

# Human Rights in the East African Community

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## 1.0 Introduction

The East African Community (EAC) is an international organisation established by governments in the region currently composed of seven Partner States including: Burundi; Democratic Republic of Congo; Kenya; Rwanda; Tanzania; South Sudan and Uganda. The community was initially re-introduced by Kenya, Tanzania and Uganda in the year 2000 having signed the treaty in the year 1999. The EAC is not new as such having attempted to integrate all through the colonial period and post independence eventually collapsing for various reasons in 1977.

The British during the colonial period had an interest in the colonial integration for ease of administration of its interests in the region at the time. Burundi, Rwanda and South Sudan were admitted into the fold at different intervals having satisfied the criterion for admission into the bloc. The Democratic Republic of Congo is the latest country to be admitted into the EAC with an interest from Somalia and Ethiopia to join the fold.

## 2.0 Jurisdiction of the East African Court of Justice

The East African Court of Justice (EACJ) has cited with approval the definition of Jurisdiction<sup>2</sup> in Shabtai Rosenne's: *"The Law and Practice of the International Court," 1920 -2005 Vol. II p.524*, it is postulated that;

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<sup>2</sup> Democratic Party V Secretary General of EAC and Others, Appeal No. 1 of 2014

*“Jurisdiction relates to the capacity of the Court to decide a particular case with final and binding force.”* It is evident that jurisdiction refers to the bounds of authority that can be exercised by any given judicial body which makes it very important in the human rights discourse in East Africa.

The jurisdiction of the EACJ is to be found in various provisions of the Treaty including: *Articles; 23 (role of the Court); 27 (jurisdiction of the Court); 28 (Reference by Partner States); 29 (Reference by Secretary General); 30 (Reference by Legal and Natural persons); 31 (Disputes between the Community and its employees); 32(Arbitration clauses and Special Agreements); 34 (Preliminary Ruling of National Courts); 35A (Appeals from the First Instance Division); 36 (Advisory opinion); 39 (Interim orders); 42 (Rules of the Court) and 45(2) (employment of staff).*<sup>2</sup>

### **3.0 The EAC Treaty and Human Rights**

It is prudent to note that the treaty establishing the East African Community does not particularly dedicate a part to issues of human rights like it is in national Constitutions. In Uganda for example, the Bill of Rights is well laid out under Chapter four of the Constitution.

Human Rights have been defined as... *inherent to all human beings and as such are not granted by the State.* Resultantly, every human being no matter their different antecedents has a right to equal treatment and or protection under the law. This means that distinctions including; sex, colour, nationality,

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<sup>2</sup> Democratic Party V Secretary General of EAC and Others, Appeal No. 1 of 2014

religion, language, ethnic origins etc. should not be used to any person's disadvantage.

### **3.1 International Protection of Human Rights**

At the International front, human rights are guaranteed by the various instruments, conventions, treaties, declarations among others.

The major international instrument that have codified the rights of individuals include; the Universal Declaration of Human Rights<sup>3</sup> (UDHR); The next in line is the International Covenant on Civil and Political Rights (ICCPR);<sup>4</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>5</sup> The latter two provide specific rights as suggested by their headings.

### **3.2 Regional Protection of Human Rights**

At the regional level particularly on the African continent, we have the African Charter on Human and Peoples Rights (ACHPR),<sup>6</sup> adopted by Burundi in 1989, Kenya 1992, Rwanda in 1983, Tanzania in 1984, Uganda in 1986, Burundi in 1989 and Kenya in 1992. In one way or the other, the African States are members of the various instruments on Human Rights.

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<sup>3</sup> Adopted by the United Nations General Assembly on 10<sup>th</sup> December 1948 at Palais de Chaillot

<sup>4</sup> Done at New York, 16<sup>th</sup> December, 1966 acceded to by Burundi in 1990, Kenya 1972, Rwanda 1975, Tanzania 1976 and Uganda 1995

<sup>5</sup> Adopted and Opened for Signature, Ratification and Accession by the General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3<sup>rd</sup> January 1976

<sup>6</sup> Adopted 27 June 1981, OAU Doc, entered into force 21 October 1986

The ACHPR is an original and innovative instrument in the field of human rights which took into consideration the specificities of the African Continent.<sup>7</sup> It does not distinguish between classes of rights effectively making the ACHPR essentially different from other human rights instruments.<sup>8</sup>

The EAC treaty under Article 6 discusses the fundamental principles of the community to include good governance which stretches to: *...promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples Rights.*<sup>9</sup> The Banjul Charter as already alluded to above sets out the rights that should be respected by the intended states among others including; Human and Peoples Rights, Duties, Measures of safe guard and enforcement.

The EACJ has already opined that it has jurisdiction to interpret the charter (ACHPR) in the context of the Treaty.<sup>10</sup> (This is what the EAC States find themselves signed up to.)

The operational principles of the Community also cite adherence to the principles of good governance, including universally accepted standards of human rights<sup>12</sup>. As already alluded to above, the EACJ does not have an express human rights jurisdiction save for its interpretation of the Treaty.

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<sup>7</sup> Franceschi, Luis. G, *The African Human Rights Judicial System Viewed from a Foreign Affairs Perspective*, Cambridge Scholars Publishing. Page 106

<sup>8</sup> Franceschi, Luis. G, *The African Human Rights Judicial System Viewed from a Foreign Affairs Perspective*, Cambridge Scholars Publishing. Page 109

<sup>9</sup> Article 6(d) Treaty

<sup>10</sup> *Democratic Party V Secretary General of EAC and Others*, Appeal No. 1 of 2014

<sup>12</sup> Article 7(2) Treaty

Considering the fact that the EAC Treaty already incorporates the African Charter that discusses all the fundamental human rights, there are two schools of thought that have emerged. One in favor of the EAC adopting its own Bill of rights suitable for the East African Community while the other is to the effect that we already have enough instruments in place to cater for all the fundamental human rights including the Universal Declaration of Human Rights (UDHR) adopted in 1948, as the first comprehensive instrument among nations regarding specific personal rights and freedom of all human beings, from all places, at all times.<sup>11</sup>

The civil society groups are at the forefront of fighting for the East African Bill of Rights to be established separately. The Human Rights Commissions of the six member States were convinced by this position and supported the initiatives of the KITUO CHA KATIBA<sup>12</sup> to draft the EAC Bill of Rights which initiative has been frustrated by member states through the Council of Ministers.

The EAC Draft Bill of Rights<sup>13</sup> is extensive in its coverage of the rights of the people in East Africa. It covers the usual areas of right to life, equality and freedom from discrimination, personal liberty, right to fair hearing, freedom of association, and freedom of expression among others. It is interesting to note that the Bill introduces sexual and reproductive rights, affirmative

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<sup>11</sup> Franceschi, Luis. G, *The African Human Rights Judicial System Viewed from a Foreign Affairs Perspective*, Cambridge Scholars Publishing. Page 95

<sup>12</sup> This organisation has observer status at EAC

<sup>13</sup> Done at Arusha, Tanzania, May 2009

action, protection of minorities among others. The various stakeholders in the region await the outcome from the Council as to whether this Bill of Rights shall be adopted or not coupled with the extension of the jurisdiction of the court. EALA made efforts to entrench the human rights discourse by passing the East African Community Human Rights Bill. Fruits are however yet to be realised in that respect.

The Sectoral Council at its 5<sup>th</sup> meeting held on 24<sup>th</sup> November 2004, decided that in view of the growing scope of the EAC integration process the jurisdiction of the court be extended. The decision of the Sectoral Council was approved by the Council at its 9<sup>th</sup> meeting held on 9<sup>th</sup> April 2005. To implement the decision the secretariat prepared a draft protocol to operationalise the Extended Jurisdiction of the EACJ (the zero draft protocol) which was adopted by the Sectoral Council at its meeting held on 8<sup>th</sup> July 2005.

The draft was prepared ready for consultations and negotiations but the decision in Anyang Nyong'o cases created some unease for the member states especially Kenya which culminated in the amendment of the Treaty in 2006 and 2007 not to extend the jurisdiction of the court but to undermine the courts powers by tampering with the security of tenure of the judges of the court.

The Council relaxed until the decision in Hon. Sitenda Ssebalu<sup>14</sup> where the court indeed faulted the EAC for the inordinate delay in extending the

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<sup>14</sup> Reference No. 1 of 2010

jurisdiction of the court. The Sectoral Council on Legal and Judicial Affairs was convened in November 2011 to consider the quick finalization of the draft protocol taking into account the comments of the partner States or defer the proposed protocol but amend the Article 27 of the Treaty with a view of extending appropriate jurisdiction to the EACJ.

At the 4<sup>th</sup> meeting of its 5<sup>th</sup> session, the EALA passed a resolution that the chairperson of the council of ministers submits to the 10<sup>th</sup> Extra Ordinary Summit of the heads of State its (EALA) resolution that the summit causes amendments to 27 of the Treaty to provide for such other jurisdiction to the EACJ as would extend to crimes against humanity. The jurisdiction of the court was expanded but not to human rights matters as had earlier been demanded by stakeholders of the community.

Indeed, the summit welcomed the resolution of EALA for expediting the amendment of the Treaty to extend jurisdiction of the court or the conclusion of a protocol on this matter. The Summit directed the Council of Ministers to consider this matter by end of May 2012 and report to the extra summit to be convened immediately after<sup>15</sup>. To date no decision to extend the jurisdiction has been taken. The stakeholders continue to hold their breath at a certain point this will be realized.

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<sup>15</sup> Paragraph 20 of the joint communiqué of the 10<sup>th</sup> Extra Ordinary Summit of EAC Heads of State

### 3.3 Jurisprudence on Human Rights

Even though it lacks a human rights mandate as clear as that of the ECOWAS Court, the East Africa Court of Justice has very progressive human rights judgments to its credit. Although explicit human rights jurisdiction of the Court is yet to be operationalised, it has been courageous enough to ensure that basic rights of individuals under the Treaty are respected.<sup>16</sup> In *James Katabazi v Secretary General of EAC*<sup>17</sup>, court noted that while it does not have jurisdiction over human rights violations per se, it may still consider cases if they fall under one of the provisions of Article 27(1) which sets out the jurisdiction of the court, even if it also includes a human rights violation. It added that one role of the court is to interpret the treaty which includes respect for the rule of law (article 6(d)). The court also stated that the Secretary General of the EAC can investigate a human rights violation if is brought to his knowledge.

In *Attorney General of Kenya V Independent Medical Legal Unit*<sup>18</sup> court affirmed the decision in *Katabazi* that lack of direct jurisdiction over human rights disputes under article 27(2) will not prevent the court from exercising jurisdiction over disputes under some other basis (including rule of law under article 6(d)...) just because they involve human rights issues. In *Venant Musenge*, court while making reference to article 14 of the African Charter on Human and Peoples Rights and the provisions of Burundian

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<sup>16</sup> <http://www.claiminghumanrights.org/eac.html>, visited on 29<sup>th</sup> May 2016 at 4:28 pm

<sup>17</sup> EACJ First Instance Division, Ref no 1 of 2007

<sup>18</sup> Appeal no 1 of 2011



Constitution, held that the failure by the appropriate authorities of the Republic of Burundi to ensure the protection of the applicant's land property rights was fundamentally inconsistent with Burundi's express obligations under article 6(d) and 7(2) of the EAC Charter and to observe the principles of good governance, including the protection of human rights.<sup>19</sup> In **Independent Medico Legal Unit V Attorney General**<sup>20</sup> a matter that was hinged on the fundamental principle of good governance including human rights provided for under Article 6(d) of the treaty. The facts were that between 2006 and 2008, over 3,000 Kenyan residents of the Mt. Elgon District forcibly disappeared, tortured and executed by Kenyan governmental authorities. The applicants alleged that the Kenyan government's failure to take measures to prevent, investigate or punish those responsible violated several International Human Rights Conventions, the Kenyan Constitution as well as the EAC Treaty. The court established jurisdiction under its power to interpret the EAC Treaty, upholding the decision in the Katabazi case and referring to Article 6(d), which covers the rule of law, accountability and promotion and protection of human rights in accordance with the African Charter.

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<sup>19</sup> Venant Musenge V Attorney General of Burundi, Reference No. 9 of 2012 page 24

<sup>20</sup> Reference No. 3 of 2010, EACJ First Instance Division <sup>23</sup>  
Appeal No. 1 of 2011

On appeal in **Attorney General of Kenya V Independent Medical Unit**<sup>23</sup> the court affirmed the decision in Katabazi but faulted the first instance division for not explaining how this cause of action fell within one of its jurisdictional bases, particularly Kenya's infringement of state responsibility towards its citizens under Article 5, 6 and 7 of the treaty.

#### **4.0 Conclusion**

It is worthy to note that the East African Community treaty recognises human rights as part of the good governance issue within the EAC. The Treaty incorporates international human rights within it though there has been debate as to whether to enact a new human rights charter for the community. It is my considered view that this is unnecessary since we have enough instruments providing for these rights in the first place. The EACJ plays a critical role in ensuring the observance of human rights in the community and whereas the treaty does not clothe it with express human rights jurisdiction, the court has found innovative means to deal with the issue as exhibited by the decisions in the Katabazi matter and others. We will continue to hope that the community extends the jurisdiction of the court and concludes on the human rights issue of whether to have an independent charter or enforce rights within the confines of the treaty.