

The application of African Union (human rights) law in Uganda: trends and prospects from a comparative review

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ABSTRACT: The body of public international law that may be known as ‘African Union (AU) law’, that is to say, the treaties, resolutions, constitutive documents, jurisprudence and practices of the AU, now constitute a respectable corpus of legal material. However, not only is this body of law under-theorised and under-studied by general public international law scholars, the nature of its reception and application within the domestic legal orders of AU member states is even more neglected. This article seeks to address the dearth of scholarship in this regard by critically analysing the judicial reference to AU law in one African country – Uganda – having particular regard to the reception of human rights related AU law.

TITRE ET RÉSUMÉ EN FRANCAIS:

L’application du droit (des droits de l’homme) de l’Union africaine en Ouganda: une analyse comparée des tendances et perspectives

RÉSUMÉ: Le corpus du droit international public pouvant être dénommé ‘droit de l’Union africaine’, composé des traités, des résolutions, des documents statutaires, de la jurisprudence et des pratiques de l’UA constituent désormais un corpus respectable de textes juridiques. Cependant, non seulement ces normes juridiques sont sous-étudiées et sous-théorisées par les spécialistes du droit international public général mais encore la nature de leur incorporation et de leur application dans l’ordre juridique internes des États membres de l’Union africaine est encore plus négligée. Cet article conduit une analyse critique de la référence à ces normes par les juridictions de un pays africain – l’Ouganda – avec un accent particulier sur la réception et l’intégration des normes de l’Union africaine en matière des droits de l’homme.

KEY WORDS: African Union law, regional economic communities, Ugandan judiciary, East African Community, European Union

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1 INTRODUCTION

This article considers the extent to which Ugandan courts have referred to African Union (AU) law in general, and AU human rights law in particular. As an initial conceptual point, by ‘AU law’ we refer to the whole range of normative instruments generated under the auspices of the AU, that is to say, AU treaties,¹ as well as the various decisions of bodies charged with the interpretation of those instruments. Included in this conception are also soft law instruments, especially those directly or indirectly generated by states.²

There is a growing body of scholarship that examines the legal orders created under the African Union and the continent’s Regional Economic Communities (RECs).³ There is also some work which

1 These include the Constitutive Act of the African Union; the African Charter on Human and Peoples’ Rights; the African Children’s Charter; the Convention on the Prevention and Combating of Terrorism; the African Convention on the Conservation of Nature; the Convention on Preventing and Combating Corruption; the African Youth Charter; and the African Charter on Democracy, Elections and Governance.

2 Judge Abdulqawi Yusuf has, elsewhere, referred to the concept of a ‘public law of Africa’, developed by Pan-African organisations – AA Yusuf (2014) *Pan-Africanism and international law* at 18 (“Through their constitutive instruments and their law-making activities, these Pan-African organisations have developed over the years a public law of Africa, which consists of rules, principles and practices applicable to intra-African relations, but capable also of influencing the development of similar rules in other regions of the world or at the universal level”). This public law of Africa might refer to something wider than AU law, since it would conceivably include those norms generated by all Pan-African and Pan-Africanist organisations.

3 See, for instance O Amao (2018) *African Union law: the emergence of a sui generis legal order*; AA Yusuf and F Ouguergouz (2012) *The African Union, legal and institutional framework: a manual on the pan-African organization*; B Kabumba ‘Soft law and legitimacy in the African Union: the case of the Pretoria Principles on ending Mass Atrocities Pursuant to article 4(h) of the AU Constitutive Act’ in OO Shyllon (ed) (2018) *The Model Law on Access to*

considers, broadly, the application of international law in Uganda.⁴ There is, however, relatively less work which considers the extent to which AU law and 'REC law' have been received and applied in national legal orders generally,⁵ and even less so with regard to the particular context of Uganda.⁶ The present work, therefore, is an attempt to contribute to the investigation of an under-researched, and yet critical, legal question – the judicial reception of AU law in Uganda. For avoidance of doubt, this article specifically addresses the approach of Ugandan courts to AU law, and does not focus on the related, but separate, question as to the nature and extent of the domestication of this law through legislative and other means.

This assessment is done through a review of case law from 1995 to the present. The year 1995 is used as starting point as it witnessed the promulgation of a new Constitution in Uganda, which has provided the foundation for robust constitutional and human rights litigation. As a guide to assessing the extent of judicial reliance on AU law, the article also considers the courts' reception of European Union (EU) law – that jurisdiction being perhaps the most advanced global effort towards supranational integration. As an additional comparator, the article also considers judicial reference to legal orders created under the eight Regional Economic Communities (RECs) traditionally viewed as

Information for Africa and other regional instruments: soft law and human rights in Africa 165; ME Olivier 'The role of the African Union law in integrating Africa' (2015) 22 *South African Journal of International Affairs* 513; F Viljoen (2012) *International human rights law in Africa* at 151; E Ugirashebuja, JE Ruhangisa, T Ottervanger and A Cuyvers (eds) (2017) *East African Community law: institutional, substantive and comparative EU aspects*; KD Magliveras and GJ Naldi (2018) *The African Union*; and EF Ssempebwa (2015) *East African Community law*.

- 4 This includes B Kabumba 'The application of international law in the Ugandan judicial system: a critical enquiry' in M Killander (ed) (2010) *International law and domestic human rights litigation in Africa* 83; J Obitre-Gama 'The application of international law into national law, policy and practice' Paper presented at WHO international conference on a global tobacco control law, 7-9 January 2000, New Delhi, India and S Namwase (2011) *The principle of legality and the prosecution of international crimes in domestic courts: lessons from Uganda* unpublished LLM Dissertation, University of Pretoria. Two papers presented at a conference on the application of international law in regional and domestic courts, 29 July 2010, Kampala, Uganda are also relevant: I Mulyagonga-Kakooza 'International human rights and the courts in Uganda' and H Onoria 'Application of international law in domestic courts: perspectives from practice'.
- 5 Examples include T Maluwa 'Ratification of African Union law treaties by member states: law, policy and practice' (2012) 13 *Melbourne Journal of International Law* 636 and F Viljoen and 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. In addition, the important and specific enquiry into the reception and impact of AU soft law has also begun to be undertaken. See, for instance, J Biegon 'The incorporation of the thematic resolutions of the African Commission into the domestic laws of African countries' in Shyllon (n 3) 190.
- 6 Preliminary work in this area includes S Serumaga-Zake and M Ilyayambwa 'The "promise" of ratification: a Uganda-EAC perspective' (2014) 5 *Mediterranean Journal of Social Sciences* 2172 and S Arach-Amoko 'Relationship between the domestic courts and regional and sub-regional courts', also presented at the Kampala conference referenced in n 4 above.

the ‘building blocks’ of the AU.⁷ These are: the East African Community (EAC); the Economic Community of West African States (ECOWAS); the Economic Community of Central African States (ECCAS); the Arab Maghreb Union (AMU); the Community of Sahel-Saharan States (CEN-SAD); the Common Market for Eastern and Southern Africa (COMESA); the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).

2 A NOTE ON METHODOLOGY AND TERMINOLOGY

2.1 Case identification and data set

The review considered cases available online, primarily those contained in the Uganda Legal Information Institute (ULII) database.⁸ A search was made through the ULII records, using all possible permutations of relevant code words and combinations thereof, so as to identify all applicable case law. The various cases highlighted were then appropriately categorised, and subsequently analysed.

This approach – of reliance on an online search rather than a survey of print law reports – was adopted for two reasons. In the first place, the tradition of law reporting in Uganda has been neither consistently nor rigorously maintained, especially after the late 1980s. The result is that many key decisions of courts of Judicature (High Court, Court of Appeal and Supreme Court) remain unreported. Some of these have been availed online either through fee-charging portals, such as Uganda Online Law Library or the open-access ULII database. Secondly, the ULII database allowed for a more systematic and quicker collection and analysis of relevant case law, through a relevant key word search, than might have been possible with print reports.

The study is, therefore, based upon and limited to this particular data set. The reliance on case law available online, and the ULII database in particular, admittedly presents a limitation upon the comprehensiveness of the study findings. At the same time, if understood as an in-depth examination of a specific sample – Ugandan jurisprudence available through ULII covering a particular time period – then it is possible that the insights provided herein might provide some useful indicators as to the more general position.

7 The reference to these RECs as ‘building blocks’ of the AU is contained in the official websites of the African Union – see <https://au.int/en/organs/recs> (accessed 15 January 2019); and the United Nations Economic Commission for Africa (UNECA) – see <https://www.uneca.org/oria/pages/regional-economic-communities> (accessed 15 January 2019). The AU website, in this regard, references the Abuja Treaty, the AU Constitutive Act, the 2008 Protocol on Relations between RECs and the AU, and the Memorandum of Understanding on Cooperation in the Area of Peace and Security between the AU, RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and Northern Africa.

8 See <https://ulii.org> (accessed 15 January 2019).

2.2 The finer distinctions implicated by the term ‘reference’

It is also important, at the outset, to point out that ‘reference’ by courts to AU law, or to other legal orders, can take several forms, with varying implications. There are at least five different forms that such reference can take: i) reference in a case record as part of a judicial summary of arguments made by counsel, with no subsequent reliance by the court in its own determination of the matter; ii) a passing reference in the court’s decision, by a way of a footnote or as one of a list of several authorities, whether or not this is accompanied by actual or specific reliance on the authority in the court’s final determination; iii) substantial engagement by the court in terms of discussing the authority without any actual or specific reliance on it in the final determination or finding, that is to say, engagement by the domestic court with a treaty or decision as part of *obiter dicta*; iv) substantial engagement with a provision or decision, with specific reliance being placed upon it in the final determination by the court, and the domestic court *agreeing* with such treaty or decision; v) substantial engagement with a provision or decision, with specific reliance being placed on it in the court’s final determination of the matter, but with the domestic court *disagreeing* with that treaty or provision. In addition, ‘reliance’ can take various additional forms. For instance, a court may rely on a treaty or decision as an aid to the interpretation of domestic law, or might apply such treaty in its own right, that is to say, as a self-executing provision.

In the narrative parts of this article – in which the specific cases are reviewed – an attempt is made to distinguish as a minimum, between ‘reference’ in the sense of i) above, from that implicated in ii) to v). The account also points out instances in which reliance took the form ‘direct application’ as opposed to being in the nature of use of AU, EU or REC law as an aid to the interpretation of Ugandan law. However, in the tabular representations of the data, and the brief analysis that follows therefrom, ‘reference’ (or ‘citation’) is used as a catch-all phrase, covering all five variations of the term.

3 THE TREATMENT OF AU LAW IN THE UGANDAN COURTS

3.1 The African Union

There seems to be a paucity of references, in Ugandan case law, to the AU as an institution or law-generating entity. Indeed, we could only find one case that specifically mentioned the AU – the High Court decision in *John Kagwa v Kolin Insaat Turizm and Another*.⁹ Even

9 High Court Civil Suit 318 of 2012 (Ruling of Judge Masalu Musene).

then, this was not a reference to the AU, as such, but rather to the AU Convention on Preventing and Combating Corruption.¹⁰

3.2 The African Charter on Human and Peoples' Rights

In contrast to the general silence in Ugandan case law relating to the AU, as such, there is a substantial body of judicial decisions referring to the African Charter on Human and Peoples' Rights (African Charter).

One of the earliest decisions that referred to the African Charter was that in the 2002 case of *Uganda Law Society and Jackson Karugaba v Attorney General*.¹¹ The petition challenged the constitutionality of the indictment, trial and execution – all conducted in one day, 25 March 2002 – of two soldiers of the Uganda Peoples' Defence Forces, for the alleged murder of three civilians. In upholding the petition, Justice Twinomujuni, who wrote the lead judgment of the Constitutional Court, observed that during the course of the proceedings, counsel on both sides apparently thought the UPDF Act did not allow for the right of appeal against a decision of a Field Court Martial.¹² To Justice Twinomujuni, this was an erroneous view, given that the African Charter was 'part and parcel' of the Ugandan Constitution.¹³ As such, article 7(1) of the Charter, which provided for the right of appeal, read together with article 45 of the Constitution (on the inexhaustibility of the Bill of Rights) created an 'automatic' right of appeal – including with respect to proceedings of the Field Court Martial – the denial of which was 'clearly unconstitutional'.¹⁴ There was, however, was no unanimity on this particular point. In a separate opinion, Justice Kavuma felt that while the African Charter was 'part of our law', it did not by virtue of article 286 of the Constitution, 'automatically become part of our Constitution although it remained part of the law of the land'.¹⁵ That said, in his view the Charter, as part of the law of the land, had 'play[ed] the role of being the equivalent to an operationalizational law to article 28 of the Constitution' and '[came] in handy to provide the necessary bridge between the UPDF Act and article 28 which calls for confirmation of the death sentence by the

10 In addition, this was not a reference in the Court's own determination, but appears to have been an authority cited by counsel for the defendants. The plaintiff sought to assert a claim for commission. The defendants raised a preliminary objection in this regard on the ground that the plaintiff's claim was tainted by indications of corruption and influence peddling. It was in support of this preliminary objection that the defendants cited article 4(f) of the AU Convention on Preventing and Combating Corruption. Although the Court ultimately upheld this objection, it did not itself consider or apply the AU Convention.

11 Constitutional Petitions 2 and 8 of 2002.

12 At 26-27.

13 At 27.

14 At 27-28.

15 At 47-48.

Highest Appellant Court'.¹⁶ In this way, the African Charter 'remove[d] an apparently serious lacuna in our law'.¹⁷

Similarly extensive reference to the Charter was made by the Supreme Court in the 2002 case of *Charles Onyango Obbo and Another v Attorney General*,¹⁸ when it had to determine the scope of the right to freedom of expression under article 29 of the Constitution. Justice Mulenga, who wrote the lead judgment, referred to article 9 of the African Charter.¹⁹ In his concurring opinion, Justice Oder also referred to the Charter, alongside the International Covenant on Civil and Political Rights (ICCPR), to support his rejection of the Attorney General's argument that Uganda's 'democracy' had to be defined using a subjective test. According to Justice Oder, the meaning of 'democracy' as used in article 43 of the Uganda Constitution had to be understood based on an objective test, in part because Uganda was a party to a number of international treaties on fundamental and human rights, including the African Charter, which provided for 'the universal application of those rights and freedoms and the principles of democracy'.²⁰

Regard may also be had to the 2005 decision in *Uganda Law Society v Attorney General*.²¹ In this case, the petitioner argued that the action of security forces, who had re-arrested 22 accused persons granted bail by the High Court, was a violation of their right to liberty under article 23 of the Constitution as well as a violation of the constitutional guarantee of independence of the judiciary under article 128. The majority of the Constitutional Court upheld the petition,²² with one Justice of the Court specifically referring to the African Charter in this regard. In his concurring opinion, while considering the substance of article 23 of the Constitution, Justice Okello observed that '[t]o recognize the universality of human rights, it is important to note

16 At 48-49.

17 At 49. As we have noted previously, however, both Justices Twinomujuni and Kavuma's postulations regarding the status and effect of the African Charter are, with the greatest respect, erroneous. On the one hand, Justice Twinomujuni's suggestion that the African Charter is 'part and parcel' of the Constitution is deeply problematic, in so far as it stipulates an effect of ratified treaties which is unknown to Ugandan law. On the other hand, Justice Kavuma's critique of the position advanced by Justice Twinomujuni is itself partly flawed, to the extent that it gives the African Charter the status and effect of an Act of Parliament. Although this postulation is somewhat less perilous than Justice Twinomujuni's position (which would give ratified treaties the status of constitutional provisions), it is itself an erroneous statement of the law, given the dualist stance of the Ugandan legal framework. For an extended discussion of these points, see Kabumba (n 4) 98-102.

18 Constitutional Appeal 2 of 2002.

19 At 7-8.

20 At 30-31.

21 Constitutional Petition 18 of 2005.

22 Justices Mukasa-Kikonyogo, Okello, Engwau and Byamugisha agreed on this point, while Justice Kavuma dissented.

that the above article is similar to article 6 of the African Charter on Human and Peoples' Rights to which Uganda is signatory'.²³

The African Charter was also relied upon in the 2005 High Court case of *Hon. Okupa Elijah and 2020 Others v Attorney General and 3 Others*.²⁴ The case concerned the failure of the State to disarm the Karamojong, a cattle-keeping people who were alleged to periodically raid neighbouring communities for cows to expand their herds. The applicants – who were from the Itesot community, and who were led in this action by a Member of Parliament from the area – faulted the Ugandan state for failing to take legislative and other steps to protect them from the Karamojong. In upholding the claim, Judge David Batema invoked article 5 of the African Charter, on the right to dignity.²⁵ He also referred to article 28 of the Charter, ostensibly on the right to non-discrimination, in deciding that the state had not been consistent in its (non)enforcement of the Firearms Act in different parts of the country.²⁶

Further, in the 2006 decision in *Caroline Turyatema and 4 Others v Attorney General and Another*,²⁷ the Constitutional Court referred to articles 7(1)(c) (right to be heard) and 8 (freedom of conscience and free practice of religion) of the Charter²⁸ in considering the petitioner's claims to constitutional violations relating to land allocation. Although the petition was dismissed, the Court drew upon these African Charter provisions in articulating the nature and scope of the relevant constitutional rights, partly on the basis that the Charter preceded the 1995 Uganda Constitution and had inspired its provisions.²⁹ The reference also appears to have been based on the Court's appreciation for the need for Ugandan law to be consistent with relevant international standards.³⁰

23 At 49.

24 High Court Misc Cause 14 of 2005, arising from Misc Cause 163 of 2002.

25 At 14.

26 At 15-16 of the Charter. Art 28 of the Charter is to the effect that '[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance'. The decision in this respect is problematic in so far it appears to invoke a provision which refers to the duties of the individual, with respect to the obligation of the State. It would appear that the more appropriate Charter provision in this respect was article 2, which requires states to ensure that the rights in the Charter are enjoyed without discrimination on any basis.

27 Constitutional Petition 15 of 2006.

28 At 12, 14 and 20 of the Decision.

29 See 14 ('The above articles of the 1995 Uganda Constitution [on freedom of expression] have their foundation from a number of International Instruments that preceded the Uganda Constitution'); at 15 ('...articles 29(1) (c), 37 and other relevant national objectives and articles of the Uganda Constitution are a reinstatement of the international human rights law position') and at 20 ('Article 21, like articles 29 and 37 of the Constitution, has also its foundation in a number of international legal Instruments that preceded the 1995 Uganda Constitution').

30 See 11-12 ('This principle [hear the other side] is now of universal application'); at 15 ('On the basis of the above international Instruments, and the current norms, practices and values practiced by the international community of nations, it can

The Charter was additionally invoked by the Supreme Court in the 2006 case of *Attorney General v Susan Kigula & 417 Ors*,³¹ which concerned the constitutionality of the death penalty in Uganda. In finding that the death penalty was not, in itself, unconstitutional, the majority of the Supreme Court referred to the Charter. The majority observed, in particular, that simply because the Charter, among other international instruments, guaranteed the rights to life and to freedom from torture, it did not thereby follow that these rights were inconsistent with the death penalty.³² According to the Court, the insertion of the word ‘arbitrarily’ in article 4 of the African Charter (relating to the right to life), among other similarly worded treaties, constituted a recognition that the death penalty could be applied, in certain instances and with appropriate procedural and substantive guarantees.³³ This proved to be an important consideration for the Court, especially since this formulation was similar to that in the Ugandan Constitution.³⁴

More recently, in the 2011 case of *Centre for Health, Human Rights and Development (CEHURD) and Daniel Iga v Attorney General*,³⁵ the Constitutional Court also referred to various provisions of the African Charter in finding that a number of Ugandan statutory law provisions violated the constitutional rights of persons with intellectual and psychosocial disabilities. In particular, the Court cited articles 2 (enjoyment of Charter rights without discrimination), 3 (equality before the law and equal protection of the law), 5 (right to dignity) and 6 (right to liberty) of the Charter.³⁶

In another 2011 case, *Omar Awadh Omar and 10 Others v Attorney General*,³⁷ before the Constitutional Court, the petitioners invoked, among others, article 6 of the African Charter (on the right to personal liberty and protection from arbitrary arrest). The matter had its antecedents in a terror attack at two places in Uganda on 11 July 2010, during the screening of the World Cup finals. The attacks left

now be safely asserted that international human rights law prohibits discrimination on the ground of religion”) and at 21 (“The prohibition against discriminatory conduct is based upon the universal principle of equality before the law. The human race as a family is characterized by the attribute of oneness in dignity and worthiness as human beings. Therefore, there ought not to be one group of human beings entitled to privileged treatment as regards enjoyment of basic rights and freedoms over others, because of perceived superiority. Likewise, no group of human beings should be taken as inferior and not entitled, and be treated with hostility, as regards enjoyment to the full of the fundamental rights and freedoms”). The decision in *Caroline Turyatamba*, relating to the right to fair trial, including the passage invoking the African Charter in this respect, was cited with approval and relied upon in *Nyaketcho Vanessa Leonie (Appealing through her next friend Elizabeth Tuhaise) and 2 Others v Oboth Obuya Gershom* Civil Appeal 12 of 2012, at 21-23.

31 Constitutional Appeal 3 of 2006.

32 At 9-11.

33 At 10-14.

34 At 14.

35 Constitutional Petition 64 of 2011.

36 At 8-10, 16, 17, 19, 23 and 26.

37 Consolidated Constitutional Petitions 55 and 56 of 2011.

several people dead and countless others injured. Initial investigations indicated that the attacks had been planned across a number of countries, including Somalia, Kenya, Tanzania, Uganda and the United Kingdom. The petitioners had been arrested from various places in Kenya, Uganda and Tanzania, charged before a Chief Magistrate's Court in Uganda, and on 30 November 2010, committed by that Court to the High Court of Uganda for trial. They were ultimately indicted before the International Crimes Division of the Uganda High Court on a number of counts of terrorism, murder and attempted murder. In this constitutional case, the petitioners challenged several aspects of their arrest, rendition and prosecution, and invoked a number of international treaties, including article 6 of the African Charter. For its part, after setting out the provisions of article 6 of the Charter, along with the article 9 of the ICCPR, the Constitutional Court noted that it would 'bear [these] in mind in the ensuing discussion',³⁸ especially since those provisions were 'largely echoed in the constitutional provisions in articles 23 regarding the protection of personal liberty and article 24 relating to respect for human dignity and protection from inhuman treatment'.³⁹ Ultimately, the Court felt that there had not, in fact, been a violation of article 6 of the African Charter, on the facts of the case.⁴⁰

A more controversial consideration of the African Charter occurred in the 2012 High Court decision in *Jacqueline Kasha Nabagesera and 3 Others v Attorney General and Another*,⁴¹ in which Judge Musota (as he then was) appeared to emphasise the claw-back clauses in the Charter rather than its more progressive aspects. The case challenged the closure, by the Ugandan Minister of State for Ethics and Integrity, of a workshop organised by the applicants. The Minister alleged that the workshop implicated illegal activities, namely the 'promotion of homosexuality'. For their part, the applicants argued that the closure violated, among others, their freedoms of assembly, association and expression. In dismissing these human rights-based claims, the Judge opined that the promotion of morals was a generally recognised ground for the restriction of rights in public interest – one which found expression in the African Charter.⁴² In particular, the Judge relied on article 27 of the African Charter (requiring rights to be exercised 'with due regard to the rights of others, collective security, morality and common interest'); article 17(3) (concerning the duty of the state to promote and protect morals and traditional values recognised by the community) and article 29(7) (the duty of the individual to 'preserve and strengthen positive African cultural values and to contribute to the moral well-being of society').⁴³ To him, the workshop organised by the complainants was unlawful since it had been convened to promote

38 At 29.

39 As above.

40 At 70.

41 High Court Misc. Cause 33 of 2012 (Ruling by Stephen Musota J).

42 At 9.

43 As above.

illegal activities.⁴⁴ In these circumstances ‘since the applicants in the exercise of their rights acted in a manner prohibited by law, it was not a valid exercise of these rights’ and ‘was also prejudicial to public interest’.⁴⁵ The Judge then went ahead to emphasise that rights had to be exercised ‘within or according to the existing law’ and that the exercise of rights could ‘be restricted by law itself’⁴⁶ citing article 9(2) of the African Charter (to the effect that individuals have the right to express and disseminate opinions only ‘within the law’).⁴⁷

The *Kasha* decision is particularly important – and problematic – insofar as it demonstrates the potential for the African Charter to be used to restrict rather than realise human rights in national contexts. Indeed, by emphasising the Charter’s claw-back clauses, and its references to morality, the Judge imposed a lower standard for human rights adjudication than that actually provided under the Ugandan Constitution.⁴⁸ In addition, in so doing, the Judge ignored a chain of jurisprudence of the African Commission, which has interpreted the Charter broadly and progressively, to overcome the restrictions presented under the Charter’s claw-back clauses.⁴⁹

The Charter was also referred to, in passing, in two cases, in 2013 and 2014 respectively. In the 2013 case of *Centre for Health, Human Rights and Development (CEHURD) and 2 Others v The Executive Director, Mulago National Referral Hospital and Another*,⁵⁰ (Mulago case) the High Court in dealing with a matter concerning the disappearance of a new-born baby, briefly mentioned articles 5, 16, 61 and 62 of the African Charter.⁵¹ Similarly, in the 2014 case of *Prof J Oloka Onyango and 9 Others v Attorney General*,⁵² the Constitutional Court mentioned the African Charter, as it enumerated the grounds upon which the petitioners had challenged the constitutionality of the Anti-Homosexuality Act.⁵³ Ultimately, however, the Court invalidated the 2014 Act on a procedural ground, rather than based upon the substantive bases urged by the petitioners.

Finally, the Charter seems to have been referenced in *Patrick Kaumba Wiltshire v Ismail Dabule*, a civil appeal from a High Court

44 At 10.

45 As above.

46 At 10-11.

47 At 11.

48 In particular, article 43 of the Constitution, but also articles 2, 20, 21, 32, 35 and 45, among others.

49 See, for instance, *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 65; *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009), para 112; *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) and *Aboubacar v Ghana* (2000) AHRLR 124 (ACHPR 1996). See, further, AO Enabulele ‘Incompatibility of national law with the African Charter on Human and Peoples’ Rights: does the African Court on Human and Peoples’ Rights have the final say?’ (2016) 16 *African Human Rights Law Journal* 1.

50 High Court Civil Suit 212 of 2013 (decision of Lydia Mugambe J).

51 At Paras 16, 24, 30, 32, 33, 66 and 67.

52 Constitutional Petition 8 of 2014.

53 At 5 of the decision.

decision.⁵⁴ In considering the right to a fair hearing, the Court of Appeal referred not only to articles 28, 44(c) and 45 of the Ugandan Constitution, but also to the ‘African Commission’: ‘The African Commission on Human and Peoples’ Rights provides for principles and guidelines on the right to a fair hearing which include *inter alia* an entitlement to an appeal to a higher judicial body’.⁵⁵ Although the Court referenced the Commission, it would appear, on balance, that the reference was in fact intended to be to the African Charter.

3.3 The Protocol to the African Charter on the Rights of Women in Africa

There has also been some reference, in Ugandan jurisprudence, to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Women’s Rights Protocol).⁵⁶

An early instance of this was in the 2003 Constitutional Court decision in *Uganda Association of Women Lawyers and Others v Attorney General*.⁵⁷ In that case, Justice Mpagi-Bahigeine was of the view that the 1995 Constitution was ‘the most liberal document in the area of women’s rights than any other Constitution South of the Sahara’ and that it was ‘fully in consonance’ with international and regional treaties relating to women’s rights, including the Women’s Rights Protocol.⁵⁸ According to her, the remaining challenge was its implementation, which ‘ha[d] not matched its spirit’.⁵⁹

In the *Mulago* case,⁶⁰ the High Court, in addition to findings based on Ugandan law, also found that the actions and omissions of the respondents constituted a violation of articles 2(a) and (b) of the Women’s Rights Protocol, which, according to the Court, ‘require[d] state parties to take appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programs to women especially those in rural areas; establish and strengthen existing pre-natal and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding’.⁶¹ This holding is particularly significant, in so far as the Judge seems to have enforced the Protocol in its own right,

54 Court of Appeal Civil Application No.16 of 2016, arising from Civil Appeal No.130 of 2015.

55 At 12.

56 It is noteworthy that the Maputo Protocol constitutes a very rare instance in which Uganda has entered a reservation to an international treaty. Uganda entered reservations to article 14(1)(a) and 2(c), regarding the right to abortion in certain circumstances – see DA Kabagambe ‘The impact of the African Charter and the Maputo Protocol in Uganda’ in VO Ayeni (ed) (2016) *The impact of the African Charter and the Maputo Protocol in selected African states* 265.

57 Constitutional Petition 2 of 2003.

58 At 45.

59 As above.

60 n 50.

61 At 56.

rather than using it as an aid in the interpretation of relevant Ugandan law.

Finally, in *Oloka Onyango*,⁶² the Constitutional Court also recognised that the Women's Rights Protocol had been one of the instruments invoked by the petitioners in their constitutional challenge to the 2014 Anti-Homosexuality Act.⁶³ As noted above, however, the Court eventually nullified the Act on a technical ground: the absence of quorum in Parliament at the time of its passage.

3.4 The African Charter on Democracy, Elections and Governance

We could find only two instances – both relating to parliamentary election petitions, and rendered on the same day by High Court Judge Rubby Opio Aweri (as he then was) – in which a court referred to the African Charter on Democracy, Elections and Governance (Democracy Charter).

In *Akidi Margaret v Adong Lilly and Electoral Commission*,⁶⁴ Judge Opio Aweri observed that the world was 'now a global village' in which the 'global family' of the world was interested in the social, political and economic life of each country, including Uganda.⁶⁵ In this regard, he noted that Uganda was bound by a number of international treaties on democracy and good governance, including the Democracy Charter.⁶⁶

Judge Opio Aweri also invoked the Democracy Charter in *Toolit Simon Akecha v Oulanyah Jacob L'Okori and Electoral Commission*.⁶⁷ In this case, he observed that Chapter 7 of the Charter required that states hold democratic elections, and that article 17 of the Charter obliged states to hold transparent, free and fair elections in accordance with the AU's Declaration on the principles Governing Democratic elections in Africa.⁶⁸ He further noted that, to achieve this, states were mandated: i) to establish and strengthen independent and important national electoral bodies responsible for the management of elections; ii) to establish and strengthen national mechanisms that redress election – related disputes in a timely manner; iii) to ensure fair and equitable access by contesting parties and candidates to State controlled media during elections; and iv) to ensure that there is a binding Code of Conduct governing legally recognised political stakeholders, government and other political actors prior, during and after elections, which Code had to include a commitment by political stakeholders to accept the results of elections or challenge them

62 n 52.

63 At 5 of the decision.

64 Election Petition 4 of 2011.

65 At 5.

66 At 6.

67 Election Petition 1 of 2011.

68 At 8-9.

through exclusively legal channels.⁶⁹ The above decisions are particularly interesting, since Uganda is, in fact, to date yet to ratify the Democracy Charter.⁷⁰

3.5 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (African Children's Charter), and its article 4 in particular, has been cited in a number of cases in the High Court Family Division, in support of the proposition that the best interests of children and their welfare must be the paramount consideration in all decisions concerning them.⁷¹

In addition, in *Turyatamba*,⁷² the Constitutional Court invoked article 9 of the Charter (on freedom of conscience and free practice of religion) as a relevant international standard in adjudicating a constitutional claim based on religious freedom.⁷³

3.6 The jurisprudence of the African Commission on Human and Peoples' Rights

The jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) has featured prominently in some Ugandan decisions, although the reception in this regard has been decidedly mixed.

69 At 9.

70 Uganda signed the Charter on 16 December 2008 but has not taken the additional step, of ratification, required to be fully bound by its terms – see the Charter's ratification table, <http://www.achpr.org/instruments/charter-democracy/ratification/> (accessed 15 January 2019).

71 See, for instance, *In the Matter of Wanzala Hassan Adam and In the Matter of An Application for Appointment as the Legal Guardians of Wanzala Hassan by Andre' Dees and Margaretha Helena Dees-Schouten* High Court Misc Cause 21 of 2012 (Ruling by Flavia Senoga Anglin J) at 5; *In the Matter of Kisule Grace (Child) and In the Matter of an Application for Appointment as Legal Guardian of Kisule Grace (Aged 5 Years) by Lyn Simon* Family Cause 29 of 2013 (Ruling by Godfrey Namundi J) at 3; *In the Matter of an Application for Guardianship of Kalema Grace (Minor) and In the Matter of an Application for Guardianship by Joshua Robinson and Jennifer Robinson* Family Cause 12 of 2014 (Ruling by Elizabeth Ibanda Nahamya J) at 3-4; *In the Matter of Namukose Aida (Child) and In the Matter of an Application for Appointment as Legal Guardians of Namukose Aida (Aged 13 Years) by Selam Techeste Ahderom and Debra Anne Kaur Singh* Misc Cause 37 of 2012 (Ruling by Flavia Senoga Anglin J) at 4-5; *Grace Namutebi v McFarland Shalona Jolene and Hann Robert Wayne* Adoption Cause 8 of 2014 (Ruling by Masalu Musene J) at 4-5 and *Wafula Renny Mike v Sarah Sheila Wanyoto and Equity Bank* Civil Revision 17 of 2014, arising from Family Cause 291 of 2013 (Judgment of Wilson Masalu Musene J) at 8. See also, to the same effect, *In the Matter of Ithungu Rolivin and Mbambu Roseline (Children) and In the Matter of an Application for a Guardianship Order by Graeme Christopher Sandell And Bethany Noel Nelson* Civil Appeal 172 of 2015 (Court of Appeal).

72 n 27.

73 At 15.

In the *Mulago* case,⁷⁴ Judge Mugambe felt that an evaluation of the right to health '[could not] be complete without a discussion of the internationally accepted ideas of the various duties or obligations engendered by it as an economic, social and cultural right'.⁷⁵ She then cited the African Commission's findings in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria*⁷⁶ as authority for various propositions regarding the nature and scope of the right to health in Uganda, and the state's obligations in this regard.⁷⁷ Judge Mugambe further made reference,⁷⁸ in the same context, to the Commission's decision in *Purohit and Moore v The Gambia*.⁷⁹ After this extensive review, the Judge concluded that: '[c]learly the notion of progressive realization within available resources must not be viewed as an excuse to defeat or deny economic, social and cultural rights like the right to health'. Ultimately, the Judge found the defendants to have violated a number of constitutional provisions, and stipulated several wide ranging specific and structural remedial orders.

Similarly, in the *CEHURD and Iga* case,⁸⁰ the Constitutional Court made extensive reference to the African Commission's decision in *Purohit*⁸¹ in finding a range of expressions and terms in statutory law to be inconsistent with the rights of persons with intellectual and psychosocial disabilities to dignity (under article 24 of the Constitution). The Justices of the Constitutional Court expressly stated that they had 'drawn inspiration from'⁸² the *Purohit* case, and especially the Commission's determination that the right to human dignity was to be enjoyed by all persons, including persons with intellectual or psychosocial disabilities, without discrimination of any kind.⁸³ The Court noted that the *Purohit* decision was consistent with, and based upon, the Commission's previous decisions in *Media Rights Agenda v Nigeria* and *John K. Modise v Botswana* – relating to freedom from torture and the right to human dignity.⁸⁴ The Court also felt that the *Purohit* decision was 'a persuasive authority' in so far as it construed a provision of a Gambian statute which was similar to section 45(5) of the Trial Indictments Act of Uganda, one of the statutes challenged before the Court.⁸⁵ The Court also later drew upon *Purohit* with regard to the right to liberty – in the context of the involuntary detention of persons with intellectual or psychosocial disabilities – again noting that the *Purohit* reasoning in this respect was 'persuasive'

74 n 50.

75 At para 19.

76 Communication 155/96.

77 See paras 19-32.

78 At para 33.

79 Communication 241 of 2001 (2003).

80 n 35.

81 n 79.

82 At 16.

83 At 17.

84 As above.

85 As above.

especially given the similarity between the African charter provision on liberty and article 23 of the Ugandan Constitution.⁸⁶ Finally, the Court also relied on the *Purohit* case to strike down derogatory language in the Penal Code Act (referring to persons with intellectual and psychosocial disabilities as ‘idiots’ and ‘imbeciles’), again noting that it had found the decision to be ‘persuasive’ and that its decision in the instant case was made expressly ‘following the reasoning and decision’ in *Purohit*.⁸⁷

A notable departure from the above approach – of receptiveness to African Commission jurisprudence – was the decision of High Court Judge Musota in the *Kasha* case,⁸⁸ in which he distinguished a number of Commission decisions from the matter before him. He, for instance, felt that the case of *Law Office Ghazi Suleiman v Sudan II*,⁸⁹ which had been cited by counsel for the applicants, was inapplicable, in that Mr Ghazi Suleiman had not sought to exercise his freedom of expression to promote any illegality. In the instant case, according to Judge Musota, the applicants ‘were using the pretext of training in human rights advocacy to promote homosexual acts which were prohibited by the Ugandan laws’.⁹⁰ Later in the judgment, Judge Musota similarly distinguished the Commission’s decision in *Civil Liberties Organizations v Nigeria*⁹¹ from the matter before him. According to him, while the *Civil Liberties* case concerned state interference in the establishment of the Nigerian Bar Association, in the case before him there had been no interference in the formation of the applicants’ various organisations – and ‘their activities were only restricted when it was established that they were using the workshop to promote prohibited and illegal acts’.⁹²

The rather strained distinctions made by Judge Musota in the *Kasha* case, between the Commission’s case law and the matter before him, might have been occasioned by the Judge’s reluctance to uphold the applicants’ claim in that particular case – which broadly related to the rights of sexual minorities in Uganda – rather than a more doctrinally grounded objection to the applicability of that jurisprudence. In any case, it is significant that he distinguished, rather than rejected, the Commission’s jurisprudence urged upon him by the applicants.

The above circumstances, taken together with the more robustly receptive approaches by the courts in *Mulago* and *CEHURD and Iga*, suggest that, going forward, there is a great potential role for use of the Commission’s jurisprudence in constitutional and human rights litigation in Uganda.

86 At 22-23.

87 At 26-27.

88 n 41.

89 (2003) AHRLR (ACHPR 2003).

90 At 11.

91 101/93, 8th Annual Activity Report 1994 – 1995.

92 At 13.

On a related note, it is of some significance that we were unable to find any domestic decisions referring to decisions rendered by the African Court or the African Committee of Experts on the Rights of the Child (African Children's Rights Committee). This may be, in part, due to the relatively more recent establishment of the African Court⁹³ and African Children's Rights Committee,⁹⁴ as compared to the African Commission.⁹⁵

3.7 Other soft law instruments in the AU system

Aside from the African Charter, related treaties and the Commission's jurisprudence, we identified two cases in which courts had referred to AU soft law instruments – in both cases generated by the African Commission.⁹⁶

In the first place, in *Onyango Obbo*,⁹⁷ Justice Mulenga, who wrote the lead judgment, noted that while article 9 of the African Charter simply provided for the right to receive information and disseminate opinions, the African Commission had, in October 2002, adopted a Declaration on Principles on Freedom of Expression in Africa (FoE Declaration) in order 'to elaborate and expound on the nature, content and extent of the right provided for under article 9'.⁹⁸ He then cited and relied upon Principles 1 and 2 of the Declaration which, according to him, had provided greater clarity regarding the scope of the right under article 9 of the African Charter.⁹⁹ In the end, the Supreme Court made far reaching pronouncements on the nature and scope of the right to freedom of expression in Uganda (article 29 of the Constitution), in a decision which continues to be the classic case on this point in Uganda's constitutional jurisprudence.

Similarly, in *Mulago*,¹⁰⁰ Judge Mugambe referred to the African Commission's Principles and Guidelines on the Implementation of

93 The African Court was instituted by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol), which was adopted by the Assembly of the OAU on 9 June 1998. The Protocol entered into force on 25 January 2004, and the first 11 judges of the Court were inaugurated on 2 July 2006 – Viljoen (n 3) 412-413.

94 The African Children's Charter was adopted on 11 July 1990, but only came into force on 29 November 1999. The first 11 members of the African Children's Rights Committee were elected by the OAU Assembly in July 2001 - Viljoen (n 3) 391-397.

95 The African Commission was established under the African Charter, which was adopted in 1981, and which entered into force on 21 October 1986. The initial 11 Commissioners held their first session on 2 November 1987 - Viljoen (n 3) 289-290.

96 The Commission's jurisprudence may also be considered to be AU soft law. For an extended consideration of the nature and scope of soft law, see B Kabumba (2018) *Soft law and legitimacy in international law*.

97 n 18.

98 At 8, citing the African Commission Declaration.

99 At 8.

100 n 50.

Economic, Social and Cultural Rights in the African Charter,¹⁰¹ (Ecosoc Guidelines) in determining a matter implicating the right to health in Uganda.¹⁰²

The foregoing enumeration and analysis suggests that AU law has made some inroads into the jurisprudence of Uganda courts. As Table 1 below shows, different kinds of AU law have had different fortunes in this regard, with the African Charter and the African Children's Charter appearing to have had the most impact. However, the references to the African Children's Charter have been mainly *pro forma*, formulaic and in passing – being in the nature of a standard recitation of the Charter, part of a statement of the 'best interests' principle, as a preamble to the determination of family causes.

Table 1: Frequency of citation of AU law by Ugandan courts

| Institution, case law or instrument | Number of cases in which cited |
|---|--------------------------------|
| AU | 0 |
| African Charter | 12 |
| AU Convention on Preventing and Combatting Corruption | 1 |
| African Children's Charter | 8 |
| Maputo Protocol | 3 |
| Democracy Charter | 2 |
| African Commission jurisprudence | 3 |
| FoE Declaration | 1 |
| Ecosoc Guidelines | 1 |
| African Children's Rights Committee jurisprudence | 0 |
| African Court jurisprudence | 0 |
| Total references | 31 |

In the next part, we assess the extent to which the laws of other regional integration efforts have been relied on in Ugandan cases, as a means of placing into context the experience of AU law in this respect.

4 COMPARATIVE PERSPECTIVES

4.1 The European Union

EU law has been referred to on a number of occasions, especially in the context of commercial litigation. Aside from a number of passing

101 Adopted on 24 October 2011.

102 At paras 19-32.

references to the EU as such,¹⁰³ and to the European Community (EC),¹⁰⁴ as shown below, Ugandan courts have extensively referred to, and relied upon, various aspects of EU law.

- 103 See, for instance, the Judgment of Odoki CJ in *Onyango Obbo* (n 18) at 49 ('The scope of the limitations imposed on freedom of expression has been considered by courts in various jurisdictions throughout the world including United Kingdom, Canada, India, Zimbabwe, Zambia, Nigeria, European Union and the United States'); *Suffish International Food Processors (U) Ltd and Another v Egypt Air Corporation T/A EgyptAir Uganda* Supreme Court Civil Appeal 15 of 2001 at 1 (relating to a consignment of fish exported to the European Economic Community, which was found by the authorities in the EEC to be unfit for entry into the Community and destroyed); *Uganda Network of Toxic Free Malaria Control Ltd v Attorney General* Constitutional Petition 14 of 2009 at 3, (in which one of the Petitioner's contentions against the use of DDT to prevent malaria was recited as that 'Uganda being an agricultural Country using DDT will continue to hurt the export market as some Ugandan exporters have already received warnings from the export buyers such as European Union, Japan and USA to reject their products if found contaminated with DDT'); *Uganda Development Bank v ABA Trade International Limited and 3 Others* High Court Civil Suit 357 of 2010 at 5 and 13 (in which one of the documents submitted by the Plaintiff, and referred to by Judge Christopher Madrama in his evaluation of the evidence on record, was a European Union Certificate of Origin/European Community Export Permit); *Uganda Revenue Authority v Total Uganda Ltd* High Court Civil Appeal 11 of 2012, arising from Tax Appeal Tribunal Case 9 of 2010 at 10 ('The honourable Tribunal considered several other authorities from the European Union'); *Paul K Ssemogerere and 2 Others v Attorney General* Supreme Court Constitutional Appeal No.1 of 2002, Lead Judgment by Kanyeihamba JSC at 74-75 ('In Uganda, it is in the people and the constitution that sovereignty resides. However, even in the United Kingdom before the creation of the European Union of which that country is a member, it was always emphasized that Parliament was obliged to obey the constitutional rules which were prior to the exercise of its sovereignty') and *Pearl Fish Processors Ltd v Attorney General and Commissioner for Fisheries* High Court Misc Appln 103 of 2007, arising from Misc Cause 92 of 2007, Ruling by Yorokamu Bamwine J at 5 ('... the suit arose out of the withdrawal of an EAN (Establishment Approval Number) from the applicant ... The closure resulted from the EU setting new standards relating to benzo (a) pyrene, a chemical secreted during combustion of any food product. While the withdrawal was in March 2006, the notification to the applicant of the need to comply and fit into the new regime of controls set by the European Union was in August 2006 ... Annexure A10 specifically outlines the effect of the new changes in the European Union. The issue as I see it is whether the 2nd respondent was justified to withdraw the EAN before a dialogue with the applicants on the matter. I am of the considered view that in a substantial investment of this magnitude, it was imperative that the management of the applicant be given notice of any deficiency and a chance to correct it, and that a reasonable notice of withdrawal of EAN be given').
- 104 See *Deepak K Shah and 3 Others v Manurama Ltd and 2 Others* High Court Misc. Appln 361 of 2001, arising from High Court Civil Suit 354 of 2001, Judgment of James Ogoola at 3 ('First, the initial practice of English Courts used to be dictated by the principle enunciated in the ancient case of *Ebrard v. Gassier* (*supra*), to the effect that the fact of a Plaintiff's residence abroad was a *prima facie* ground for ordering him to pay security for costs. From that venerable principle, English courts have had to swing to a different position in cases involving European Community residents') and at 4 ('the East African Court of Justice ... is similar to the Court of Justice of the European Community').

4.1.1 European Community Council Directives

A European Community Council (ECC) Directive was invoked in *AON Uganda Limited v Uganda Revenue Authority*,¹⁰⁵ a judicial review application before the Commercial Division of the High Court. In that case, counsel for the defendant cited article 13B(a) of ECC Directive 77/388, in support of the argument that tax provisions had to be construed strictly.¹⁰⁶ In deciding the matter, the Judge similarly referred to this Directive, in his evaluation of the extent to which, in its construction, the European Court of Justice (ECJ) jurisprudence had adopted as strict and literal an approach as urged by the defendant in the instant case.¹⁰⁷

4.1.2 The European Convention on Human Rights

More substantial reference to EU law has been in terms of reliance on various provisions of the European Convention on Human Rights (European Convention).

In the earlier referenced 2002 case of *Onyango Obbo*,¹⁰⁸ Chief Justice Odoki¹⁰⁹ and Justice Mulenga¹¹⁰ referred to article 10 of the European Convention, as an aid to interpreting article 29 of the Uganda Constitution (on freedom of expression).

The Convention was also mentioned in the 2005 case of *Muwanga Kivumbi v Attorney General*,¹¹¹ a leading authority on the right to freedom of assembly in Uganda's constitutional jurisprudence. Byamugisha JCA, who delivered the lead judgment of the Constitutional Court, observed that although the United Kingdom had previously not had a written constitution, 'this position had changed with the enactment of the human rights Act in 1998 which domesticated the European convention on human rights'.¹¹² She then proceeded to consider articles 8 to 11 of the Convention, noting that article 29 of the Ugandan Constitution had been 'modeled along the lines of the Convention'.¹¹³

Similarly, in *Kigula*,¹¹⁴ Egonda-Ntende Ag JSC, who dissented from the decision of the Court, referred to articles 2(1) and 3 of the European Convention, noting that they were similarly worded to articles 22(1) and 24 of the Ugandan Constitution, on the rights to life

105 High Court Civil Suit OS-04 of 2008 (decision of Judge Geoffrey Kiryabwire).

106 At 10.

107 At 15.

108 n 18.

109 At 46.

110 At 11.

111 Constitutional Petition 9 of 2005.

112 At 15.

113 As above.

114 n 31.

and to freedom from torture, respectively.¹¹⁵ This reference, in his view, was in part informed by the fact that the Convention was ‘the forerunner of the bill of rights found in many independence, and post independence constitutions’.¹¹⁶

Significant reference to the European Convention was also made by the Constitutional Court in the *Turyatamba* case.¹¹⁷ Relying on article 6(1) of the Convention, the Court opined that the right to be heard was ‘a fundamental basic right’, ‘one of the cornerstones of the whole concept of a fair and impartial trial’, ‘fundamental and far reaching’ and ‘now of universal application’.¹¹⁸ The Court also referred to the Convention in respect of the right to freedom of conscience and of religion,¹¹⁹ as well as the right to non-discrimination.¹²⁰ The Court seemed to be particularly attracted by the fact that the Convention preceded the 1995 Constitution.¹²¹

A less enthusiastic stance towards the Convention was, however, adopted by the Constitutional Court in *Andrew Mujuni Mwenda and The Eastern African Media Institute v Attorney General*,¹²² two cases from 2005 and 2006 respectively which were consolidated by the Court as they dealt with the same subject matter. It was argued on behalf of the Attorney General, based in part on the provisions of article 10(2) of the European Convention, that restrictions on the freedom of expression were not unique to Uganda but a feature of many other progressive legal orders.¹²³ In determining the matter, however, the Constitutional Court itself did not rely upon the European Convention.

The Constitutional Court also declined to rely on the Convention in the 2007 case of *Soon Yeon Kong Kim and Another v Attorney General*.¹²⁴ This matter came to the Court by way of reference from a criminal trial, before a Magistrate, of two Korean nationals. Counsel for the accused persons (the applicants in the matter before the Constitutional Court) sought access to police statements made by prosecution witnesses, arguing that this was an aspect of the right to a fair trial, guaranteed under article 28 of the Constitution. In support of this argument, he referred to, among others, article 6 of the European

115 At 51.

116 As above.

117 n 27.

118 At 12-13.

119 At 14.

120 At 20.

121 At 14 & 20.

122 Consolidated Constitutional Petitions 12 of 2005 and 3 of 2006.

123 Article 10(2) of the European Convention provides that: ‘The exercise of these freedoms since it carries with it duties formalities and responsibilities, may be subject to such conditions, restrictions or penalties as are prescribed by the law and are necessary in a democratic society in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime for protection of health or minerals, for the protection of the reputation or rights of others for preventing of the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary’.

124 Constitutional Reference 6 of 2007.

Convention, on the ground that its text was similar to that of article 28 of the Constitution.¹²⁵ In the event, although the Constitutional Court upheld the applicants' contention, it did not itself rely upon the European Convention.

4.1.3 The European Court of Human Rights

In addition to some references to the European Convention, Ugandan courts have also occasionally referred to the jurisprudence of the European Court of Human Rights (European Court) in determining matters before them.

In *Onyango Obbo*,¹²⁶ for instance, Mulenga JSC¹²⁷ and Odoki CJ¹²⁸ also referred to the jurisprudence of the European Court on the nature and scope of freedom of expression (in addition to references to the European Convention), in interpreting the scope of the right under article 29 of the 1995 Constitution of Uganda.

Similarly, in *Turyatamba*,¹²⁹ the Constitutional Court referred to the decision of the European Court in the case of *Kokkinakis v Greece*¹³⁰ as authority for the proposition that the right to freedom of religion, conscience and belief was not absolute but rather subject to such limitations, in the public interest and based on law, as were necessary and demonstrably justifiable in a free and democratic society.¹³¹ Later in the judgment, the Court further referred to the European Court decision in *Cha'are Shalom Ve Tsedek v France*¹³² to support its determination that the term 'discrimination' had 'come to imply a distinction, exclusion, restriction, or preference based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.¹³³

In addition, in *Kigula*,¹³⁴ Egonda-Ntende Ag JSC, in dissenting from the majority decision, placed substantial reliance upon the jurisprudence of the European Court. Having regard to the decision of the European Court in *Soering v United Kingdom*¹³⁵ Egonda-Ntende Ag JSC was of the view that the relevant provisions of the Constitution (on the right to life, freedom from torture and the non-derogability of the right to freedom from torture) had to be read together, rather in

125 At 3.

126 n 18.

127 At 11, citing the ECtHR's decision in the *Lingens Case* 12/1984/84/131.

128 At 48, citing what he referred to as a 'celebrated statement' by the ECtHR in *Handyside v The United Kingdom* (1979 - 80) 1 EHRK 737 (para 49).

129 n 27.

130 Judgment of 25 May 1993, Series A 260 - A.

131 At 15-16.

132 Judgment of 27 June 2000.

133 At 21.

134 n 31.

135 Application 14038/88 delivered on 7 July 1989.

isolation. In addition, he made reference to the European Court's decision in *Ireland v United Kingdom*¹³⁶ as a guide to the definition of 'inhuman treatment' as used in article 24 of the Constitution. In so doing he made a case for the relevance of the European Court's case law, in the following terms:

Article 2(1) of the European Convention on Human Rights is *in pari materia* with article 22(1) of our Constitution. So is article 3 with article 24 of our Constitution. The approach by the European Court to read the said provisions in harmony is in line with the established approach to constitutional interpretation here in Uganda. Reading the provisions together is essential in order to grasp the full meaning of the provisions bearing upon the same subject. The reasoning of the European Court is very persuasive. The European Convention on Human Rights is the forerunner of the bill of rights found in many independence constitutions, and post independence constitutions. The jurisprudence of the European Court is therefore quite persuasive.¹³⁷

The Constitutional Court was more reticent regarding European Court jurisprudence in the consolidated case of *Mwenda and EAMI*.¹³⁸ Counsel for the first petitioner cited the cases of *Surek and Ozdemir v Turkey*¹³⁹ and *Lingens v Austria*¹⁴⁰ to emphasise the importance of a free press in a democratic society, which would allow it to inform public debate and discussion. Ultimately, however, the Constitutional Court determined the matter without itself engaging with, or relying upon, these authorities.

A more emphatic repudiation of the legitimacy of references to European Court jurisprudence was evidenced in *Kasha*.¹⁴¹ In that case, High Court Judge Musota rejected the invitation to consider jurisprudence from the European Court of Human Rights in the interpretation of the African Charter and, ultimately, of article 29 of the Uganda Constitution. In the first place, according to him, the jurisprudence of the European Court had to be 'viewed in the context that there is no member country of the European community which prohibits homosexual acts which reflects the moral standards of Europe'.¹⁴² In Uganda, on other hand, homosexual acts were prohibited by law on moral and cultural grounds.¹⁴³ Secondly, in his view, as Uganda was not a signatory to the European Convention, decisions of the European Court were not binding on Ugandan courts.¹⁴⁴ Finally, according to him, it was not open to use the decisions of the European Court to interpret the African Charter since this would be inconsistent with the Charter itself.¹⁴⁵ To him, article 61 of the Charter required the African Commission to consider international treaties stipulating rules expressly recognised by member states of the

136 Application 531 of 1971.

137 At 51.

138 n 122.

139 Applications 23927/94 and 24277/94.

140 Application 9815/82.

141 n 41.

142 At 14-15.

143 At 15.

144 As above.

145 As above.

Organization of African Unity (OAU).¹⁴⁶ The provision also obliged the Commission to take into account African practices consistent with international norms, customs generally accepted as law, legal principles recognised by African states and legal precedents and doctrine.¹⁴⁷ To the Judge, therefore, international jurisprudence could only be ‘considered as a legal precedent depending on whether the cited rules and legal principles [were] expressly recognized by African states and reflect[ed] African practices’.¹⁴⁸ In the instant case, to the Judge, ‘the recognition of homosexuals as a minority whose acts [were] legitimately protected [was] not a principle of law and norm generally recognized by all African states nor [were] homosexual acts recognized as an accepted African practice’.¹⁴⁹ In such circumstances, the Court would not place any reliance on the European Court’s jurisprudence presented to it.¹⁵⁰ In the same vein, in a posture generally uncharacteristic of Ugandan courts, the Judge rejected the invitation to consider comparative jurisprudence as a guide for the determination of the extent to which morality could be a valid restriction on rights.¹⁵¹

4.1.4 The European Court of Justice

Aside from the European Court, decisions of the ECJ have also been referenced by Ugandan courts, particularly in commercial and civil litigation.

One of the earliest instances of such reliance appears to be in the earlier referenced *AON* case,¹⁵² a tax dispute, brought by way of judicial review, before the High Court Commercial Division. Counsel for the defendant cited the ECJ decisions in *Card protection Plan Ltd v Customs and Excise Commissioner*¹⁵³ (hereafter referred to as the ‘*Card Protection Plan* case’) and *Re Forsakringsaktiebolaget Skandia (Publ)*¹⁵⁴ as authorities for the proposition that a tax exemption could

146 As above.

147 As above.

148 As above.

149 As above.

150 As above.

151 At 18 (‘In Uganda, the only forum which can determine if protection of public morals is justifiable as a basis for limiting homosexual rights under art 43 or if legal restrictions such as sec 145 of the Penal Code Act is inconsistent with Uganda’s obligations under International Law are our National Courts. Decisions from South Africa, India and Hong Kong which learned counsel for the applicants relied on reflect what those national courts have determined as to what amounts to public interest of those countries and as such are not binding on Uganda. Since public interest is defined by a country’s fundamental values, it differs between countries. In as far as there is no legal challenge to the validity of sec 145 of the Penal Code Act, it is still valid and bidding on all courts in Uganda, regardless of whether there are foreign precedents stating that prohibition of homosexual acts as offences against morals is unjustified restriction on rights of the homosexuals’).

152 n 105.

153 [1999] STC 270 at pages 291 – 292.

154 [2001] STC 754.

only be granted if expressly provided for under the law.¹⁵⁵ In the event, High Court Judge Kiryabwire (as he then was) did refer to the *Card Protection* case, albeit in a holding apposite to that urged by the defendant, and found that the applicants' services were entitled to tax exemption under the Value Added Tax Act.¹⁵⁶

Substantial reliance on the case law of the ECJ also occurred in the 2012 case of *Uganda Revenue Authority v Total Uganda Ltd*¹⁵⁷ – another tax dispute before the Commercial Division of the High Court. In interpreting Section 12(1) of the Value Added Tax Act, High Court Judge Christopher Madrama (as he then was) also referred to, and relied upon the ECJ decision in the *Card Protection Plan* case.¹⁵⁸ He held, on the authority of *Card Protection Plan*, that a supply which was essentially a single or incidental service from a commercial lens should not be mechanically disaggregated, and that the Revenue Authority was required to assess the main characteristics of the whole dealing to evaluate whether the taxable entity was supplying a number of separate services, or a single service.¹⁵⁹ In reaching this decision Judge Madrama found that an alternative ECJ decision urged upon the Court by the appellant – the case of *Leyob Verzekeringen BV and another v Staatssecretaris van Financien*¹⁶⁰ – did not diminish the authority of the *Card Protection Plan* case but rather affirmed the principle therein.¹⁶¹ The Judge also seemed to have drawn comfort, in relying on *Card Protection*, from the fact that the decision in that case had 'been followed in subsequent cases both by the European Court of Justice of the Communities and the English courts'.¹⁶²

In addition, in the 2015 case of *Kampala Stocks Supermarket Co Ltd v Seven Days International Ltd*,¹⁶³ a trademark dispute in the Commercial Division of the Uganda High Court, Counsel for the defendant relied on, among others, the case of *Arsenal Football Club v Matthew Reed*.¹⁶⁴ In that case, the ECJ had held that the purpose of trademarks was to assure the identity of origin of the protected goods or services to the final consumers by enabling them to distinguish such goods or services from others of a different origin. Ultimately, in resolving the dispute, however, High Court Judge Christopher Madrama placed no reliance on this particular decision.

Similar invocation of ECJ jurisprudence by counsel was made in another trademark dispute before the Commercial Division of the Uganda High Court – the 2015 case of *Nairobi Java House Ltd v*

155 At 10-11.

156 At 15.

157 High Court Civil Appeal No.11 of 2012, arising from Tax Appeal Tribunal Case No. 9 of 2010.

158 n 153.

159 At 10-12.

160 [2006] STC 766, Decision of the First Chamber, ECJ.

161 At 12.

162 At 10.

163 High Court Civil Suit 112 of 2015.

164 Case C-206/01.

*Mandela Auto Spares Ltd.*¹⁶⁵ Counsel for the Appellant cited the ECJ case of *Office of Harmonization in the Internal Market (OHIM)*¹⁶⁶ to support the proposition that in evaluating two contentious trade marks, and the extent to which there may be a likelihood of confusion of the marks, the Registrar had to conduct a comprehensive assessment of such likelihood, taking into account all the relevant aspects including a phonetic and aural comparison. However, again, in his adjudication of the matter, High Court Judge Christopher Madrama did not rely on this decision.

Most recently, ECJ case law was referred to in the 2017 matter of *Arua Municipal Council v Arua United Transporters SACCO*,¹⁶⁷ a public procurement dispute before the High Court. In that case, Judge Stephen Mubiru cited the ECJ case of *SAG ELV Slovensko a.s and Others v Urad pre verejne obstaravanie*¹⁶⁸ in support of the proposition that a procuring and disposal entity was entitled to seek correction or amplification of particular details in a tender on an exceptional basis, especially where it was apparent that the tender in question needed ‘mere clarification’ or to ‘correct obvious material errors’, as long as such amendment did not in fact constitute the submission of a fresh tender and was applied across the board to all bidders.¹⁶⁹

As the foregoing survey reveals, EU law has been surprisingly well-received by Ugandan courts, in the context of both constitutional and human rights litigation on the one hand, and commercial and civil cases on the other.

Table 2: Frequency of citation of European Union law by Ugandan courts

| Institution, case law or instrument | Number of cases in which cited |
|-------------------------------------|--------------------------------|
| EC | 1 |
| EU | 7 |
| European Convention | 6 |
| European Court jurisprudence | 5 |
| ECJ jurisprudence | 5 |
| ECC Directives | 1 |
| Total references | 25 |

165 High Court Civil Appeal 13 of 2015, arising from the decision of the Registrar of Trademarks dated 21st May 2015 in the matter of a trademark opposition lodged by Mandela Auto Spares Parts Ltd To the Registrar of Trademarks Application No. 48062/2013 ‘JAVA HOUSE AND JAVA SUN’ and trademark application No 48063 ‘NAIROBI JAVA HOUSE’ In Class 43 in the name of NAIROBI JAVA HOUSE LTD.

166 Case C – 334/05 – P.

167 High Court Civil Appeal No.25 of 2017, arising from PPDA Appeal Tribunal Application 15 of 2017.

168 Case No. C- 599/10.

169 At 17.

4.2 The East African Community¹⁷⁰

Like EU law, EAC law has also been frequently invoked before, and relied on by Ugandan courts in the context of both commercial and human rights-related litigation. It is noteworthy, in this respect, that a number of EAC laws have been domesticated, and thus strictly speaking, now apply as Ugandan law. These include: the East African Community Customs Management Act, 2004 (EACCMA); the East African Community Act (Commencement) Instrument, 2005; and the East African Community Customs Management Regulations, 2005.¹⁷¹ The EACCMA has, in particular, generated significant commercial litigation;¹⁷² and has in fact also created criminal liability.¹⁷³ Interestingly, the EAC is also present in the judicial system in terms of

- 170 The East African Community has seven organs: i) the Summit; ii) the Council of Ministers; iii) the Coordinating Committee; iv) the Sectoral Committees; v) the East African Court of Justice; vi) the East African Legislative Assembly and vii) the Secretariat. It is important to note that the East African Development Bank (EADB) is not actually one of the organs of the current EAC. The Bank was formed in 1967 under the first East African Cooperation Treaty. When the community collapsed in 1977, the Bank was re-constituted in 1980 under a separate Charter. As such, we do not, in this article, refer to case law which has referred to the EADB.
- 171 In addition, general statutes have begun to take the East African Community into account and to introduce accommodations in this regard. For instance, sec 12 (12) of the Trademarks Act of 2010 provides that a person who gives notice of an objection to a trademark may be required to furnish security for costs, but that this requirement does not apply to someone who resides or carries on business in the East African Community. For a general consideration of sec 12, see *Purplemoon (U) Ltd v Numa Industries Ltd* High Court Misc Appln 1137 of 2016, arising from High Court Civil Suit 989 of 2016 (ruling of Judge Christopher Izama Madrama) at pp 18-22.
- 172 See, for instance, *Lumu Tonny v The Commissioner General Uganda Revenue Authority*, High Court Civil Suit 361 of 2004 (decision of Judge Lameck N Mukasa) concerning, among others, the power to seize goods under the Act, which would be subject to forfeiture; *Uganda Revenue Authority v Total Uganda Limited*, High Court Civil Appeal 8 of 2010 (decision of Judge Christopher Izama Madrama), relating to export of goods under the Act; *Uganda Development Bank v ABA Trade International Ltd and 3 Others*, High Court Civil Suit 357 of 2010 (decision of Judge Christopher Izama Madrama), as to whether the term 'owner' under the Act included a consignee; *Regal Pharmaceuticals Ltd v Maria Assumpta Pharmaceuticals Ltd*, High Court Company Cause 20 of 2010 (decision of Judge Christopher Madrama), as to whether pharmaceutical products were restricted goods under the Act; and *Messrs InCargo Freighters and Agents Ltd v The Commissioner of Customs URA* High Court Civil Suit 513 of 2012 (Ruling by Judge Christopher Madrama Izama), establishing that imported goods are subject to customs control under the Act.
- 173 There appear to have been prosecutions based on the provisions of the EACCMA. In this regard, the Court of Appeal in the 2014 case of *Commissioner Customs, Uganda Revenue Authority v Fred Kirenga* (Court of Appeal Misc Appln 91 of 2014, arising from Misc Appln 90 of 2014) noted, in terms of the background to those civil proceedings, that the respondent had on 5 August 2009 been charged and prosecuted for contravention of certain provisions of the EACCMA, before the Chief Magistrate's Court in Nakawa *vide* Criminal Case No.884 of 2009. That Court had acquitted Mr. Kirenga of those charges, and ordered the Uganda Revenue Authority to release to him 160 drums of Ethanol, which it had confiscated. It was the failure of the Authority to comply with this order that set into motion the civil proceedings that led to the present miscellaneous application.

litigation arising from the collapse of the original Community in 1977.¹⁷⁴

4.2.1 East African Community Treaty

The Treaty establishing the East African Community (the EAC Treaty) has been relied upon in three cases, all filed in 2011.

In *Awadh*,¹⁷⁵ counsel for the respondent urged the Constitutional Court to take into account the fact that, in terms of article 124 of the EAC Treaty, the member states of the Community had agreed to cooperate in respect of the maintenance of peace and security in the region. In particular, the member states had committed, under article 124(5) of the EAC Treaty, to cooperate in the fight against cross border crime, and to extend mutual assistance in criminal matters including through the arrest and repatriation of fugitives as well as through exchanging information relating to national frameworks for fighting crime. In upholding this contention, the Constitutional Court took special note of the fact that the EAC Treaty had been domesticated by Kenya, Uganda and Tanzania.¹⁷⁶ In the case of Uganda, the Court observed that Parliament had passed the East African Community Treaty Act of 2002, which had entered into force on 15 January 2005 by the terms of Statutory Instrument No. 29 of 2005 - The East African Community Act (Commencement) Instrument, 2005.¹⁷⁷ The Court also took note of, and relied upon, article 124 of the EAC Treaty, which had been stressed by counsel for the respondent.¹⁷⁸ On these bases, the Court was of the view that neither the Ugandan Police nor the Director of Public Prosecutions had violated the Constitution by receiving and prosecuting the petitioners since, from the facts, there had been legitimate cooperation between Uganda, Kenya and Tanzania under the terms of the EAC Treaty.¹⁷⁹

Further, in *Akidi*,¹⁸⁰ Judge Opio Aweri rendered a vigorously pro-EAC decision. He noted that Uganda, as a member of the international

174 See, for instance, *James Bahinguza and Edward Grace Lubega (on behalf of 622 other former employees of the defunct East African Airways) v Attorney General* C.A Misc Appln 269 of 2013, arising from H.C Misc Appln 448 of 2009, itself arising from H.C Misc Appln 763 of 2003 and High Court Civil Suit No.1010 of 1996 (seeking terminal benefits arising from the collapse of the East African Community); *Administrator General v Kakooza Umaru and Stanbic Bank* High Court Misc Appln 11 of 2017, arising from EMA 1381 of 2016, itself arising from High Court Civil Appeal 16 of 2009 (in which the respondent sued to access benefits accruing to his late father, arising from service to the defunct East African Community); *JL Okello v Uganda National Examinations Board* Supreme Court Civil Appeal 12 of 1987 (in which one issue related to whether the Uganda National Examinations Board, as successor to the East Africa Examination Council, had a subsisting claim to the land in dispute).

175 n 37.

176 At 71.

177 At 71-72.

178 At 72.

179 As above.

180 n 64.

community, was bound by a number of international treaties requiring democratic practices, including the EAC Treaty.¹⁸¹ In his view, article 123 of that Treaty required the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms.¹⁸²

Similarly, in *Toolit*,¹⁸³ Judge Opio Aweri noted that aside from domestic law on elections, Uganda was bound by a number of international and regional treaties, of which the EAC Treaty was among the ‘most relevant’.¹⁸⁴ As he had in the *Akidi* case above, he cited article 123 of the EAC Treaty as being especially pertinent with respect to the obligation to observe democratic practices.¹⁸⁵

4.2.2 East African Court of Justice

The case law of the East African Court of Justice (EACJ) has been cited in a number of cases, straddling human rights, constitutional and electoral law as well as civil and commercial related fields. At the same time, this reception has not been unanimous, and there are some instances in which courts have ignored invitations to consider EACJ jurisprudence.

In the 2007 case of *Tim Kabaza and 2 Others v Chatha Investments Ltd*,¹⁸⁶ for instance, High Court Judge Opio Aweri relied on the EACJ decision in *Prof Peter Anyang Nyong’o & others v The Attorney General of Kenya and Others*¹⁸⁷ as authority for the propositions that: i) temporary injunctions were discretionary orders and thus required the careful and judicious consideration of all aspects of the case; ii) flexibility was to be preferred rather than hard and fast rules; and iii) courts should avoid determining issues that were the subject of the main case.¹⁸⁸

Further reliance on EACJ jurisprudence occurred in the two earlier referenced High Court decisions also rendered by Judge Opio Aweri. In the *Akidi* case¹⁸⁹ in particular, Judge Opio Aweri stressed the importance of EACJ case law. Counsel for the first respondent had cited the *Anyang’ Nyongo* case and urged the Court to be guided by it. In response, counsel for the petitioner had argued that the case was not binding on the court, but was only persuasive at best. In rejecting the latter view, Judge Opio Aweri observed that Uganda, as part of the community of nations, was bound by a corpus of relevant treaty law,

181 At 5-6.

182 At 6.

183 n 67.

184 At 7.

185 As above.

186 High Court Misc Appln No.745 of 2007, arising from High Court Civil Suit No.489 of 2007 (decision of Judge Rubby Aweri Opio).

187 East African Court of Justice Case Ref 1 of 2006.

188 At 4 (the Court should bear in mind the following guidelines’).

189 n 64.

including the EAC Treaty;¹⁹⁰ and that article 123 of that Treaty was pertinent to the rule of law and democracy.¹⁹¹ According to him, the Treaty had also established the EACJ as a means of ensuring ‘adherence to the law in the interpretation, application and compliance with the treaty’.¹⁹² On this basis, he rejected the notion that Uganda was not bound by EACJ decisions.¹⁹³ In his view, and specifically invoking the EACJ’s decision in *Hon. Sitenda Sebalu v The Secretary General of the EAC, the Attorney General of the Republic of Uganda, Hon. Sam Njuba and Electoral Commission of Uganda*,¹⁹⁴ Judge Opio Aweri stressed that all member states of the EAC were ‘bound by the decisions of the EACJ in respect of the articles of the Treaty such as article 123’.¹⁹⁵ As such, the *Anyang’ Nyongo* case was ‘not only binding but also very persuasive’.¹⁹⁶ He then proceeded to rely on the *Anyang’ Nyongo* decision as authority for the proposition that a cause of action under common law, as stipulated in the *Auto Garage* case, was distinct from that created by Statute or other legislation.¹⁹⁷

Judge Opio Aweri also referred to EACJ case law in the *Toolit* case.¹⁹⁸ After describing the EAC Treaty as one of the ‘most relevant’ international treaties relating to democracy, which had to be borne in mind together with national law, he stressed the importance of article 123 of the Treaty in terms of its democracy-related obligations.¹⁹⁹ To this end, and again citing the EACJ cases of *Anyang’ Nyongo*²⁰⁰ and *Sitenda Sebalu*,²⁰¹ he opined that the institution of the EACJ under the terms of the EAC Treaty had been intended to promote the adherence to law.²⁰² The jurisprudence of that body was therefore a relevant guide to the Court.

EACJ case law was similarly applied in the 2013 High Court case of *Betty Nalima and 4 Others v Sebyala Moses Kiwanuka and 4 Others*.²⁰³ In that matter, the court cited with approval the decision of the EACJ First Instance Division in *Mbidde Foundation Ltd and Another v Secretary General of the East African Community and Another*²⁰⁴ as authority for the proposition that, in considering a grant of a temporary injunction, the applicant had to show ‘real prospects’ for

190 At 5-6.

191 At 6.

192 As above.

193 As above.

194 EACJ Ref 1 of 2011.

195 As above.

196 As above.

197 As above.

198 n 67.

199 At 7.

200 n 187.

201 n 194.

202 As above.

203 High Court Misc Appln 396 of 2013, arising from High Court Civil Suit 209 of 2013 (Ruling of Judge Monica K Mugenyi).

204 East African Court of Justice (First Division) Applications 5 & 10 of 2014.

succeeding in the claim for a permanent injunction rather than ‘a strong *prima facie* case’ in this respect.²⁰⁵

In addition, in the 2016 case of *Erasmus Masiko v John Imaniraguha and 2 Others*²⁰⁶ the High Court relied on the EACJ First Instance Division decision in *Sitenda Sebalu v Secretary General of the East African Community*²⁰⁷ as a basis for the view that the offence of contempt of court could be founded upon the failure to comply with court orders.²⁰⁸

The above cases constitute instances in which Ugandan courts have been receptive to EACJ jurisprudence, with some decisions perhaps being too ‘EACJ-friendly’. For instance, while it might have been open to the court in *Akidi* to describe EACJ case law as ‘very persuasive’, it is difficult to find support, under Ugandan law, for the court’s assertion, in that case, that EACJ decisions are ‘binding’ on Ugandan courts.

On the other hand, there have been a number of instances in which courts have been indifferent to EACJ case law. For instance, in the 2012 High Court case of *Hon. Abdu Katuntu and Another v MTN Uganda Ltd and 6 Others*²⁰⁹ counsel for the fifth defendant urged the Court ‘to find wisdom in the holding’²¹⁰ of the EACJ Appellate division, in the matter of *Legal Brains Trust (LBT) Ltd v Attorney General*, with regard to the notion that a court of law was precluded from determining a moot or hypothetical question. Counsel for the Plaintiff, in urging the Court to disregard a number of preliminary objections to the suit, also pointed the Court to the decision of the EACJ in *James Katabazi and 21 others versus Secretary-General of the East African Community and Another*.²¹¹ According to counsel, the EACJ in *Katabazi* found that it would be inappropriate to uphold a preliminary objection, if to do so would involve the ascertainment of facts in issue before the Court. In dismissing the suit, however, the High Court did not rely on either of the decisions of the EACJ urged upon it by the parties.

Similarly, in the 2014 High Court case of *Tororo Progressive Academy Limited v DFCU Limited and Bank of Uganda*²¹² counsel for the defendants cited the EACJ decision in *East African Law Society v Attorney General of Burundi and the Secretary General of the East African Community*²¹³ as authority for the notion that an interlocutory order did not have the effect of completely disposing of the matter in issue, but rather left additional questions for determination by the

205 At 4, para 10 of the ruling.

206 High Court Misc Appln 1481 of 2016, arising from High Court Civil Suit 125 of 2005 (Ruling of Judge Andrew K Bashajja).

207 Reference 8 of 2012.

208 At 11 (‘the East African Court of Justice ... extensively considered the issue of contempt of court and held that ...’).

209 High Court Civil Suit No.248 of 2012 (ruling by Judge Christopher Izama Madrama).

210 At 9.

211 Reference 1 of 2007.

212 High Court Civil Suit 398 of 2014 (Ruling of Judge Kainamura).

213 Application No. 3 of 2014.

court. However, in his own determination of the point, the High Court Judge did not rely on this case.

In *Legal Brains Trust (LBT) Ltd v Attorney General and National Council of Sports*,²¹⁴ another 2014 High Court case, counsel for the respondent relied on the EACJ decision in *Timothy Alvin Kakkoko v the Secretary General of the East African Community*²¹⁵ to contend that, in determining the award of a temporary injunction, a Court had to be satisfied that the applicant had a *prima facie* case with a likelihood of success. Again, in determining the matter, the High Court did not rely upon this authority.

The trend of judicial avoidance of EACJ jurisprudence was further evident in 2015 High Court case of *National Oil Distributors Ltd v Attorney General*.²¹⁶ In that matter, counsel for the respondent cited the EACJ's decision in *East African Law Society*²¹⁷ with regard to the nature of an interlocutory order, as distinct from a final order. Once again, however, in determining the question, the High Court Judge did not himself depend upon this authority.

Most recently, in the 2016 High Court case of *Hon. Acire Christopher v Hon Okumu Reagan Ronald and Electoral Commission*²¹⁸ counsel for the first respondent referred to the case of *Sitenda Sebalu*²¹⁹ relating to contempt of court for non-compliance of court orders and stipulated that in the instant case, no contempt could arise as the first respondent had not been obligated to do any act by the orders in question. However, in determining the matter, the High Court did not expressly rely on this authority.

The division in Ugandan jurisprudence regarding the reception of EACJ case law appears to run right down the middle: of the ten cases in which EACJ case law was cited, in five cases the courts relied on the EACJ authorities, while in the other five, the courts appear to have ignored those authorities. The apparent deadlock might be broken in favour of judicial indifference to EACJ case law, when it is considered that on the one hand, three of the five pro-EACJ decisions (*Kabaza*, *Akidi* and *Toolit*) were rendered by the same Judge – Opio Aweri, while on the other hand, of the five EACJ-neutral decisions, only two (*Katuntu* and *National Oil*) were by the same Judge – Izama Madrama. As such, it could be said that, on balance, however slight, Ugandan courts have been more indifferent than receptive to EACJ jurisprudence.

214 High Court Misc Appln No.638 of 2014, arising out of Misc Cause No.54 of 2014 (Ruling of Judge Elizabeth Ibanda Nahamya).

215 Application 5 of 2012.

216 High Court Misc Cause 241 of 2015 (Ruling by Judge Christopher Izama Madrama).

217 n 213.

218 Election Petition 4 of 2016 (decision of Judge David Matovu).

219 n 207.

At the same time, it bears noting that we were unable to find a case in which a Ugandan court expressly *declined* to rely on EACJ case law, as has been the case with the jurisprudence of the European Court.²²⁰ From this perspective, it is arguable that indifference is to be preferred to outright rejection, and that, the absence of the latter – taken together with those decisions in which EACJ authorities have in fact been relied upon – suggests that the door remains open for EACJ jurisprudence to feature even more prominently in Ugandan case law.

4.2.3 East African Legislative Assembly

The East African Legislative Assembly (EALA) has been referenced in two Ugandan court decisions – about eleven years apart.

In the 2006 case of *Jacob Oulanyah v Attorney General*,²²¹ before the Constitutional Court, the petitioner challenged the constitutionality of Rules 11 and 12 of the Rules of Procedure of Parliament. He contended that Parliament had unlawfully delegated its responsibility to elect Ugandan members of the EALA to political parties, through their respective caucuses, a decision which did not allow for the inclusion and participation of independent MPs. The Constitutional Court upheld this contention, noting that elections conducted in such a manner were not in fact decisions of Parliament – the designated electoral college under articles 89(1) and 94(1) of the Constitution.²²² The impugned rules, having been found to be in contravention of those provisions of the Constitution, were thus rendered null and void.

More recently, in the 2017 High Court case of *Yona Musinguzi v National Resistance Movement and Attorney General*,²²³ the applicant sought an interim injunction restraining the Parliament of Uganda from receiving the candidates from the National Resistance Movement (NRM) party for election to the EALA pending the determination of his election petition. In dismissing the application, the High Court had in mind the need to respect Uganda's commitments under the EAC Treaty. According to Judge Wolayo, the Court had to be mindful of the requirement, in section 4(2) of the EALA Act of 2011, for Parliament to elect representatives to EALA within 90 days of the expiry of the term of the present Parliament.²²⁴ Section 4 effectively

220 See the decision of Judge Musota in *Kasha*, considered in Section 4.1.3 above.

221 Constitution Petition 25 of 2006.

222 This decision would be cited with approval by the Constitutional Court in *Dan Mugarura v Attorney General* Constitutional Petition 23 of 2009, at 27. The *Mugarura* case involved, among others, a challenge to the power of the Appointment Committee of Parliament to approve nominees for public office (in this case the Electoral Commission), as being inconsistent with articles 60(1) and (2) of the Constitution. The Court felt that this power was consistent with the Constitution, since such power was contemplated by the Constitution itself. This situation, according to the Court, could be distinguished from that in *Oulanyah* in so far as, in the latter instance, the delegation of the Parliament's power to political party causes was neither envisaged nor sanctioned by political parties.

223 High Court Misc Appln 103 of 2017, arising from Misc Appln No.102 of 2017 and Election Petition 1 of 2017 (ruling of Judge Wolayo).

224 At 3.

required that 9 members be elected.²²⁵ As such, to issue an order stopping some candidates for taking part in the election would be ‘against the spirit’ of section 4(1), (2) and (3) of the EALA Act.²²⁶ In these circumstances, the Judge declined to issue the order sought.²²⁷

Table 3: Frequency of citation of EAC law by Ugandan courts

| Institution, case law or instrument | Number of cases in which cited |
|-------------------------------------|--------------------------------|
| EAC Treaty | 3 |
| EACJ jurisprudence | 10 |
| EALA | 2 |
| Total references | 15 |

4.3 Other Regional Economic Communities in Africa

We were unable to find any references, in Ugandan case law, to the laws of ECOWAS, AMU, CEN-SAD, ECCAS and IGAD. There were, however, some references to COMESA law and, curiously, to that of SADC, which are discussed below.

4.3.1 Common Market for Eastern and Southern Africa

There is a respectable body of Ugandan case law that has referred to COMESA law, whether by reference to the institution as such, the Treaty, or the jurisprudence of the COMESA Court.

The earliest instance in this regard appears to be the 2009 Supreme Court case of *Concorp International Ltd v East and Southern African Trade and Development Bank*.²²⁸ In this case, a dispute arose regarding the restructuring of certain loans advanced by the respondent to the appellant. The respondent’s counsel raised a preliminary objection, asserting the respondent’s immunity from civil process. One of the issues before the Supreme Court was, therefore, as to whether in the absence of a waiver by the President of the respondent bank under the provisions of the COMESA Treaty, Ugandan courts had jurisdiction to entertain the matter. Having regard to the terms of the Treaty, as well as the facts of the instant case, the Court found that a waiver by the respondent’s President was not required to clothe Ugandan courts with jurisdiction to try the case and therefore, dismissed the preliminary objection.

225 At 4.

226 As above.

227 As above.

228 Supreme Court Civil Appeal 11 of 2009.

Further, in the 2010 High Court case of *Regal Pharmaceuticals*,²²⁹ the petitioner sought to recover monies from the respondent arising from goods allegedly supplied to the latter between 2007 and 2009. In this case, the references to COMESA were quite tangential. Part of the plaintiff's evidence consisted of annexures, which included a COMESA Certificate of Origin and a list of goods containing, among others, a COMESA number. Aside from these, there were no further references to, nor reliance upon, COMESA law by the respective counsel and the Judge.

More extensive reference to COMESA law was made in the 2011 High Court case of *Pearl Impex (U) Ltd and 2 Others v Attorney General and Kampala City Authority*.²³⁰ The plaintiffs, by way of originating summons, sought the assistance of the High Court with regard to the proper understanding of the meaning of a 'foreign investor' under Ugandan law, as well as regulatory requirements for the conduct of trade by such persons. In adjudicating the matter, Judge Madrama thought that the central questions before the court could not be adjudicated upon without reviewing a range of other bodies of law, including COMESA law, germane to the issue of trade and investment.²³¹ In terms of the COMESA Treaty, one of its major objectives, under article 3 thereof, was the establishment of a common market, to spur growth and development, including through the creation of an environment conducive to transboundary investment.²³² As such the Investment Code Act of Uganda had to be read in light of the objectives of the COMESA Treaty.²³³ The Uganda Investment Authority was also duty bound to ensure that Uganda's legal and policy framework was consistent with the process of regional integration and common markets as conceptualised, among others, under the COMESA Treaty.²³⁴

Later, in the 2012 High Court case of *Akiphar Pharmaceuticals Ltd v The Commissioner Customs Uganda Revenue Authority*,²³⁵ the plaintiff alleged that the defendant had unlawfully auctioned its sugar, since the sugar should have been duty-free, having been imported from Swaziland (a COMESA member state). However, apart from this passing reference, based on the plaintiff's pleadings, no further reference to COMESA or COMESA law appears to have been made by the parties, and no further reference or reliance on this law was reflected in the judgment, which turned very much on the provisions of the EACCMA.²³⁶

229 n 171.

230 High Court Civil Suit 3 of 2011 (decision of Judge Christopher Madrama).

231 At 16.

232 As above.

233 At 16-17.

234 At 20-21.

235 High Court Civil Suit 366 of 2012 (before Judge Christopher Madrama Izama).

236 For a summary of Ugandan decisions referring to the EACCMA, see n 172.

In another 2012 matter, the High Court case of *Isaac Katongole v Excel Insurance Company Ltd*,²³⁷ the plaintiff contended that the defendant had breached the terms of a third party insurance contract entered into under the COMESA Yellow Card Protocol. Relying on the terms of the Protocol on Transport and Communications (Annexure VII to the PTA Treaty), the defendant raised a preliminary objection, contending that the Ugandan court lacked jurisdiction, as the accident in question had occurred in Rwanda. However, having regard to the Protocol, as well as to the plaintiff's pleadings, the High Court Judge felt that the Court retained jurisdiction, in so far as the plaintiff's claim related to loss arising from the defendant's failure to supply accurate documentation, which would have enabled the plaintiff to obtain compensation from the Rwandan authorities.

More recently, in the 2016 High Court case of *Coil Ltd v Transtrade Services Ltd*,²³⁸ the plaintiff sought an order allowing it to attach the defendant's property in Uganda or, in the alternative, an order for security for costs, on account of the defendant being a Kenyan-based company. The reference to COMESA in this case was only a tangential one, and was a narration of the averments in one of the affidavits for the plaintiff – to the effect that defendant was likely to remove its assets from Uganda and that, in such a circumstance, the defendant's 'COMESA insurance' was unlikely to satisfy any judgment rendered in favour of the plaintiff.²³⁹ Aside from this passing reference, the Judge's determination of the matter did not turn on, or make any further reference to, COMESA law.

Finally, in the 2016 High Court case of *Clet Wandui Masiga v Association for Strengthening Agriculture in Eastern and Central Africa*,²⁴⁰ the plaintiff, a former employee of the defendant, alleged that the defendant was infringing his copyright in respect to a livestock productivity manual and programme the defendant was implementing in various areas of Uganda. The defendant raised a preliminary objection to the suit, on the ground that it enjoyed diplomatic immunity from civil process in Uganda. In determining the validity of the objection, the Judge referred to the COMESA Court decision in the case of *Eastern and Southern African Trade and Development Bank (PTA bank) v Ogang*²⁴¹ as authority for the propositions that the privileges and immunities of an institution had to be determined from a perusal of its constituent treaty or statute,²⁴² and that, in any case, no such treaty or statute would conceivably provide for the 'existence of a rogue organ or institution flouting with impunity all the rules of the organization from which it derive[d] birth'.²⁴³ In the end, the Judge

237 High Court Civil Suit 176 of 2012 (before Judge Christopher Madrama Izama).

238 High Court Misc Appn 14 of 2016, Arising from Civil Suit No.6 of 2016 (before Judge Stephen Mubiru).

239 At 5.

240 High Court Civil Suit 266, 267 and 268 of 2016 (before Judge Christopher Madrama Izama).

241 [2001] 1 EA 46.

242 At 12.

243 At 12 & 14.

upheld the preliminary objection, finding that the defendant in fact enjoyed the immunity it asserted.

4.3.2 The Southern African Development Community

Interestingly, although Uganda is certainly not a member of SADC, the SADC Treaty has found mention in Ugandan jurisprudence, courtesy of the two decisions by Judge Opio Aweri – *Akidi* and *Toolit* – previously referenced.

In the *Akidi* case,²⁴⁴ Judge Opio Aweri appeared to be under the mistaken impression that Uganda was bound by the SADC Treaty, and invoked it as one of the instruments relevant to the determination of electoral disputes.²⁴⁵

Judge Opio Aweri took this reliance even further in his decision in the *Toolit* case.²⁴⁶ According to him, aside from the relevant domestic law relating to the conduct of elections, there were regional and international protocols which *bound* Uganda to ensure the holding of democratic elections.²⁴⁷ In his view, one of the ‘most relevant’ of these was the SADC Treaty, signed in 1992 in Namibia.²⁴⁸ To him, the SADC Treaty ‘emphasized the need for democratic consolidation, the development of principles governing democratic elections, transparency and credibility of elections and democratic governance as well as ensuring acceptance of election results by all contesting parties’.²⁴⁹ To this end the Treaty stipulated a number of principles for the conduct of elections, that is to say: i) full participation of the citizens in the political process; ii) freedom of association; iii) political tolerance; iv) regular intervals for elections as provided in the respective national Constitutions; v) equal opportunity for all political parties to access the state media; vi) equal opportunity to exercise the right to vote and be voted for; vii) independence of the judiciary and impartiality of the electoral institutions; viii) voter education; ix) acceptance of electoral results and x) challenge of the election results as provided for in the law of the land.²⁵⁰

These decisions, in so far as they suggest that the SADC Treaty is binding upon Uganda, cannot be supported by a reference to Ugandan law as it currently stands.

244 n 64.

245 At 6 (‘As far as democracy and good governance is concerned we are bound by international protocols which emphasize among other things that our elections should be free and fair. See ... SADC Treaty ...’).

246 n 67.

247 At 7.

248 At 7-8.

249 At 8.

250 As above.

Table 4: Frequency of citation of African REC law by Ugandan courts

| Institution, case law or instrument | Number of cases in which cited |
|-------------------------------------|--------------------------------|
| COMESA | 7 |
| SADC | 2 |
| ECOWAS | 0 |
| AMU | 0 |
| CEN-SAD | 0 |
| IGAD | 0 |
| ECCAS | 0 |
| Total references | 9 |

5 EMERGING TRENDS REGARDING THE INFLUENCE OF AU LAW IN THE UGANDAN LEGAL SYSTEM

The preceding sections have provided an overview of the trends regarding the reception, in Ugandan jurisprudence, of the laws of various integration efforts. This provides a fair basis for a brief qualitative and quantitative assessment of the extent to which AU law in general, and AU human rights law in particular, has influenced the normative landscape in Uganda.

In Table 5 below, we set out a broad picture of the comparative trends in this respect.

Table 5: Frequency of citation of AU law relative to the citation of the laws of other integration efforts

| Body of law | Number of cases in which cited |
|-------------|--------------------------------|
| AU | 31 |
| EU | 25 |
| EAC | 15 |
| COMESA | 7 |
| SADC | 2 |
| ECOWAS | 0 |
| AMU | 0 |
| CEN-SAD | 0 |
| IGAD | 0 |
| ECCAS | 0 |

At first blush, it might appear as if AU law has had the greatest success in influencing the adjudication of cases in Uganda, since it appears to have been referred to more frequently (31 times) than EAC law (15 times) and EU law (25 times). This initial assessment must, however, be tempered by two immediate observations. In the first place, as Uganda is obviously not a member of the EU, the frequency of citation, of EU law by Ugandan courts is disproportionately high relative to the reference to AU law. Secondly, given the only relatively recent re-establishment of the EAC, and the much longer uninterrupted existence of the AU (and its predecessor the OAU), the citation of AU law would be expected to be much higher compared to that of the newer EAC.

In addition, if one is to further analyse the disaggregated data contained in the preceding individual tables, the challenges of AU law in terms of its judicial reception in Uganda become even more apparent. In the first place, the majority of citations of AU law have arisen from references to the African Charter (12 times) and the African Children's Charter (8 times). In the latter case, these have mainly been very passing mentions – often a single, apparently *pro forma*, reference to the 'best interests of the child'-principle usually in the context of guardianship and adoption cases. Indeed, if the references to the African Children's Charter were to be discounted, AU law would fall to second place after EU, in terms of frequency of citations. Secondly, the influence of AU jurisprudence is relatively weak as compared to that from the EU and the EAC. For instance, decisions of the African Commission on Human Rights have only been cited 3 times, while Ugandan courts are yet to cite any decisions of the African Court or the African Children's Rights Committee. On the other hand, EU jurisprudence has been considered a total of 10 times (5 times for the European Court of Human Rights and 5 times for the European Court of Justice), while EACJ jurisprudence has been referenced 10 times. Thirdly, with the exception of one reference – to the AU Convention on Preventing and Combating of Corruption – the reception of AU law in the Ugandan judicial system has almost exclusively related to *human rights* law. By contrast, EU law and EAC law appear to have influenced not just human rights law but a broader variety of the legal landscape, including commercial and civil litigation.

On the whole, therefore, AU law appears to have had a disproportionately weak impact in the Ugandan legal system, relative to its longevity, reach and potential. A number of factors might account for this trend. In the first place, as a general matter, international law's reception in national courts may depend on the nature of the obligation in question, that is to say, whether it primarily seeks to influence domestic action or action on the international plane.²⁵¹ As Tzanakopoulos has noted:

... the 'directionality' of the international obligations assumed by states ... has consequences for the position of domestic courts. What is meant by 'directionality'

251 A Tzanakopoulos 'Domestic courts as the "natural judge" of international law: a change in physiognomy' in J Crawford and S Nouwen (eds) (2011) *Select Proceedings of the European Society of International Law* 155-168.

is whether a given international obligation addresses the state with respect to its actions towards other states, i.e. whether it prescribes or proscribes certain conduct exclusively on the international level, or whether it addresses the state with respect to taking certain conduct or guaranteeing certain results within its domestic jurisdiction. In the former instance the international obligation is 'extrovert' or 'outward-looking': it addresses the state in its conduct on the international level towards other states. In the latter it is 'introvert' or 'inward-looking', it mandates conduct within the domestic jurisdiction. The prohibition of the use of force and the prohibition of intervention are obvious examples of outward-looking obligations, while obligations under human rights law, or under the law of immunity, are inward-looking obligations.²⁵²

In this regard, the fact that a significant number of obligations under AU law are directed towards Uganda's conduct on the international plane may explain the relatively limited presence of this body of law in the jurisprudence of Ugandan courts. This is also a convincing explanation for the predominance of AU *human rights* law in Ugandan judicial decisions, since those obligations are quintessentially 'inward-looking'.²⁵³ This further explains the relatively strong showing of EAC law, a great degree of whose obligations are directed towards changing the domestic landscape in member states in a range of fields (ranging from free movement of goods to free movement of persons).²⁵⁴

Secondly, few Ugandan law schools, if any, teach 'Integration Law' as a distinct area – much less 'AU Law'. This reality is also reflected in scholarship – with no Ugandan-authored book on AU law.²⁵⁵ On the other hand, AU human rights law seems to have had more traction – perhaps because it is usually a standard staple of international human rights law courses. Similarly, there are a great number of EU law courses across the world, which Ugandan Judges might have undertaken in the course of post-graduate studies. The sheer volume of EU-focused legal texts, widely available in Uganda, as well as EU-supported capacity building courses for lawyers and Judges,²⁵⁶ might

252 Tzanakopoulos (n 251) 158.

253 Even then, as Viljoen has pointed out, there are a number of instances where AU human rights law could have been referred to, and applied, by Ugandan courts but where this did not happen. He cites, for instance, the decision of the Constitutional Court in *Salvatori Abuki and Another v Attorney General* Constitutional Case No.2 of 1997, which invalidated parts of the Witchcraft Act as being inconsistent with the constitutional guarantees relating to freedom from cruel, inhuman and degrading treatment or punishment. As he rightly notes, the Court could have referred to the African Charter, which contains a similar protection - see Viljoen (n 3) 542.

254 In addition, from this perspective, a sub-regional court with competence over both commercial disputes and human rights matters might be viewed as wielding a degree of influence – in the domestic plane – with which states might be uncomfortable. This might explain the poor fortunes of the SADC Tribunal, as well as why initiatives to clothe the EACJ with a human rights mandate seem to have stalled.

255 By contrast, there is a written text on EAC law by a prominent Ugandan legal scholar – see Ssempebwa (n 3).

256 See, for instance, J Arutu 'The recent judicial reforms in Uganda with emphasis on "ADR and mediation"' Paper presented to the 3rd Magistrates and Registrars' Conference, 2012 <https://www.jlos.go.ug/index.php/document-centre/mediation/258-recent-judicial-reforms-in-uganda-emphasis-on-alternative-dispute-resolution-adr-and-mediation/file> (accessed 15 January 2019) at 1 ('Mediation has been an integral part of the Commercial Court Division since 2003 when it was piloted for a period of two

also explain EU law's unduly prominent presence in Ugandan judicial decisions, relative to AU law.

Thirdly, EAC law appears to enjoy a potentially significant advantage over AU law in terms of the scope for a more reflexive interaction between that system and the domestic order. Under the EAC Treaty, domestic courts are entitled to refer matters relating to EAC law to the EACJ, which allows domestic courts to engage, in the judicial function, with their counterparts at the EAC level.²⁵⁷ This interaction might then form a natural basis for greater attention to, and respect for, EACJ jurisprudence relative to the more apparently extrinsic jurisprudence of the AU. However, to date this right does not seem to have been invoked by any of the domestic courts in the East African Community, and there is no record of the EACJ having delivered any such preliminary rulings in the context of domestic litigation. Relatedly, service on the EACJ by Judges concurrently engaged by the Ugandan judiciary also seems to have created a window for enhanced familiarity with, and receptiveness to, EAC law. The EAC-friendly decision in the 2013 High Court case of *Nalima*²⁵⁸ might, for instance, in part be explained by this factor. By contrast, Ugandan jurists who have served on the African Commission have typically not been serving Judges in the Ugandan judiciary, potentially negatively affecting the permeation of that law into the domestic system.²⁵⁹

The above factors might explain – to different extents – the relatively weak imprint of AU law as a feature of the jurisprudence of Ugandan courts. However, on their own, they cannot fully explain the trends identified in this article. This is an important enquiry – one which merits more detailed research, one which preferably seeks the views of serving and retired Ugandan Judges. Ultimately, only they are

256 years with support from JLOS and EU under the Commercial Justice Reform Programme'). See also, Uganda Judiciary 'Denmark supports access to justice in Uganda' 28 May 2014 <http://judiciary.go.ug/data/news/99/6850/Denmark%20Supports%20Access%20to%20Justice%20in%20Uganda..html> (accessed 15 January 2019). The report recounts that Denmark, through its international development arm – the Danish International Development Agency (DANIDA) has supported Uganda's judiciary, including through, 'providing technical expertise' at least since 1989. It further notes that Denmark has 'constructed most of the Ugandan courts' and has trained more than 200 judicial officers, including Judges. These have received training in such areas as 'human rights, commercial transaction, management of courts, commercial law, European law and administration of Justice in Nordic countries' and that this training has been 'with a view of comparing and replicating it in Uganda'.

257 Art 34 of the Treaty for the Establishment of the East African Community appears to straddle the line between requiring such a reference and making it subject to the discretion of national courts. In the end, the language used points towards both obligation and discretion, with the latter being narrowly favoured. According to that provision: 'Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question'.

258 n 203.

259 For instance, the current Ugandan member of the Commission, Hon. Meddie Kaggwa, is Chair of the Uganda Human Rights Commission.

in position to shed light upon the reasons for leaning more strongly upon certain legal orders than others in the adjudication of the matters arising before them. It would also be interesting, and important, to replicate the assessment undertaken in this article in the context of other domestic systems in Africa, to obtain a fuller picture of the trends in this regard. This panoramic view of the trends of judicial reception of AU law within the member states of the Union – especially if accompanied by a comparative review in the style undertaken in this article – might also provide important insights into some of the issues under-explored in this very preliminary study.

6 CONCLUSION

This paper has analysed emerging trends in the reception of AU law in the Ugandan judicial system, with the courts' reference to EU law and African REC law being used as comparators.

While AU law has had some impact in the jurisprudence of Ugandan courts, this has almost exclusively been in the area of human rights law, and even then, in a limited sense, tending towards mere citation of certain treaties and decisions as opposed to a more robust engagement with those authorities. On the other hand, EAC law and, surprisingly, EU law seem to have had a disproportionately significant influence upon the case law of Ugandan courts, not just in the areas of constitutional and human rights law, but also in the fields of more general commercial and civil litigation.

The trends identified in this preliminary enquiry call for more detailed research, especially in two directions: i) identifying the trends in other African countries, as a means of obtaining a more general picture of the jurisprudential impact of AU law; and ii) exploring the reasons for the (under)performance of AU law relative to other legal orders in terms of its reception in the case law of domestic courts.

The AU has a significant – and positive – role to play in terms of encouraging the development of a more progressive normative order on the continent. For this to happen, however, more work has to be undertaken, in terms of scholarship, activism and at the political and strategic levels. To this end, it is my hope that more scholars, especially those based on the continent, might be persuaded to engage in the critical work required in this regard, including through taking forward the analysis initiated in this exploratory study.