html. Accessed on 12th August, 2016.
[4] *Ibid.*
[5] See Labspace.open.ac.uk/mod/resource/view.php.id=415870. Accessed on 12th August, 2016.
[6] Note that, this is the basic characteristic feature which distinguishes the civil law legal system from common law legal system.
[7] See the Constitution of the Republic of Burundi.
[8] See Articles 221,225 and 233 of the Constitution of Burundi and see also the East African Court of Justice Strategic plan, 2010-2015.
[9] This is a creature of the Constitution established under Article 225 of the Burundi Constitution.
[10] Unlike the Supreme Court, the Constitution Court and the Court of Appeal of Burundi and other Courts are creatures of statutes. See also footnote No.275 in this study.
[11] *Ibid.* This information was also obtained from an interview with one respondent, a citizen of Burundi on 15th July, 2014. Note also that the jurisdiction of the administrative courts is mainly on disputes arising out of employment contract between the government and its employees.
[12] See Article 143 of the Rwanda Constitution of 2003 as amended in 2010.
[13] *Ibid*. See also Articles 144, 145,149,150 and 151 of the Constitution.
[14] See Article 152 of the Constitution of Rwanda. *Ibid.*
[15] See Article 2(2) of the International Criminal Tribunal for Rwanda (ICTR) of 31st January, 2010 defines "Genocide" to mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such as (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.
[16] See also Nkunda, D., "The Great Lakes Pact on Security, Stability and Development in the Great Lakes Region: Introduction and Brief Reflections in the Tanzanian context," a paper presented at a workshop sponsored by the International Refugee Rights Initiative on 13th September, 2013.

been killed.

8.2 Legal System and Judicial Hierarchy in Kenya, Tanzania and Uganda

The three EAC founding Partner States of Kenya, Tanzania and Uganda were part of the former British Empire after the First World War. Thus, each of these countries inherited a common law system,[1] a system which has also been adopted by the EACJ.[2] Although Burundi and Rwanda have acceded to the EAC Treaty and become Partner States, the EAC legal system has not been changed to accommodate the two.

In the system of the Courts, Kenya has the Supreme Court, the Court of Appeal, the High Court and other courts established by the parliament with a status of a High Court. [3] According to Article 163(3) of the Constitution of Kenya, a Supreme Court has an exclusive jurisdiction to determine disputes relating to elections to the Office of the President and hear appeals from the High Court. The High Court of Kenya has original jurisdiction in all matters relating to violation of human rights.[4] In other words, any Kenyan who alleges that his/her basic fundamental rights is or is about to be violated must file a case before the High Court for determination.

Unlike Kenya, the Tanzania Court system is composed of the Court of Appeal of the United Republic of Tanzania (URT), the High Court of Tanzania,[5] the District Magistrate Court and the Resident Magistrate Court and the Primary Court.[6] Among others, the High Court of Tanzania has unlimited jurisdiction to try any civil or criminal matters. The Court has also original jurisdiction to hear and try any case involving the violation of human rights[7] in Tanzania. In 2012 Tanzania engaged in the constitutional-making process.[8] The Constitution Commission chaired by Hon. Joseph Sinde Warioba Judge (retired) collected views from the people on the new constitution. After being debated, the Constituency Assembly prepared a draft proposed Constitution (Katiba Inayopendekezwa) of the URT, October, 2014.

Views collected from the people nation-wide support the adoption of new court structure. The proposed new court structure consist of; the Supreme Court,[9] the Court of Appeal,[10] the High Court of the URT,[11] and the High Court of Zanzibar.[12] According to the proposed Constitution, the two courts (the Supreme Court and the Court of Appeal of the URT) shall have unlimited jurisdiction to hear and try all cases in the United Republic of Tanzania.[13] In other words, the two Courts constitute union matters. On the other hand, the High Court of the URT shall have jurisdiction over all cases in Mainland Tanzania, while the High Court of Zanzibar shall exercise powers over cases in Zanzibar.[14]

The proposed court structure has been in place and practiced in some of the EAC Partner States. In Uganda, for instance, the court structure consists of the Supreme Court, the Court of Appeal, the High Court, the Magistrate Court and Specialised Courts.[15] It includes; the Industrial Court, the local Council Courts and the Military Courts, which also form part of the judicial bodies in Uganda, and are considered as courts established to deal with special cases.

This author is of the argument that the existing difference in legal systems among EAC Partner States presents a challenge to the EACJ in protecting and promoting human rights. This problem arises because the procedures and technicalities for handling cases between the two legal systems are quite different. Whereas the common law system require parties to strictly adhere to the law and procedure, the civil law system allow flexibility to achieve substantial justice. As such, litigants of human rights cases from Burundi and Rwanda, which belong to the civil law system are likely to face many technical challenges when accessing the court for cases involving human rights violations before the EACJ. This is because, rules and procedure of the EACJ have been fashioned on the common law system, which requires a strict adherence to the rules and procedure. To approach the Court, they should first learn the rules and procedure of the common law system and do away with a civil law system which is not applicable under the EACJ.

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[1] Source: www.nyula global.org/globalex. Accessed on 13th September, 2013.
[2] Ibid.
[3] See Article 162(1) of the Constitution of Kenya, 2010.
[4] Article 165(2) (b) of the Kenyan Constitution, *Ibid*.
[5] Article 117(1) and 108(1) of the Constitution of the United Republic of Tanzania (URT). *Op .cit* establishes the Court of Appeal of the URT and the High Court of Tanzania.
[6] Section 4 of the Magistrate's Courts Act (MCA) [Cap.11 R.E.2002] establishes the District Court in every district, and Section 5 of same Act gives powers to the Chief Justice to establish Courts of a Resident Magistrate by order to be published in the Gazette.
[7] See Article 30 of the Constitution of the URT of 1977 and section 4 and 8 of the BRDE Act [Cap.3 R.E.2002].
[8] See Section 5 of the Constitution Review Act, 2012 which gives powers the president of the United Republic of Tanzania with consultation and agreement with the president of Zanzibar establish the Commission with mandate of coordination and collection of public opinions.
[9] Article 171, of the Proposed Constitution, 2014, p.143.
[10] Article 182 (1), *Ibid,* p.155.
[11] See Article 193((1), *Ibid*, p.162.
[12] Article198(1), *Ibid,* p.170.
[13] See Article 173(1) and 184(1), *Ibid*, pp.144-156.
[14] Article 199(1), *Ibid*, p 170.
[15] See also the Constitution of Uganda, 1995.

9.0 Funding Challenges

Like other challenges examined in this paper, funding is also a major challenge facing the EACJ. In a nutshell, the author revealed the EACJ is inadequately funded by the EAC Partner States. Though the EAC Treaty provides that the budget of the organs and institutions of the Community depends on equal contributions by the Partner States, internal and external donors, yet Partner States do not contribute effectively as expected.[1] Lack of adequate fund to meet the EACJ's budget seems to be an acute challenge in discharging the court's functions. Generally, lack of political will to contribute to the EACJ's budget is one of many reasons cited for poor funding of the Court.[2] For instance, the total budget of the EAC in the 2013/2014 financial year was US$ 38,073,491.50, only US$ 17,460,831.25 (45.86%) was paid by Partner States, thus the EAC faced a budget deficit of US$ 20,612,660.25. Worse enough, Partners States of Burundi and Tanzania contributed less compared to Kenya, Uganda and Rwanda where Burundi contributed 20.74% and Tanzania contributed only 48.63% of the total budget.[3] The table below shows the trend of contributing to the EAC budget by its member states.

Table: Budgetary Contribution to the EAC by Partner States by 18th November, 2013

PARTNER STATE	CONTRIBUTION DUE 2013/14 (USD)	CONTRIBUTION PAID 2013/14 (USD)		TOTAL OUTSTANDING (USD)
Kenya	7,614,698.30	4,298,558.88	56.45%	3,316,139.42
Tanzania	7,614,698.30	3,703,337.93	48.63%	3,911,360.37
Uganda	7,614,698.30	4,072,867.31	53.49%	3,541,830.99
Rwanda	7,614,698.30	3,807,149.00	50.00%	3,807,549.30
Burundi	7,614,698.30	1,578,918.13	20.74%	6,035,780.17
Total	**7,614,698.30**	**17,460,831.25**	**45.86%**	**20,612,660.25**

Source: EAC 28th Report of the meeting of the Council of Ministers held at Kampala, Uganda on 22nd – 29th November, 2013 available at www.eac.org. Accessed on14th July, 2016.

With regard to the EACJ, the court has seriously been affected by the reluctance of the Partner States to contribute on its annual budget. A good example is the financial year 2013/2014 whereby the proposed total budget of the EACJ was estimated to US$ 3,829,765.00, but only US$ 1,595,767.45 (41.67%) was contributed by Partner States. A total of US$ 2,233,997.55 (58.33%) was not contributed.[4] Generally, the requirement of equal budgetary contribution in accordance with the EAC Treaty to meet the EACJ's budget is not observed by Partner States, hence affecting the Court's efforts in protecting and promoting human rights. A good picture of budgetary contributions to EACJ is clearly demonstrated in the table below.

Table: Status of Partner States Budgetary contribution to EACJ by November, 2013

PARTNER STATE	CONTRIBUTION DUE 2013/14 (USD)	CONTRIBUTION PAID 2013/14 (USD)		TOTAL OUTSTANDING (USD)
Kenya	765,953.00	432,386.67	56.45%	333,566.33
Tanzania	765,953.00	372,514.14	48.63%	393,438.86
Uganda	765,953.00	249,088.86	32.52%	316,864.14
Rwanda	765,953.00	382,956.37	50.00%	382,996.63
Burundi	765,953.00	158,821.40	20.74%	607,131.60
Total	**3,829,765.00**	**1,595,767.45**	**41.67%**	**2,233,997.55**

Source: EAC 28th Report of the meeting of the Council of Ministers held at Kampala, Uganda on 22nd – 29th November, 2013 available at www.eac.org. Accessed on 14th July, 2016.

10 Conclusion

This paper presented the legal and practical challenges facing the EACJ in protecting and promoting human rights in the EAC. The central argument advanced throughout the chapter is that the existing legal and practical challenges hinder the EACJ in its endeavour to promote and protect human rights in EAC. One of the major challenges of the EACJ in protecting human rights highlighted in this paper is the contentious human rights competence of the EACJ. Another key challenge noted under this paper is the *ad hoc* nature of the EACJ and respective Judges, thus leading to delay of cases and difficulty in planning for EACJ sessions. The paper argued vehemently against; the absence of an effective mechanism for enforcing court's judgment, mixed legal system and budgetary constraints, among others. Following existence of these challenge, the author recommends the following: the EAC partner states must adopt the protocol in accordance with Article 27(2) of the EAC treaty to

[1] See Article 132(4) of the Treaty for the establishment of the EAC.
[2] Information obtained from the office of registrar of the EACJ in Arusha, on December, 2014.
[3] See 28th Report of the meeting of the EAC Council of Ministers, held at Kampala, Uganda on 22nd to 29th November, 2013, p.56.
[4] 28th Report of EAC Council of Ministers, *Op. cit*, p.56.

give powers to the EACJ to hear human rights cases, national laws in the EAC should be reviewed to recognise the human rights mandate of the court and the EAC partner should assent to the proposed draft Bill of rights to enhance the protection and promotion of human rights. Other recommendations are; the EACJ should have permanent Judges, partner states should commit their financial resource and fund the activities of the court in accordance with the treaty and the EACJ should have its own body responsible for enforcement of its orders and decree.

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