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The domestic impact of the decisions of the East African Court of Justice

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Summary

The East African Court of Justice is the judicial arm of the East African Community and is vested with the primary mandate of interpreting and applying the Treaty for the Establishment of the East African Community. The EAC Treaty does not contain a catalogue of human rights, neither does it constitute the EACJ as a human rights court with the power to adjudicate human rights cases. Nonetheless, the EACJ over time has handed down decisions that have had the effect of safeguarding and promoting human rights within the Community. It is in this context that the article explores the influence of the EACJ's decisions within the legal frameworks of the respective member states, beyond mere compliance by the member states with the orders of the Court. Inclusive in this is an analysis of how these decisions have influenced the development, interpretation or application of law and policy, and the practices of state and non-state actors in the domestic sphere of the East African Community member states. The overall finding of the article is that there are clear linkages, albeit limited in scale and spread, between the decisions of the EACJ and national laws, policies and practices of national actors, which extend beyond the domestic implementation of the Court's decisions and which need to be further investigated and upscaled in order to harness their potential benefits for the EAC integration process.

Key words: *East African Court of Justice; human rights; domestic impact; EAC Treaty*

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1 Introduction

The integration objectives of the East African Community (EAC) as set out in its constitutive treaty include enhancing cooperation among member states in the political, economic, social and cultural fields, and security, legal and judicial affairs,[1] through the creation of a Customs Union, a Common Market, a Monetary Union and, ultimately, a Political Federation.[2]

The 1999 Treaty for the Establishment of the East African Community (EAC Treaty) made a deliberate effort to hinge the achievement of these integration objectives on a set of principles that include adherence to principles of good governance, democracy and respect for human rights. Indeed, in articles 6(d) and 7(2) of the EAC Treaty, the EAC member states agree to a set of fundamental and operational principles such as good governance, democracy and the rule of law, 'gender equality as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights (ACHPR)'.[3] So significant are these principles that the East African Court of Justice (EACJ) has held that they are core and indispensable to the success of the integration agenda, and that their inclusion in the EAC Treaty denotes a serious commitment by member states to the promotion and protection of human rights in line with the Treaty imperatives.[4]

This article adopts the position that these commitments by the EAC member states can be of tangible value to their citizens and residents only if they translate into enhanced respect for and promotion of human rights in the domestic realm. For this to happen, the EAC member states must institute deliberate measures at the sub-regional level to promote and protect human rights, and these measures in

1 See art 5(2) of the Treaty for the Establishment of the East African Community, signed in Arusha, Tanzania, on 30 November 1999; entered into force 7 July 2000.

2 In the theory of economic integration, a customs union is characterised by the elimination of tariffs between participating states, and a common external tariff for goods exported from the union. The EAC Customs Union Protocol was adopted by the Summit on 2 March 2004 and entered into force on 1 January 2005. A common market adds the free movement of factors of production to the customs union. In this regard, the Common Market Protocol was concluded in 2010. Its implementation will make possible the free movement of goods and services and factors of production (capital and labour) across the borders of the member states. The EAC member states have also concluded the East African Monetary Union Protocol, which was adopted and signed by the member states on 30 November 2013. It entered into force on 1 July 2014.

3 See art 6(d) of the EAC Treaty. Other provisions relating to human rights in the EAC framework are found in art 3(3)(b), arts 5(1) and 5(3)(f), arts 120, 123 and 124 as well as arts 146 and 147 of the EAC Treaty.

4 See *Samuel Mukira Mohochi v The Attorney-General of The Republic of Uganda* EACJ Reference 5 of 2011 para 36, as well as *Plaxeda Rugumba v Secretary-General of the EAC & Attorney General of Rwanda*, Ref 8 of 2010, EACJ First Instance Division, para 37.

turn should radiate from the sub-regional to the domestic sphere and impact their respective human rights frameworks for the benefit of their citizens and residents.[5]

The article pursues this proposition by evaluating the impact of the EACJ's decisions on human rights complaints litigated before it on the member states' respective national human rights frameworks. The understanding of 'impact' adopted for the purposes of the article is guided by several scholarly works,[6] but relies heavily on the writings of Okafor, who adopts and advocates a broader view, which evaluates impact beyond the traditional notions of state compliance with the decisions of monitoring regimes.[7] Therefore, for the purposes of the article impact is understood to go beyond mere state compliance with the decisions of the EACJ and therefore will be used to denote the influence of the EACJ's judgments on domestic law and policy, as well as the actions of domestic actors leading to changes in human rights practices in EAC member states.

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5 The EAC has taken up both binding (hard law) and soft law measures in an attempt to adhere to the treaty's human rights imperatives. Binding measures in this context include provisions of the EAC Treaty, its Protocols and Annexes, Acts of the Community, Regulations, Directives and Decisions of the Council as well as the decisions of the EACJ. Soft law measures, on the other hand, generally refer to standards of conduct which, although not legally binding, still have some legal significance and effect. These include resolutions and declarations made by the EALA; Bills passed by the EALA but pending assent by the heads of state; and policies and strategies by EAC organs such as the Secretariat and the Council. For an in-depth conceptual discussion of soft law, see U Mörth 'Soft law and new modes of EU governance: A democratic problem?' (2005) http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/6/Papers_Soft%20Mode/Moerth.pdf (accessed 26 November 2016).

6 Heyns & Viljoen define impact as 'any influence the treaties may have had in ensuring realisation of the norms they espouse in individual countries'. See CH Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 6. Writing on the extent of state compliance with the recommendations of the African Commission, Viljoen & Louw distinguish between 'direct impact' and 'indirect impact' of human rights treaties and law. They define 'direct impact' as immediately demonstrable results expressed, eg, by the implementation of a finding of a treaty-monitoring body. 'Indirect impact' in their view is defined as incremental and occurring over time. See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 1. See also J Krommendijk *The domestic impact and effectiveness of the process of state reporting under UN human rights treaties in The Netherlands, New Zealand and Finland: Paper pushing or policy promoting?* (2014) 368-375. A recent study on the national impact of the international human rights monitoring mechanisms in Kenya assesses impact 'through the influence of the monitoring mechanisms' judgments, decisions, concluding observations and recommendations on national courts, executive action and policy making, law making, activities of non-state actors'. See generally F Kabata 'Impact of international human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, 2015.

7 In his view, impact may be incremental in nature, through influencing the thinking processes and actions of key domestic actors including national courts, the national executive, policy-making and legislative processes and civil society activists. See OC Okafor *The African human rights system, activist forces and international institutions* (2007).

The choice of the EACJ as a candidate for this impact analysis is borne out by the fact that it is one of the African sub-regional courts that has been the theatre of substantial human rights litigation, notwithstanding the fact that it lacks express jurisdiction to hear and determine human rights complaints. Its creativity in claiming for itself a limited human rights jurisdiction has seen it hand down a number of progressive and binding decisions that over time have influenced the member states' national human rights frameworks.

The first part of the article delves into the EACJ as the sub-regional court and the custodian of the EAC Treaty, including its commitment to the promotion and protection of human rights. Part two of the article evaluates the national impact of selected EACJ decisions to showcase the extent to which the Court's judgments have influenced member states' respective national human rights frameworks. The article concludes with a reflection on the national impact of the Court's judgments and their influence on the domestic human rights discourse in the respective member states.

2 EACJ and its human rights competence

Established under article 9 of the EAC Treaty, the EACJ is the Community's judicial arm, whose core function is to ensure the adherence to law in the interpretation and application of the Treaty.[8] The Court's jurisdiction covers both contentious and non-contentious matters relating to the interpretation and application of the Treaty.[9] The Court may be seized of a matter through references by natural and juristic persons resident within the Community, EAC member states and the EAC Secretary-General.[10] The EAC Council may also seek advisory opinions from the Court under article 14 of the Treaty.

The EACJ does not have express jurisdiction to hear and determine human rights cases. Article 27(2) of the EAC Treaty suspends the Court's human rights jurisdiction until a protocol has been adopted that would extend its jurisdiction to include human rights cases. A protocol adopted in 2014 under article 27(2) of the EAC Treaty

8 The EACJ is different in composition and jurisdiction from the defunct East African Court of Appeal which was a court of appeal from decisions of the national courts on both civil and criminal matters except constitutional matters and the offence of treason in Tanzania. See HR Nsekela 'Overview of the East African Court of Justice' paper for presentation during the sensitisation workshop on the role of the EACJ in the EAC integration, Imperial Royale Hotel, Kampala, Uganda, 1-2 November 2011, http://www.eacj.org/docs/Overview-of-the-EACJ.pdf (accessed 12 February 2017).

9 It is also empowered to determine disputes between the EAC and its employees with regard to their terms and conditions of employment and arbitrate disputes pursuant to an arbitration clause contained in a contract agreement which confers such jurisdiction on the Court. Detailed provisions on the mandate and functions of the Court are outlined in arts 23-47 of the EAC Treaty. See also http://www.eacj.org/establishment.php (accessed 21 June 2016).

10 See arts 28-32 of the EAC Treaty.

excluded human rights jurisdiction based on the argument that member states already have acceded to the African Charter on Human and Peoples' Rights (African Charter) and, therefore, any human rights cases emanating from the member states should be argued at the African Court on Human and Peoples' Rights (African Court).[11] Furthermore, member states have argued that they have sufficient national constitutional safeguards for the protection of human rights without the need for a sub-regional human rights court.[12]

Nonetheless, the EACJ through a mix of judicial activism and creative interpretation has claimed for itself limited human rights jurisdiction. The landmark case in this regard was *James Katabazi & 21 Others v the Secretary-General of the EAC & Another*, where the Court held that although it not yet had jurisdiction to deal with human rights issues, it had jurisdiction to interpret the Treaty even if the matters complained of included human rights violations.[13] Accordingly, the Court proceeded to 'interpret' and 'apply' articles 6(d), 7(2) and 8(1)(c) of the Treaty and made a finding that the facts of the case disclosed a violation of the principle of the rule of law and, consequently, a contravention of the EAC Treaty.

This position continues to be reaffirmed in subsequent decisions by the Court. For instance, in *Independent Medical Legal Unit v the Attorney-General of the Republic of Kenya & 4 Other*s, the Court held that it had jurisdiction to hear and determine a petition against the Republic of Kenya relating to allegations that it had failed to take measures to prevent, investigate or punish those responsible for human rights violations allegedly carried out by its military between 2006 and 2008 in violation of several international instruments, including the EAC Treaty.[14] Furthermore, in *Democratic Party v Secretary-General of the East African Community & 4 Others,* the EACJ unequivocally held that it had jurisdiction to interpret provisions of the African Charter, thereby reaffirming its position as a normative source of law within the EAC's legal framework.[15]

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11 See Report of the 13th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref EAC/ SCLJA/13/2012 and Report of the 16th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref EACJ/ SCLJA/16/2014.

12 See Question EALA/PQ/OA/3/34/2013 (by Hon Dora Byamukama). Report of the 4th Meeting of the 2nd Session of the East African Legislative Assembly, Kampala, Uganda, 19-31 January 2014. See also reports of the 13th and 16th Sectoral Council on Legal and Judicial Affairs (n 11). At the 15th Ordinary Summit of the EAC Heads of State, the Summit endorsed recommendations by the Council to expand the Court's jurisdiction to cover trade and investment matters, as well as matters associated with the East African Monetary Union. See para 16 of the Communiqué of the 15th Ordinary Summit of the EAC Heads of State, 30 November 2013.

13 *James Katabazi & 21 Others v the Secretary-General of the EAC & Another* EACJ Reference 1 of 2007.

14 EACJ Reference 3 of 2010. See also *Attorney-General of Rwanda v Plaxeda Rugumba* EACJ Appeal 1 of 2012.

15 *Democratic Party v Secretary-General of the East African Community, the Attorney-General of the Republic of Uganda, the Attorney-General of the Republic of Burundi,*

The EACJ is not an appellate court from the domestic jurisdiction. Rather, it fulfils a complementary function to the national courts.[16] The EAC Treaty creates a system whereby national courts have limited jurisdiction to determine disputes relating to the application of Community law, but at the same time recognising that this is subject to the supremacy of the EACJ in the interpretation of all law made within the EAC framework.[17] As such, decisions of the EACJ, being part of Community law, take precedence over decisions of national courts insofar as the interpretation and application of the EAC Treaty is concerned. This position is reinforced by articles 8(4) and 33(2) of the EAC Treaty and was reaffirmed by the EACJ in the case of *Attorney-General of the Republic of Uganda v Tom Kyahurwenda.*[18]

The EACJ lacks its own implementation framework and, therefore, relies on national legal systems to implement its decisions, and in particular those that require some form of action at the national level. Judgments that impose a pecuniary obligation on a person are executed as per the rules of civil procedure of the member state concerned, thereby enforcing the EACJ's judgments in the same manner as decisions of national courts.[19] Those that do not impose pecuniary obligations are implemented under the broad framework of article 38(3) of the EAC Treaty, which requires the Council of Ministers or the member states to take measures to expeditiously implement the Court's decisions, thus to a large extent hingeing compliance on the political goodwill of member states.

3 Evaluating the national impact of the human rights judgments of the EACJ

Since its inauguration in 2001 the EACJ through its adjudicative, interpretative and advisory jurisdiction has played a critical role as the plumb line for policy, legislation and administrative action taken by member states in relation to the implementation of their Treaty obligations. As will be demonstrated in the cases analysed in this section, the EACJ through its bold and innovative decisions has

the Attorney-General of the Republic of Rwanda and the Attorney-General of the Republic of Kenya, EACJ Reference 2 of 2012 and EACJ Appeal 1 of 2014.

16 The wording of art 33 of the Treaty recognises, albeit obliquely, that national courts also have jurisdiction to determine disputes concerning the application of EAC law.

17 See the case of *The East African Law Society & 4 Others v The Attorney-General of Kenya & 3 Others* Reference 3 of 2007, where the Court observed that by the provisions of arts 23, 33(2) and 34 the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty, to ensure harmony and certainty.

18 Case Stated 1 of 2014 arising from Miscellaneous Application 558 of 2012 in Civil Suit 298 of 2012 of the High Court of Uganda. The Court held *inter alia* that its decisions in the interpretation of the Treaty take precedence over decisions of the national courts and tribunals on similar matters.

19 See Rule 74 of the EACJ Rules of Procedure.

distinguished itself as a champion for the promotion and protection of human rights notwithstanding the lack of express human rights jurisdiction. These cases have been selected having taken cognisance, among others, of the human rights issues that were raised in the arguments before the Court, the decisions of the Court thereon and their contribution to the human rights discourse and jurisprudence both at the EAC level and within the respective member states' national legal framework.

3.1 *Anyang' Nyong'o* case[20]

3.1.1 Arguments and findings of the Court

The core of this reference was article 50 of the EAC Treaty, which provides that the National Assembly of each member state shall elect nine members to the East African Legislative Assembly (EALA) in accordance with such procedures as it may determine. It also stipulates that the elected members, as far as is feasible, shall be representative of specified groups, and sets out the qualifications for election.

Pursuant to this provision, the Kenya National Assembly enacted the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001 (2001 Election Rules). The first nine members of the EALA from Kenya, whose terms expired on 29 November 2006, were elected under those rules. A dispute arose at the conclusion of the election of Kenya's representatives to the second Assembly in 2006, leading to the reference by the applicants to the EACJ claiming that the process of nomination and election adopted by the National Assembly of Kenya had been contrary to article 50 of the EAC Treaty in so far as no 'election' was held nor any debate allowed in Parliament on the matter.

Furthermore, they contended that the 2001 Election Rules did not allow for direct election of nominees to the EALA by citizens or residents of Kenya or their elected representatives and, therefore, were null and void for being contrary to the letter and spirit of the EAC Treaty. In addition to the reference, the applicants successfully made an interlocutory application for injunctive orders barring the swearing-in of the Kenyan nominees pending the final determination of the reference.

The respondents for their part argued that only the High Court of Kenya had the jurisdiction to determine questions of legality of elections conducted in Kenya, and that an assumption of jurisdiction thereon by the EACJ would be an usurpation of the national court's functions. Furthermore, the government of Kenya contended that

20 *Peter Anyang' Nyong'o & 10 Others v the Attorney-General of the Republic of Kenya & 5 Others* EACJ Reference 1 of 2006 and EACJ Appeal 1 of 2009.

only the Attorney-General of Kenya could file a suit in the public interest, hence the applicants had no *locus standi* before the Court.

The Court in its final decision held that the 2001 Election Rules did not provide for a voting procedure for choosing or selecting the representatives to the EALA and were thus inconsistent with article 50 of the EAC Treaty.

The reasoning of the Court was grounded on the fact that the Rules failed to provide for actual parliamentary debate and approval of party nominees to the EALA and, thus, the ensuing process did not amount to an 'election' as contemplated by the EAC Treaty. Thus, Kenya had violated the provisions of article 50 of the EAC Treaty by holding a 'fictitious election in lieu of a real election'.[21] The Rules merely turned the national assembly into a rubber-stamping entity, approving the names of nominees submitted to it without any inquiry into their suitability for the position.[22]

On the question of *locus standi,* the EACJ held that article 30 of the EAC Treaty provided sufficient *locus* to the applicants to found a cause of action, and that there was no requirement of exhaustion of local remedies by applicants prior to instituting references before it.[23]

3.1.2 Influence on national laws, policies and actors

The immediate effect of the decision was that, since the Kenyan nominees to the EALA could not validly take office, the EALA could not conduct its business as it was not fully constituted as required by the EAC Treaty. Consequently, the Kenyan Parliament on 23 May 2007 passed fresh nomination rules in the form of the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2007. These Rules set out an elaborate procedure for election of Kenya's EALA representatives taking into consideration the concerns raised by the EACJ in its judgment in the *Anyang' Nyong'o* case. According to these Rules, Parliament must debate and approve the nominees for the position of EALA members. Fresh 'elections' of Kenya's nominees were therefore conducted under these new Rules.

From a human rights perspective, the outcome of compliance by Kenya was legal reform in the nature of development of a more representative and more democratic framework for the election of members of the EALA from Kenya consistent with the EAC Treaty requirements, hence giving effect, among others, to the right to

21 See para 43 of the decision.

22 This was not only one of the cases in which the Court clearly showed its capacity to 'bite', but was also the first case before the EACJ in which the primacy of community law over domestic legal provisions in accordance with art 8 of the EAC Treaty was tested and upheld by the Court. Notably, the EACJ in its decision made reference to EU case law which established the primacy of EU law over domestic law; *Flaminio Costa v ENEL*, Case 6/64 ECR 585 and *Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECJ Case 26/62 ECR 1.

23 See generally paras 17-20 of the decision.

political participation and effective representation in the regional parliament.

However, going beyond the compliance by Kenyan authorities in passing new election rules, the decision has had a considerable influence across the member states, as is demonstrated below.

Most notably, the EACJ's decision in this case had a spill-over effect, reverberating beyond Kenya's borders and influencing the filing of similar cases at the EACJ, challenging elections to the EALA by litigants in Uganda and Tanzania respectively. Two cases, *Democratic Party and Mukasa Mbidde v Secretary-General of the East African Community and the Attorney-General of the Republic of Uganda* and *Mtikila v Attorney-General of Tanzania & Others*,[24] were instituted in the wake of this decision, and similarly resulted in changes to domestic laws relating to the election of members of the EALA from these member states. To that extent, therefore, it confidently can be concluded that the decision not only influenced private citizens in the two other member states to pursue similar claims before the EACJ, but also contributed to legal reform in their respective jurisdictions, thereby enhancing the respect for democracy and the right to political participation.

Further evidence of the national impact of this decision is found in its use as legal precedent in litigation before national courts and, most notably, in human rights cases. A significant instance in this regard was the reliance on the *Anyang' Nyong'o* decision by the Ugandan Constitutional Court in *Jacob Oulanyah v Attorney-General,*[25] in which the petitioner argued that the 2006 electoral rules of the National Assembly of Uganda were inconsistent with the Constitution of Uganda to the extent that independent candidates were denied the right to be elected to the EALA. The Constitutional Court found that the rules not only were inconsistent with the Constitution but also with article 50 of the EAC Treaty. It is worth noting that this was the first instance in which a national court in a member state made reference to a decision of the EACJ in its judgment, thus signifying the legal value attached to EACJ's decisions by national courts.

The *Anyang' Nyong'o* case has been relied on in subsequent cases before the Ugandan High Court, notably in *Akidi Margaret v Adong Lilly and the Electoral Commission*[26] as well as in *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission*,[27] both of which were election-related cases which hinged on the promotion of a transparent and representative elections framework. Save for Uganda,

24 *Democratic Party and Mukasa Mbidde v The Secretary-General of the East African Community and the Attorney-General of the Republic of Uganda* EACJ Reference 6 of 2011, First Instance Division; and *Mtikila v Attorney-General of Tanzania & Others* EACJ Reference 1 of 2007.

25 Constitutional Petition 28 of 2006.

26 Election Petition 0004 of 2011 (unreported).

27 High Court Election Petition 001 of 2011 (unreported).

this research, however, did not find evidence of the case being used as precedent in the national courts of the other member states.

Notwithstanding its positive influence as outlined above, the *Anyang' Nyong'o* case precipitated unprecedented negative ramifications in the overall legal, human rights and governance architecture both sub-regionally and in the respective EAC member states. This was borne out by the EACJ's decision in an interlocutory application by the applicants in which it issued injunctive orders barring the swearing in of Kenya's EALA nominees.[28] In a campaign spearheaded by the Kenyan government, the EAC Summit of Heads of State and the EAC Council of Ministers pushed through a raft of amendments to the EAC Treaty, which substantially altered the EACJ's structure and jurisdiction.[29] Consequently, the Court was split into a First Instance Division and an Appellate Division; new grounds for the removal of judges were introduced which allowed suspension on allegations of misconduct in the countries of origin; and a 60-day time limit was set for instituting references before the Court challenging violations of the Treaty. Furthermore, the Court's jurisdiction was limited with the inclusion of a provision to the effect that it had no power to review cases for which 'jurisdiction is conferred by the Treaty on organs of Partner States'.[30]

The outcomes of the political backlash and the amendments to the EAC Treaty had a negative impact on the work of the EACJ and on the human rights discourse in the sub-region, which then precipitated a negative ripple effect on the realisation of human rights in the respective national spheres. For instance, the introduction of a 60-day time limit within which to file cases before the EACJ has effectively blocked access to justice for individuals and communities who would wish to have their cases ventilated before the EACJ. It also denied the Court a chance to pronounce itself on fundamental issues of human rights and governance, which would enrich its jurisprudence. Three cases are instructive in this regard. As a result of the 60-day rule, the EACJ in *Attorney-General of Kenya v Independent Medical Legal Unit*,[31] *Omar Awadh & 6 Others v Attorney-General of the Republic of Uganda*[32]*as well as Mbugua Mureithi v The Attorney-General of the Republic of Uganda*[33] held that it could not determine the references on their merits as they had been filed outside the 60-day time limit. These cases raised substantial questions with regard to the human

28 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293.

29 For a detailed account and analysis of the backlash arising from the EACJ's decision in the *Anyang' Nyong'o* case, see J Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2014) 24 *Duke Journal of Comparative and International Law* 249.

30 See arts 26(1), 26(2), 27(1) & 30(2) of the EAC Treaty.

31 Appeal 1 of 2011, Judgment of 15 March 2012.

32 EACJ Ref 4 of 2011, First Instance Division.

33 EACJ Reference 11 of 2011, First Instance Division.

rights obligations of national governments in the context of the maintenance of national security, including the fight against terrorism. The Court's pronouncements on these and other related questions would have greatly enhanced the EACJ's jurisprudence in addition to providing guidance to member states on their obligations under the EAC Treaty. This negative impact can be traced directly to the decision of the EACJ in the *Anyang' Nyong'o* case, albeit at the interlocutory stage.

Notwithstanding the negative effects from the backlash from the EAC's political organs, a silver lining that arose from the events of the *Anyang' Nyong'o* case was the galvanising of various non-state actors including the East African Law Society, legal scholars, Kenyan legislators and non-governmental organisations (NGOs) around the EACJ to shield it from the negative political fallout.[34] This show of solidarity around the EACJ at one of its most vulnerable points in recent history resulted in the creation of networks that have been sustained and that have played a critical role in litigating subsequent human rights cases before the EACJ.[35]

3.2 *Katabazi* case[36]

3.2.1 Arguments and findings

This was one of the earliest cases litigated before the EACJ and which shaped the course of human rights litigation at the Court. The applicants in this case had been charged with treason before a Ugandan court in 2004 and remanded in custody. Fourteen of them subsequently applied for and were granted bail by the Ugandan High Court on 16 November 2006, whereupon the High Court was surrounded by security personnel who interfered with the preparation of bail documents, and the 14 applicants were rearrested and taken into custody. On 24 November 2006 all the applicants were brought before a military General Court Martial and charged with unlawful possession of firearms and terrorism and remanded in prison. The Uganda Law Society successfully challenged before the Constitutional Court the interference of the court process by the security agents and the constitutionality of simultaneously conducting prosecutions in civilian and military courts. The Ugandan government ignored the Constitutional Court's decision and continued to remand the applicants in custody. They therefore filed the reference before the EACJ with prayers for a declaration *inter alia* that the acts of the Ugandan government were an infringement of articles 7(2), 8(1)(c) and 6 of the EAC Treaty.

In finding for the applicants, the Court observed that 'the intervention by the armed security agents of Uganda to prevent the

34 See Alter, Gathii & Helfer (n 28).
35 See Gathii (n 29) 271.
36 *Katabazi* (n 13).

execution of a lawful court order violated the principle of the rule of law and consequently contravened the Treaty'.[37] Furthermore, the Court in this case creatively and authoritatively claimed for itself a limited human rights jurisdiction by holding that although it did not have express jurisdiction to deal with human rights complaints, it nonetheless had jurisdiction to interpret the treaty even if the matters complained of included human rights violations.

3.2.2 Influence on national laws, policies and actors

Respect for the rule of law, including the guarantees of a fair trial, is a fundamental pillar in the promotion and protection of human rights. Although this decision did not result in direct legal reform, its effect within the national realm was to facilitate an atmosphere in which courts are able to dispense justice in an impartial and independent manner without fear of any reprisals from security personnel. This conclusion is borne out of the fact that not only were the persons in question subsequently released from unlawful custody, but also that since there have been no similar instances of unlawful intimidation of the judiciary by the military.[38] This is evidenced, for instance, by the circumstances surrounding the arrest and arraignment of Dr Kizza Besigye in 2016 on charges of terrorism and treason, which were similar to those against the applicants in the *Katabazi* case. The response by the Ugandan authorities in the case of Dr Besigye was markedly different in that there was no interference with the judicial process upon his release on bail in July 2016.[39] Furthermore, in the aftermath of the Kasese crisis in Uganda in November 2016, which culminated in the arrest of Ruwenzururu King Charles Wesley Mumbere and approximately 150 members of his royal guard on a raft of charges including terrorism and murder, several suspects have been released on bail by the Ugandan High Court with no interference by security agencies.[40] Based on the foregoing, whereas there is no direct evidence to this effect, it is plausible to conclude that the restraint by the Ugandan authorities in part may be attributed to the outcome in the *Katabazi* case.

A clearer instance of the decision's national influence has been the use of this case as authority by litigants and the High Court of Uganda. In *Kamurali Jeremiah Birungi & 2 Others v Attorney-General of Uganda and the Secretary-General of the EAC*,[41] the High Court referred

37 *Katabazi* para 23.

38 See interview with Justice Isaac Lenaola, Judge of the Supreme Court of Kenya and Principle Judge of the East African Court of Justice, 16 December 2014, Nairobi, Kenya (notes on file with author).

39 'Besigye released on bail' *Daily Monitor* http://mobile.monitor.co.ug/News/Besigye-released-on-bail/2466686-3290918-format-xhtml-ppml77z/index.html (accessed 10 November 2016).

40 'Mumbere granted bail but restricted to Kampala, Wakiso' *The Observer* https://observer.ug/news/headlines/50771-mumbere-granted-bail-but-restricted-to-kampala-wakiso (accessed 10 January 2018).

41 National Assembly Election Petition 2 of 2012 (unreported).

to the *Katabazi* decision to clarify the Secretary-General's responsibilities under the EAC Treaty. Notably, whereas the Court did not rely on the substantive decision of the EACJ on the facts of the *Katabazi* case, it nonetheless made reference to the other aspects of the Court's reasoning and, in this case, to determine whether the Secretary-General of the EAC was a proper party to the suit.

Similar to the *Anyang' Nyong'o* case, the *Katabazi* decision has reverberated across all the member states and has been revolutionary in terms of shaping human rights litigation before the EACJ. It is through this decision that the EACJ staked its claim to human rights jurisdiction, albeit in a limited fashion. Accordingly, it has served as a point of reference by litigants in all subsequent references filed at the EACJ in which claims of human rights violations have been made. Thus, in terms of national impact, the *Katabazi* case has influenced individual litigants, lawyers and civil society organisations in the EAC member states by opening a crucial door for them to ventilate human rights issues before the sub-regional court.

3.3 *Rugumba* case[42]

3.3.1 Arguments and findings

The applicant in this reference, Plaxeda Rugumba, approached the EACJ claiming that her brother, Seveline Rugigana Ngabo, a lieutenant-colonel in the Defence Force of the Republic of Rwanda, had been arrested on 20 August 2010 and held *incommunicado* by the Rwandan government. She alleged also that Lieutenant-Colonel Ngabo had not been formally charged before any court of law and that his wife was not able successfully to file an application for *habeas corpus* as her attempts to follow up the detention of her husband had led to her being harassed into hiding by the Rwandan government.

It is on this basis that she sought a declaration by the Court that her brother's arrest and detention without trial was a breach of articles 6(d) and 7(2) of the EAC Treaty which demand that member states shall govern their populace on the principles of good governance and universally-accepted standards of human rights.

In defence, the respondent claimed that Lieutenant-Colonel Ngabo had been arrested on suspicion of having committed crimes against national security, and that the government had since regularised his detention and, as such, he was detained in a known military prison and was exercising his rights including visitation by his lawyers, family and friends. This, however, was subsequent to a decision of the Military High Court, which on 28 January 2011 ruled that his detention from the date of his arrest until arraignment in court was irregular and contravened the provisions of the Rwandan Code of Criminal Procedure.

42 *Rugumba* (n 4).

In rendering its decision, the First Instance Division of the EACJ made a finding that the respondent had indeed violated the provisions of articles 6(d) and 7((2) of the EAC Treaty by holding the applicant's brother *incommunicado* for a period of five months. The Court in its judgment not only reaffirmed the *Katabazi* doctrine, but also proceeded to refer substantially to the provisions of article 6 of the African Charter which protects against unlawful detention. It further observed that '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'.[43]

The respondent appealed the decision on grounds which included the fact that the EACJ had no jurisdiction to entertain the claim since it raised issues of violations of human rights.[44] In reaffirming its jurisdiction, the EACJ's Appeals Chamber acknowledged that although the Court as yet had no express human rights jurisdiction as envisaged under article 27(2), it did have jurisdiction to interpret and apply the treaty provisions. Given that the claim referred to articles 6(d) and 7(2) of the Treaty, it could not abdicate its interpretive jurisdiction merely on the basis that the claim included allegations of a violation of human rights. In its judgment the Court made substantial reference to the decision in *Katabazi* and the *IMLU* case, in which the Court clarified that it was not a human rights court adjudicating substantive claims of violations of specific rights, but that it was determining claims of breach of articles of the EAC Treaty.[45] The appellate court then proceeded to dismiss the appeal and upheld the decision of the First Instance Division.

3.3.2 Influence on national laws, policies and actors

It is arguable from the judgment of the First Instance Division that the case contributed to the promotion of human rights and respect for the rule of law by the Rwandan government, albeit in an oblique manner. Based on the facts, Lieutenant-Colonel Ngabo was arrested and detained *incommunicado* on 20 August 2010. His older sister filed the reference before the EACJ on 8 November 2010. It is only after this reference had been filed that the domestic wheels of justice began to turn in Rwanda with the subject being presented to the Military High Court on 21 January 2011. The Military High Court made its decision within a week and on 28 January 2011 declared his detention unlawful and thereafter proceeded to issue a valid preventive detention order as stipulated under the Rwandan Code of Criminal Procedure. Indeed, the Appellate Division of the EACJ acknowledged the impact that the filing of the reference had on the

43 See para 37 of the First Instance decision.

44 *Attorney-General of the Republic of Rwanda v Plaxeda Rugumba* EACJ Appeal 1 of 2012.

45 *Attorney-General of Kenya v Independent Medical Legal Unit* (n 31) as well as *Katabazi* (n 13).

national systems when it observed that 'it was agreed by both parties before the court below that upon the reference being filed; the Republic of Rwanda produced the subject before the Military High Court'.[46] In a departure from the other cases analysed in this article, it is noted that it was not the decision of the Court that spurred the government to cease the violation complained of, but rather the filing of the reference before the EACJ. This approach by a member state was also apparent in the case of *Democratic Party & Another v the Attorney-General of the Republic of Uganda*, where the authorities proceeded with haste to pass national legislation upon the filing of the reference at the EACJ. Thus, a unique form of influence is seen in these two instances, which may seem to be a departure from the overall object of this article, but which is significant for purposes of human rights litigation in general – that at times the filing of suits may influence states to cease ongoing violations or take positive steps to comply with their human rights obligations, thereby safeguarding human rights in the long run.[47]

3.4 *Burundi Press Law* case[48]

3.4.1 Arguments and findings

This reference concerns the Burundi Press Law 1/11 of 4 June 2013, amending Law 1/025 of 27 November 2003 regulating the press in Burundi.[49] The applicant's contention was that the Press Law as enacted unjustifiably restricted the freedom of the press and the right to freedom of expression which form a cornerstone of democracy, the rule of law, accountability, transparency and good governance. As such, these restrictions contravened Burundi's obligations under articles 6(d) and 7(2) of the Treaty. The applicant requested from the Court declaratory relief to the effect that the Press Law was in violation of the right to press freedom and the right to freedom of expression, and consequently was inconsistent with Burundi's treaty obligations as set out in articles 6(d) and 7(2) of the Treaty. In their view a free press would result in an informed electorate who would then be able to hold their leaders to account and thus uphold the principles of good governance and democracy.

46 See of the decision of the Appellate Division (n 44) para 33.

47 Furthermore, it may be concluded that the decision has had a deterrent effect within the national framework. The inference here is that the reputational risks that come with a public litigation process at the EACJ which for EAC member states would amount to 'airing dirty linen in public' serves to deter state agents from engaging in acts that would result in references being filed at the EACJ. See also interview with Justice Isaac Lenaola (n 38). This of course does not rule out the possibility that member states' agents have resorted to other methods that are less public and less discoverable but which in essence still amount to human rights violations.

48 *Burundian Journalists Union v Attorney-General of the Republic of Burundi* EACJ Reference 4 of 2014, First Instance Division.

49 See generally para 8 of the decision.

The applicant also called for the Court to order the Republic of Burundi either to repeal the law or amend the offending provisions to bring them into compliance with the Treaty.

Specific provisions of the Press Law pointed out by the claimants as inconsistent with the Treaty included those relating to compulsory accreditation of all journalists; restrictions as to what may be published by the media; requirements for journalists to disclose confidential sources of information; the regulation of print and web media; provisions for a prior censorship regime for films proposed to be directed in Burundi; a right of reply and correction; and fines and penalties.

The government, on the other hand, maintained that the Press Law was consistent with the EAC Treaty and noted that the Parliament of Burundi had exercised its legislative mandate as the representative of the people and its decisions could not be replaced by the wishes of any other organisation or person. Furthermore, the respondent contended that in any event, the Press Law had been challenged in the Constitutional Court of Burundi and since its decision was yet to be delivered, the reference was premature and misconceived as the latter Court was the only court with jurisdiction to interpret its legality.

In its decision the EACJ observed that democracy of necessity must include adherence to press freedom and that free press goes hand-in-hand with the principles of accountability and transparency which are all entrenched in articles 6(d) and 7(2). Accordingly, the Court declared articles 19(b), (g), (i) and part of (j) of the Burundian Press Law in violation of the principles enshrined in articles 6(d) and 7(2) of the Treaty to the extent that they unreasonably restrict the dissemination of information on the stability of the currency; offensive articles or reports regarding public or private persons; information that may harm the credit of the state and the national economy; diplomacy; scientific research; and reports of commissions of inquiry by the state.

It further declared article 20 of the Press Law inconsistent with articles 6(d) and 7(2) of the EAC Treaty to the extent that it required journalists to reveal their sources of information before the competent authorities in situations where the information relates to offences against state security, public order, state defence secrets and against the moral and physical integrity of one or more persons. As such, the Court required the Republic of Burundi in accordance with article 38(3) of the Treaty to take measures, without delay, to implement the judgment within its internal legal mechanisms.

3.4.2 Influence on national laws, policies and actors

The immediate impact of this decision was that Burundi's Parliament reviewed the Press Law and proposed new amendments thereto which would remove the contentious provisions in line with the decision of the EACJ. These amendments were debated and approved

by the Senate. A new Press Law 1/15 was passed and promulgated on 9 May 2015. However, four days later this was followed by an attack with heavy weapons on four prominent private radio stations which completely destroyed their physical infrastructure and rendered them inoperable. This attack was attributed to pro-establishment elements, but the government denied any such involvement. Furthermore, a raft of legislation deemed as repressive was also put in place to curtail freedom of assembly and freedom of information and, in particular, with reference to the regulation of social media and internet use. Thus, whereas on the one hand there was compliance with the decision of the EACJ, the overall human rights environment in Burundi took a turn for the worse following the decision. Going beyond mere compliance with and implementation of the Court's decision, it may be inferred that this decision did not have much positive traction in the member state to which it was directed. Indeed, the period following the decision has witnessed heightened attacks against freedom of the press in Burundi, which unfortunately has been in a state of national turmoil following the widespread unrest and aborted *coup* attempt in 2015. As such, given the unique circumstances in Burundi at the time of writing this article, it becomes difficult to isolate and track, beyond mere compliance with this specific decision on human rights laws, the influence of policies or state practice in such an environment.

3.5 *Rufyikiri* case[50]

3.5.1 Arguments and findings

This was another reference filed against the Republic of Burundi by the East African Law Society on behalf of Mr Isidore Rufyikiri, who at the material time was the President of the Burundi Bar Association as well as the Burundi Centre for Arbitration and Conciliation (CEBAC). In early 2013 Mr Rufyikiri was charged and prosecuted in relation to allegations of corruption as the President of CEBAC. On 24 July 2013 he wrote a letter to the governor of Bubanza Province in Burundi with reference to one of his clients, which culminated in a complaint by the Prosecutor-General of the Bar Council alleging that the contents of the letter were defamatory and injurious. The Prosecutor requested the Bar Council to institute disciplinary proceedings against Mr Rufyikiri.

On 29 October 2013 Mr Rufyikiri held a press conference in which he is alleged to have made statements against state security and public peace. On 30 October 2013 the Prosecutor-General filed a second complaint against him, asking that he be disbarred from the roll of advocates based on the statements made at the press conference.

50 *East African Law Society v Attorney-General of Burundi and the Secretary-General of the East African Community* EACJ Reference 1 of 2014, First Instance Division.

On 17 December 2013 the Prosecutor-General moved to the Court of Appeal and obtained an order dated 24 January 2014 disbarring Mr Rufyikiri from the roll of advocates. He applied for a review of the decision in March 2014, but the Court of Appeal reaffirmed its decision to disbar him. Meanwhile, the Prosecutor-General of the Anti-Corruption Court had also placed a travel ban on him, forbidding him from leaving Burundi.

Mr Rufyikiri approached the East Africa Law Society (EALS) to pursue a reference at the EACJ on his behalf, complaining that his prosecution for corruption, his disbarment from the roll of advocates as well as the travel ban imposed on him were all unprocedural and in breach of the rule of law, good governance and freedom of movement, as stipulated in articles 6(d) and 7(2) of the EAC Treaty.

The EALS also sued the Secretary-General of the EAC for alleged breach of his duty to monitor the observance by the Republic of Burundi of the EAC Treaty obligations pursuant to the provisions of article 71(1)(d) of the EAC Treaty.

The applicant sought several reliefs including a declaration that Mr Rufyikiri's prosecution, disbarment and travel restriction were a violation of the EAC Treaty; a declaration that the EAC Secretariat had breached its obligations under article 71 of the Treaty; and an order by the Court quashing his disbarment by the Court of Appeal and reinstating his name to the roll of advocates.

In its response, the government of Burundi maintained that the applicant had been barred from leaving the country as he wished to flee the country. It further argued that the applicant had been disbarred in accordance with the laws of Burundi on the grounds that he had violated his oath as an advocate by making statements that were prejudicial to state security and public peace.

The Secretary-General raised his defence by claiming that he was unaware of the matters complained of by the applicant, and therefore was not blameworthy for failure to discharge his duties under the Treaty. He further averred that as soon as he learnt of the issues raised by the applicant, he constituted a task force to investigate, among others, the alleged breaches of the EAC Treaty by Burundi, and the cause of increasing litigation at the EACJ emanating from Burundi.

On the allegations of malicious prosecution for corruption, the Court, upon examining Burundi's anti-corruption legislation and Penal Code, concluded that the relevant laws empowered the Prosecutor-General to initiate investigations and prosecutions against any person suspected of corruption and that, therefore, there was no violation of the EAC Treaty.

With reference to Mr Rufyikiri's disbarment, the Court examined the relevant provisions of the Burundi Advocates Act and concluded that the Prosecutor-General had moved to the Court of Appeal before the expiry of the statutory 60-day period within which the Bar Council was required to exercise its disciplinary processes over Mr Rufyikiri. As

such, the flawed procedure followed by the Prosecutor-General was a violation of due process and, therefore, inconsistent with articles 6(d) and 7(2) of the Treaty. Whereas the Court made a declaration that the failure of due process by the Court of Appeal was a Treaty violation, it declined to grant an order quashing and setting aside the Court of Appeal's decision to disbar Mr Rufyikiri, basing its decision on the fact that making such an order was outside its jurisdiction by virtue of the provision of article 27(1) of the Treaty.

With regard to the alleged failures by the Secretary-General, the Court noted his submissions that, prior to the institution of the reference, he had engaged with the Republic of Burundi and had formed a task force to investigate alleged breaches of the EAC Treaty and the causes of growing litigation at the EACJ emanating from Burundi. The Court also recorded the Secretary-General's report that he had not received any positive cooperation from Burundi with regard to the proposed investigations by the task force. The Court proceeded to order the Secretary-General to operationalise the task force to investigate the situation in Burundi, and further ordered the government of Burundi to take measures to implement its judgment including allowing the Secretary-General to conduct his investigative mission.

3.5.2 Influence on national laws, policies and actors

As has been discussed in the context of the *Press Law* case, this case reveals the difficult governance environment experienced by anti-establishment voices in Burundi.[51] A review of available information reveals that the task force created by the EAC Secretariat is yet to conduct its fact-finding visit to Burundi as ordered by the Court.[52] A follow-up communication from the East African Law Society has not elicited any feedback from the Secretary-General. From the foregoing and, taking into consideration the Secretary-General's veiled frustrations as may be deduced from their submissions in the case, it appears that not much headway has been made in terms of implementing the decision of the EACJ as envisaged. This may be attributed, on the one hand, to a lack of cooperation by Burundi with the EAC Secretariat in the discharge of its mandate under articles 29(1) and 71(1)(d) of the EAC Treaty[53] or, on the other hand, to reluctance on the part of the Secretary-General to engage with the Council and Summit in the case of an uncooperative member state. The overall result is that there has been no observable change in law or policy in Burundi which draws its origins to the decision of the EACJ

51 *Press Law Case* (n 48).

52 See letter from the Chairperson of the East African Law Society to the EAC Secretary-General regarding continuing breaches of human rights in Burundi, 22 September 2015 Re EALS/SG-EAC/5/2015. See also 2015 Annual Report of the East African Law Society, October 2015, http://www.ealawsociety.org/images/publications/annual_report/annual_report_2015.pdf (accessed 10 May 2017).

53 See generally, para 27 of the *Rufyikiri* case (n 50).

in this case. A review of the EACJ case load shows that cases in which the government of Burundi is accused of human rights violations in the context of the EAC Treaty have escalated considerably and continue to mount, as observed by the EAC Secretary-General in arguments before the Court. Therefore, in this regard it may be concluded, taking into consideration the cases from Burundi referred to in this article, that political goodwill, in addition to a conducive democratic environment, are key ingredients for positive traction of EACJ decisions within the member states.

A notable observation in this case in terms of influence does not arise out of the decision itself, but rather out of the manner in which the litigation was conducted. This was one of the many cases that have been litigated by the EALS before the EACJ. However, it is one of the very few cases where the EALS has filed a reference before the EACJ on behalf of one of its members. In the *Anyang' Nyong'o* decision analysed earlier in this article, it was observed that one of the positive outcomes was the creation of sub-regional networks which have been exploited for, among other purposes, litigating human rights cases before the EACJ. As such, this case showcases the workings of the sub-regional advocacy and professional bodies in pursuance of respect for and promotion of good governance and human rights within the EAC.

4 Reflections on the national impact of decisions of the EACJ

The EACJ as an organ of the Community has clearly distinguished itself in the realm of the promotion and protection of human rights. This is notwithstanding the fact that it is yet to be clothed with unfettered jurisdiction to adjudicate rights cases as provided for in article 27(2) of the EAC Treaty.

A review of the few cases analysed in the article reveals that going beyond the easily-observable compliance with the orders of the Court by the respective member states, one can decipher traces of influence that the Court's decisions have had on the human rights discourse within the EAC member states at various levels.

The study has revealed that the EACJ's decisions have influenced national judiciaries in member states in their determination of disputes at the national level. Although only documented in relation to Uganda, references to the *Anyang' Nyong'o* and *Katabazi* cases by the Constitutional Court in Uganda demonstrate the potential that the EACJ's decisions have in influencing the development and interpretation of national laws. Therein lies an untapped opportunity for the development of a common East African jurisprudence that benefits from decisions of both national and sub-regional jurisdictions.

A second layer of influence is found in the 'spill-over effect', where particular EACJ decisions have spurred litigants and non-state actors in

other member states to found claims of violations of human rights at the EACJ. Thus, for instance, the decision in the *Katabazi* case has influenced litigants across the EAC to frame their human rights claims on the basis of articles 6(d) and 7(2) of the EAC Treaty.[54] It is also credited with opening the door for litigants to approach the EACJ with human rights claims notwithstanding the fact that the EACJ does not have express jurisdiction to hear and determine claims of human rights violations.[55] Similarly, the *Anyang' Nyong'o* case precipitated the filing of similar cases at the EACJ from Uganda and Tanzania to address the election of representatives of these member states to the EALA.

In the third place, although in most instances the EACJ decisions have elicited a positive influence on the human rights framework, the political backlash experienced by the EACJ in the wake of its interlocutory ruling in the *Anyang' Nyong'o* case precipitated a negative effect, both in the short and long term, on the wider human rights framework within the EAC. The effects of the amendments to the EAC Treaty, and in particular the 60-day rule, have denied litigants access to justice even in instances where gross violations of human rights are alleged. Nonetheless, a silver lining of the *Anyang' Nyong'o* case was the galvanising of activists and NGOs to create a formidable network that has engaged in sustained litigation at the EACJ on thematic areas of governance and rights. Thus, for instance, the *Rufyikiri* case discussed above was filed and litigated by the East African Law Society.[56] Although there was no observable change in law or policy arising from the EACJ decision in that case, it has nonetheless profiled the ongoing rights abuses in Burundi and placed it at the centre stage at the sub-regional level.

A further area of influence, although not very clearly established, is based on what Justices Lenaola and Ntezilyayo refer to as the 'deterrent effect'. In their view, issues such as outright disregard for the rule of law, where the military intimidates the judiciary through acts of show of force, as exhibited in the facts of the *Katabazi* case, have not been reported in Uganda since the delivery of the EACJ decision, notwithstanding the fact that several cases of a similar nature have been brought before the Ugandan courts. Similarly, no references have been filed against Rwanda for *incommunicado* detentions as was the case in the *Plaxeda Rugumba* case. As such, a plausible conclusion is reached that the EACJ's decisions have served

54 See interview with Justice Isaac Lenaola (n 38).

55 Although not a change in law or policy, one can reasonably infer that the EACJ's decisions, and in particular on matters relevant to human rights, have served the function of emboldening EAC residents to file references with the Court. This has seen the EACJ's case load increase significantly, in particular with cases from Burundi, which had hitherto not had any references filed against it.

56 See para 14 of the *Rufyikiri* case (n 50) which details the circumstances in which the applicant sought assistance from the East African Law Society.

to deter certain breaches by member states.[57] It is, however, submitted that the flip side of this deterrence also is that member states adhere to human rights standards in order to avoid the obvious reputational risk that comes with litigation before the EACJ. Thus, compliance with human rights standards and the impact considered in this context may not arise from an overt act on the part of the member state concerned, but from refraining from acts that would otherwise have amounted to a breach of human rights in the context of the EAC Treaty.

Closely related to this finding is a special type of influence that is not based on the decision of the Court itself, but rather on the mere fact of filing a reference before the EACJ. This emerged clearly in the *Rugumba* case, where the Rwandese authorities proceeded with haste to undo a continuing violation upon the realisation that a reference had been filed at the EACJ. Similar circumstances played out in the *Democratic Party* case in Uganda where Parliament moved with unprecedented haste to pass national legislation upon the filing of the reference at the EACJ.

5 Conclusion

This article set out to evaluate the domestic impact of the EACJ's decisions on human rights complaints, with an understanding of impact as being the influence of the Court's decisions on national law, policy and actors, which extends beyond mere compliance by national authorities with orders of the Court. It emerges from the foregoing that the EACJ's decisions have had both a direct and indirect influence on both state and non-state actors in the sub-region, which has resulted in human rights gaining traction in the sub-region. Gathii attributes this result, among others, to efforts of human rights NGOs and pro-democracy activists that have consistently litigated human rights cases before the EACJ, proactive judges who have encouraged litigants to file human rights cases before the court, as well as positive action by governments to comply with EACJ decisions, sometimes spurred by political goodwill and at other times due to the 'name and shame' strategies where activists call out EAC member states for human rights violations.[58] From a theoretical standpoint it is plausible to conclude that this situation lends credence to the constructivist and liberalist thinking in which national preferences and ultimately national impact are influenced and shaped by the development and dissemination of norms and rational strategising by diverse constituents including non-state and

57 See interview with Justice Isaac Lenaola (n 38). See also interview with Justice Faustin Ntezilyayo at the EACJ headquarters, Arusha, Tanzania, 10 March 2016.

58 See JT Gathii 'Variation in the use of sub-regional integration courts between business and human rights actors: The case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 37.

sub-state actors. In the context of the EACJ decisions, rational strategising by actors in the wake of the *Anyang' Nyong'o* decision, for instance, precipitated similar suits in relation to Tanzania and Uganda, thereby resulting in changes to law and policy.

Importantly, however, one glaring point that must be reiterated is the lack of an express human rights jurisdiction of the EACJ. Whereas there is no mandatory treaty obligation on the member states to vest the EACJ with human rights jurisdiction, it is submitted that the EACJ would have more impact on national human rights practices if it were able to issue binding decisions to reinforce the Community's human rights commitments as stipulated in its founding Treaty. Moreover, the progressive integration of the EAC into a political federation requires a correspondingly robust framework for the promotion and protection of human rights, which would include an EACJ with clear jurisdiction to hear and determine complaints relating to the violation of human rights.