

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**HUMAN RIGHTS JURISDICTIONAL OVERLAP BETWEEN THE EAST
AFRICAN COURT OF JUSTICE AND THE NATIONAL COURTS**

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DECLARATION

I HELLEN NGESSA OKOLLA, declare that this thesis is my original work and has not been submitted for examination in any other University for the award of any degree.

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This Thesis has been submitted for examination with my approval as the University Supervisor.

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DEDICATION

To my mother **RHAEL NAMALWA AMBUNYA** you are a true rock and I love you.

ACKNOWLEDGEMENT

Thank you to the Almighty God, for granting me life, blessing me with good health, wisdom and according me patience and perseverance to pursue my academic goals.

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ABBREVIATION AND ACRONYMS

1. **ACHPR** African Charter on Human and Peoples Rights
2. **EAC-** East Africa Court
3. **EACT-** East African Community Treaty
4. **EACJ –** East African Court of Justice
5. **EACA –** East Africa Court of Justice
6. **EU –** European Union
7. **EUC-** European Union Charter
8. **ECJ** European Court of Justice
9. **ICC –** Internal Criminal Court
10. **EALA** East African Legislative Assembly
11. **ECHR** European Court of Human Rights
12. **ECHR** European Convention on Human Rights

ABSTRACT

As the topic suggests, *Human Rights Jurisdictional Overlap between the East African Court of Justice and National Courts*, is a discourse on the overlap in jurisdiction between the EACJ and national court to hear, determine and remedy human rights violations. The research is informed by the problem that both the EACJ and national courts have jurisdiction over human rights abuse cases. This overlap has arisen partly from the failure to approve the Protocol to Operationalize Extended Jurisdiction of the EACJ as well as the lack of the principle of Exhaustion of Local Remedies in the EAC Treaty. The situation has resulted in overlap and potential human rights jurisdictional conflict between the EACJ and the national courts more than a decade after the EACJ became operational, contrary to the fundamental principles of the Community.

The research therefore sets out to: examine the jurisdiction of the EACJ from its inception to date; examine the jurisdictional relationship between the EACJ and national courts to hear and determine human rights abuse cases; and make recommendations on how to resolve or avoid the jurisdictional overlaps.

KEY WORDS: Jurisdictional Conflict, East African Court of Justice, National Courts, Human Rights, Parallel Jurisdiction, Jurisdictional overlap.

CHAPTER ONE

INTRODUCTION TO THE HUMAN RIGHTS JURISDICTIONAL CONFLICT BETWEEN THE EACJ AND THE NATIONAL COURTS

1.0 Introduction

The aim of this chapter is to highlight the research design and methodology on human rights jurisdiction of the East African Court of Justice and the national courts. Accordingly, the Chapter discusses the background to the study, problem statement, hypothesis, objectives, research questions, justification, theoretical and conceptual framework and methodology.

1.1 Background to the Study

The East African Community (EAC) is an Inter-Governmental Organization¹ encompassing six (6) countries in the East African Region namely: Republic of Kenya,² Rwanda,³ United Republic of Tanzania,⁴ Burundi,⁵ Republic of Uganda⁶ and South Sudan.⁷ The Community was formed after the ratification of the EAC Treaty for the Establishment of the East African Community by Kenya, Uganda and Tanzania in 2000.⁸ The Republic of Burundi and Rwanda joined EAC in 2007⁹ and later Republic of South

¹EAC Treaty, Article 2

²*Ibid*, Article 3

³*Ibid*.

⁴*Ibid*.

⁵*Ibid*.

⁶*Ibid*

⁷ *Ibid*; See also, Ken Karuri, 'South Sudan officially joins EAC', (African News 20th March, 2016)

<http://www.africanews.com/2016/04/15/south-sudan-officially-joins-east-african-community> accessed on 3rd March, 2016

⁸ East African Community <http://www.eac-network.org/community-service> accessed on 30th November, 2015; See also, Treaty Establishing the East African Community

⁹*Ibid*; See also EAC Treaty, Article 3 on admission of more states.

Sudan in 2016.¹⁰ The objective¹¹ of the EAC is to widen and deepen social, economic, political and cultural integration¹² between the member states.¹³ The EAC just like the defunct EAC has organs and institutions that are designed to ensure efficient and effective management of the functions of the Community. The judicial organ of the EAC is the East African Court of Justice (hereinafter referred to as ‘EACJ’) established under Article 23 of the EAC Treaty and it became operational in 2001.¹⁴

Kenya, Uganda and Tanzania had previously formed and cooperated under the defunct EAC which collapsed in 1977,¹⁵ and later the East African Cooperation from 1993 to 2000.¹⁶ The East African Community in 1967¹⁷ had organs and institutions that ensured efficient and effective management of the affairs of the Community.¹⁸ The judicial organ of the defunct EAC was the East African Court of Appeal (EACA)¹⁹ which operated as the appellate court for the three member states;²⁰ its mandate was to hear and determine appeals in civil and criminal matters from the High Court of the partner states and its

¹⁰ eacj.org accessed on 25th September 2017; *See also* Karuri, K ‘South Sudan officially Joins EAC’, (*African News* 20th March 2016) <http://www.africanews.com/2016/04/15/south-sudan-officially-joins-east-african-community>, accessed on 3rd March, 2016

¹¹EAC Treaty, Article 5

¹²EAC Treaty, Article 5

¹³*Ibid*; *See also* Alli Possi, ‘Striking a Balance Between Community Norms and Human Rights: The Continuing Struggle of Justice’, (2015) 15 *African Human Rights Law Journal*, p 194

¹⁴EAC Treaty, Article 23, ‘the provision establishes the EACJ as the judicial body of the EAC tasked with ensuring adherence to the law in the interpretation, application of and compliance with the Treaty. The Provision was amended in 2007 to include a two-tier court system; Court of First Instance and Appellate Division. Both divisions are now operational.’

¹⁵Treaty for the East African Community; *See also*, Bheki R. Mngomezulu, ‘Why did regional Integration Fail in East Africa in the 1970s? A Historical Explanation’ http://www.kznhass-history.net/files/seminars/Mngomezulu_2013.pdf accessed on 9th March, 2016

¹⁶Mediation Agreement, 1993

¹⁷ Treaty for the East African Community, 1967

¹⁸*Ibid*

¹⁹*Ibid*, Article 17

²⁰ The highest Court in the Partner States was the High Court. The EACA therefore operated as an appellate Court to hear and determine Appeals from the High Court.

decision was final.²¹ The EACA's jurisdiction was limited; Constitutional and elections petitions were reserved for the partner states and the offence of Treason in the case of United Republic of Tanzania.²²

After the dissolution of EAC in 1977,²³ EACA automatically ceased its operations.²⁴ This created a legal appellate *lacuna* within the partner states and in response to this challenge partner states amended their respective Constitutions to establish the Court of Appeals.²⁵ Tanzania amended its 1977 Constitution to establish the Court of appeal,²⁶ Kenya passed the Appellate Jurisdiction Act of 1977²⁷ and Uganda too established the Court Appeal through a statute.²⁸ The partner states have since independently further developed their internal judicial systems to create more appellate opportunities for litigants; Republic of Kenya promulgated the Constitution in 2010 which established the Supreme Court of Kenya.²⁹ The Republic of Uganda promulgated the Constitution in 1995 which established the Supreme Court of Uganda.³⁰ The judicial structures of national courts have developed over the years fully to dispense with most legal

²¹ Treaty for the East African Community, 1967; *see also*, Stephen Willis, 'International Courts and Tribunals', 9th June 2015, <http://guides.library.harvard.edu/>.> accessed on 21st November, 2015

²²The East African Community Cooperation, 1967; *See also*, The Partner States mutually agreed to reserve the power to hear and determine Constitutional Petitions to the internal judicial bodies. This was seen as an attempt to maintain Sovereignty of the Partner States.

²³<http://www.eac.int/about/EAC-history> accessed on 25th September, 2017 ; *See also*, The East African Community collapsed in 1977 after a disagreement between the Partner states

²⁴Willis Note 13 *Ibid* at p 67

²⁵Appellate Jurisdiction Act, 1977, Kenya

²⁶Constitution of the United Republic of Tanzania, Article 117.

²⁷Appellate Jurisdiction Act, Kenya 1977, Section 3.

²⁸Uganda Judicial System < <http://countrystudies.us/uganda/59.htm>> accessed on 10 March 2016

²⁹Constitution of Kenya, 2010, Article 163.

³⁰Constitution of Uganda, 1995, Article 130.

challenges.³¹ Rwanda, Burundi and South Sudan did not experience the *lacuna* challenge as they had developed their judicial systems with final appellate jurisdiction by the time they joined the EAC.³²

Other institutions and organs established by the EAC Treaty to ensure effective and efficient operations and affairs of the Community³³ include the Summit,³⁴ the Council,³⁵ the Co-ordination Committee, Sectoral Committee,³⁶ the East African Legislative Assembly³⁷ and the Secretariat.³⁸

EACJ is tasked with hearing and determining disputes between partner states, within the partner states and disputes with the organs, institutions and employees of the Community.³⁹ Its main mandate is with regard to the interpretation and application of the EAC Treaty⁴⁰ it has a superior jurisdiction in matters of interpretation and application of the Treaty over the national courts.⁴¹ The Court can determine a case brought by a Partner State regarding a breach of the Treaty or failure to fulfill an obligation by a Partner State or any institution of the Community.⁴² Partner states may refer a matter to the Court to determine the legality of any act, regulation, decision or action pursuant to the Treaty and

³¹Benjamin J Odoki, '*Developing International Jurisprudence: a Case for an East African Court of Appeal*', Paper Presented at the Annual Kenya Judges Colloquium 2011 <http://kenyalaw.org/kl/index.php?id=1938>>accessed on 15th November, 2015.

³²*Ibid*

³³ EAC Treaty, Article 9

³⁴*Ibid*, Article 10

³⁵*Ibid*, Article 13

³⁶*Ibid*, Article 20

³⁷*Ibid*, Article 48

³⁸*Ibid*, Article 66

³⁹*Ibid*, Article 27

⁴⁰*Ibid*

⁴¹*Ibid*, Article 33(2)

⁴²*Ibid*, Article 28

any other rule of law.⁴³ Thus, the Court may consider not only the EAC Treaty in its analysis but potentially municipal law and general international law.⁴⁴

The Secretary General⁴⁵ of the Community may also bring a case to the Court against a Partner State for failure to fulfill an obligation or breach of the Treaty, though the Council of Ministers must consent.⁴⁶ Legal or natural persons can refer cases to the EACJ over legality of any act, regulation, directive decision or action of a partner state as long as it is unlawful or an infringement of the Treaty.⁴⁷ In addition to this direct means of seizing the Court, individual cases may also come to the Court through referral by a national court faced with a question of EAC Treaty interpretation or the determination of the legality of a Community law or action.⁴⁸

EACJ can hear and determine disputes concerning East African Community employees that include,⁴⁹ disputes that involve terms and conditions of employment or interpretation and enforcement of staff rules and regulation.⁵⁰ It is also a court of arbitration.⁵¹ The court has jurisdiction to give advisory opinions on request by the Summit, Council or Partner

⁴³*Ibid*, Article 28(2)

⁴⁴*Ibid*, Article 35; *See also* the case of *Prof. Peter Anyang' Nyong'o and 10 others v The Attorney General of Kenya & 5 others*, Reference No. 1 of 2006 Restraining the Clerk of the East African Legislative Assembly and the Secretary General of the East African Community from recognizing 9 persons nominated by Kenya as duly elected by the National Assembly of Kenya to the East African Legislative Assembly.

⁴⁵ EAC Treaty, Article 29

⁴⁶ EAC Treaty, Article 29.

⁴⁷ *Ibid*, Article 30.

⁴⁸ *Ibid*, Article 34.

⁴⁹ *Ibid*, Article 31.

⁵⁰ *Ibid*

⁵¹ *Ibid*, Article 32.

States on questions of law that affect the community.⁵²The Court may review its judgment upon discovery of a fact of decisive nature.⁵³

The EACJ received its first case in December 2005,⁵⁴ more than four (4) years since the court became operational and a discourse had begun on possible expansion of the Court's jurisdiction.⁵⁵ In June of 2005, the East African Law Society (EALS)⁵⁶ suggested to President Yoweri Museveni⁵⁷ of Uganda that time was right to initiate the amendment for EAC Treaty on the provision for expansion of the jurisdiction of the EACJ to include appellate jurisdiction.⁵⁸ There were also calls from civil society organizations across the partner states to expand the Court's jurisdiction to include human rights abuse cases.⁵⁹ In 2006, there were amendments to the EAC Treaty to create the appellate division of the EACJ that became operational in 2007.⁶⁰ Human Rights jurisdiction has remained a grey area for the court since inception, human rights abuse cases have always been admitted, heard and determined, it therefore serves that the EACJ is in parallel jurisdiction with the national courts on these cases. This has become a cause for concern and has informed the discourse in the following ways:-

⁵²*Ibid*, Article 36.

⁵³*Ibid*, Article 35(3).

⁵⁴eacj.org accessed on 24th September, 2017; *See also*, Callist Andrew Mwatela & 2 others v East African Community, Reference No.1 of 2005

⁵⁵John Eudes Ruhangisa, "The Scope, Nature and Effect of EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law* p 139 booksandjournals.brillonline.com accessed on 25th September, 2017.; *See also* eacj.org

⁵⁶<http://www.ealawsociety.org/> accessed on 25 September, 2017, formed in 1995 and incorporated in Tanzania as a professional body for lawyers in the region.

⁵⁷ EAC Treaty; *See also*eac.org accessed on 29th September 2017, Head of Summit

⁵⁸ EAC Treaty, Article 27; *See also*, Luis Franceschi, 'The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from Foreign Affairs Power Perspective', Cambridge Scholars Publishing 2014 p 187

⁵⁹*Ibid*

⁶⁰ EAC Treaty, Article 27; *see also*, Anne Pieter, 'Regional Integration: The Contribution of the Court of Justice of the East African Community', p 417 <<http://www.zaoerv.de> accessed on 20th March, 2016.

Firstly, the Protocol to operationalize the Extension of the Jurisdiction has not been approved, the Council of Ministers has requested for a policy paper from the Secretary General of the Community on the legal impact of extension of jurisdiction. The Attorney Generals of the partner states and the Secretary General have on several instances argued before the court that the EACJ should wait for the Protocol to be operationalized before admitting human rights abuse cases and reserve the matters to the national courts.

Secondly, the EAC Treaty does not compel parties to exhaust all local remedies before filing a matter with the EACJ, this has been an area of conflict and overlap because of the possibility of multiple filing and conflicting judgements.⁶¹

1.2 Statement of the Problem

Both the EACJ⁶² and the national courts⁶³ have the jurisdiction to hear and determine human rights abuse cases. This parallel jurisdiction is seen, partly by the failure of the EAC to approve Protocol to Operationalize Extended Jurisdiction of the EACJ⁶⁴ and the proactive approach adopted by the EACJ by relying on the provisions of Articles 27 (2), 6 and 7 of the EAC Treaty and international law to determine human rights abuse cases filed before the court. The EAC Treaty does not require parties to exhaust all local

⁶¹ Constitution of Kenya, Chapter 4; *see also*, Ryoba Marwa, 'An Examination of the Jurisdiction of the East African Court of Justice', (2014) International Journal of Innovative Research and Practice 2, p 20

⁶² EAC Treaty, Article 33; *See also*, 'African Network for Animal Welfare v the Attorney General of the United Republic of Tanzania', Reference No. 9 of 2010 the EACJ has relied on the provisions of Articles 6 and 7 of the EAC Treaty as a basis to hear and determine Human Rights abuse cases filed in court by citizens from the Partner States. This approach has been criticized by the Attorney Generals of the Partner States who have at all times argued that the EACJ is exceeding its mandate and should wait for the Protocol to Operationalize Extended Jurisdiction of the EACJ to be approved by the Summit.

⁶³ The Constitution of Kenya, 2010, Article 22; *see also*, Constitution of the Republic of Uganda, United Republic of Tanzania, Rwanda, Burundi and South Sudan

⁶⁴ EAC Treaty, Article 27

remedies available before approaching the court.⁶⁵ This means that a party being a citizen of a member state can bypass the national courts and file a human rights violation case before the EACJ. This debate came to the fore in the case of Attorney General of Rwanda v Plaxedia Rugumba⁶⁶ where the attorney General of Rwanda argued the EACJ not to hear the case because all the local remedies available in Rwanda had not been utilized. The court determined that the claimant had relied on the provisions of the EAC Treaty which the national courts of Rwanda did not have the power to interpret and as such they were properly seized of the matter.⁶⁷

The option available to a litigant to access both the national court and the EACJ has resulted in confusion, overlap and possible jurisdictional conflict between the two courts.⁶⁸ The lack of express human rights jurisdiction to the EACJ and its continued resolve to hear and determine the matters is a cause for concern for the partner states.⁶⁹ Accordingly, there is a danger that the court which plays a major role in the community integration process will instead stand in the way in the way of integration. This gap in clarity on the human rights jurisdiction is inappropriate and requires research to fill in. This research should illuminate the human rights jurisdiction of the EACJ and the national courts and determine the current jurisdictional relationship more than a decade after the establishment of the EACJ and recommend a way forward.

⁶⁵European Convention on Human Rights, Article 35

⁶⁶ Reference No. 1 of 2012

⁶⁷ *Ibid*

⁶⁸ The EAC Treaty does not have a provision on exhaustion of local remedies rule unlike the EU Convention under Article 35 states as follows: ‘Court may only deal with a matter after all the domestic remedies have been exhausted according to the generally recognized rules of International law, and within a period of six months from the date on which the final decision was taken’

⁶⁹Ssempebwa, E, “East African Community Law’ Chapter 7 ‘The East African Court of Justice’ Lexis Nexis p. 69

1.3 Theoretical Framework

Three theories have been identified to guide this research in answering the research questions and testing the hypothesis; the theories are inter-related and feed into each other.

1.3.1 Constrained Independence Theory

When states create such authority as the EACJ; they do so to protect their interest,⁷⁰ they however they face the risk that members of the international courts will seek to expand their authority or recognize new legal norms and thus impose restrictions on national governments.⁷¹ The theory helps the states counter this potential overreaching of these courts without abandoning independent international adjudication.⁷² The EACJ was established to help in integration of the East African Community but over time it has developed its jurisdiction to hear and determine matters member states did not envisage at inception. The partner states expected that it would reserve itself to Treaty interpretation, disputes among states, breach of Treaty, and advisory opinion, arbitration, preliminary ruling and employment and labour matters but not human rights abuse cases which national courts can and have dealt with. This has led to jurisdictional overlap, and possible conflict and partner states can now look into amending the EAC Treaty to prevent such overreach.

⁷⁰Laurence Helfer, '*Why States Create International Tribunals; a Theory of Constrained Independence*' https://www.law.berkeley.edu/files/helfer_05.pdf p. 3

⁷¹*Ibid*

⁷²*Ibid*

1.3.2 Neo-Functionalism Theory

Unlike the constrained independent theory above that states that communities create institutions such as the EACJ to protect their interests, this theory asserts that the process of having the formation of a Community such as the EAC is with specific interest and aims.⁷³ The greater the interest of a nation is protected the greater the integration. The EAC came together with the objective to become an economic power block with provisions for monetary union and eventually political federation.⁷⁴ EACJ has been formed to uphold the interest of the States within community, to survive it must reserve itself to that to avoid conflicting with the partner states.

1.3.3 Principal –Agent Theory

Unlike the two theories above which address the interests of the partner states and the interests of the community, this theory truly mirrors the relationship that the EAC Partner states have with the EACJ. Where member states of a community create a dependent court,⁷⁵ the state is the principal and the judges of the court are the agents.⁷⁶ The partner state addresses any issue with the court or when the judges overstep their mandate. In the EAC Treaty, only the partner states can expand the jurisdiction of the court as provided in Article 27(2) of the EAC Treaty. The EACJ has however developed its jurisdiction over time to human rights cases which the partner states

⁷³Haas, E. B “*The Uniting for Europe Social-Economic Forces*” 1950-1957 Stanford University Press, 1958.

⁷⁴ EAC Treaty

⁷⁵Gakii, James Thuo. “Variation in the use of sub regional integration courts between business and human rights actors: the Law and Contemporary Problems” Wntr 2016 Issue; see also, Laurence R. Helfer “ Sub-Regional Courts in Africa; Litigating the Hybrid Right to Freedom of Movement” iCourts- The Danish National Research Foundations Centre of Excellence for International Courts, September 2015

⁷⁶*Ibid*

intentionally reserved for the national courts.⁷⁷The Principals have denied extending the jurisdiction of the court to human rights, although the EAC Treaty anticipated extension of jurisdiction in future.⁷⁸Partner States can influence the jurisdiction of the court as they can make amendments to the EAC Treaty to limit the jurisdiction of the court as Partner States prefer national courts to regional courts on the basis of protecting their sovereignty.⁷⁹

The three theories above are not independent of each other they feed into each other and are all instrumental in helping to answer the research question.

1.4 Literature Review

This section surveys the current literature on the concept under study: human rights jurisdiction of the EACJ, overlap and possible conflict and National Courts. This section is arranged thematically for ease of understanding.

1.4.1 The Jurisdiction of the East African Court of Justice

The first research question concerns the developing jurisdiction of the EACJ. Chapter 8 of the EAC Treaty addresses the establishment and jurisdiction of the EACJ, although the EAC Treaty is the primary source, the EACJ has also developed its jurisdiction through practice. As a result this research approaches jurisdiction from a historical perspective as Ssempebwa Edward does in Chapter 7 of the book “East African Community

⁷⁷*Ibid*

⁷⁸*Ibid*

⁷⁹Tom Ojienda, 'Alice in Wonderland; Preliminary Reflections on the Jurisdiction of the East African Court of Justice,' 2 East African Journal of Human Rights and Democracy, p. 100

Law”⁸⁰ which offers a series of other chapters that address the history of the East African Community generally and the EACJ specifically. The chapter proceeds to address the composition and structure of the EACJ, access and jurisdiction of the court. Although the book is very helpful in understanding the jurisdiction of the court, it is not specific on the human rights jurisdiction question, this can be attributed to the fact that at the time the EACJ had not handled many human rights abuse cases but also that the author chose to reiterate the provisions of the Treaty. Ruhangisa⁸¹ examines the scope and origins of EAC Law as well as validity with regard to partner states in ‘the Scope, Nature and Effect of EAC Law’. He analyzes the relevance of the EAC Law within the integration process and by way of case law analyzes the hierarchy between community law and national law. Being the immediate former registrar the author had the benefit of first hand experience in how the court operated and the decisions it grappled with. He has written several articles at different times in the life of the court which I have greatly benefited from.

Tom Ojienda⁸² in his article “Alice in Wonderland; Preliminary Reflections on the Jurisdiction of the East African Court of Justice”, analyzes the jurisdiction of the EACJ from inception. He addresses jurisdiction of the court, its role in interpretation and application of the EAC Treaty, original and appellate jurisdiction. He recommends

⁸⁰Ssempebwa E, “The East African Court of Justice” Chapter 7 in “The East African Community Law” p. 65

⁸¹John Eudes Ruhangisa, “The Scope, Nature and Effect of EAC Law’ in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law* p 139 booksandjournals.brillonline.com accessed on 25th September, 2017.; See also eacj.org

⁸²Tom Ojienda, ‘*Alice in Wonderland; Preliminary Reflections on the Jurisdiction of the East African Court of Justice*’, 2 East African Journal of Human rights and Democracy, p 96

expansion of the jurisdiction of the EACJ and enhancing independence of the court.⁸³ This article addresses the jurisdiction of the court at inception, whereas my work addresses that period as well, so much has changed since it was published including the EAC Treaty amendments in 2006 and 2007⁸⁴ which fundamentally changed how the court operates.

Solomy Bossa⁸⁵ in his article, “Towards a Protocol Extending the Jurisdiction of the East African Court of Justice”, addresses the discussion and negotiations that led up to the amendment of Article 27 (2) of the EAC Treaty⁸⁶ whose effect was to provide for a two tier system; court of first instance and the appellate division in the EACJ. This article is also essential because it analyzes the impact of the extension of the jurisdiction of the EACJ on the national courts. The author at the time was optimistic that the Summit was going to approve the Protocol for Extension of Jurisdiction within a year, it is now over a decade since the draft protocol was drafted and not much progress has been done. The article addresses specific provisions in the Protocol that would be instrumental in resolving the human rights jurisdiction confusion.

Understandably, there is literature on the jurisdiction of the EACJ partly because of its provision in chapter 8 of the EAC Treaty and partly because the area has attracted interest from scholars, litigants, advocates and judges especially on the need to further expand the

⁸³*Ibid*

⁸⁴ EAC Treaty

⁸⁵ Solomy, ‘*Towards a Protocol Extending the Jurisdiction of the East African Court of Justice*’, African Journal of Human Rights and Democracy 2006

⁸⁶ EAC Treaty

jurisdiction of the court to human rights. This expansion was envisaged from the onset as under Article 27(2) states as follows:-

“the court shall have such other original, appellate, human rights and other jurisdiction as it will be determined by the Council at a suitable subsequent date.”⁸⁷

Although there is a developing body of literature on the jurisdiction of the EACJ, none of the current research touches on the present topic as framed. The literature provides a foundation to anchor the current research and the basis of future research in this field.

It is nearly two decades since the inception of the court and time is ripe for the human rights jurisdiction question to be addressed. This is therefore a live area for research on the policy, political and legal implication of the extension of the jurisdiction and benefits the citizens of the partner states.⁸⁸ In accordance with the Principal-Agent theory,⁸⁹ this research argues that the failure to extend the jurisdiction of the court by the partner states is deliberate; it is intended to limit the power that the states surrender to the EACJ. Human rights questions globally are sensitive and most states prefer to have the national courts hear and determine human rights violations cases.

Overall, the developing jurisdiction of the EACJ is at the centre of discussions, at the core of the discussions is the human rights jurisdiction and how the EACJ has refused to turn a blind eye on human rights violations is currently admitting the matters and how it affects the relationship with the national courts.

⁸⁷*Ibid*, Article 27 (2)

⁸⁸EAC Council of Ministers has directed the EAC Secretariat to write a report on the policy and legal implications of the approval of the Protocol to extend the Jurisdiction of the EACJ Treaty

⁸⁹Gakii, James Thuo p.283

In conclusion, the literature above addresses the issue of jurisdiction of the court from inception. This research therefore has the benefit to address the developing jurisdiction from inception to the amendments and possible approval of the protocol for extension of the jurisdiction of the EACJ.

1.4.2 The EACJ's Human Rights Jurisdiction

The greatest fear for the partner states at the moment is the admission of individual human rights abuse cases by the EACJ. The Attorney Generals⁹⁰ and the Secretary General have argued that the court should wait for the approval of the Protocol of the Extension of the EACJ Jurisdiction⁹¹ before hearing and determining human rights abuse cases. This argument has been defeated by the provisions of Articles 6 and 7 of the EAC Treaty and the recognition of the African Charter on Human and Peoples Rights.⁹²

Ally Possi,⁹³ in his article, “The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community” states the role of the EACJ in the Community. His article points the key challenges facing the EACJ to include: few cases filed, resources, Human rights jurisdiction and recommends possible solutions which if adopted can improve the functioning of the EACJ to effectively hear and determine human rights abuse cases from the member states.

⁹⁰See, all the partner states have Attorney Generals who represent the partner states in the EACJ after being sued; the Secretary General represents the community

⁹¹EAC Treaty, Article 27

⁹²EAC Treaty, Article 6 and 7: Fundamental Principles of the Community and Operational Principles of the Community

⁹³Possi, “*The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community*”. (2013)

Thuo Gathii James in his article, “Mission Creep or Search for Relevance; the East African Court of Justice Human Rights Strategy”,⁹⁴ analyzes how the court has used the EAC Treaty interpretation to imply and develop a human rights jurisdiction and questions if this move by the EACJ is a plot to remain relevant within the community. This study addresses the issue of development of a human rights jurisdiction by the EACJ as a cause of overlap and possible conflict of jurisdiction with the national courts. The article addresses the issue of jurisdiction generally and how the member states have reacted to this exercise of power by the EACJ.

John Eudes Ruhangisa⁹⁵ in his article “Judicial Protection under the EAC Law: Direct Actions” espouses that in any form of active partnership, disputes, differences and disagreements are bound to happen. Focusing on the EACJ he breaks down the role of the court and the various disputes that the court has had to deal with over and above its core function of interpreting and applying the EAC Treaty. This article is important for this study because it analyses the specific human rights cases that the EACJ has handled.

This second objective is in accordance with the Constrained Independence theory, that the partner states create regional bodies to protect their interest, the risk is that the regional courts will always seek to expand their authority or recognize new legal norms and thus impose restrictions on national governments. To this end this research will also refer to the several human rights abuse cases that have been heard and determined by the court.

⁹⁴Gathii James Thuo, ‘*Mission Creep or Search for Relevance; the East African Court of Justice Human Rights Strategy*’ 24 *Duke Journal of Comparative & International Law*

⁹⁵ John Eudes Ruhangisa, ‘The Scope, Nature and Effect of EAC Law’ in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law* p 139 booksandjournals.brillonline.com accessed on 25th September, 2017.

The literature referenced above is instrumental in understanding the human rights jurisdiction of the EACJ, it is however limited in the question of overlap with the national courts. This research will therefore be instrumental in demonstration the human rights jurisdictional overlap and later recommending the possible solutions.

1.4.3 Lessons from the Relationship between the European Union Courts and National Courts

Later, this study will look into the European Union⁹⁶, how the European Court of Justice⁹⁷ and the European Court of Human Rights⁹⁸ have over the years established a jurisdictional clarity with the national courts. Although the system is not perfect, the European Union appears to have established a working balance and as such avoid overlap and or conflict. To that end, a review of an Article titled “The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?” by Oreste Pollicio is important. It analyses the relationship between the national legal order and the European Court of Justice after the inclusion of the countries from the Central Eastern Europe (CEE) into the European Union.

He analyses how at the beginning certain Central Eastern Europe constitutional courts conflicted with European Court of Justice. This review is important based on the fact that the European Union appears to have overtime found a proper working balance in the

⁹⁶European Union Charter; *see also* https://europa.eu/european-union/index_en, accessed on 25th September 2017

⁹⁷*Ibid.*, *see also* https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en

⁹⁸ European Union Convention on Human Rights, Article 19

interpretation and application of laws between the domestic legal order and the European Court of Justice.

Richard Frimpong Oppong,⁹⁹ in his book titled “Legal Aspects of Economic Integration in Africa’ discusses the development of the Regional Economic Community in the International Community. In Chapter 2 of the book, the author delves into the legal framework for managing relational issues between the Community, member states and individuals. The book in general and Chapter 2 in particular is important because it concentrates on the legal frameworks and how communities all over the world have attempted to use various mechanisms and principles of law to address rational issues. This book is helpful in this study because it is undeniable that integration of states for a common goal always results in juxtaposition of states, laws, legal systems and institutions. This position is true for the East African Community and as such it is important to review some of the recommendations that the author came up with.

Gathii, James Thuo¹⁰⁰ in his article, “African Regional Trade Agreements as Legal Regimes”, chapter VII reviews at length the case of *Prof. Peter Anyang’ Nyong’o and others v the Attorney General of Kenya & 5 others*.¹⁰¹ He discusses the relationship between the EACJ and the national courts and opines that where a question is raised before a national court regarding the validity of some act by the Community the court

⁹⁹Richard FrimpongOppong, “Legal Aspects of Economic Integration in Africa,” Cambridge University Press, 1 edition (2011).

¹⁰⁰Gathii James Thuo, “African Regional Trade Agreements as Legal Regimes,” Cambridge University Press

¹⁰¹*Prof. Peter Anyang’ Nyong’o and others v. Attorney General of Kenya and Others*, Reference 1 of 2006

may request the EACJ to give a preliminary ruling.¹⁰² He addresses the EACJ's jurisprudence by analysis of cases such as the *East African Law Society and Others v Attorney General*.¹⁰³

Laurence Helfer in his article, "Why States Create International Tribunals; a Theory of Constrained Independence", discusses the theory of constrained independence of regional courts.¹⁰⁴ He introduces a discussion around the theory of constrained independence and how states create dependent international courts such as the EACJ which can be controlled and manipulate. This study will help us understand why the EAC member states are reluctant to extend the jurisdiction of the EACJ.

The European Union over the years had developed an albeit seamless relationship in the operations of the court. Firstly, The European Court of Justice and the European Court of Human Rights are distinct courts, this clarity has been instrumental in enhancing the credibility of the court and the relationship between the courts and the national courts has been clarified over time through case law and amendments to the Treaties.s

1.5 Objective of the Study

The overriding goal of this research is to analyze the possible human rights jurisdictional overlap and or conflict between the EACJ and the national courts In this regard the specific objectives are:-

¹⁰²EAC Treaty, Article 34

¹⁰³Reference No. 3 of 2007

¹⁰⁴Laurence Helfer, 'Why States Create International Tribunals; a Theory of Constrained Independence'
https://www.law.berkeley.edu/files/helfer_05.pdf p. 3

1. Examine the developing jurisdiction of the EACJ from inception, subsequent amendments to the EAC Treaty and practice;
2. Analyze the parallel human rights jurisdiction of the EACJ and the national courts; and
3. Examine the lessons from the European Union judicial bodies; the European Court of Justice, the European Court of Human Rights and the national courts.

1.6 Hypothesis

This research is under-girded by the following three propositions:

- (a) Articles 6 and 7 of the EAC Treaty mandates the EACJ to hear and determine human rights abuse cases though the Protocol to operationalize the extended jurisdiction of the EACJ has not been approved by the Summit.
- (b) Continuation of the EACJ to hear and determine human rights abuse cases without express jurisdiction creates a jurisdictional overlap and possible conflict with the national courts of the partner states which has both a legal and political implication on the integration process.
- (c) There is need for jurisdictional clarity between the EACJ and the national courts as concerns human rights cases.

1.7 Research Question

In view of the Statement of the Problem, therefore, this research seeks to answer the following questions:

1. How has the jurisdiction of the EACJ developed over time? What was the jurisdiction of the EACJ at inception and how has it developed over time?
2. Why do we have a parallel human rights jurisdiction between the EACJ and the National Courts? What is the effect of the parallel human rights jurisdiction between the EACJ and the National Courts to hear and determine human rights abuse cases?
3. How has the European Court of Justice and the European Court of Human Rights achieved jurisdictional clarity that the EAC and the national courts can learn from? What lessons can the EAC, EACJ and national courts learn from the European Court of Justice and the European Court of Human Rights and national courts?

1.8 Research Justification

As has already been demonstrated above, there is a gap in the practice and theory of the human rights jurisdictional overlap between the EACJ and the national courts. There is need for research to fill this gap. The findings of the research will benefit the Secretariat of the EAC¹⁰⁵ who at this moment have been tasked with the momentous duty of preparing a policy paper to the Council of Ministers on the legal and political impact of Protocol to operationalization Extended Jurisdiction of the EACJ,¹⁰⁶ Judges, lawyers, scholars and litigants.¹⁰⁷

¹⁰⁵ EAC Treaty, Article 67

¹⁰⁶ *Ibid*, Article 27

¹⁰⁷ John Eudes Ruhangisa, “ Parallel Jurisdiction of Courts; the view from EACJ” Commonwealth Law Bulletin, September 2010

1.9 Research Methodology

To investigate the jurisdictional overlap between the EACJ and the national courts on human rights cases, this research took the form of exploratory qualitative research. The research was primarily library based. There was review of primary sources of data on human rights jurisdiction including the EAC Treaty, the Constitution of Kenya, 2010, the European Union Convention and judicial decisions from EACJ and Partner States courts of record.

Reliance was placed on secondary sources of law such as academic commentary, books, journal articles and websites. A comparative approach was envisaged to draw lessons from the European Union specifically the relationship between the national courts and the European Court of Justice and European Court of Human Rights.

A preliminary literature review was conducted to delimit the research area, conduct a theoretical review, contextualize the research and identify current research gaps.

1.10 Scope and Limitations of the Study

The Protocol to operationalize Extended Jurisdiction of the EACJ¹⁰⁸ has not been approved by the EAC Summit.¹⁰⁹ To this end, the EACJ does not have express jurisdiction to hear and determine human rights abuse cases but has inferred the same from the provisions of Article 6 and 7 and other enabling provisions of the EAC Treaty

¹⁰⁸International Justice Resource Center, 'East African Court of Justice' www.ijrcenter.org/regional-communities/eacj accessed on 25th September, 2017; See also <http://eac-network.org/community-service> accessed on 25th September, 2017. The Council of Ministers approved a draft Protocol to Operationalize Extended Jurisdiction of the EACJ in 2005. In June, 2012 the Council directed the EAC Secretariat to write a report policy and legal implication of extended jurisdiction.

¹⁰⁹EAC Treaty

and has relied on the provisions to determine individual cases. The EAC Treaty, unlike the European Union Charter,¹¹⁰ does not have the principle of exhaustion of local remedies rule; arguably, a party can approach both the national court and EACJ to seek relief. The study is however limited to decisions of the EACJ on human rights cases.

1.11 Chapter Synopsis

The study is set out in five chapters divided as below:-

Chapter 1 ‘Introduction’ this Chapter is an introduction to the study; it contains a broad overview of and layout of the research. The chapter entails the Background to the Research, Statement of the Problem, Objective of the Study, Research Question, Hypothesis, Literature Review, Theoretical Framework, Methodology used and Limitations of the Study.

Chapter 2 ‘The East African Court of Justice (EACJ)’ This chapter looks at the establishment of the East African Court of Justice under the East African Community Treaty, the jurisdiction of the court on interpretation and application of the EAC Treaty, the Human Rights jurisdiction, Arbitration and Advisory Opinion. I also examine the various natural and legal persons who can institute proceedings before the court such as; the Member States, the Secretary General and employees of the EAC Secretariat.

Chapter 3 ‘Relationship between the EACJ and the National Courts of the EAC Member States – Study of the Kenyan Judiciary’ This chapter examines the jurisdictional relationship between the East African Court of Justice (EACJ) and the national/domestic

¹¹⁰ European Union Charter, Article 35

courts with a specific focus on the Kenyan judiciary. The chapter will address the different areas that are likely to cause conflict between the two courts namely: the Human Rights jurisdiction, amendment to the EAC Treaty, doctrine of the exhaustion of local remedies not included in the EAC Treaty.

Chapter 4 ‘Lessons from the European Union’ this chapter deals with the comparative analysis. It focuses on the European Court of Justice and the European Court of Human Rights establishing how these two courts within the same community have struck a balance in the jurisdiction within the same community. The two courts offer invaluable lessons to the EAC and the EACJ on how to strike a balance and avoid overlap.

Chapter 5 ‘Conclusions and Recommendations’ this chapter brings together the arguments, ideas and suggestions in the preceding chapters in a unified manner and puts forward recommendations on how the EACJ and the national courts of the member states can work to ensure none to minimum jurisdictional conflict.

1.12 Conclusion

Arising from the statement of the problem, there is need, now more than ever, to study the jurisdictional overlap between the EACJ and the national courts of the partner states to hear and determine human rights violations cases. The justification for the study is that it could help the EAC Secretariat as they come up with a policy paper on the legal and political impact of expanding the jurisdiction of the EACJ and thus enhance clarity on the issue of human rights jurisdiction and reduce the confusion that currently reigns.

CHAPTER TWO

JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE (EACJ)

2.0 Introduction

In line with the first objective of this research, this chapter delves into the developing jurisdiction of the EACJ. Whereas it might appear obvious from the EAC Treaty, interpretation and application of the Treaty over the years, amendments to the Treaty and case law jurisprudence from the court has shown that it is not obvious. This chapter therefore comprehensively delves into the question of jurisdiction in line with the theories set out in chapter 1.

2.1 Organs and Institution of the EAC

Integration is an important concept in contemporary international relations;¹¹¹ integration among the East African countries was paramount for continued success of individual partner states and for better economic bargaining power as a block.¹¹² The Treaty establishing the East African Community developed policies and programs that aim at widening the integration in the political, economic, social and cultural, research and technology, defense and security, legal and judicial affairs for the benefit of member

¹¹¹Ssempebwa Edward P., "The East African Court of Justice" Chapter 7 in 'The East African Community Law' Lexis and Nexisp66; *See also* Kefa Ruth, 'The Role of the East Africa Court of Justice in Regional Integration; Emerging Jurisprudence and the Way Forward ' (LLM thesis University of Nairobi 2008) P 37

¹¹²San Bilai, "Trade and Development making Link,9Great Insight Magazine) 1 August 2012 <http://ecdpm.org/great-insights/trade-and-development-making-the-link/east-african-integration-achievements-challenges> accessed on 4th July, 2016

states.¹¹³The EAC is an instrument to aid the member countries to cooperate in order to achieve greater economic development.¹¹⁴

For integration policies to succeed there is need for strong institutions,¹¹⁵ Article 9 of the EAC Treaty establishes organs and institutions to aid in fulfilling the objectives of the Treaty.¹¹⁶The organs include the Summit, the Council, the Co-ordination Committee, Sectorial Committee, the East African Court of Justice, the East African Legislative Assembly; and the Secretariat.¹¹⁷Each of these organs have been established fully by the EAC Treaty and carries out various roles that are key in ensuring integration among the East African States, each of those roles is important to the functioning of the community. The law is an instrument for preserving common interest in regional integration.¹¹⁸ The EAC Treaty provides for the rules and regulations that govern relations between the member states, institutions, organs, secretariat and private citizens. In any active partnership, disagreements, differences or disputes are bound to happen in the course of realizing the agreed terms by the partners.¹¹⁹ To resolve any of the disagreements and provide judicial protection the EAC Treaty established the East African Court of Justice.¹²⁰ The judicial body's role in integration is to determine the legislative intent of

¹¹³ EAC Treaty, Article 5

¹¹⁴ *Ibid*, Preamble

¹¹⁵ Ssempebwa Edward P., "The East African Court of Justice" Chapter 7 in "The East African Community Law" p.66

¹¹⁶ EAC Treaty, Chapter 1

¹¹⁷ *Ibid*.

¹¹⁸ East African Law Society, "No Integration without the Rule of Law", 4th December, 2006 (press release) available at <http://www.ealawsociety.org> Accessed on 10th September, 2017.

¹¹⁹ Ssempebwa Edward P., "The East African Court of Justice" Chapter 7 in "The East African Community Law" p. 67

¹²⁰ Ruhangisa, John Eudes "Judicial Protection under EAC Law: Direct Actions' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), East African Community Law p 89 booksandjournals.brillonline.com Accessed on 9 September 2017.

the law and to provide a public forum for resolving disputes.¹²¹ The EACJ resolves the disputes brought before it and upholds rule of law while enhancing integration.¹²²

The crucial role that the court and the EAC laws plays in the daily lives of the lives of the people and in managing the relationship that exist between the sovereign state that intend to deepen and widen their relationship in the form of East African Integration cannot be overemphasized.¹²³ There is therefore a need to have judicial independence and autonomy¹²⁴ for effective and efficient EACJ in the execution of its mandate as an arbiter in dispute resolution and thereby enhancing the community integration through confidence building in its institutions.¹²⁵

2.2 The East African Court of Justice (EACJ)

Article 9 of the EAC Treaty establishes the EACJ¹²⁶ as one of the organs of the EAC; the court however commenced its operations in 2001.¹²⁷ The court has since its inception put in place systems and structures such as the Registry to aid the court in carrying out its duties and ensure efficiency.¹²⁸ The court is based in Arusha, Tanzania.¹²⁹

¹²¹ A Possi 'Striking a balance between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice' (2015) 15 "African Human Rights Law Journal" p 190

¹²² *Ibid*, p 195

¹²³ Ssempebwa Edwards P., "The East African Court of Justice" Chapter 7 in "The East African Community Law" p. 65

¹²⁴ Ruhangisa, John Eudes "Judicial Protection under EAC Law: Direct Actions' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), East African Community Law p 89 booksandjournals.brillonline.com Accessed on 9 September, 2017.

¹²⁵ *Ibid*

¹²⁶ EAC Treaty, Article 9

¹²⁷ *Anyang Nyong'o & others v the Attorney General of Kenya & others*; See also Henry Kilama, 'The role of the east African court of justice in the promotion, protection and enforcement of human rights in Uganda', (LLM thesis, University of Lagos 2012) p 25

¹²⁸ EAC Treaty, Article 45

¹²⁹ Henry Kilama, 'The Role of the East African Court of Justice in the Promotion, Protection and Enforcement of Human Rights in Uganda', (LLM thesis, University of Lagos 2012) p 25

Amendments¹³⁰ to the EAC Treaty established a two tier system; the court of first instance and the appellate division. The appellate division was created in the 2006¹³¹ pursuant to an amendment of the EAC Treaty and became operational 2007.¹³² The court has developed most of its jurisprudence as a two tier, first case to be lodged with the court, *Anyang Nyong'o & others v the Attorney General of Kenya & others* was in 2005. The number of cases has gradually increased over the years.¹³³

The judges of this court are appointed by the Summit from persons who have been recommended by partner states¹³⁴ they are required to be persons of proven integrity, impartial, independent and persons who have qualified to be judges in their countries.¹³⁵ The President and Vice President of the court are appointed by the Summit.¹³⁶ The judges of the court are appointed to serve for a term of seven (7) years.¹³⁷ The first six (6) judges, two from the founding member states; Kenya, Uganda and Tanzania, were sworn in on 30th November 2000. The number of judges was later increased to ten (10) after Burundi and Rwanda joined the EAC in 2007¹³⁸ and later twelve (12) after the Republic of South Sudan joined the EAC.¹³⁹ The court is now composed of twelve (12) judges with six in the court of first instance division and six in

¹³⁰ EAC Treaty, Article 23 (2)

¹³¹ Phillip K, The State of Constitutionalism in East Africa; The role of the East African Community 2007 in "Constitutionalism East Africa: progress, challenges and Prospects" (Kituo Cha Katiba, Kampala).

¹³² *Ibid*

¹³³ <http://eacj.org/> accessed on 24th September, 2017

¹³⁴ *Ibid*, Article 24

¹³⁵ *Ibid*

¹³⁶ *Ibid*, Article 24(4)

¹³⁷ *Ibid*, Article 24(2)

¹³⁸ O.C.Ruppel 'Regional Economic Communities and Human Rights in East and Southern Africa' <http://www.kas.de/upload/auslandhomepage/Namibia/Humanrightsinafrica/ruppel.pdf> accessed June 2016

¹³⁹ EAC Treaty, Article 3

the appellate division.¹⁴⁰ A judge of the court can only be removed from office if a question of his or her removal has been heard and determined by an *ad hoc* independent tribunal which has recommended that the judge be removed from office for misconduct or inability to perform his or her functions.¹⁴¹

The court together with other organs of the EAC has been instrumental in the integration process.

2.3 Jurisdiction of the East African Court of Justice (EACJ)

To date, the court has heard and determined slightly over thirty three (33) cases from the time it received its first case in 2005.¹⁴² The East African Court of Justice main jurisdiction is provided under Article 27(1) of the Treaty as interpretation and application of the EAC Treaty, Articles 28,29,30,31 and 32 of the Treaty further espouses on the jurisdiction. Article 27(2) provides the member states shall have power to extend the jurisdiction of the court, the partner states wanted to gradually expand the jurisdiction of the court to meet the demands of developing nations.¹⁴³ The court only has explicit jurisdiction in matters of interpretation of the EAC Treaty as other areas of jurisdiction are to be added by the parties at a later date that is not definite. However, recent jurisprudence indicates development in jurisdiction of the court as it has relied on the principles and objectives of the community to admit human rights cases.

¹⁴⁰http://eacj.org/?page_id=1135 accessed on 24th September, 2017

¹⁴¹EAC Treaty, Article 26(2)

¹⁴²Cara Richard, 'The Logic of International Courts: An Exploration of The East African Court of Justice', (Centre of Democracy)

¹⁴³EAC Treaty, Article 27(2); see also, Tom Ojienda, "Alice in Wonderland; Preliminary Reflections on the Jurisdiction of the East African Court of Justice", 2 East African Journal of Human Rights and Democracy, p 95

2.3.1 Interpretation and Application of the EAC Treaty¹⁴⁴

The EACJ main mandate is to interpret the EAC Treaty,¹⁴⁵ it has superior jurisdiction in matters of interpretation of the Treaty over the national courts.¹⁴⁶ The first case on interpretation to be brought before the court was the case of *Callist Andrew Mwatella & 2 others v the East African Community*.¹⁴⁷ another case that sought the court's interpretation of the Articles of the EAC Treaty *vis a vis* the actions of a partner state and got so much traction was the case of *Anyang' Nyong'o & Others v the Attorney General of Kenya and Others*.¹⁴⁸ The rules of Kenya national Assembly Elections infringed Article 50 of the EAC Treaty. The court considered the possible meaning of the expression 'the national assembly shall elect', and determine whether the Kenyan rules complied with Article 50 of the EAC Treaty. It held that the election rules partially complied with Article 50 of the EAC Treaty in so far as they provide for proportional representation of political parties.

Article 27(2) of the Treaty provides that the jurisdiction of the court can be extended.¹⁴⁹ The cases that are brought before the court for determination have to derive a basis under section 27(1) of the EAC Treaty. Other cases that have been brought before the courts

¹⁴⁴EAC Treaty, Article 3

¹⁴⁵*Ibid*

¹⁴⁶*Ibid*, Article 33(2)

¹⁴⁷Reference No. 1 of 2006; *see also*, Ruhangisa, John Eudes "Judicial Protection under EAC Law: Direct Actions" in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law* p 89 booksandjournals.brillonline.com Accessed on 9 September 2017.

¹⁴⁸Reference No. 1 of 2005

¹⁴⁹EAC Treaty, Article 27(2); *See also*, Attempts to extend the Jurisdiction of the EACJ have been unsuccessful; in 2005 the Council of Ministers approved a Draft Protocol to Operationalize Extended Jurisdiction of the EACJ.

have included Employment and Labour, Human Rights violations, Environment, Economic, interpretation and annulment.¹⁵⁰

The EACJ is obligated to adhere to the object and purpose of the EAC Treaty when interpreting its provisions,¹⁵¹ the main object of Treaty interpretation is to ascertain and give effect to its norms.¹⁵² Article 31 of the Vienna Convention on Law of Treaty,¹⁵³ provides that Treaties ought to be interpreted in good faith, taking into consideration the ordinary meaning given to the terms in their context and in light of its object and purpose. These are the principles that the court has to apply when exercising its role of interpreting the EAC Treaty.

The EACJ has jealously guarded its jurisdiction.¹⁵⁴ There are cases that have been brought before the court and have been dismissed for lack of jurisdiction. In the case of *Christopher Mutikila v Attorney General of Tanzania*¹⁵⁵ the court stated that only the national court of Tanzania could make a declaration that someone was improperly elected into the legislative office. The case of *Union Trust Centre vs. Attorney General of Republic of Rwanda*¹⁵⁶ recognized that the court jurisdiction had been limited to matters of interpretation; the court stated that the restriction of the court to matters of interpretation of the Treaty deferred legal disputes that fall outside that ambit to the

¹⁵⁰EACT Treaty, Article 27; see also, Cara Richard, 'The Logic of International Courts: An Exploration of The East African Court of Justice', (Centre of Democracy) p 52

¹⁵¹Alli Possi 'Striking a Balance Between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice' (2015) 15 "African Human Rights Law Journal" p 200

¹⁵²*Ibid*

¹⁵³Vienna Convention on Law of Treaties, Article 31

¹⁵⁴Ssempebwa, E "The East African Court of Justice" Chapter 7 "East African Community Law" Lexis and Nexus p68

¹⁵⁵Reference 2 of 2007

¹⁵⁶Reference 10 of 2013

jurisdiction of national courts. The court further stated that matters of internal laws of a member state should be heard by the national courts. Interpretation of the Treaty has remained the main role of the court, even though the national courts have jurisdiction to interpret the provisions of the Treaty too, in case of conflict, the EACJ determination is superior to the national courts.¹⁵⁷

2.3.2 Human Rights Jurisdiction

Prior to the amendments to Article 30 of the EAC Treaty,¹⁵⁸ the Treaty provided that natural and legal persons could refer to the court for determination, the legality in terms of Treaty, of any act, regulation, directive, decision or action of a Partner State or an institution of the community to the EACJ for determination.¹⁵⁹ Article 30 (2) of the Treaty, as amended, is to the effect that a person must approach the court within sixty (60) days¹⁶⁰ from the day the cause of action arose or from the day the person was seized of knowledge of the infringement.¹⁶¹ Although the EACJ does not have an express mandate to hear and determine human rights abuse/violations, the court has previously based its jurisdiction on Article 6 and 7 and other enabling provisions of the Treaty.¹⁶² Alli Possi¹⁶³ argues that the EAC Treaty does not expressly grant the EACJ jurisdiction to determine of human rights abuse cases but the court cannot be blind to

¹⁵⁷ EAC Treaty, Article 33(2)

¹⁵⁸ EAC Treaty, Article 30 before the Amendments in 2007.

¹⁵⁹ *Ibid*; see also, Ssempebwa, E “*The East African Court of Justice*” Chapter 7 “East African Community Law” Lexus and Nexus

¹⁶⁰ *Attorney General of the Republic of Kenya v Independent Medical Legal Unit* (2010) Appellate Division of the *EACJ*, the court stated that there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant.

¹⁶¹ EAC Treaty, Article 30 (2)

¹⁶² EAC Treaty, Article 6 and 7 provides for the Principles that shall govern the Community to include: Good Governance, Rule of Law and Democracy.

¹⁶³ African Charter on Peoples and Human Rights

violations in the partner states.¹⁶⁴ The jurisdiction to hear and determine human rights cases has been claimed through judicial activism.¹⁶⁵ EACJ has been protecting human rights indirectly through adherence to the principles of rule of law, Democracy and good governance.¹⁶⁶ Article 7(2) of the Treaty states that member states undertake to abide by principles of good governance, adherence to principles of democracy, the rule of law, social justice and maintenance of universally accepted human rights. These universally acceptable norms that have been provided for in the EAC Treaty have made human rights a part and parcel of the Treaty.¹⁶⁷ The court in the case of *Democratic Party v Secretary General of EAC*,¹⁶⁸ held that it had the jurisdiction to interpret the African Charter on Human and Peoples' Rights¹⁶⁹ because Article 6(d) of the EAC Treaty requires member states to adhere to the provisions of the African Charter on Human and Peoples Rights and hence inherently granting the EACJ jurisdiction.

Recent cases determined by the court have further developed its human rights jurisdiction. In the case of *Henry Kyariimpa v. Attorney General*,¹⁷⁰ the court categorically stated that it can go beyond just interpretation of the EAC Treaty and determine if there had been human rights violations. The court stated that it had no role when it came to executive decisions and functions of the Republic of Uganda but where there was obvious blatant violation or breach of the principles of good governance and rule of law, then the court will without hesitation assert jurisdiction on such matters. The

¹⁶⁴Alli Possi 'Striking a Balance Between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice' (2015) 15 "African Human Rights Law Journal" p 196

¹⁶⁵*Ibid*

¹⁶⁶*Ibid*

¹⁶⁷EAC Treaty, Article 7

¹⁶⁸Appeal no 1 of 2014

¹⁶⁹African Charter on Peoples and Human Rights; *See also*, <http://www.achpr.org/instruments/achpr>

¹⁷⁰Reference 4 of 2013

case of *Democratic Party v the Secretary General of East African*¹⁷¹ and the case of *James Katabazi and Others v Secretary General of the East African Community and Another*¹⁷² are some of the earliest cases that developed human rights jurisdiction of the court. In the *Katabazi* case,¹⁷³ jurisdiction of the EACJ was opposed by the Attorney General of Uganda and the Secretary General of EAC. They claimed that the court had to await the adoption of a Protocol on Extension of the Jurisdiction as provided for in Article 27(2)¹⁷⁴ in order to have such jurisdiction. The same argument was advanced in the case of *Samuel Mohochi vs. Attorney General of Uganda*,¹⁷⁵ and the court said that Article 27(2) does not limit it from interpreting and applying provisions of the EAC Treaty that make reference to human rights.¹⁷⁶

Arguments have been made for the extension of the court's jurisdiction. Judges in the case of *Sitenda Sebalu v Attorney general of Uganda and 3 others*¹⁷⁷ declared that the delay in the extension of the jurisdiction of the EACJ to hear and determine human rights abuse cases contravened the EAC Treaty and there was need for a quick action to conclude a Protocol to extend its jurisdiction. The lack of a definite human rights jurisdiction for the EACJ is an obstacle to realizing the dream of a viable regional

¹⁷¹Ruhangisa, John Eudes "Judicial Protection under EAC Law: Direct Actions" in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law* p 45 booksandjournals.brillonline.com Accessed on 9 September 2017.

¹⁷² Reference 2 of 2006

¹⁷³Ruhangisa, John Eudes "Judicial Protection under EAC Law: Direct Actions in Ugurashebya, E et al (ed). *East African Community Law and Comparative EU Aspects*. Accessed on 12 September 2017

¹⁷⁴ EAC Treaty, Article 27(2)

¹⁷⁵ Reference 5 of 2011

¹⁷⁶*Samuel Mohochi v Attorney-General of Uganda* Reference 5 of 2011, EACJ, First Instance Division

¹⁷⁷ Cause no 1 of 2014

integration in East Africa and a cause for jurisdictional overlap and at times confusions.¹⁷⁸

A lack of exhaustion of local remedies rule allows litigants to file to the EACJ directly and potentially institute a suit in both courts.

2.3.3 Arbitration

Article 32 of the EAC Treaty¹⁷⁹ stipulates that the court has jurisdiction to hear and determine any matter arising from an arbitration clause that is contained in a contract or agreement, which confers such jurisdiction to it and which the community or any of its institution is a party. This is an express grant of jurisdiction by the parties to the contract.

2.3.4 Advisory Opinions

Article 36 of the EAC Treaty stipulates that the court has jurisdiction to give advisory opinion to the Summit, the Council or a Partner State. This advisory can be on matters of law that arise from the EAC Treaty and affect the community, the Secretary General or a partner state can therefore make a request to the EACJ for advisory opinion. An advisory opinion when pronounced by the court is binding to the parties that sought it.

¹⁷⁸Alli Possi 'Striking a Balance Between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice' (2015) 15 "African Human Rights Law Journal p 199

¹⁷⁹ EAC Treaty, Article 32

2.3.5 Employment and Labour Court

Employees of the EAC have a direct access to the EACJ.¹⁸⁰ This is in respect of disputes arising out of the terms and conditions of employment or the interpretation and application of the staff rules, regulations and other terms of employment. Employees of the community include the employees of the institutions of the Community.¹⁸¹ To date, only two cases have been filed before the court that concern labour and employment issues. The case of *Angela Amudo v The East Africa Community*¹⁸² was dismissed on the grounds that the Claimant was not a staff of the EAC as described under the Staff Rules and Regulations. The second case of *Alloys Mutabingwa v the Secretary General of the EAC*¹⁸³ was withdrawn before a determination was made.

2.3.6 Preliminary Ruling

The EACJ unlike the defunct EACA does not allow direct appeals from the national courts; its jurisdiction however includes references for Preliminary Ruling.¹⁸⁴ A Preliminary Ruling is sought when a question is raised before any court or tribunal of a partner state concerning the interpretation and application of the provisions of the EAC Treaty or the validity of regulations, directives or decisions or actions of the community.¹⁸⁵ A reference is made only when a national court considers that a ruling is

¹⁸⁰ EAC Treaty, Article 31 ; *See also*, Ssempebwa Eward P. , The East African Court of Justice, Chapter 7 of the East African Community Law p 67

¹⁸¹ EAC Treaty

¹⁸² Claim No. 2 of 2012

¹⁸³ Claim No. 1 of 2011

¹⁸⁴ John Eudes Ruhangisa, Judicial Protection under EAC Law: Direct Actions, Ruhangisa, E et al (ed). East African Community Law: Institutional, Substantive and Comparative European Union Aspect. Brill the Hague, 2017

¹⁸⁵ EAC Treaty, Article 34

necessary before making a final determination on the matter before it.¹⁸⁶To date no Preliminary Question has been filed before the EACJ, this is a fertile ground for interaction between the EACJ and the national courts that should be encouraged since it popularizes community law in the member states.¹⁸⁷

2.4 Institution of Proceedings

The EAC Treaty provides for legal standing of those who may submit disputes for determination before the EACJ. It is limited to following: The Secretary General, EAC employees, residents of Partner States and the Partner States.¹⁸⁸ They can be able to submit their cases before the EACJ based on the following:-

2.4.1 Partner States

The EACJ has jurisdiction to hear disputes between the member states¹⁸⁹ for an infringement of the Treaty or failure to fulfill an obligation under the Treaty. Since the establishment of the EACJ no member state has ever submitted a case against another state. The cases that a partner state can take before the EACJ are matters which also touch on the legality of an act, regulation, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the provisions of the Treaty or any rule of law relating to the application or amounts of misuse or abuse of power.¹⁹⁰Ssempebwa¹⁹¹

¹⁸⁶Ssempebwa Edward P., The East African Court of Justice, Chapter 7 in East African Community Law, p 75

¹⁸⁷Ssempebwa Edward P., The East African Court of Justice, Chapter 7 in the East African Community Law p 72

¹⁸⁸EAC Treaty, Article 28

¹⁸⁹*Ibid*,

¹⁹⁰ *Ibid*

¹⁹¹Ssempebwa Edward P., The East African Court of Justice, Chapter 7 in the East African Community Law p 72

argues that the reason no case against another partner states has been filed to date is that it would amount to a declaration of hostility and greatly jeopardize the integration process.

2.4.2 The Secretary General

The Secretary General of the Community may also bring a case to the Court against a Partner State for failure to fulfill an obligation or for breach of the Treaty, provided that the Council approves.¹⁹²The Treaty has provided for procedures if the Secretary General wants to take a partner state before the court. The Secretary has to first submit his or her findings on breach of an obligation of the Treaty to the partner state. If the partner state does not submit its observations to the Secretary General within four (4) months or they are unsatisfactory, then he or she refers the matter to the council which can decide whether to resolve it or allow the Secretary General to take the matter to the EACJ.¹⁹³

Unlike the inter-state approach to the court, the action by the Secretary General is likely to be less acrimonious and beneficial to all the partner states.¹⁹⁴for instance in the case of *Attorney General of the United Republic of Tanzania v African Network for Animal Welfare (ANAW)*¹⁹⁵the organization challenged the construction of a road across Serengeti National Park as this would have a negative environmental impact in the region and threaten the welfare of animals at Serengeti National Park.

¹⁹² EAC Treaty, Article 29

¹⁹³ *Ibid*

¹⁹⁴ Ssempebwa Edward P., *The East African Court of Justice, The East African Community*, p 72

¹⁹⁵ Reference 9 of 2010

2.4.3 Legal and Natural Persons

Legal and natural persons had an unfettered right to access the court for a determination that a legality in terms of the Treaty, of any act, regulation, directive, decision or action of a partner state or an institution of the EAC.¹⁹⁶ This access or the open door policy was fettered by the amendments to introduce a requirement for filing of the alleged violation within sixty (60) days from the day the cause of action arose or from the day the person was seized of knowledge of the infringement.¹⁹⁷ Residents within the East African Community can enforce the provisions of the Treaty against the Community and the Partner States, strengthening, in theory, the binding nature of the Treaty. In addition to this direct means of seizing the Court, individual cases may also come to the Court through referral by a national court faced with a question of Treaty interpretation or the determination of the legality of a Community law or action.¹⁹⁸ Notably, these provisions limit the scope of review to compliance with the Treaty and legality under the Treaty.

2.4.4 Employees of the EAC Secretariat

EACJ can hear and determine labour and employment disputes. These are disputes that specifically deal with East African Community employees.¹⁹⁹ They involve terms and conditions of employment or interpretation and application of Staff Rules and Regulation.²⁰⁰

¹⁹⁶Ssempebwa Edward P, 'The East African Court of Justice', Chapter 7 the East African Community

¹⁹⁷ EAC Treaty, Article 30 (2)

¹⁹⁸ *Ibid*, Article 34

¹⁹⁹ *Ibid*, Article 31

²⁰⁰ *Ibid*

2.5 Conclusion

In line with the objective of this research, this chapter had set out to analyze the developing jurisdiction of the EACJ under the Treaty with the attendant amendments. The chapter had also set out to examine some of the human rights cases that have been handled by the court. The discussion on the objective directly tested the three hypotheses in this research and was also informed by the theories relied on in this research being: Principal- Agent, Constrained Independent and Neo- Functionalism Theory.

As the discourse above shows, the jurisdiction of the EACJ has developed from its inception. This has been through deliberate amendments of the EAC Treaty by the Partner States to include the two tier court system and the limitation of time as well as through case law where the EACJ has admitted, heard and determined several human rights abuse cases. As a result the jurisdiction of the court now is not as it was at the time of inception; this is despite the fact that the Protocol to Operationalize Expanded Jurisdiction of the EACJ has not been approved. There is therefore a need for jurisdictional clarity between the EACJ and the national courts. In line with the first objective of the research of the research, having proved the validity of the three hypotheses, the next chapter therefore examines the relationship between the two courts.

CHAPTER THREE

RELATIONSHIP BETWEEN THE EACJ AND NATIONAL COURTS

3.0 Introduction

As the previous Chapter revealed that the jurisdiction of the EACJ has metamorphosed over time. This development in jurisdiction is bound to bring possible conflict and overlap of jurisdiction with the national courts on human rights abuse cases because the EAC Treaty does not require a litigant to exhaust all the local remedies before approaching the court. This Chapter, linked to the second research objective, set out to demonstrate the relationship between the two courts and the possible jurisdictional conflict and or overlap. It also provides answers to the second research question. Focus, ultimately will be on the human rights jurisdiction of the two courts.

3.1 Cooperation between National Courts and The EACJ

3.1.1 Human Rights Jurisdiction and the Principle Exhaustion of Local Remedies

Rule

Human rights cases are sensitive in nature, most states would want to retain the power to hear and determine human rights abuse cases within its borders through the national judiciaries.²⁰¹ Although this is the desired plan, when countries come together to form a regional body with a judicial organ such as the EACJ, the organ cannot be blind to the violations of the rights and freedoms of the residents of the member states. That is why

²⁰¹Ssempebwa Edwaard P., 'The East African Court of Justice,' in "The East African Community Law" p 72

even where express jurisdiction has not been granted; the court has exercised judicial activism, by interpreting the EAC Treaty broadly to address the human rights questions. Article 27²⁰² of the EAC Treaty stipulates that the Human Rights Jurisdiction of the Court shall be granted at a future date through an additional Protocol of the Court.²⁰³ To date the Protocol has not been adopted and as such an express permission to the EACJ to hear and determine human rights abuse cases has not been granted.²⁰⁴ In 2007, in the case of *James Katabazi v. Secretary General of the EAC*,²⁰⁵ the EACJ created a *de facto* human rights mandate by arguing that Article 6 of the EAC Treaty²⁰⁶ incorporated protection of Human Rights as formulated in the African Charter for Peoples and Human Rights. The court further stated that Article 7 of the EAC Treaty²⁰⁷ provides for principles that include “Rule of Law” and the “maintenance of universally accepted standards of Human Rights” is an invitation to the court to hear and determine human rights abuse cases even though the Human Rights Protocol is not in force. Other cases where the court has exercised a human rights mandate include the case of *Sitenda Sebalu v Secretary General of EAC*, the trend of human rights cases streaming to the EACJ can only increase. This is despite the setback that was suffered when the Appellate Division of the EACJ in the case of *Attorney General of the Republic of Kenya v Independent Medical Legal Unit*²⁰⁸ ruled that matters must be brought to court within sixty (60) days from the day the

²⁰²East African Community Treaty

²⁰³ East African Community Treaty, Article 27 (2)

²⁰⁴Knott, L “African Regional Courts and the Paradox of Regional Economic Integration” Available on www.nai.uu.se/ecas Accessed on 6th September, 2017

²⁰⁵ Reference 1 of 2007

²⁰⁶ EAC Treaty, Article 6

²⁰⁷*Ibid*, Article 7

²⁰⁸Reference 1 of 2011

cause of action arose or from the day the person was seized of knowledge of the infringement.²⁰⁹

This provision has been argued to be punitive and prohibitive; it came on the backdrop of the *Anyang' Nyong'o case* and was fuelled by political aspirations to hinder access to the court for legal and natural persons in light of the interim orders that the court had issued in that matter and the final judgment compelling the Republic of Kenya to follow the right procedure in nominating members to the East African Legislative Assembly.²¹⁰

Express jurisdiction to hear and determine human rights abuse cases can enhance a link between the EACJ and the national courts.²¹¹ However, political and professional considerations have to be taken into account in determining the scope and extent of jurisdiction that can be vested in the EACJ. Other courts such as the African Court of Justice²¹² have the exhaustion of local remedies rule which require that before one brings a case before the court, one has to exhaust all the local remedies that are available to them within the member states.²¹³ Lack of such a rule in the EACJ opens up a parallel jurisdiction with the national courts which may cause an overlap or conflict.²¹⁴

Ojienda argues that vesting of a human rights jurisdiction in the EACJ is not intended to affect the jurisdiction of the national courts nor is the jurisdiction appellate in the strict

²⁰⁹ EAC Treaty, Article 30 (2)

²¹⁰ East African Community Treaty, Chapter Nine, Article 48

²¹¹ Tom Ojienda (n 5) 98

²¹² Constitutive Act of the African Union, Article 18

²¹³ Sarah Joseph & Adam Macbeth, 'Research Handbook on International Human Rights Law,' (2010) Edward Edgar Publishing P 409

²¹⁴ *Ibid*

sense.²¹⁵ Matters of human rights, governance, rule of law and democracy are primary duties of the state.²¹⁶ However, the states have regional and international obligations to uphold and hence the need to ensure that there are enough mechanisms to achieve that. Ojienda further argues that in invoking such jurisdiction, such matters must first go through the national courts in order to exhaust the local remedies.²¹⁷ Lack of such a provision makes it possible for one to go directly to the EACJ without going to the National Courts or both. The EACJ in its decisions has always looked more keenly in matters of jurisdiction to ensure that it is not in conflict with National courts.²¹⁸ The jurisdiction of the court has been challenged severally in cases where the Attorney General or the Secretary General to a case has argued before the EACJ that the matter before it ought to be filed at the national court.²¹⁹ The national courts have the jurisdiction to hear and determine any matter with regards to human rights and cannot be estopped from hearing and determining the matter if it is brought by a party as it is not subject to the EACJ in matters that do not directly involve interpretation of the EAC Treaty.

²¹⁵ Tom Ojienda (n5) P 100

²¹⁶ *Ibid*

²¹⁷ *Ibid*

²¹⁸ William Mwanza, “*The Jurisdiction of the East African Court of Justice vis a-vis-National-Legal Domains*” -Henry-Kyarimpa v Attorney-General of Uganda <http://www.tralac.org/discussions/article/9417-the-jurisdiction-of-the-eac-court-of-justice-vis-a-vis-national-legal-domains-henry-kyarimpa-v-attorney-general-of-uganda> accessed on 6th April 2016

²¹⁹ *Attorney General of Kenya vs. Independent Medical Legal Unit*, EACJ Appellate Division, Reference No.1 of 2011

The Human right jurisdiction at the EACJ has developed through practice and not as strictly intended in the provisions of the EAC Treaty under Article 27.²²⁰ In the case of *Sitenda Sebalu v Secretary General of EAC*,²²¹ the EACJ stated that it was true that the national courts of the member states had the obligation to hear and determine human rights violation matters, but if a state showed reluctance, unwillingness or inability to redress the abuse, the regional integration was under threat and hence the need for the courts to have a wider jurisdiction to aid the aggrieved citizens. The EACJ further stated that even though Article 27(2) of the Treaty has put on hold the human rights jurisdiction, the EAC Treaty is not silent on matters such as democracy, good governance rule of law and other human rights elements under Articles 6 and 7.²²² This is the provision that has been used to assert jurisdiction in human rights matters.²²³

Lukas Knott²²⁴ argues that we risk creating a parallel dispute resolution mechanism, in ECOWAS for instance, there is no requirement under the Protocol for exhaustion of local remedies before approaching the court. The ECOWAS Court in 2008 dealt with a human rights abuse case where it held Niger responsible for the enslavement of a woman for nine (9) years for failing to protect her from the practice of slavery.²²⁵ This argument is true for EACJ, we do not have a requirement under the Treaty for exhaustion of local

²²⁰EAC Treaty, Article 27; *see also*. Ally Possi, 'Striking A Balance Between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice,' (2015) 15 African Human Rights Law Journal p 194

²²¹ Reference 5 of 2007

²²² EAC Treaty

²²³ James Gathii, 'Mission Creep or Search for Relevance: The East African Court of Justice's Human Rights Strategy,' (2013) 24 Duke Journal of Comparative & International Law p 254

²²⁴ Knott, L "African Regional Courts and the Paradox of Regional Economic Integration".....

²²⁵*Hadijatou Mani Korau v The Republic of Niger*, Judgement Number ECW/CCJ/JUD/06/08 27October 2008

remedies and as such a person aggrieved, with a basis under the EAC Treaty can approach the EACJ directly to seek redress.

Ally Possi argues that there are two (2) matters that have emerged out of the EAC Treaty, one is that by the provisions of the Treaty, the court has been limited to interpretation of the Treaty but by the principles provided therein, the court has norms that it ought to protect and uphold and therefore the court has been trapped balancing the norms and adhering to the provided restrictions.²²⁶ He says that the EACJ using rule of law as a basis to adjudicate over human rights cases is a right path but not effective enough.²²⁷ In the case of *Samuel Muhochi v Attorney General*,²²⁸ the court stated that the extension that had been provided under Article 27(2) had in no way any intention to limit it from interpreting and applying provision of the EAC Treaty including the provisions that make reference to human rights. This was a bold and assertive move by the court, that it shall not sit on the sidelines and watch human rights violations taking place in the member states, if confronted by a matter, it shall use the principles of the EAC to determine the matter.

Recent decisions from the EACJ indicate that it has evolved to a court that holds the government of member states to account for violations of human rights, bad governance and the rule of law.²²⁹ Politically, the member states perceive the developed jurisdiction from the EACJ to sub verse the sovereignty of independent states.²³⁰

²²⁶ Ally Possi (n17) 196

²²⁷ *Ibid*, p 202

²²⁸ Reference 5 of 2011

²²⁹ Ally Possi, (n20) P 250

²³⁰ *Ibid*, p 251

3.1.2 Preliminary Ruling

The need for a smooth, efficient and regular cooperation between the EACJ and the national courts cannot be over-emphasized.²³¹ For integration to succeed the application of the laws have to be seamless, regular consultation between the courts have been provided in the EAC Treaty by way of Preliminary Ruling.²³² The National Courts can apply the Community law if it is relevant to issues before them.²³³

The Preliminary Ruling is arguably the most important yet the most underutilized legal option available to the national court to interact with or cooperate with the EACJ in the EAC Treaty.²³⁴ The EAC Treaty has given the national courts an opportunity to refer matters or questions regarding correct interpretation and application of the Community law to the EACJ before making a final determination on the matter before them. In the European Union, for instance, the Preliminary Ruling forms the bulk of the matters before the European Court of Justice.²³⁵ It has been noted that the Preliminary Ruling before the EACJ would be instrumental in realizing legal integration, popularizing the community laws in the member states and harmonization.²³⁶ This harmonization of laws through frequent engagements between the courts enhances integration, encourages the

²³¹ Knott, L “*African Regional Courts and the Paradox of Regional Economic Integration*” p 9 www.nai.uu.se/ecas Accessed on 6th September, 2017.

²³² EAC Treaty

²³³ EAC Treaty Article 35; *see also*, Ssempebwa, E “*The East African Court of Justice*” Chapter 7 “East African Community Law” Lexus and Nexus

²³⁴ Knott, L “*African Regional Courts and the Paradox of Regional Economic Integration*” p 9 www.nai.uu.se/ecas Accessed on 6th September, 2017

²³⁵ European Union Charter, *see also*, Ssempebwa, E “*The East African Court of Justice*” Chapter 7 the East African Community, p 81

²³⁶ Knott, L “*African Regional Courts and the Paradox of Regional Economic Integration*” p 10 www.nai.uu.se/ecas Accessed on 6th September, 2017

member states to apply community laws and in turn popularizes the community laws and encourages its application.²³⁷

Over a decade since the establishment of the EACJ, there has been minimal cooperation and coordination, a general lack of judicial dialogue between Partner States and the EACJ. The EAC Treaty offers a fertile ground and conducive environment for judicial dialogue to take place. The provision of Preliminary Ruling envisages litigation of the EAC Treaty and the other community laws and its purpose is to ensure uniformity in interpretation and application.²³⁸

3.1.3 Application of Community Laws by Member States

Article 33(2) of the EAC Treaty²³⁹ provides that the decision of the EACJ on the interpretation and application of the Treaty take precedence over decisions of national courts on similar matter.²⁴⁰ This position was made clear in the *Anyang Nyong'o Case*; the court was very categorical that no interpretive role is available to the national courts, that national courts have no jurisdiction to interpret community law or to test them for their legality.²⁴¹ However, Application of EAC laws by the national courts and other judicial bodies is in order,²⁴²

²³⁷Ssempebwa, E, “ East African Court of Justice” Chapter 7 in “ The East African Community Law” p 81

²³⁸Ssempebwa, E, “ East African Court of Justice” Chapter 7 in “ The East African Community Law” p 81

²³⁹EAC Treaty, Article 33 (2)

²⁴⁰*Ibid*, Article 27

²⁴¹Ssempebwa E “The East African Court of Justice” Chapter 7 in The East African Community Law” p 81

²⁴²Ssempebwa E “ The East African Court of Justices” Chapter 7 in The East African Community Law” p 82

The first advisory opinion was sought in 2008 by the East African Community Council of Ministers²⁴³ who asked two far reaching questions on the possibilities of variable geometry within regional integration and subsequent limitation to the requirement of consensus in decision making.²⁴⁴ In Uganda, the Constitutional Court in the case of *Jacob Oulanyah v Attorney General of Uganda*²⁴⁵ approved the decision of the EACJ in *Anyang Nyong'o Case* in holding that Uganda's parliament Rules of Procedure which restricted the participation in election to the East African Legislative Assembly to only political parties was discriminative and unconstitutional.²⁴⁶

The National Courts have not been keen to apply the community laws; this is saddening because there are several instances in the day to day operations of the national courts that the Community law would come in handy. This is another area that would encourage cooperation but has not been utilized. The EAC Treaty and other Community laws can therefore be the subject to litigation before the national courts.²⁴⁷

3.1.4 Amendments to the EAC Treaty and the Political Question

Lukas Knott²⁴⁸ argues that it is important to strengthen institutions at the regional level, create independence and have integration friendly systems at the supra-national level. He

²⁴³*In the Matter of a request by the Council of Ministers of the EAC for an Advisory Opinion*, Application Number 1 of 2008, Judgement 24th April, 2009.

²⁴⁴ John Eudes Ruhangisa, "The Scope, Nature and Effect of EAC Law" in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law* p 139 booksandjournals.brillonline.com accessed on 25th September, 2017.; See also eacj.org

²⁴⁵ Constitutional Petition 28 of 2006 (CC-U)

²⁴⁶ Ssempebwa, E, "The East African Court of Justice" Chapter 7 in "The East African Community Law" p 82

²⁴⁷ Ssempebwa, E "The East African Court of Justice" Chapter 7 in the East African Community Law p 82

²⁴⁸ Phillip K, 'The State of Constitutionalism in East Africa; the role of the East African Community 2007 in 'Constitutionalism East Africa: Progress, Challenges and Prospects', Kituo Cha Sheria

further argues that such improvement must pass through the systematic application of community law by the national courts and tribunal, bringing regional integration to citizens and private companies in a decentralized manner.²⁴⁹ Whereas these principles are noble and desirable, countries integrate to advance individual interests, especially where they can benefit, and the organs and institutions of the community are vehicles to advance these entrenched interests.²⁵⁰ In the EACJ not long after it was formed dealt with a case of grave legal issues and great political interests. In the case of *Prof. Peter Anyang Nyong'o and 10 Others v the Attorney General of Kenya and 5 Others*,²⁵¹ the court questioned the process used by the Kenya National Assembly to nominate members to the East Africa Legislative Assembly and ordered Kenya to follow the right process and conduct the nominations again. Whereas the decision was lauded as bold and the Kenyan National Assembly implemented the decision of the court, there were conversations about the vigorous jurisdictional activity of the court.²⁵²

Edward Ssempebwa²⁵³ has argued that it is the decision in the *Nyong'o case* specifically and the increased adjudication of human rights abuse cases by the EACJ that prompted the EAC Treaty Amendment to provide for a two tier court system; the court of first instance and the Appellate court and the requirement for filing of a suit within sixty

²⁴⁹Ruhangisa, John Eudes “*Judicial Protection under EAC Law: Direct Actions*” in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law* p 89 booksandjournals.brillonline.com Accessed on 9 September 2017.

²⁵⁰ Constrained Independence Theory

²⁵¹ Reference 1 of 2006

²⁵²Knott, L (2011) “ African Regional Courts and the Paradox of Regional Economic Integration” p 5 accessed from www.nai.uu.se/ecas accessed on 6th October, 2016

²⁵³Ssempebwa, E “*The East African Court of Justice*” in “East African Community Law” Lexus and Nexus p 73

days.²⁵⁴ It was intended to curtail the rigorous jurisdictional activities in the courts and also prohibit the filing of suits by reducing the time limit.

Similarly, in the case of *Mike Campbell (pvt) Ltd & Others v Republic of Zimbabwe*,²⁵⁵ farmers in Zimbabwe had been fighting against the expropriation of Agricultural land by the government of President Mugabe, the case led to an outright condemnation of Zimbabwe by the Tribunal. Whereas the case was legally a success, it did not have the material consequences that they had hoped for. The government of Zimbabwe refused to regularize and implement the Judgment.

Lukas Knott²⁵⁶ argues that the above two cases have become symbolic of the fact that there will always be a hostile reaction from the member states to any rigorous jurisdictional activity from the regional courts and has become symbolic of the number characteristics and challenges of regional adjudication.²⁵⁷ The amendment to the EAC Treaty to provide for the Protocol on enforcement of Human Rights is long overdue, the member states are unwilling or reluctant to implement the same and this can be attributed to the need to maintain the right within the state in the name of exercising sovereign power.

²⁵⁴ EAC Treaty, Article 33 (2)

²⁵⁵ SADC (T) Case2 of 2007, Judgement delivered on 28th November, 2008

²⁵⁶ Knott, L (2011) “ African Regional Courts and the Paradox of Regional Economic Integration” p 5 accessed from www.nai.uu.se/ecas accessed on 6th October, 2016

²⁵⁷ *Ibid*

3.2 Jurisdiction of National Courts: the Kenyan Judiciary

There is a hierarchy²⁵⁸ in national courts across the East Africa Community; the partner states as it has been discussed above have a comprehensive legal system to aid in addressing all the legal disputes that may arise. The East African Community members no longer rely on the EACA which appeals from the High Court of member states. Under the Kenyan constitution, the judicial authority is derived from the people of Kenyan and is vested in the Judiciary which comprises of courts and tribunals.²⁵⁹

Article 159 (2) (e)²⁶⁰ provides for the principles which are to guide the Kenyan courts in the execution of its mandate. The national courts have the obligation to protect and promote the principles and purpose of the Constitution. Among the purpose and principles which have to be protected are provided under Article 10²⁶¹ and include rule of law, democracy, participation of the people, good governance. The Kenyan courts have a mandate hear and determine issues of human rights violations.²⁶² The Constitution of Kenya shares similar principles with the EAC Treaty. The principles in Article 6 of the EAC Treaty include good governance, adherence to the principles of democracy, rule of law, accountability, transparency, gender equality and recognition and protection of human rights. Article 7(2)²⁶³ provides for good governance, democracy, rule of law and maintenance of universally accepted standards of human rights.

²⁵⁸ The Judicature Act, Laws of Kenya; *see also*, the Constitution of Kenya, 2010

²⁵⁹ Constitution of Kenya, Article 159

²⁶⁰ *Ibid*

²⁶¹ Constitution of Kenya, Article 10

²⁶² *Ibid*, Article 22

²⁶³ EAC Treaty

The fact that the courts share the abovementioned principles demonstrates that both courts can adjudicate over matters that claim the violation of the fundamental principles. The EACJ has expressed that the EAC Treaty has not expressly given the court jurisdiction over matters such as human rights violations but the fundamental principles in the EAC Treaty imply that the EACJ can have such jurisdiction²⁶⁴. The principles espoused in these provisions are principles which can be adjudicated upon by the Kenyan Court as they are espoused in the Constitution of Kenya and other partner states.²⁶⁵

The goal of EAC has been to widen cooperation of member states in political, economic, social and cultural fields.²⁶⁶ Article 23(1) of the EAC Treaty points out that the primary mandate of the court is towards the interpretation and compliance with the Treaty. The EACJ has a duty to hear, determine and apply the Treaty; the Kenyan courts similarly have the jurisdiction to apply the EAC Treaty if confronted with a matter that requires an application of the community law. Article 8 of the EAC Treaty forms the basis for enforcing community rights and obligations by the national courts and other institutions of the community.²⁶⁷ Further, partner states have an obligation to enact laws to give effect to the EAC Treaty, it must confer the force of law upon the legislation, regulations and directives of the community and its institutions. The national courts are important partners to the EACJ.

²⁶⁴ *John Katabazi v Secretary General of the EAC* Reference No 1 of 2007

²⁶⁵ Buberwa Kamala, “*Achievement and Challenges of the New East African Community Co-operation*”, (2006) Research Memorandum page 3 < <http://www2.hull.ac.uk/hubs/pdf/memorandum58.pdf> > accessed on 24 March 2016

²⁶⁶ EAC Treaty, Preamble

²⁶⁷ Ssempebwa, E “*The East African Court of Justice*” in “East African Community Law” Lexis and Nexus p 68

3.3 EACJ and National Courts

One area in the analysis of the relationship between the national courts and EACJ is with regard to the doctrine of supremacy between the national courts and the EACJ. In matters of jurisdiction between these two courts, there is need to establish the hierarchy that exist between the national laws of the member states and the EAC laws. The National courts to preside over national laws without overarching and the EACJ will interpret and apply the EAC Treaty and exercise its other mandate.

The only hierarchy that has been clearly defined by the Treaty and case law²⁶⁸ is the hierarchy of the EACJ on matters of the interpretation of the EAC Treaty. Article 8(4) of the EAC Treaty states that community organs, institutions and laws shall take precedence over similar national ones on matters of the EAC Treaty, one of the cases in which the EACJ clearly demonstrated this balance of power is *Prof. Peter Anyang Nyong'o and Others v Attorney General of the Republic of Kenya and 5 Others*²⁶⁹. In this case the court stated that from the very nature of the Treaty, it was required that the member states would cede some part of their sovereignty to the community and its partner organs. This meant that the EAC organ had been accorded supremacy as per the provision of the EAC Treaty. Further, in the case of *East African Law Society and others vs. The Attorney General of Kenya and others*,²⁷⁰ the court adjudicating on a case on the amendments that sought to change the way judges of the EACJ were removed or suspended, stated in its decision that 'the amendment limiting the Court's jurisdiction so as not to apply to

²⁶⁸EAC Treaty, Article 23; *see also*, the case of *Plaxedia Rugumba v Secretary General of the EAC and another*, Reference No. 8 of 2010

²⁶⁹Reference No. 1 of 2006

²⁷⁰Reference No 3 of 2007

jurisdiction conferred by the Treaty on organs of Partner States runs the risk of undermining of the overall supremacy of the Court over the interpretation and application of the Treaty.’

The *Anyang Nyongu* case represents the conflict that can exist between the national laws and the community laws. The case of *Okunda v Republic*²⁷¹ it was determined that community law was subordinate to the Constitution Kenya.²⁷² The court held that the Constitution of Kenya was Supreme law of the land and any law in conflict with the Constitution was void to the extent of its inconsistency. The lack of a clear provision which provide for the position of community law against the Constitution of the member states, puts the national courts on a collision path with the community courts and also can lead to uncertainty as to which law is to be applied.²⁷³

The supremacy of the EACJ is also undermined with the creation of other bodies to address conflicts in matters of the EAC law. Article 27 states that provides for a jurisdiction that the EAC confers on national courts and Article 33 does add that only when the jurisdiction is conferred on EACJ, dispute on which a community is a party shall not on that ground alone be excluded from the jurisdiction of national courts of the partner states. Articles 27 and 33 of the EAC Treaty indicate that the national courts have a very wide jurisdiction with regards to matters of the Community. Having power to hear

²⁷¹(1970) KLR p 457

²⁷²*Okunda v. Republic* [1970] KLR p 457

²⁷³ Brown L.N and Jacobs F.G, ' *The Courts of Justice of the European Communities*, '5TH Edition ,Sweet and Maxwell ,London p 251

more matters that concern EAC be heard by national courts may weaken the authority of the EACJ.

Commercial matters are one of the areas that the jurisdiction of the EACJ has been curtailed. The Customs Union Protocol has put up a separate channel to solve disputes. In that protocol, the EACJ does not have an appellate jurisdiction with regards to the decisions of the committee. EACJ can only deal with challenges on the decision of the committee on matters such as decisions on ground of fraud, lack of jurisdiction and other illegality as it has been provided in paragraph 6(7) of Annex ix of the Custom Union Protocol. The protocol has taken away the jurisdiction of the EACJ. The protocol is part of the EAC Treaty and the EACJ has the mandate to interpret the Treaty.

When there exist parallel and multiple centers for dispute resolution in matters of the EAC Treaty, it only gets to further diminish the role of the court and its authority.²⁷⁴The National Courts under the provision of the Common Market Protocol have been given the jurisdiction as seen in Article 54(2) of the Common Market Protocol to solve disputes that arise from the protocol.

Article 24(1) of custom union protocol established the East African community Committee and gave it the jurisdiction to settle disputes as per the provisions of the East African Customs Union protocol (dispute settlement mechanisms) regulations. In the case of *East African Centre for Trade Policy and Law v Secretary General of the East African Community no 9 of 2012* it questioned whether the parallel dispute settlement

²⁷⁴*Ibid* p 47

mechanisms in the custom union protocol and the common market protocol was against the EAC Treaty. The court agreed that the protocol undermined the supremacy of the EACJ as a judicial body. The National Courts and the East African Customs Union Committee have taken jurisdiction in matters that ought to be reserved to the EACJ. This practice has only led to conflicts and undermined the authority of the court. The court cannot be effective enough if it does not have enough jurisdictions to adjudicate over matters important matters such as trade disputes. The court supremacy over the national courts needs not be limited to matters of interpretation but also matters that govern relation within EAC.

3.4 Conclusion

This Chapter, linked to the second research objective, had set out to explain the human rights jurisdictional relationship between the EACJ and the National Courts and in doing so answers the second research question. As a result the Chapter examined several areas of cooperation between the two courts; preliminary ruling, human rights jurisdiction. The Chapter also examines the supremacy between the two courts on human rights cases.

In answer to the research question, the Chapter has shown that there is an overlap and possible conflict in the question of hearing and determining human rights abuse cases between the two courts. Particularly, there is need for clarity on whether the EACJ should wait for the Summit to operationalize the Protocol to Extend the Jurisdiction of the court or continue to hear and determine human rights abuse cases under the EAC Treaty as is.

CHAPTER FOUR

LESSONS FROM THE EUROPEAN COURT OF JUSTICE, THE EUROPEAN COURT OF HUMAN RIGHTS AND THE NATIONAL COURTS

4.0 Introduction

This Chapter is inherently linked to the third research objective which is lessons from the European Union; the hypothesis is also revisited to see whether it has been proven true or false. To meet the third objective of the research on the lessons that the EAC generally and the EACJ and national courts specifically can learn because the European Court of Justice and the European Court of Human Rights have developed a level of jurisdictional clarity over the years with the national courts.

4.1 Justification for the Comparison

The chapter is justified for the following reasons:-

Firstly, regional bodies across the world do have a dispute settlement system mostly in the form of a court, tribunal or committee.²⁷⁵ The common system of dispute resolution mechanism is through the court system.²⁷⁶ Integration is usually at the core of the regional bodies and an efficient court system is highly needed in order to ensure that disputes within the community are resolved amicably to foster integration.²⁷⁷ Success of a regional court depends on a wide jurisdiction for the court and a strong foundation based

²⁷⁵ Finn Laursen, 'Comparative Regional Integration: Europe and Beyond,' (2010) Ashgate Publishing p 172

²⁷⁶ Martin Scheinin, Helle Krunke & Marina Aksenove, 'Judges as Guardians of Constitutionalism and Human Rights,' (2016) Edward Edgar Publishing p 4

²⁷⁷ Willem Molle, 'The Economics of European Integration: Theory, Practice, Policy,' (2006) Ashgate Publishing Ltd p 51

on mutual trust between the regional member states.²⁷⁸ Regional courts help in the creation of a complete integration system.²⁷⁹

Secondly, the European Union is the oldest regional organization; the community has been able to use the European Court of Justice and the European Court of Human Rights as the judicial bodies of the community for distinct reasons. The European Court of Human Rights hears and determines human rights abuse cases from the member states after a litigant has exhausted the local remedies and the European Court of Justice Jurisdiction is interpretation and application of European Union laws. This clarity in relationship is developed over a long period of time and the EACJ could learn some invaluable lessons from the EU. The EAC's objective is focused on four pillars: Customs Union,²⁸⁰ the Common Market,²⁸¹ Monetary Union²⁸² and eventually Political Federation.²⁸³ The EU operates on the pillars of Common Market, Economic and Monetary Union.²⁸⁴

Lastly, for integration to succeed it is important that national court have a good relationship with the regional courts free from overlap, confusion of conflict.²⁸⁵ The European Union separation of jurisdiction and different judicial bodies which will be

²⁷⁸Katrin Nyman Metclaf & Loannis Papageorggiou, '*Regional Integration and Court of Justice*,' (2005) Intersentia NV p 110

²⁷⁹ Grainne De Burca & Joseph Weiler, '*The European Court of Justice*,' (2001) Oxford University Press p 207

²⁸⁰ East African Community, available at www.eac.int/intergation-pillars/customs-union Accessed on 10th September, 2017

²⁸¹*Ibid*, Common Market

²⁸²*Ibid*, Monetary Union

²⁸³*Ibid*, Political Federation

²⁸⁴www.echr.coe.int Accessed on 12th September, 2017

²⁸⁵ Pierre Lorouche & Peter Cserne, '*National Legal Systems and Globalization: New Role, Continuing Relevance*,' (2012) Springer Science & Business Media P 359

analyzed below offers a great example of how national courts and regional courts can foster a good working relationship.

4.2 European Union

4.2.1 European Court of Justice and European Court of Human Rights

European Court of Justice is the highest judicial body in the European Union.²⁸⁶ The European Union was formed in order to foster a harmonious and peaceful economic and political development.²⁸⁷ It started as the European Economic Community and later transformed to the European Union establishing a Common Market, Economic and Monetary Union.²⁸⁸ The European Union has several organs and institutions; for purposes of this study we shall focus on the European Court of justice.²⁸⁹ The court was established for the purposes of interpretation and the application of the European Union Treaty.²⁹⁰ The court is established under Articles 165 and 166 of the European Union Treaty and has the highest number of judges.²⁹¹

Initially, the ECJ received considerable criticism by member states opposed to its integrative approach as it appeared at the time to extend the application of community law through the use Preliminary Ruling.²⁹² This criticism has considerably reduced over

²⁸⁶ www.echr.coe.int Accessed on 12th September, 2017

²⁸⁷ Tom Ojienda, “*Alice in Wonderland; Preliminary Reflections on the Jurisdiction of the East African Court of Justice*,” 2 East African Journal of Human Rights and Democracy

²⁸⁷ *Ibid*

²⁸⁸ John Eudes Ruhangisa, “The Scope, Nature and Effect of EAC Law’ in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law* p 139 booksandjournals.brillonline.com accessed on 25th September, 2017.; See also eacj.org

²⁸⁹ *Ibid*

²⁹⁰ European Community Treaty, Article 164

²⁹¹ Ssempebwa, E “*The East African Court of Justice*” in “East African Community Law” Lexus and Nexus p 90

²⁹² *Ibid*, p 89

the years and the European Union is considered successful with regards to regional integration.²⁹³

The European Court of Human Rights hears and determines human rights abuse cases; the court is established from the European Convention of Human Rights,²⁹⁴ the courts hears and determines human rights cases from the member states after it has met the requirements provided under Article 35²⁹⁵ of the ECHR; that is they must exhaust all the local remedies available to them before approaching the court. In the case of *Schenk v Germany*²⁹⁶ the court held that governments, courts and parliaments play a primary role in guaranteeing and protecting Human Rights at the national level and as such should be the first point of address before coming to the ECHR. The court further stated that the exhaustion of local remedy rule should be applied with some level of flexibility and without excessive formalism.

Because of this clear jurisdictional distinction on the ECJ, ECHR and the national courts, overlap, confusion and conflict on the issue of jurisdiction has been greatly avoided.

4.2.2 Supremacy of the Community Law

Just like the EACJ and most regional courts, the European Union initially had a restrictive view of the role of the ECJ; it was established to ensure that Community organs do not exceed their authority, to interpret and give meaning to the Community law

²⁹³ *Ibid*, p 89

²⁹⁴ European Union Convention on Human Rights

²⁹⁵ European Convention on Human Rights, Article 35

²⁹⁶ (2000)

and to resolve issues of non-compliance by Partner States.²⁹⁷The European Union Charter strict interpretation of the jurisdiction ECJ is that it shall not have a detailed involvement on the municipal law and national courts.²⁹⁸

The supremacy of the community law remains an unwritten rule in the EU, just like the EACJ has established its supremacy in the interpretation of EAC Treaty. The supremacy of the community law has developed as a jurisprudence of the EACJ. A clash, conflict or overlap between the community and the national laws is imminent but since the ECJ has created a system whereby the community law has taken precedence of national laws this is unlikely to occur because of the concept of “Supremacy of Community Law”.²⁹⁹The national courts of the European Union have to ensure and uphold the supremacy of the EU law. The principle of Preliminary Ruling have led to a situation where even matters within the competence of the states have been subject to challenges in national courts as contravening community law.³⁰⁰

The ECJ in the case of *Pasquate Foglia v Moriella Novello*³⁰¹ addressed the parameters that should guide the court when addressing itself to a Preliminary question that its duty is not of delivering an Advisory Opinion on general and hypothetical questions but assisting in the administration of justice in member states.³⁰²On the question of Supremacy of Community law the ECJ stated that the community law was a separate

²⁹⁷Ssempebwa, Edward P, “East African Court of Justice” in “East African Community Law”, Lexis Nexis Durban 2015 p 67

²⁹⁸*Ibid*, p 69

²⁹⁹*Ibid*, p 68

³⁰⁰*Ibid*, P 70

³⁰¹ ECJ Case 244/80

³⁰²*Ibid*, 71

legal system from both the international law and domestic legal system but it was closely linked.³⁰³ The national courts are required to enforce the provisions of community law even when they are in conflict with the national law.

The primacy of the community law over the national laws³⁰⁴ of the European Union member states is said to have been recognized even before the signing of the Treaty establishing the Charter of the European Union.³⁰⁵ The principle of primacy operates with the principle of direct effect and the principle of uniform applicability. The primacy principle of the EU is viewed as the embodiment of the transfer of constitutional power from the member states to the community. The supremacy of the European Court of Justice aids in avoiding conflicts between it and the national courts. It's important to note that not all countries in Europe are members of the European Union and Britain voted to leave the European Union in 2016.³⁰⁶

4.3 Lessons for the East African Community, East African Court of Justice (ECJ) and the National Courts

The East African Community generally and the court specifically could learn a lot from the ECJ on the delicate balancing act of international law, domestic law and community law in the following ways:-

³⁰³ *Ibid*, 72

³⁰⁴ European Union Charter

³⁰⁵ European Union Charter, 24 October 2004

³⁰⁶ www.europa.eu accessed on 11th September, 2017

Firstly, the ECJ has benefitted greatly from the suits that have been filed on the Preliminary Ruling;³⁰⁷ this has been helpful in aligning the community laws with the domestic laws. Several cases were filed and they had an impact on varied areas of clash that initially existed between the community law and domestic laws. The EACJ has not been as lucky, the court has never had a Preliminary Ruling request be referred to it, this means that the system has not been tested and speaks to the unpopularity of community laws within the state. The EACJ through the avalanche of cases and decisions has had an opportunity to now understand what works and what doesn't and make necessary adjustments for the good of the community.

Secondly, decisions of the ECJ are directly enforceable within the member state and this disposes of the likelihood of a state ignoring and or failing to enforce the decisions.³⁰⁸ The principle of direct enforcement is not available in the EACJ and the national courts; this means that the EACJ has to rely on the goodwill of a partner state to implement its decision.³⁰⁹ This is a direct stab at integration; countries that feel targeted may fail to honour the decisions of the EACJ with little or no consequence.

Thirdly, the distinction between the courts; ECJ and ECHR, to interpret and apply community laws and to hear and determine human rights abuse cases respectively. This clarity in jurisdictions in as far as human rights abuse cases are concerned, the European Union achieved it through the ECHR which established the European Human Rights

³⁰⁷ EAC Treaty, Article 34

³⁰⁸ Ssempebwa, Edward P, "The East African Court of Justice" in "East African Community Law" Lexis Nexus Durban 2015 p 78

³⁰⁹ EAC Treaty, Article 38

Court³¹⁰ which hears and determines all human rights abuse cases. The EACJ suffers from such clarity, there is potential for a conflict or overlap of jurisdictions. The community could learn from the EU and create a separate court to hear purely human rights violations cases.

Lastly, the Principle of Exhaustion of Local remedies is entrenched in the ECHR,³¹¹ litigants before filing a matter at the European Court of Justice are required to have exhausted all the local remedies available. This has helped deal with the issue of parallel jurisdiction. The EACJ and EAC could greatly benefit from this principle.

4.4 Conclusion

This chapter linked the third research objective, had set out to explore lessons that the EAC, EACJ and the national courts could learn from the EU a community that over the years through practice and amendments of laws has managed to achieve a level of jurisdictional clarity. As discussed above some of the lessons include; exhaustion of local remedies rule, supremacy of the community laws and distinction between the courts.

In answer to the research question, the chapter has demonstrated that indeed there is need to amend the EAC Treaty or operationalization of the Protocol for the Extension of the Jurisdiction of the EACJ.

³¹⁰European Convention of Human Rights, Article 19; *See also*; www.echr.coe.int accessed on 15th September, 2017

³¹¹European Convention of Human Rights, Article 35

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter's objective is to summarize the findings of the three research questions on the human rights jurisdictional overlap between the EACJ and the National Courts. The hypothesis is revisited to see whether it has been proven true or false. Recommendations are proposed to help the Summit, EAC Secretariat, Council of Ministers, EACJ, National Courts, Litigants, and Scholars to meaningfully engage in the ever live debate of the human rights jurisdiction of the EACJ.

5.1 Conclusion

This study sought to address the issue of a possible human rights jurisdictional conflict between the EACJ and the national court. It also sought to establish that both courts can hear and determine human rights abuse cases thereby creating a potential overlap, confusion or even conflict. The EAC member states have not operationalized the Protocol for extension of the EACJ jurisdiction that was intended to give the EACJ a specific mandate to hear and determine the human rights abuse cases. In the absence of the Protocol the EACJ not to turn a blind eye on human rights abuse cases in the partner states has admitted, heard and determined human rights cases. This is a live matter essentially because the partner states have been deliberately reluctant in bringing to force the Extension of Jurisdiction Protocol³¹² thereby creating uncertainty and parallel jurisdiction for members of the EACJ on human rights abuse cases.

³¹² EAC Treaty, Article 27 (2)

This study began by providing a background on the establishment and jurisdiction of the EACJ which had been preceded by the EACA. It established that unlike EACA the jurisdiction of the EACJ to hear and determine human rights abuse cases is parallel to the national courts, jurisdictional overlap aside, and lack of the Protocol for Extension of Jurisdiction as envisaged by the drafters of the EAC Treaty initially has forced the court to use other provisions to determine the cases. Under the *Constrained Independence Theory*,³¹³ this study argued that when states create such authority as the EAC and organs such as the EACJ they do so to protect their own interests, the states recognize that the new legal norms that is the EACJ would impose restrictions on national governments and thus try to counter the potential overarching of the EACJ by reserving some powers internally but without abandoning independent international adjudication.

Chapter 3 of this study offered an overview of the relationship between the national courts and the EACJ with a specific focus on the Kenya judiciary. Focus was accorded to how the two courts have cooperated to help achieve their objectives; the study established that the national courts have a role to play in the application of the EAC Treaty and popularizing the same to its citizens. The other area of cooperation was the Preliminary Ruling³¹⁴ provision in the EAC Treaty that accords a national court an opportunity before determining a matter before it that has a community law interpretation required to submit the same before the EACJ as a preliminary question before proceeding.

³¹³ Laurence Helfer, 'Why States Create International Tribunals: a Theory of Constrained Independence' https://www.law.berkeley.edu/files/helfer_05.pdf p3

³¹⁴ EAC Treaty, Article 34

The study under this chapter also addressed itself to the human rights jurisdiction as discussed and established that the jurisdiction is not as clear as it would have been desired. There is potential for an overlap if a suit is filed in the national court and the EACJ. The other area was a lack of exhaustion of local remedies rule in the EAC Treaty before filing a suit at the EACJ, this is basically adoption of an open door policy by the EACJ. There is a no supremacy battle between the EACJ and the national courts, with regard to interpretation and application of the EAC Treaty, the same has been settled through case law³¹⁵ to the effect that the EACJ has superior power in the interpretation of the Treaty. However, as far as human rights cases are concerned the jurisdiction is not clear; both courts can hear and determine human rights violations.

Chapter Four of this study provided lessons from the European Union, establishing that at inception the European Union faced similar jurisdictional challenges as the EAC as far as jurisdiction is concerned. But the ECJ with the benefit of time, multitude of cases that have been filed before the court and addressing the concerns of the individual partner states in as far as the relationship with the court and community is concerned have been able to harmonize the national and community laws in almost all aspects. Of concern to us was the human rights jurisdiction where under the European Union a separate court known as the European Court of Human Rights was created to hear and determine human

³¹⁵*Plaxedia Rugumba v Secretary General of the EAC and another*, Reference No. 8 of 2010; *See also, Prof. Peter Anyang' Nyong'o and 10 others v the Attorney General of Kenya & 5 others*, Reference No. 1 of 2006

rights violations. The EAC could learn so much from the processes of the European Union in handling human rights violations.

5.2 Recommendations

Understanding the gaps that exists in the studies that have been done in the area of possible conflict and or overlap in the human rights jurisdiction of the EACJ and the national courts, this study makes three recommendations that if implemented would resolve the impasse. They include:-

5.2.1 Establish a distinct Human Rights Court

The European Union model of having two distinct courts can be adopted in the EAC, where the EACJ retains its role on interpretation and application of the EAC Treaty and a separate court to deal with Human Rights violations in the region is established. A new and specialized court is good for the community the rules and regulations thereto would address specific issues such as time litigation and exhaustion of local remedies.

5.2.2 Amend the East African Community Treaty

The East African Community Treaty as drafted in 1999 reflected the needs and aspirations of the partner states at the time. Provisions in the EAC Treaty such as Article 27(2) provided for Extension of Jurisdiction Protocol at a future date, it is now close to twenty (20) years since inception and obviously there have been tremendous changes within the community. The amendments passed by the community were to allow for a

two tier court system³¹⁶ and limitation of time within which to file a case at the EACJ.³¹⁷

Time is ripe for further amendments including:-

5.2.2.1 Include the Principle of Exhaustion of Local Remedies

The EAC Treaty is silent on this principle; the study recommends that adoption of such a Provision provides clarity on when the EACJ can handle Human Rights Matters. Currently it is possible that a suit could be instituted both at the national court and at the EACJ³¹⁸ to avoid this likely scenario that might lead to a jurisdictional overlap, the study recommends an amendment to the EAC Treaty to include a provision on exhaustion of local remedies by a party claiming a human rights violation before approaching the court.

5.2.2.2 The EACJ to operate as an Appeals Court

Just like the defunct EACA³¹⁹ the EAC Treaty and the Constitutions of the National Courts can be amended to provide for the EACJ as the final appeals court. National courts can reserve matters that shall be concluded at the highest court at the national level. This was done by United Republic of Tanzania in the defunct EAC which reserved the offence of Treason and constitutional petitions.

It can be done if properly structured and all the member states are on board, it will be one of the ways to avoid a jurisdictional overlap including conflict between the EACJ and National Courts when hearing and determining human rights abuse cases.

³¹⁶ EAC Treaty, Article 27

³¹⁷ *Ibid*, Article 30

³¹⁸ European Convention on Human Rights, provides that the ECHR may only deal with a matter after all the domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was take.

³¹⁹ East Africa Cooperation Treaty; *also*, EACA Operated as the Judicial Body in the defunct EAC before its collapse in 1977, it operated as an appeals court and heard matters from the High Court of the then three members- Kenya, Uganda and Tanzania.

5.2.3 Approve Protocol to Operationalize Extended Jurisdiction of the EACJ

The Summit³²⁰ has been deliberately slow in amending the EAC Treaty despite the Council of Ministers approving a draft Protocol to operationalize the extended jurisdiction of the EACJ; the initial drafters of the EAC Treaty were alive to the fact that the court may need to extend its jurisdiction to address the concern of the day such as human rights violations. But the EACJ because of lack of a clear Human Rights mandate has been forced to be creative and rely on other provisions of the Treaty that are general such as Articles 6 and 7³²¹ on good governance, democracy and rule of law, the effect of which is likely to put the court on a collision path with the member states. As discussed above the European Union through the European Convention of Human Rights created a human rights court to deal with human rights violations in the member states. EAC through the Protocol to operationalize extended jurisdiction of the EACJ could establish an Independent Human Rights Court.

³²⁰*Ibid*, Article 10

³²¹EAC Treaty

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