

**DISPUTE SETTLEMENT WITHIN THE EAST AFRICAN COMMUNITY: THE EAST AFRICAN
COURT OF JUSTICE AND ITS JURISDICTION**

**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
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-BY-

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DECLARATION

I, GATHEGE PROTAS SAENDE, do hereby declare that this Research Paper is my original work, and that it has not been submitted, and is not currently being submitted, in any other university.

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This Research Paper has been submitted for examination with my approval as University Supervisor.

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DEDICATION

This Research Paper is dedicated to my dear wife Mary Wanjiku, our sons Michael, Leandre and Peet and our expected baby. They have always supported me and provided a loving home. May God bless them abundantly.

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ABSTRACT

This research paper contains results on the study carried out on the jurisdiction of the East African Court of Justice and its effectiveness in promoting the objectives of the East African Community. It provides an in depth analysis of the East African Community and its objectives and dwells on the East African Court of Justice as one of the organs of the Community. The study is based on an analysis of various treaties, written works and case law. It concludes that the East African Court of Justice does not have sufficient jurisdiction to assist the Community in achieving the objectives set out in the Treaty. The findings are that there is a need to enhance the jurisdiction of the East African Court of Justice and to overhaul its structure to attain the effectiveness required to promote the economic integration and development of the East African Community.

LIST OF ABBREVIATIONS

CFI	Court of First Instance
COMESA	Common Market for East & Southern Africa
EAC	The East African Community
EACA	The East African Court of Appeal
EACJ	The East African Court of Justice
ECCSO	The East African Common Services Organisation
EC	The European Communities
EU	The European Union
ECJ	The European Court of Justice
PTA	The Preferential Trade Area

LIST OF CASES

Attorney General of Kenya v Anyang' Nyong'o & 10 others [2010] eKLR.

Automec v E.C. Commission [1990] II ECR 367.

Commission of the European Communities v Council of the European Communities [1971] E. C. R, 263.

East African Community v Republic [1970] EACA 457.

Haegeman v Belgium [1974] ECR 449.

Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide [1970] E. C. R. 1125.

IBM v E.C. Commission [1981] ECR 2639.

Okunda v Republic [1970] E. A. 453.

Patel v The Commissioner of Income Tax [1961] E. A. 701.

Stauder v City of Ulm [1969] E. C. R. 419.

CHAPTER 1: STUDY PROPOSAL

1.1 Introduction

The Treaty Establishing the East African Community (the Treaty) came into force on 7th July 2000.¹ The Treaty aims at developing policies and programmes aimed at widening and deepening of integration in the political, economic, social and cultural fields, research and technology, defence and security, legal and judicial affairs for the mutual benefit of the Partner States.² This is not the first time East Africa is going through the process of integration. The three original members of the East African Community (EAC)³ have enjoyed close historical, commercial, industrial, cultural and other ties for many years.⁴ Formal economic and social integration in the East Africa Region commenced with, the construction of the Kenya Uganda Railway (1897 -1901), the establishment of the Customs Collection Centre⁵, the East African currency Board⁶, the establishment of the Postal Union in 1905, Court of Appeal for Eastern Africa⁷, the Customs Union⁸, the East African Governors Conference⁹, the East African Income Tax Board¹⁰ and the Joint Economic Council¹¹.¹² The process has involved the establishment of the East Africa (High Commission) Orders-in-Council 1947 -1961; the East African Common Services Organisation¹³, the East African Co-operation for the establishment respectively of the East African High Commission¹⁴; the East African Common Services Organisation and the East African

¹ See Foreword of The Treaty for the Establishment of the East African Community (As amended on 14th December 2006 and 20th August 2007).

² Odek, J. O. (2002) (Ed.) *The East African Community Treaty: Its Impact on Kenya*, Reporting International Treaties, 1.

³ Kenya, Uganda and Tanzania.

⁴ Lubega- Kyazze, J. (2003) *Legal Implications of The East African Community Treaty*, 1 The Uganda Living Law Journal, 43.

⁵ 1900.

⁶ 1905.

⁷ 1909.

⁸ 1919.

⁹ 1926.

¹⁰ 1940.

¹¹ 1940.

¹² *Ibid.*

¹³ 1961-1966.

¹⁴ 1967.

Community as successive joint organisations of the said countries. In 1977 the Treaty for the East African Co-operation establishing the East African Community was officially dissolved. The main reasons contributing to the collapse of the original East African Community were lack of a strong political will; lack of strong participation of the private sector and civil society in the co-operation activities; the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development; and lack of adequate policies to address this situation.¹⁵

The East African Community was finally dissolved on the 14th day of May 1984, at Arusha, in Tanzania. The East African Community Mediation Agreement 1984 was then signed. This provided for the division of assets and liabilities of the former East African Community. Despite the dissolution, the three countries agreed, under the Mediation Agreement, to explore and identify areas for future co-operation and to make arrangements for such co-operation.

On 30th November 1993, a second attempt towards integration was made, culminating in the Treaty which came into force on 7th July 2000¹⁶ following its ratification by the original three Partner States. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18 June 2007 and became full members of the Community with effect from 1 July 2007.¹⁷

One of the Organs of the East African Community established under the Treaty is the East African Court of Justice,¹⁸ whose role is spelt out in Article 23 as ensuring the adherence to law in the interpretation and application of and compliance with the Treaty.

This study will analyse the dispute settlement mechanisms in place within the East African Community under its Treaty, i.e. the East African Court of Justice. The study also looks at implications of an enhanced jurisdiction of the East African Court of Justice in promoting regional integration. It explores the extent of the jurisdiction and functions that the East African

¹⁵ *Ibid.*

¹⁶ The EAC Treaty *op cit.*

¹⁷ http://www.eac.int/index.php?option=com_content&view=article&id=1:welcoming-to-eac&catid=34:body-text-area&Itemid=53 (last visited on 9/11/2012).

¹⁸ The Treaty for The Establishment of the East African Community, Article 9.

Court of Justice ought to have in order to provide an effective dispute settlement mechanism within the East African Community. In addition to liberalisation measures, other policies of host countries are important for a favourable investment climate; and as liberalisation progresses, they become increasingly so. Thus the existence of a reasonably comprehensive legal framework for business activities and a properly functioning legal order are required to provide predictability and stability.¹⁹ In addition a well functioning administrative infrastructure is necessary to ensure the effective implementation of the legal framework.²⁰

1.2 Background to the Problem

The East African Court of Justice (the Court) was inaugurated on 30th November 2001.²¹ The Court has a very limited jurisdiction which is restricted to the interpretation and application of the Treaty.²² Article 27 of The Treaty confirms this, and further states that the Court shall have other original, appellate, human rights and other jurisdiction as may be determined by the Council. To date no protocol has been concluded to define this extended jurisdiction of the Court. A draft protocol published in May 2005 but has not been ratified.²³ However the same falls short of giving the Court the required jurisdiction to operate as a regional court.

Under Article 21 of the Treaty, the Court has jurisdiction to hear and determine disputes between the Community and its employees that arise out of the terms and conditions of employment of the Community employees. Under Article 32, the Court has jurisdiction to hear and determine any matter in a contract containing an arbitration clause which confers jurisdiction upon the Community or any of its institutions. Reference to the Court may be made by Partner States (Article 28), the Secretary General (Article 29) or by legal and natural persons (Article 30). Under article 39, the Court has power to issue interim orders or directions.

¹⁹ UNCTAD, Division on Transnational Corporations and Investment; World Investment report 1994, Transnational Corporations, Employment and the Workplace, (UN New York and Geneva, 1994), p. xxix.

²⁰ *Ibid.*

²¹ See the Preface of The Treaty for The Establishment of the East African Community publication.

²² *Op cit*, note 7, Article 23.

²³ Draft Protocol To Operationalise the Extended Jurisdiction of the East African Court of Justice.

Article 33 gives precedence to the Court over national courts on decisions of the Court on the interpretation and application of the Treaty. However this article does not provide what would happen if a constitutional question should arise as regards a decision emanating from the Court.

One of the main reasons for countries forming International and Regional Economic Institutions is the need to have a dispute settlement mechanism.²⁴ Existence of such a dispute settlement mechanism has the effect of reducing tension between countries, and avoiding recourse to force as a means to resolving trade disputes. When countries are certain that there is a dispute settlement mechanism, it guarantees international peace and security. In the Preamble to The treaty the five countries resolve to create an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities. This enabling environment can only be created when there is a uniform and clear dispute settlement mechanism applicable to all the Partner States.

The East African Court of Justice needs to have a clearly defined and extended jurisdiction for the Court as a way of enhancing the economic development in the East African Region as envisaged in Article 5 of The Treaty. In this extended jurisdiction, the court should be able to deal with any trade disputes between state parties and other legal or natural persons not only as relates to interpretation of the Treaty but also any legal issues that arise including but not limited to labour issues and human rights to the extent that they are related to trade and enhancement of the objectives of the Treaty. This clearly defined and extended jurisdiction is also necessary if the political union of the three East African Countries is to be a reality.

The former East African Court of Appeal (EACA) had an extended jurisdiction but it had its shortcomings which included the constitutional issues that arose in *Okunda and Another –v- Republic*²⁵ as a result of the constitutional jurisdiction conferred on the former EACA. In this case, the Attorney General of Kenya brought a prosecution against two persons under the Official Secrets Act 1968 of the East African Community without acquiring the consent of counsel to the

²⁴ *Op cit*, note 19.

²⁵ [1970] E.A. 453.

Community under Section 8 (1) of the Act. It was argued by the Government that section 26 (8) of the Kenyan Constitution states that the Attorney General is not subject to the direction or control of any person in the exercise of his functions. Therefore Section 8 (1) of the Official Secrets Act was inconsistent with the Constitution. Since the East African Community is a creation of Parliament, which is itself subject to the Constitution, section 8 (1) must be invalid. Counsel for the Community argued that any conflict should be decided in favour of the Community legislation, because Article 95 of the Treaty for East African Co-operation requires the partner States to adopt legislation to give effect to the Treaty, and to acts of the Community, which are to have the “force of law” in their territories. The Court stated in its judgment that there was “a clear conflict between the provisions of the Constitution and an Act of the Community” but says that Kenya had carried out its obligations under Article 95 of the Treaty. The Court concluded that section 8 (1) of the Official Secrets Act of the Community as being invalid as it was inconsistent with the Constitution and therefore it was of no effect in Kenya.

The East African Community appealed to the Court of Appeal of East Africa. The Court stated that the Constitution of Kenya was paramount and law, Kenyan or Community’s, or another country’s law, is void to the extent of any conflict with the Constitution.

Thus in looking at an expanded jurisdiction it is important to examine any proposals in light of the problems experienced by the old East African Court of Appeal and ways of overcoming them. It will also be necessary to draw lessons from the collapse of the East African Community in order to understand what pitfalls should be avoided in future.²⁶The court could have played a role in addressing some of these problems.

The jurisdiction and role of the East African Court of Justice is not only of interest to the Partner States, but also external investors bringing in foreign direct investment who will be assured of accessing the same kind of judicial treatment in any country within the E.A. Community.

²⁶ Odek, J. O. (2004), “*Re-appraising the Framework for Regional Economic Integration in Africa*”, 1 *The East African Law Journal* 47-68.

There is a need to examine other established regional courts e.g. the Court of Justice of the European Communities and the COMESA court of justice. Unlike the EACJ, the COMESA Court of Justice has jurisdiction on all matters which may be referred to it pursuant to the COMESA Treaty.²⁷ References may be made by Member States, the Secretary General or by legal and natural persons. The COMESA Court of Justice also has detailed rules governing the proceedings of the court.²⁸ The importance of these courts in promoting regional integration will be examined. The Court of Justice of the European Communities has shown itself to be an important driving force in European integration.²⁹ Some of its important decisions include in April 1976 when the court upheld, in the *Royer case*, the right of a national of a member state to stay in any other member state independently of any residence permit issued by the host country.³⁰ In February 1979, in the *Cassis Dijon case*, the Court ruled that any product legally manufactured and marketed in a member state must in principle be allowed into the market of any other member state.³¹ Other important judgments of the court which have driven on the process of European integration relate to competition policy and social security policy.³² A comparative analysis should be done and positive attributes that EACJ can borrow should be identified.

1.3 Statement of the Problem

The existing provisions in the East African Treaty do not provide the East African Court of Justice with adequate jurisdiction, role and powers to enable it to handle disputes that may arise from member states and its citizens or investors so as to enable the Court to contribute meaningfully in the achievement of the EAC objective of promoting regional integration and economic development within the community and providing an effective dispute settlement mechanism.

²⁷ Treaty Establishing the Common Market for Eastern and Southern Africa, Article 23.

²⁸ Established under Legal Notice No. 6 of 2003, The Rules of the Court of Justice of the Common Market for Eastern and Southern Africa, 2003.

²⁹ Jones, A. and Budd, S. (1994) *The European Community: A Guide Through the Maze*, Kogan Page, London, 37.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

1.4 Theoretical Framework

This research is based on the area of law and development. The study examines dispute resolution within the East African Community and seeks to answer to the problem of having a regional court that is not effective in promoting the objectives of the Community, which seeks to bring development to its member states through regional integration. The study focused on showing that the East African Court of Justice does not have adequate jurisdiction and this has led to the court not being effective in promoting the regional integration and economic development within the Community.

The United Nations, particularly through its various regional Commissions, has for many years been prominent in propagating the view that regional integration and cooperation is an important device for fostering development.³³ Disputes both within groups and between them, are found everywhere in human society.³⁴ Disputes are therefore expected (and have arisen) within the EAC. Regional integration without a proper dispute settlement mechanism will quickly lead to disintegration. Once states are in a dispute, they have opposing interests and thus have an incentive to provide misleading or inaccurate information and to interpret the available information in a light favourable to their own position.³⁵ Society is by definition ordered; a dispute is a moment of disorder; it is therefore unthinkable as a permanent condition. Hence the need for resolution is integral.³⁶

The theory therefore suggests the enhancement of the jurisdiction of the EACJ to be able to deal with other disputes other than just interpretation of the Treaty. The research looked at how the Community has addressed the issue of dispute resolution. It has also looked at how the

³³ Hazelwood, A. (1985) “*The End of the East African Community: What are the Lessons for Regional Integration Schemes?*” in Onwuka R. I. et al (Eds), (1985) *The Future of Regionalism in Africa*, Macmillan Publishers (London), 172-189 at p 173.

³⁴ Cain, M. And Kulscar, K. (1981-1982) “*Thinking Disputes; An Essay on the Origins of the Dispute Industry*” 16 (3) *Law & Society Review*, 375-402 at p. 377.

³⁵ Guzman, A. T. (2008) “*International Tribunals: A Rational Choice Analysis*” 157(1) *The University of Pennsylvania Law Review*, pp. 171-235 at p. 183.

³⁶ *Supra* note 35 at p. 379

community views the mechanisms it has put in place and it is clear that it is not satisfied with the same but fails to explicitly state the same.³⁷

With a proper dispute settlement mechanism, there is freer trade and movement of skilled and unskilled labour within the economic region without having unnecessary tension which could lead to the use of force between states whenever a dispute arises. This also tends to attract investors from outside the economic region to invest in the region. Special consideration has to be given to the concerns of both foreign investors and host countries with respect to dispute settlement procedures. The vast majority of bilateral investment treaties (BITs) -as well as some regional agreements and other instruments -contain provisions for the settlement of disputes between private parties and the host State(s), and of disputes between States arising from investment.³⁸

1.5 Literature Review

A lot has been written regarding the issue of dispute resolution in international courts and international tribunals.³⁹ These written works look at institutionalized dispute resolution mechanisms in the context of international law. However the main issue in this research is how a proper dispute mechanism can assist the EAC a regional economic body achieve its objectives. The following review looks at the available literature which touches on the East African Community in terms of historical background and also the East African Court of Appeal and East African Court of Justice.

Hazelwood, A.⁴⁰

³⁷ See the various strategic plans drawn by the East African Community.

³⁸ UNCTAD, *International Investment agreements: Key Issues*, Vol. 1, UN New York and Geneva, 2004, p. 348.

³⁹ See Carter, B.E., Caron D. D., Roessler, F. and Millhauser, M. S. (1991) "*Comparative Analysis of International Dispute Resolution Institutions*" 85 *American Society of International Law*, pp. 64-82, Keohane, R. O., Moravesik, A. and Slaughter, A.M., (2000) "*Legalized Dispute Resolution: Interstate and Transnational*", 54 (3) *The MIT Press*, pp. 457-488 and Guzman, A. T. (2008) "*International Tribunals: A Rational Choice Analysis*" 157 (1) *The University of Pennsylvania Law Review*, pp. 171-235.

⁴⁰ *Op cit*, note 33.

This work analyses how the original East African Community came into being. The historical context of how the initial three East African Community members came to have such close economic ties is well set out. The writer looks at the shared institutions before independence and even the shared currency. The writer then turns to when the union was formalised through the 1967 Treaty. Hazlewood examines the reasons as to why the Treaty was negotiated and the structures that it put in place. According to Hazlewood, when the Treaty came into force is when the economic integration, which worked so well without the formal Treaty, started collapsing. Hazlewood then dwells in the issues that led to the disintegration of the initial EAC. He acknowledges that the failure of the initial EAC Treaty to achieve its intention cannot be attributed to one single reason. He then proceeds, to analyse what in his view were the reasons for the breakup. He classifies the reasons into three. Those which were dealt with in the Treaty, those not dealt with in the treaty, but which could have been, by amendment or extension of the Treaty and those of a kind not amendable to settlement by Treaty.

The writer however fails to examine the dispute settlement mechanism. Some of the reasons are issues which were open disputes and quite a number centred on distribution of resources. These issues if they had been referred to a court with proper jurisdiction would have been dealt with satisfactorily. The tension amongst the member states would have thus been reduced and probably the breakup of the Community could have been averted.

Odek, J. O. (Ed).⁴¹

This booklet examines the provisions of The Treaty for the Establishment of the East African Community and its relevance to Kenya. The various obligations set out in the Treaty are well analysed. The article looks at the Objectives of the Treaty. The writer then examines the steps of integration and the time frame for steps of integration. The areas of co-operation are also analysed. The writer examines the roles of each of the organs of the Community as set out in the Treaty. This includes the role of the East African Court of Justice (EACJ). The writer correctly

⁴¹ (2002) “*The East African Community Treaty: Its Impact on Kenya*,” Reporting International Treaties, 1.

points out that the East African Court of Justice is required to determine disputes arising from the interpretation of the Treaty. The writer also looks at the impact of the Treaty on Kenya and the implementation of the Treaty in Kenya. The article notes that the impact of EACJ would be to create certainty as regards regional legal disputes. The articles however does not analyse the effectiveness of the EACJ or its shortcomings. The article therefore does not make any suggestions for the improvement of the EACJ but merely states what it does.

Ojienda, T. O.⁴²

In this paper, the writer focuses on the shortcomings of the EACJ as it is. However the paper concentrates on the angle of the shortcomings in the human rights jurisdiction and not the court's overall jurisdiction. The writer makes suggestions as to how the court's jurisdiction can be enhanced to address the human rights claims. The paper also does not examine the impact of the EACJ in promoting regional and international trade. Further in reviewing the old East African Court of Appeal, the writer does not identify the challenges that were experienced by that court or the positive aspects of that court which could be implemented in the EACJ.

Johnson, O. E. E. G.⁴³

This article looks at regional integration in Africa with a focus on economic integration. It examines the challenges that African countries have faced in their attempts at economic integration. It looks at the effect of having a common external tariff and a monetary union. The defunct East African Community is mentioned favourably in this area as having found a workable solution to the challenge of finding a satisfactory taxation agreement. The writer then examines defunct East African Community and draws some lessons that can be used by regional economic groupings in Africa. These are firstly the removal of the highest authority in an economic union

⁴² (2004) "*Alice's Adventures in Wonderland: Preliminary Reflections on the Jurisdiction of the East African Court of Justice*," 2 (2) East African Journal of Human Rights and Development, 94-103.

⁴³ (1991) "*Economic Integration in Africa: Enhancing Prospects for Success*", 29 (1) Journal of Modern African Studies, 1-26.

from the direct control of the top political leaders. Secondly is that in formation of a customs union, measures should be put in place to ensure that the differential impact on the gross domestic product does not aggravate disparities in productivity and in real incomes among the populations of the different countries (therefore allowing a high mobility of labour and capital). Lastly is that for an economic union that has a good chance of success, the member states must allow intra-union mobility of capital, must put in place mechanisms to co-ordinate their fiscal, monetary, and exchange-rate policies, and must be willing to improve the management of their reserves of foreign currency -all at an early stage in the process of integration.

The article however fails to analyse the impact of an effective dispute resolution mechanism as an important part of an effective economic integration.

1.6 Research Objectives

Main Objective

To analyse the East African Court of Justice, its development and current status, to compare it with other regional dispute settlement mechanisms and to indicate possible legal solutions to the inadequacies of the Court that will make the Court an effective regional court that will assist in the achievement of the objectives of the East African Community.

Specific Objectives

- ◆ to identify the problems experienced by the old East African Court of Appeal;
- ◆ to identify the problems with the current East African Court of Justice;
- ◆ to identify how the treaty can be amended in respect of the East African Court of Justice while addressing the problems identified;
- ◆ to identify the role of the East African Court of Justice in promoting trade and economic development in the East African Community; and

- ◆ to identify positive attributes that the EACJ can borrow from the COMESA Court of Justice and the Court of Justice of the European Community;

1.7 Hypotheses

The East African Court of Justice does not have the required jurisdiction to enable it play an effective role in promoting trade and economic development within the EAC. The EACJ can only contribute positively to the economic growth of the East African Community with an enhanced and clearly defined jurisdiction.

The present study pays special attention to two main points; firstly the historical background of the East African Community and the dispute settlement mechanisms and the challenges therein; secondly evaluate the suitability of the current setup of the East African court of justice as a regional dispute settlement mechanism with a comparison with similar regional institutions. These two aspects of the investigation will enable us to identify any specific problems that hinder the realisation of an effective regional dispute settlement mechanism through the East African Court of Justice.

The foregoing account raises the following hypotheses: -

- ◆ the East African Court of Justice as currently set up does not have adequate jurisdiction, structures and powers to enable it function as an effective regional dispute settlement mechanism that will promote the objectives of the East African Community.
- ◆ an effective dispute settlement mechanism is essential in regional economic institution to promote regional integration and create a favourable investment climate as investors are more likely to invest in a region if the dispute settlement provisions are clearly defined and are harmonised.

1.8 Research Questions

- ◆ Is the East African Court of Justice as established an effective dispute settlement body for the East African Community?

- ◆ Is the East African Court of Justice a regional court or a domestic court?
- ◆ What problems were experienced in the old East African Court of Appeal?
- ◆ Have the problems experienced with the old East African Court of Appeal been taken into account in the establishment of the East African Court of Justice?
- ◆ What role can the East African Court of Justice play in promoting the EAC objectives?
- ◆ What amendments need to be made to the East African Community Treaty to enable the EACJ play an effective role in promoting the objectives of EAC?
- ◆ Is there anything that we can borrow from the Court of Justice of the European Communities and the COMESA Court of Justice?

1.9 Limitations of the Proposed Study

The main limitation of this study is that the study was an analysis of written works and other instruments. The study was not founded on actual collection of data such as conducting interviews. This therefore means that some information which may have helped the study is not included. Further, even the written works on the subject matter are not so many. Most of the literature available was on the defunct East African Community. Reliance was made on the reports made by the EAC Secretariat to obtain information on the prevailing situation at the EAC and EACJ. Reliance was also made on works written about the experiences of other regional courts and the same was adapted to the East African scenario and which helped in making recommendations for reforming the EACJ.

1.10 Proposed Methodology

- Library Research i.e. books, journals and articles.
- Internet searches.

1.11 Chapter Breakdown

Chapter 1 will trace the historical origin of the East African Community and the old East African Court of Appeal. In this regard, the integration experience of the East African region will be explored right from the colonial times to the eventual collapse of the initial East African Community in the mid 1977. The structure and jurisdiction of the old East African Court of Appeal will be examined and some of the hurdles and problems experienced by it analyzed.

The rejuvenation of the East African Community and the creation of the East African Court of Justice will also be discussed with a view to contrasting with the earlier frameworks that existed before the demise of the East African Community in 1977.

Chapter 2 will discuss the role of the East African Court of Justice in promoting the objectives of the East African Community.

Examination of status of EACJ i.e. whether it is a domestic court or a regional court. The need for conversion to a regional court. Importance of a strong and clear dispute settlement mechanism in promoting regional trade and economic development.

Chapter 3 will compare the structure, jurisdiction, functions, role and operations and structure of the East African Court of Justice with that of the court of justice of the European community and The COMESA Court of Justice as regional courts.

Chapter 4 will make the case for an enhanced and clearly defined jurisdiction. A critical look at the Draft Protocol to operationalise the extended jurisdiction of the East African Court of Justice.

CHAPTER 2: ORIGIN AND HISTORICAL DEVELOPMENT OF THE EAST AFRICAN COMMUNITY

2.1 Introduction

It is near impossible to discuss the history of one of the initial three Partner States of the East African Community without necessarily discussing the other two, not much because of their colonial history than to the history of their people.⁴⁴ Having regard to their past and existing social, cultural and economic interrelationship, their geographical juxtaposition, the co-operation among the initial three Partner States has always been inevitable, whether within a formal legal framework or amorphously as peoples of East Africa. The relationship among the initial three Partner States is traceable to before World War I but formally after Tanganyika was brought within British administration.⁴⁵

The late entrants to the East African Community namely Rwanda and Burundi have their own shared history; they share the same ethnic groupings and were colonised by Germany and Belgium.⁴⁶

2.2 The Conference of Governors

The latter day Kenya and Uganda territories were originally colonized by the British. Tanzania was for the early years of colonization under German protection until 1920, when its administration passed to British authorities. The three colonies were administered through separate British administrations, each headed by a Governor.⁴⁷ For uniformity and assumed ease of administration, the three governors would generally agree on several administrative issues. The

⁴⁴ See generally, Akiwumi, A.M. (1972) “*The East African Community*” 6 (2) *The Journal of World Trade Law*, 203.

⁴⁵ *Ibid.*

⁴⁶ See <http://www.gov.rw/History> (last accessed on 8/11/2012) and <http://www.burundiembassy-usa.org/burundiindepth.html> (last accessed on 8/11/2012).

⁴⁷ *Op cit*, note 43.

colonial office in London encouraged such agreements by making directives which would normally be made to apply to all the three territories.⁴⁸

In the aftermath of the First World War, with the ensuing need to mitigate the effects thereof, the co-operation among the three countries accelerated with the introduction of a common currency, a postal union, a common external tariff, East African Income Tax Board, Civil Aviation among others.⁴⁹

However, it is not until after World War II that the three Governors began to hold periodic meetings as the Conference of Governors.⁵⁰ The conference provided a forum where common interests of the three territories were discussed and unanimous decisions taken.⁵¹ Such decisions would then be separately implemented within the colonies. It is however noted that though the Conference made a lot of progress, its decisions were not binding upon the Governors⁵² as it was not an emanation of a formal legal framework. Without a constitutional or juridical basis, coupled with logistical and personnel problems,⁵³ the conference would not effectively drive the co-operation agenda.⁵⁴ After operating for about one year and establishing a skeleton for organized co-operation, the Conference of Governors gave way to the East Africa High Commission.⁵⁵

2.3 The East African High Commission

In response to conference's apparent lack of capacity to meet the demand for more effective co-operation, the British Government promulgated in 1947 the East Africa (High Commission)

⁴⁸ The so called Orders in Council.

⁴⁹ Colonial Paper No. 2 10, Kenya National Archives.

⁵⁰ *Op cit*, note 43.

⁵¹ Most of the decisions related to the passage of uniform legislation by the separate territorial legislative bodies. *Op cit*, note 43..

⁵² By its very nature the Conference was not well designed to enlist the support of public opinion , *Ibid*.

⁵³ The Conference did not have employees of its own.

⁵⁴ See for example the official comment on the Conference of Governors in "Inter-territorial Organisation in East Africa, 1945" Colonial Paper No. 191.

⁵⁵ Akiwumi, A. M. (1972) "*The Development of the Legislative Process in East African Integration*", 7 (3) *Africa Spectrum* 30-47 at p. 30.

Order-in-Council, ⁵⁶establishing effective 1st January 1948, the East Africa High Commission.⁵⁷ The Order-in-Council, far from giving recognition to the already existing co-operation, widened its scope and gave it the much-needed judicial framework. The Commission⁵⁸ was entrusted with the administration of many common services⁵⁹ on behalf of the three territories. A legislature, the East African Central Legislative Assembly was also established under the Order in Council, as a forum for public debate and enactment of certain laws as would be necessary and principally, laws concerning the administration of the common services formerly under the conference and the new areas of co-operation.⁶⁰ The Assembly would therefore legislate on areas such as railways, harbours, posts and telecommunication, civil aviation, research, financial appropriation, staff of the High Commission among others. The Assembly also had a fundamental strength, in its jurisdiction to legislate even on non-common services matters if such legislation was necessary for the peace, order and good government of the territories.⁶¹ The three countries could therefore give the consent to be legislated for by the Central Assembly.

Though the Order-in-Council did not create a dispute resolution mechanism, the East Africa Central Legislative Assembly was created as a supreme legislative organ within the territories. An enactment of the Assembly could amend or suspend the application of any municipal law of the member states.⁶²

In most interstate co-operations and integrations, it is common place that the states or territories involved would negotiate, consult and come up with the terms of the co-operation.⁶³ This,

⁵⁶ The Orders in Council were laws made to apply in British colonies, under the powers vested in the British Sovereign by the British Settlements Acts of 1887 and 1945 and the Foreign Jurisdictions Act of 1890.

⁵⁷ Akiwumi, A.M. “*A legal Profile of Economic Co-operation in East Africa, 1947-1967*”, paper presented at The United Nations Institute for Training and Research Regional Seminar in International Law, Accra, Ghana, 1971. (A copy of the article was obtained from the personal library of Hon. Justice (Rtd.) Akilano Akiwumi during discussions on the East African Community).

⁵⁸ Established under section 4 of the Order-in-Council.

⁵⁹ These included railways, harbours, posts, telecommunications, civil aviation, income tax, excise and customs duties, research organizations among others.

⁶⁰ *Op cit* note 52 at p. 31.

⁶¹ Section 28 of the Order in Council.

⁶² Section 28 (3) and (4), Akiwumi *op cit* note 54.

⁶³ *Op cit* note 52.

however, did not happen with the East African territories of Kenya, Uganda and Tanzania. The three countries were, as it were, forced into co-operation by the imposition by British administration of the East Africa High Commission by the 1947 Order-in-Council.⁶⁴ This imposition may have been legally sound having regard to fact that these territories were not independent states but colonies.⁶⁵ They were, however, not to remain as colonies for long.⁶⁶ With the changing colonial policy towards giving self-rule to their colonies and the clamour for self-government the East African states were then or later to be independent.

2.4 The East African Common Services Organisation

Having been born out of an imperial order, the High Commission could not continue existing in its form with the independence of one or two of the member territories.⁶⁷ With the impending independence of Tanganyika⁶⁸ and the ensuing consequences,⁶⁹ coupled with the need to continue providing and managing the common services,⁷⁰ it became imperative that a mechanism be found to accommodate its soon to be acquired independence status. With this truism consultations were soon launched, culminating in the replacement of the High Commission, on 22nd December 1961 with the EACSO.⁷¹ The Organisation was established by an agreement, the East African Common Services Agreement, entered into by the independent government of Tanganyika and the colonial administrations of Kenya and Uganda.⁷² The agreement was a negotiated document, complete with a constitution attached thereto with schedules detailing the functions of and the common services to be administered by the Organisation.⁷³

⁶⁴ Since the territories were of dependent status and hence the question of sovereignty did not arise, it was argued that this constitutionally sound. *Op cit*, note 43. at pg 203.

⁶⁵ *Op cit*, note 52.

⁶⁶ Tanzania became independent in 1961, Uganda 1962 and Kenya 1963.

⁶⁷ See for example Sir Forbes V.P.'s opinion in *Patel v The Commissioner of Income Tax* [1961] E.A at p. 701.

⁶⁸ The first East African Country to attain independence.

⁶⁹ Tanganyika assuming self-rule meant that it could not continue operating under Orders in Council or any other external arrangements without its consent.

⁷⁰ The Colonial Office Report, Cmnd. 1433.

⁷¹ The discussions were attended by representatives from Kenya, Uganda, Tanzania, the High Commission and British government officials.

⁷² *Op cit*, note 43.

⁷³ *Ibid*.

As a successor to the High Commission, the Organisation was to take over the administration of services hitherto provided by the Commission.⁷⁴ One major concern at the creation of the organisation was the need to have the common services provided by the East Africa High Commission continued by the Organisation on an East Africa basis. The first schedule to the Organisation's constitution in this regard set out the common services to be administered by the Organisation.⁷⁵ The organs of the Organisation, namely the Authority and the Ministerial Committees, were to act on an East Africa basis and not from their respective governments' point of view.⁷⁶ Over and above the traditional bodies by the former High Commission, the Public Service Commission⁷⁷ of the Organisation was created but with the exclusion of coordination of the Defense and the Navy.

The Organisation established the Central Legislative Assembly to replace the East African Central Legislative Assembly under the former Commission.⁷⁸ The Assembly could legislate⁷⁹ on similar matters as the former Assembly.⁸⁰ To conform to the constitution of the Organisation, the contracting Governments in identical legislations allowed the Acts made by the Central Assembly to have the force of law in their territories and provided for how the Organisation's laws were to be treated in the local courts.⁸¹

It is discernible from the foregoing discussion that the cooperation among the three countries was headed for a better future with so many things being done in common. However, it can be said that the framework of the Organisation did not contemplate any disputes arising between and among member states.⁸² And if at all it did, then it was left to the municipal courts to decide even on matters touching on the Organisation.⁸³ Though it never came to pass, theoretically, a member

⁷⁴ Article 1.1(a), the Constitution of the Organisation.

⁷⁵ *Ibid* Notably telecommunications, railways and customs.

⁷⁶ See The Community General Gazette Notice No. 1 of 14 December 1967.

⁷⁷ See Article 33 of the Constitution establishing the Organization.

⁷⁸ Article 1 (1) The agreement establishing the Organization.

⁷⁹ *Op cit*, note 55. note 52.

⁸⁰ Schedule 2 to the EACSO Constitution, setting out matters on which the Assembly could legislate.

⁸¹ Article 5, Organisation Agreement.

⁸² See Akiwumi, *op cit* note 43 ; there was not established a dispute resolution mechanism e.g. a court.

⁸³ The possibility of municipal courts giving effect to the objectives of the Organisation was quite real.

state could amend or even repeal an Act of the Organization.⁸⁴ The Organisation was therefore lacking in supremacy and in a common dispute resolution mechanism.

2.5 The (first) East African Community

As discussed earlier,⁸⁵ the three East African countries were bound to be independent and as common with most countries just emerging from colonial rule, political and territorial sovereignty was of paramount importance, overriding any other consideration.⁸⁶ The organ hitherto running the cooperation, The EACSO, was not suited to midwife the integration of these countries in their post independence status.⁸⁷ The now independent East African countries were eager to have more control on their economies and assert their sovereignty. There arose the need for the establishment of a common market with an appropriate legal framework that allowed for deviations and equality measures in view of the obtaining murmurs on distribution of the Organisation's revenue.⁸⁸

The EACSO as constituted did not contemplate the regulation of the common market, which existed among the three countries.⁸⁹ The imbalance of trade between the importing Tanzania and the exporting Kenya,⁹⁰ the unequal distribution of benefits from the common services,⁹¹ centralization of financial, commercial and industrial activities in Nairobi were some of the issues causing discomfort among the partner states.⁹² A more efficacious Agreement providing for a legal framework for the common market had to be found. The cooperation without such a framework

⁸⁴ *Op cit*, note 43 at p.221.

⁸⁵ See pages 22 and 23 above.

⁸⁶ This is said to have influenced and indeed decelerated the pace of regional integration worldwide alongside slackening the development of international law generally.

⁸⁷ See the discussion on the EACSO above.

⁸⁸ Akiumi, A. M. *"The Tripartite Commission for East African Corporation and its Predecessors: A Brief Constitutional Profile"* Unpublished.

⁸⁹ Lack of a treaty like legal framework for managing the Common Market and the Customs Union.

⁹⁰ Normally touted as one of the reasons for the collapse of the initial East African Community.

⁹¹ Ghai, D. P. (1964) *"Territorial Distribution of the benefits and Costs of the East African Common Market"*, 11 (1) *The East African Economics Review*, 29-40.

⁹² *Ibid.*

had indeed taken its way to deterioration.⁹³ With the benefits of independence, the East African countries had the task of reversing such downward motion to a fledging cooperation. At a meeting in Mombasa in 1965,⁹⁴ the East African governments decided to establish a Commission later known as the Philip Commission⁹⁵ to among others recommend how the East African Common Market could be maintained and strengthened.⁹⁶ The commission acted as machinery for negotiation between the three states and consisted of three ministers for each country with an Empire but as the initiator of ideas and conciliator.⁹⁷ The Commission was assisted by the United Nations Economic Commission for Africa and in May 1966 submitted its report reflecting the new attitudes of the East African governments towards elaborate and invigorated co-operation among them. The report provided the basis of, and was indeed translated into the provisions of Treaty of the East African Community.⁹⁸ The conclusion of the Treaty in 1967 depicted the desire by the three countries to work together. The main objective of the treaty was to ‘strengthen and regulate the industrial, commercial and other relations of the partner states to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities the benefits whereof shall be equitably shared’.⁹⁹ The Treaty dealt with all fields of co-operation between the East African countries and established the East African Common market.¹⁰⁰ It also established a secretariat and a number of councils at which discussions took place between representatives of the partner states. The ultimate authority of the community rested with the three presidents.¹⁰¹ Although the treaty conferred a legal personality on the

⁹³ Kenya had actually given notice of its intention to terminate the EACSO Agreement under art. 3.1 of the Agreement.

⁹⁴ *Op cit*, note 43.

⁹⁵ Named after the Commission’s Chairman, Prof. Kjeld Phillip, a former Danish Minister for Trade and Finance.

⁹⁶ Adar, K. G. and Ngunyi, M. (1994) “*The Politics of Integration in East Africa since Independence*” in Walter Oyugi (Ed), (1994), *Politics and Administration in East Africa*, East African Education Publishers, Nairobi, 402.

⁹⁷ Maxon, R. M. (2009) *East Africa: An Introductory History*, East Africa Educational Publishers, Nairobi.

⁹⁸ Signed in Kampala on 6th June 1967 by the respective Presidents of Kenya, Uganda and Tanzania.

⁹⁹ *Op cit*, a note 96 at p. 401.

¹⁰⁰ Article 3 of the Treaty.

¹⁰¹ Akiwumi, *op cit*, note 43.

Organisation, it can be mentioned this early that it failed to provide for a mechanism for conflict resolution in the event of disputes among the partner states.¹⁰²

The enactment of the Treaty for East Africa Co-operation may be well regarded as one of the fundamental post-independence steps in the integration process of the East African region.¹⁰³ This is because there had been earlier efforts towards economic integration even before any of the three partner states attained independence. There existed a customs union¹⁰⁴ with a common tariff and free trade between the countries, common customs and income tax administration, common transport and communication, a common university, and a common currency. The customs union of Kenya and Uganda was amalgamated and fully established by 1917 and from that time there was a single customs administration for the two territories. Free trade between Kenya, Uganda and Tanzania in local produce begun in 1923 and it was fully established in 1927.¹⁰⁵ Common currency for all the three territories was developed when the East African currency board was established at the end of 1919. The board converted the existing coinage into East African shillings by 1925. The posts and telegraphs of Kenya-Uganda were amalgamated with that of Tanganyika in 1933 providing postal and communication services in east Africa. In 1961 the East African Common Services Organisation came into existence to provide the common services for the East African territories that the East African High Commission had previously provided.¹⁰⁶

The three countries also explored the possibility of establishing the East African Federation.¹⁰⁷ In 1963 President Nyerere of Tanganyika, Prime Minister Milton Obote of Uganda and Prime Minister Kenyatta of Kenya met in Nairobi and pledged to work for the political federation of East Africa.¹⁰⁸ Unfortunately, Uganda held back and the desire towards the union did not reach

¹⁰² *Ibid.*

¹⁰³ The earlier co-operation initiatives bearing a lot of colonial undertones.

¹⁰⁴ Hazelwood, A. *Op cit*, note 33.

¹⁰⁵ Commonly referred to in East Africa as the common market.

¹⁰⁶ *Op cit*, note 33.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Op cit* note 76.

fruition. Kenya and Tanganyika showed commitment to the establishment of the federation¹⁰⁹ but Uganda emphasized that it would not be rushed into the federation before crucial issues were resolved. It was therefore not desirable to federate only two countries; Kenya and Tanganyika. The issue of a political federation for East Africa did not only emerge after the independence of the three states. The colonialists had the desire to establish a federation in the colonies.¹¹⁰ However, this hope was weakened by the recommendation of the Milton -Young Commission of 1928 which had concluded that time was not ripe for any change towards the establishment of a federation.

The Community as constituted under the Treaty achieved so much in its ten years of operation. It is beyond the scope of this discourse to discuss such achievements,¹¹¹ but it must be mentioned that the Community trebled cohesion among the countries.¹¹² One institution of the Community with which this thesis is concerned is the classical judicial arm of the Community to which it now turns.

2.6 The East African Court of Appeal

Hand in hand with executive administration, the colonial agenda was also loaded with the determination to spread and entrench the English Common-law system¹¹³ in their colonies. This was done by the establishment of domestic courts within the colonies. These domestic courts were not backed with domestic appeal bodies but one regional appellate court, the Court of Appeal of Eastern Africa.¹¹⁴ Having come into existence later in the day, the High Commission was served by this Court, which was renamed under the EACSO the Eastern African Court of

¹⁰⁹ Leys C. and Robinson P. (Eds) (1965) *Federation in East Africa: Opportunities and Problems*, Oxford University Press, Nairobi.

¹¹⁰ Hazelwood *op cit*, note 33.

¹¹¹ See Omas, P. K. (1961) "The Report of the East African Economic and Fiscal Commission", 8 The East African Economic Review.

¹¹² Stewart, I. G. (1962) "Customs Union in East and Central Africa"⁹ Scottish Journal of Political Economy.

¹¹³ See generally Oyugi, W. (Ed), (1994) *Politics and Administration in East Africa*, East African Education Publishers, Nairobi.

¹¹⁴ Established in 1902.

Appeal.¹¹⁵ The jurisdiction of this Court was determined by an Order in Council, which included appeals from national courts with respect to common services and all other matters. Under the EACSO, the jurisdiction of this court was subject to limitations put by the domestic laws of the East African countries.¹¹⁶ It was the highest court in Tanzania (mainland), Uganda and Kenya. Appeals from the court lay directly to the Judicial Committee of the Privy Council in London. However appeals from Zanzibar continued to be entertained by the high court in Bombay until 1914.

In 1909, a new Order-in-Council established His Majesty's Court of Appeal for Eastern Africa, the court sat at Mombasa and its personnel comprised judges of the protectorates. In 1921 the Court of Appeal for Eastern Africa was again restructured.¹¹⁷ The members were not yet fulltime, being the Chief Justices of Kenya, Tanganyika and Uganda, and assisted by the Chief Justice of Zanzibar and the puisne judges of the territories.¹¹⁸ In 1950 a new and permanent court, having its own fulltime staff (personnel, a vice-president and one or more justices of appeal) was constituted. The court acquired a permanent seat in Nairobi and the superior court judges continued to be entitled to seat when required.¹¹⁹

As soon as the East African territories became politically independent, appeals to the British Judicial Committee of the Privy Council were abolished and the Court of Appeal for East Africa was made a final court of appeal there being no further appeals from its decisions.¹²⁰ One of the mischiefs sought to be addressed by the replacement of the Organisation with the Community was the need for an elaborate system for dispute resolution.¹²¹ Indeed the regulation of the

¹¹⁵ Akiwumi, A.M. *op cit* note 54. "A Legal Profile of The Economic Co-operation in East Africa, 1947-1967", 1971 Unpublished.

¹¹⁶ Akiwumi, A. M. "The Permanent Tripartite Commission for East African Co-operation and its Predecessors: A Brief Constitutional Profile", 1997 at pg 25. Unpublished. (A copy of the article was obtained from the personal library of Hon. Justice (Rtd.) Akilano Akiwumi during discussions on the East African Community).

¹¹⁷ Oyugi, W. *Supra* note 113.

¹¹⁸ *Ibid.*

¹¹⁹ *Op cit*, note 94.

¹²⁰ *Ibid.*

¹²¹ *Op cit* note 96.

common market was poised to bring with it a number of issues to be decided upon. The EAC Treaty at Article 80 therefore established the Court of Appeal for East Africa effectively replacing the Eastern African Court of Appeal.¹²² The Court had jurisdiction to hear and determine Appeals from the courts of partner states as such states may by law allow.¹²³

2.7 Jurisdiction of the East African Court of Appeal

The East African Court of Appeal was part and parcel of the judicial machinery of each partner state.¹²⁴ It heard both civil and criminal appeals and applications. Before independence of the East African countries, the jurisdiction which the court exercised was much wider in the area.¹²⁵ It exercised jurisdiction in relation to appeals from the courts of the then British Somaliland, Seychelles, Aden, St. Helena, Kuria Muria islands and Perim.¹²⁶ After these territories became politically independent, this jurisdiction ceased and the court exercised jurisdiction for the appeals from the three East African states only: Kenya Uganda, and Tanzania. The discussion that follows briefly evaluates the efficacy and effectiveness of the court as a regional court.

In exercising its jurisdiction under the Treaty, the court met a number of hurdles that almost paralyzed its operations. To begin with, the court had been touted as the highest judicial organ in as far as disputes concerning the regulation of the common market was concerned, among other matters referred to it or upon which jurisdiction was granted by the member states.¹²⁷ As discussed earlier,¹²⁸ one of the reasons for the creation of the Community was to remedy the imbalances implicit in the arrangement under the former EACSO. This Court however did not have the jurisdiction to entertain matters concerning the compliance or lack of it thereof by the member states with their obligations under the establishing Treaty. There was no mechanism for

¹²² Article 80 of the Treaty.

¹²³ Article 81 of the Treaty.

¹²⁴ Appeals lay from the partner state's courts to the Court.

¹²⁵ See the discussion above.

¹²⁶ Maxon R. M. *Op cit*, note 97.

¹²⁷ Reading of Articles 80 and 81 of the Treaty.

¹²⁸ *Op cit*, note 43.

bringing the member countries to the jurisdiction of the court. This may have assisted to some extent in providing checks and balances on the integration of the Community.

Secondly, an East African country could legally exclude the application of an Act of the Community within its territory without the court's ability to intervene. The court did not have the jurisdiction mostly conferred to other judicial organs of its nature to bring the member states to compliance with the laws, regulations and decisions of the Community.¹²⁹ The court's lack of efficacy was indeed laid bare by the Kenyan High Court in *In the matter of an application by Evers Maina and In the Matter of East African Customs and Transfer Tax Management Act, 1952, Laws of the East African Community*.¹³⁰ In this case the East African Act empowered the Commissioner General of East African Customs and Excise Department to compound offences committed against the Act and order the payment of a fine. The applicant in this matter had been ordered to pay a compounded fine by an officer¹³¹ of the Community on behalf of the Commissioner General. The Applicant challenged the validity of the Community law citing section 77 (1)¹³² of the Kenyan Constitution. The High Court of Kenya upheld his argument based on both section 77 and section 3¹³³ of the Kenyan Constitution. Without an appeal¹³⁴ on such a decision to the Court of Appeal of East Africa, the judgment effectively subordinated the Acts of the Community to the Constitution of a member state.

Any doubts cast upon the foregoing judgment by the High Court of Kenya were laid to rest in the often cited case of *Okunda and Another v Republic*,¹³⁵ in which the court held that it had no jurisdiction to entertain appeals from the High Court of Kenya on matters dealing with constitutional references. The facts of that case were that prosecutions were brought by the

¹²⁹ *Ibid*, see the discussions on the European Court of Justice and the European Court of Human Rights in Chapter 3.

¹³⁰ Miscellaneous Cause No. 7 of 1964 (unreported).

¹³¹ Held not to be a court under sec. 77.

¹³² Providing for fair hearing by an impartial court established by law.

¹³³ The supremacy clause providing that if any law be inconsistent with the constitution then that law will be null and void to the extent of that inconsistency.

¹³⁴ The EACA did not have jurisdiction over constitutional references, *ibid*.

¹³⁵ [1970] E.A. 453.

Attorney General against two persons under the Official Secrets Act 1968 of the East African Community without consent of the counsel to the community. This was contrary to section 8 (1) of the Act, which provided that the consent of the counsel is necessary to a prosecution. The question that arose in the Resident Magistrate's court was whether the Attorney General could institute such prosecution without the consent of the counsel to the community. In the light of the issue, the magistrate referred the question to the High Court pursuant to the section 67 of the then Kenyan Constitution.¹³⁶ It was submitted in the High Court that the Constitution¹³⁷ provided that the Attorney General was not subject to the direction or control of any person in the exercise of his functions. This meant that section 8 (1) of the Official Secrets Act was inconsistent with section 26 (8) of the Constitution. The latter prevailed since East African Community was a creation of parliament which is itself subject to the constitution. On the other hand, counsel for the community argued that section 8 (1) was procedural, and that any conflict should be determined in favour of the community legislation by reason that article 95 of the Treaty for East African cooperation imposed a requirement on the Partner States to enact legislation to give effect to the treaty and to confer on acts of the community the force of law in their territories. The High Court held that there was a conflict between the Attorney General's functions and the requirement of consent by the counsel to the community.¹³⁸ Secondly, that the laws of the community are other laws within the constitution, section 3, and are void to the extent of any inconsistency with the constitution with the constitution.

The East African Community filed an appeal to the East African Court of Appeal.¹³⁹ The appeal was struck out. One of the most instructive parts of the judgment was that the East African Court of Appeal had no jurisdiction in a constitutional reference in a criminal case¹⁴⁰ since there was no right of appeal to the court either by section 361 or section 379 of the criminal procedure code. In arriving at the decision the court observed that the appellate jurisdiction of the East African Court

¹³⁶ Section 67.

¹³⁷ Section 26 and 28.

¹³⁸ [1969] EACA, Pages 456 and 457.

¹³⁹ *East African Community v Republic* [1970] EACA, 457.

¹⁴⁰ *Ibid* at p. 459.

of Appeal is such as is given to it by the law of Kenya. The court concurred with the argument put forth by the community that there was nothing prohibiting the appeal, but also stressed that there was nothing in the constitution which specifically granted a right to appeal directly from a decision of the High Court given on a constitutional reference. The court stated, “While we accept that the provisions conferring appellate jurisdiction on this court should not be interpreted in a restrictive manner but rather in the most liberal manner, nevertheless the court can only exercise appellate jurisdiction where that jurisdiction is given by the law of Kenya”.¹⁴¹

The court went ahead and stated that in criminal proceedings the only right of appeal from the decision of the High Court is that given in section 361 and section 379 of the criminal procedure code. It observed that section 361 deals with second appeals to the court from the appellate jurisdiction of the High Court. The decision of the High Court on a constitutional reference to it was a decision given in an original jurisdiction and not an appellate jurisdiction. The court also noted that section 379 deals with appeals to the court from a conviction by the High Court of a person tried before it and also with a reversionary jurisdiction on the acquittal of any such person. It therefore followed that that section did not apply as neither of the accused had been tried before the High Court.

It is clear from the decision of the East African Court of Appeal above, that it did not have jurisdiction to hear appeals relating to constitutional matters. The jurisdiction of the East African court of appeal was limited in relation to constitutional matters and the High Court was made the final and most superior court with regard to such matters. Here was a regional court pleading lack of jurisdiction based on non-conferment of such by the laws of a member state!

The court could authoritatively be said to have lacked in some of the mundane areas and could not as constituted have any attributes of an international court. It was indeed a local court operating at a regional level. The court could not cure the mischief for which it was created. One can easily conclude that the demise of the initial East African Co-operation to which this chapter

¹⁴¹ *Op cit*, note 139 at p. 459.

now turns was partially if not substantially, contributed to by lack of elaborate and effective dispute resolution organ(s) and mechanisms.¹⁴²

2.8 The Fall of the (first) East African Community

There seems to be no exact date when the community finally collapsed but it is thought that the middle of 1977 when the partner states failed to approve the 1977/8 budget for the community may have marked the ultimate demise of the community.¹⁴³ The disintegration was however a gradual one, with the Community being formally dissolved in May 1984.

Various reasons may be attributed to the failure of the community.¹⁴⁴ However, it has been argued that the East African community collapse was more of a political decision than an economic development.¹⁴⁵ The main causes of the collapse of the East African community have been cited to include absence of an acceptable mechanism for fair distribution of advantages arising from the community, which was both an economic and a political issue.¹⁴⁶ Difficulties in the administrative system from the partner states which interfered with the meaning of the community. Another cause was lack of political commitment and will among the member states.¹⁴⁷ Finally, the external influence from countries, especially European countries with had strong links with individual member states of the community.¹⁴⁸ It is important to note here that the treaty for East African cooperation bestowed the ultimate authority of the community on the heads of states of the three countries thus the existence of the community was pegged on the relationship between the three individuals hence making it very delicate. It has indeed been concluded that the collapse was much due to deterioration in the personal relations among the presidents than to the other reasons.¹⁴⁹

¹⁴² See Odek, J. O. *op cit supra* note 26.

¹⁴³ Hazelwood *op cit supra* note 33.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ See Odek, J. O., *op cit*, note 26.

¹⁴⁸ Hazelwood *op cit*, note 33.

¹⁴⁹ See Oyugi, *op cit*, note 33.

2.9 The Re-launch of the East African Community

The revival of the East African Co-operation began formally in 1986 with the meeting of the three East African Heads of states.¹⁵⁰ This was followed by a series of meetings that culminated in the establishment in 1993 of the Agreement for the Establishment of the Permanent Tripartite Commission for Co-operation. It is not intended to discuss the role of the Commission here, but it must be mentioned that it played a pivotal role in the re-establishment of the East African Community.¹⁵¹ It came up with the framework for renewed co-operation and the new East African Community Treaty.¹⁵²

The rebirth of the East African Community was signalled when the Treaty for the East African Community was signed on November 30th 1999. This treaty entered into force on July 7th 2002 following its ratification by the East African partner states, Kenya, Uganda and Tanzania. The inauguration of the community on 15th January 2001 in Arusha was jubilantly welcome for its historical importance and the pride and hope that it reignited in the East African people.

The signing of the treaty for the establishment of the East African Community was a culmination of a long period of thorough negotiations and consultative processes among the East African people in their desire of reconstructing the system of co-operation that had existed before the collapse of the former community in 1977 for achieving integration were initiated on the 30th day of November 1993 when a provision was made by the agreement for the establishment of a permanent tripartite commission for cooperation between the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda for the creation of the permanent tripartite commission for cooperation (the tripartite commission)¹⁵³. This commission was charged with the duty of coordinating economic, social, cultural, security and political issues among the said countries and a declaration was also made for a closer East African Cooperation.¹⁵⁴ On 26th

¹⁵⁰ See Akiwumi, *op cit* note 43.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ See the Agreement on the Tripartite Commission.

November 1994 a protocol on the establishment of a secretariat of the permanent tripartite commission for cooperation was promulgated, which established a secretariat of the commission and the Republic of Uganda was to act as the secretariat of the tripartite commission on 29th April 1997 in Arusha, Tanzania, the heads of state of the three countries approved the East African Cooperation Development Strategy for the period 1997 -2000. They then directed the Tripartite Commission to embark on negotiations for the upgrading of the agreement establishing the tripartite commission into a treaty.

The treaty provides a framework for the eventual unification of the East African community partner states.¹⁵⁵ It sets out a detailed system of cooperation among the member states in agriculture and food,¹⁵⁶ infrastructure and services,¹⁵⁷ trade,¹⁵⁸ investments¹⁵⁹ and industrial development, monetary and fiscal policy,¹⁶⁰ human resources,¹⁶¹ science and technology, environment and natural resources management.¹⁶² The treaty has also recognized the role of women in socio economic development.¹⁶³ The most important feature of this treaty is that it has given a chance to the private sector and the civil society to participate in the affairs pertinent to the growth of the community.¹⁶⁴ Under the treaty, the customs union that was envisaged has already been established. This is intended to lead to the creation of a common market followed by a monetary union and finally a political federation of the East African states.¹⁶⁵

The Treaty establishes the various organs of the community which include the Summit of the Heads of state, the Council of Ministers, the Coordination Committee, the Sectoral Committees the East African Court of Justice, East African Legislative Assembly the Secretariat and other

¹⁵⁵ Preamble to the new Treaty.

¹⁵⁶ Articles 105 to 110.

¹⁵⁷ Articles 89 to 101.

¹⁵⁸ Articles 74 to 78.

¹⁵⁹ Articles 79 and 80.

¹⁶⁰ Articles 82 to 88.

¹⁶¹ Articles 102 and 103.

¹⁶² Articles 111 to 114.

¹⁶³ See the Preamble and Articles 121 and 122.

¹⁶⁴ Articles 128 and 129.

¹⁶⁵ See generally Chapter 11 of the Treaty.

institutions of the community.¹⁶⁶ The objectives of the community are set out in article 5 of the Treaty. They include *inter alia*, to develop policies and programs aimed at widening and deepening cooperation among the partner states in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs for their mutual benefit, the establishment of a customs union, a common market, a monetary union and ultimately a political federation that will strengthen and regulate the commercial, industrial infrastructural, cultural, social, political and other relations of the partner states to the end that there shall be accelerated, harmonious and a balanced development and a sustained expansion of economic activities, the benefits of which shall be equitably shared.¹⁶⁷

The community is accorded legal capacity within each of the partner states. It shall be a body corporate with perpetual succession with power to acquire, hold, manage and dispose of land and other property and be sued and sue in its own name.¹⁶⁸ The Secretary General shall represent the community as a body corporate. The Treaty also provides that the fundamental principles that shall guide the achievement of the objectives of the community include mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness, peaceful settlement of disputes; good governance; equitable distribution of benefits and cooperation for mutual benefit.¹⁶⁹

¹⁶⁶ Article 9.

¹⁶⁷ Article 5.

¹⁶⁸ Article 4.

¹⁶⁹ Articles 6, 7 and 8.

CHAPTER 3: THE EACJ AND THE OBJECTIVES OF THE EAST AFRICAN COMMUNITY

3.1 Introduction

The East African Court of Justice, like the other organs of the Community is established under Article 9 of the Treaty.¹⁷⁰ The role of the Court is to be a judicial body, which should ensure adherence to law in the interpretation and application of and compliance with the Treaty (“**the Treaty**”) establishing the Community.¹⁷¹ It is therefore the main organ for adjudication of disputes where the treaty is concerned. This chapter attempts a juridical analysis of the place, status and functions of the court in as far as it is suited for furthering the objectives of the Community. The analysis will be based on the Treaty as history and practice has shown that the success of any court or tribunal, whether it is domestic or international, in discharging its judicial functions is to a large extent dependent on the powers conferred on it by the creating instrument.¹⁷² It is for this reason that this chapter seeks to link the role of the court with the objectives and ambitions of the community, for the role of a dispute resolution mechanism within any integration framework cannot be over-emphasized. Without delving into the synthesis of the same, it may be instructive to state herein briefly the objects of the Community, which the court is to aid in realizing.

3.2 Objectives of the Community

The objectives of the EAC are not only embodied in the preamble of the Treaty but are comprehensively covered within the Treaty itself.¹⁷³ Just like the defunct East African Community, the present East African Community is widely regarded as an instrument for

¹⁷⁰ Also established include the Legislative Assembly, the Council and the Summit.

¹⁷¹ Article 23.

¹⁷² Being in the province of international law, states and governments are not always ready to submit themselves before tribunals that they cannot control hence limited jurisdiction.

¹⁷³ Article 5 generally.

achieving economic development and progress through cooperation.¹⁷⁴ The preamble of the Treaty states in part that the Community was established with a view to realizing a fast and balanced regional development and that the partner states resolved to create an enabling environment in all the partner states in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities through the development of sound macro-economic sectoral policies and their efficient management.¹⁷⁵

On the other hand, Article 5 of the Treaty elaborates this objective in detail. Paragraphs 2 and 3 state respectively as follows: -

1. The objective of the Community shall be to develop policies and programmes aimed at widening and deepening cooperation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.
2. In pursuance of the provisions of paragraph 1 of this Article, the partner states undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the partner states to the end that there shall be accelerated harmonious, balanced and sustained expansion of economic activities, the benefit of which shall be equitably shared.

Further, Article 5 (3) provides for duties and obligations that the partner states shall undertake to ensure that the objectives of the EAC are realized. These objectives of the Community were well captured in the Community's Development Strategy (2001-2005).¹⁷⁶ It focuses on a priority

¹⁷⁴ See the Preamble of the EAC Treaty.

¹⁷⁵ *Ibid*

¹⁷⁶ The Development Strategies (2001-2005, 2006-2010 and 2011-2016) are usually signed and adopted by the three Head of States of the East African Countries. The strategy is a systematic way of charting out action towards achieving the goals of integration in the EAC. The strategy of 2001-2005 was the successor of the first development period which covered the period between 1997-2000. This first Strategy formed the basis of the Treaty that established the current East African Community.

programme towards establishment of a Customs Union and a common Market as the starting point for laying the foundations for attaining a strong and international competitive single market and investment area in the region. It is then that it is expected that a political and economic federation will be born.

In the light of the above exposition on the objectives of the EAC, it is apparent that the regional cooperation and integration envisaged in the EAC is broad based,¹⁷⁷ covering trade and industrial development; monetary and fiscal affairs; infrastructure and services; science and technology; agriculture and food security; environmental and natural resources management; tourism and wildlife management and health, social and cultural activities.¹⁷⁸

To successfully accomplish the aforementioned objectives, the Treaty has constituted several organs that are charged with various functions.¹⁷⁹ It is hoped that this body of organs provides a framework under the treaty that fosters regional peace and security, while providing an appropriate response for economic development and competitiveness in light of globalization of trade and transnational corporations. The East African Court of Justice forms a part of this institutional framework.¹⁸⁰

3.3 The structure, Composition and Jurisdiction of the EACJ

The East African Court of Justice (“**the EACJ**”) is established under Chapter 8 of the Treaty Establishing the EAC. Its major responsibility is to ensure adherence to law in the interpretation and application and compliance with the Treaty.¹⁸¹ Following its inauguration by the Summit and the swearing in of Judges and the Registrar on 30th November 2001, the East African Court of Justice became operational. The operations of the Court during the transitional period are *ad hoc* until the Council of Ministers determines that there is enough business to make it fully

¹⁷⁷ Chapter one of the Treaty.

¹⁷⁸ See Article 5 of the Treaty.

¹⁷⁹ *Op cit*, note 1.

¹⁸⁰ Other organs of the Community include: The Summit of Heads of State and Government; Council of Ministers; Co-ordination Committee; Sectoral Committees; East Africa Assembly and the Secretariat.

¹⁸¹ Article 23 of the Treaty Establishing the EAC.

operational.¹⁸² This means that judges are not required to permanently reside in Arusha where the temporary seat of the Court is located.¹⁸³

It is proposed, in examining the role of the court to consider the composition of the court, its jurisdiction, the applicable jurisprudence, the affected member states and the position of legal and natural persons before it.

3.4 Composition of the EACJ

The composition of the court is limited to fifteen judges, three from each member state of the community.¹⁸⁴ The Judges are appointed by the Summit¹⁸⁵ from among sitting judges of any National courts of judicature or from jurists of recognized competence. The Registrar is appointed by the Council of Ministers.¹⁸⁶ The President and the Vice President are also appointed by the Summit from the Judges of the Court.¹⁸⁷ The Court may employ such other staff to enable it to perform its functions.¹⁸⁸ The court is supposed to exemplify a fair and trustworthy judicial institution. The judges appointed for five years must be persons of impartiality and independence.¹⁸⁹

¹⁸² *Op cit*, note 176.

¹⁸³ The Court has admitted several cases since its inauguration.

¹⁸⁴ The current sitting Judges of the Court:-

Appellate Division

- Hon. Mr. Justice Harold Reginald Nsekela-President of the Court (United Republic of Tanzania)
- Hon. Mr. Justice Phillip Kiptoo Tunoi-Vice President (Republic Of Kenya)
- Hon. Lady. Justice Emillie R. Kayitesi (Republic of Rwanda)
- Hon. Mr. Justice Laurent Nzosaba (Republic of Burundi)
- Hon. Mr. Justice James Ogoola (Republic of Uganda)

First Instance Division

- Hon. Mr. Justice Johnston Busingye-Principal Judge (Republic of Rwanda)
- Hon. Lady. Justice Mary Stella Arach-Amoko- Deputy Principal Judge (Republic of Uganda)
- Hon. Mr. Justice John Mkwawa (United Republic of Tanzania)
- Hon. Mr. Justice J. Butasi (Republic of Burundi)
- Hon. Mr. Justice Isaac Lenaola (Republic of Kenya).

¹⁸⁵ Article 24 of the Treaty.

¹⁸⁶ Article 45 of the Treaty.

¹⁸⁷ Article 24 (4).

¹⁸⁸ *Ibid*.

¹⁸⁹ Article 24 (1).

It must be underscored that in the application of international law, which the judges of the community must apply, one need not be qualified for appointment as a judge in his own country if he be a recognized jurist or academic. The provisions relating to the tenure of office of the judges of the court are well made to ensure continuation in office, as they will be replaced in rotation.¹⁹⁰

One concern with the composition of the court regards the functions to be carried out by the President and Vice President of the Court. It may seem that the provisions of art. 26 (4)¹⁹¹ are contradicted by those of 26 (7)¹⁹² in as far as the latter allows the Summit to appoint a temporary President where the President disqualifies himself from a case disregarding the former which allows the VP to act in the President's capacity under certain situations. There is therefore need to synchronize the two provisions and clearly define the role of the Vice President of the Court.

The appointment of judges in the judiciaries of their countries brought to the fore a controversial situation with the suspension of the former president of the court from his duties in his home country for alleged misconduct.¹⁹³ Such judges once appointed should resign from their national duties.

3.5 The Jurisdiction of the EACJ

The EAC Treaty imposes a number of obligations upon the member states ranging from trade liberalization, financial co-operation, co-operation in transport and communication, energy,

¹⁹⁰ Article 24 (3).

¹⁹¹ Providing for the Vice President to deputize the President in case of the latter's incapacity.

¹⁹² Allowing the Summit to appoint a temporary President.

¹⁹³ In what was famously dubbed 'radical surgery' in the judiciary in Kenya, a number of judges were suspended while others opted to resign. The late Justice Moiwo ole Keiwua was to appear before a Tribunal appointed to investigate his conduct. Although he was cleared it was awkward when he was suspended from his duties in his home country.

industrial development, science and technology through health and environmental matters,¹⁹⁴ which are bound to bring to the fore a lot of litigation before the Court¹⁹⁵.

The jurisdiction of the Court under the relevant part of the Treaty is as follows: -

1. The court shall initially have jurisdiction over the interpretation and application of this treaty.
2. The Court shall have such other original, appellate, human rights and other jurisdictions as will be determined by the Council at a suitable subsequent date. To this end, the partner states shall conclude a protocol to make operational the extended jurisdiction.¹⁹⁶

In the light of the jurisdiction conferred on the Court, the Court has the competence to determine the following matters within the region; -¹⁹⁷disputes on the interpretation and application of the Treaty; disputes between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations; disputes between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement; disputes arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the Court to which the Community or any of its institutions is a party; disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.¹⁹⁸

¹⁹⁴ Chapter Two of the Treaty.

¹⁹⁵ So far the court has delivered 24 judgments, 17 rulings on applications, 6 taxation rulings and 1 advisory opinion. See <http://www.eacj.org/judgments.php>, http://www.eacj.org/other_rulings.php and http://www.eacj.org/advisory_opinions.php. (last visited on 9/11/2012).

¹⁹⁶ Article 27 of The Treaty.

¹⁹⁷ Refer to note 176 above.

¹⁹⁸ Article 27.

As stated,¹⁹⁹ the primary function of the Court is to uphold the rule of law and ensure adherence to the law in the interpretation and application of the relevant treaty.²⁰⁰ The Treaty makes directions as to who may approach the court. These are discussed hereunder.

Reference by Partner States

The Court has the power to hear and determine a matter referred to it by a Partner State²⁰¹ if the latter considers that another Partner State or an organ or an institution of the Community has failed to fulfil an obligation or has infringed a provision of the Treaty, may refer the matter to the Court.²⁰² A State may also seek the Court to determine the legality of any Act, regulation, directive decision or action on the ground that it is beyond its powers or unlawful or infringes the provisions of the Treaty.²⁰³

Reference by the Secretary General

If a Partner State fails to fulfil its obligation under the Treaty, the Secretary General may refer the matter to the Court upon the approval of the Council.²⁰⁴

Reference by Natural and Legal Persons

The court will also give audience to natural and legal persons concerning the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that it infringes the provisions of the Treaty.²⁰⁵ This person however must be a resident of a member state.²⁰⁶ This right is also subject to the jurisdiction of the court as set out in

¹⁹⁹ *Op cit*, note 171.

²⁰⁰ *Ibid*.

²⁰¹ Article 28.

²⁰² Article 28 (1).

²⁰³ Article 28 (2) of the Treaty.

²⁰⁴ Article 29 of the Treaty.

²⁰⁵ Article 30 of the Treaty.

²⁰⁶ *Ibid*.

article 27. Whether the persons are to exhaust remedies available in their municipalities still remains untested. This approach by natural and legal persons is the main focus of this thesis.

Advisory Opinions

The Summit, the Council or a Partner State may request the Court to give an advisory opinion regarding a question of law arising from the Treaty and which affects the Community.²⁰⁷ The Court may review its judgment upon discovery of a new and important matter or evidence which, was not within its knowledge or could not be produced at the time when the judgment was passed, or on account of some mistake, fraud or error apparent on the face of the record, or because an injustice has been done.²⁰⁸

3.6 Execution of the Judgments of the Court

A very important component of dispute resolution is the enforceability of the result of such resolution. The treaty herein contemplates and indeed gives the court the power to impose a pecuniary obligation upon any party found in violation of its treaty obligations. Member states and parties concerned undertake to accept the judgment of the court. Upon the court giving judgment, a member state is bound to take steps to implement the judgment of the court without undue delay.²⁰⁹ It further allows the court to make interim orders or issue interim directions as may be necessary for the ends of justice.²¹⁰ However, the Treaty glaringly lacks in the ability of the court to secure the implementation of its judgments. It does not give the court the power to impose any sanctions against a member who fails to meet its judgment.

²⁰⁷ Article 36 of the Treaty.

²⁰⁸ Article 35 (30) of the Treaty.

²⁰⁹ See Article 38 of The Treaty.

²¹⁰ Article 39 of The Treaty.

The Court has so far put in place the [Rules of Procedure](#)²¹¹ and the [Rules of Arbitration](#).²¹² The rules are simple and user friendly. The execution of judgments of the Court, which imposes a pecuniary obligation on a person, shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place.²¹³ Where there is no pecuniary obligation involved, the Partner States and the Council are under obligation to implement a judgment of the Court without delay.²¹⁴

Having looked at the structure, composition and jurisdiction of the Court, it is important now to analyze the issues invoked by the status of the court. The question that looms high is whether the Court as constituted is sufficiently mandated and competent to discharge its functions. An issue that arises is the role of the court in promoting the objectives of the EAC and its adequacy *vis-a-vis* the status of the court.

3.7 Role of the Court in Resolving Trade Disputes

One of the main reasons for countries forming international and regional economic institutions is the need to have a dispute settlement mechanism.²¹⁵ Existence of such a dispute settlement mechanism has the effect of reducing tension between countries and also making them avoid recourse to force and resolve any trade disputes.²¹⁶ Within the EAC, it is expected that the EACJ will discharge this duty efficiently. Its ability to do so is largely dependent on its status.

It cannot be over-emphasized that the dimensions of contemporary trade, both at international and domestic level, have considerably been increased to greater heights.²¹⁷ Increase in trade and

²¹¹ See <http://www.eacj.org/docs/EAC%20Gazette%205-5-10.pdf> (last visited on 10/10/2012).

²¹² See http://www.eacj.org/docs/EACJ_Arbitration_Rules.pdf (last visited on 10/10/2012).

²¹³ Article 44 of the Treaty.

²¹⁴ *Ibid.*

²¹⁵ See generally J.G. Merrills, *International Dispute Settlement*, 2nd edn, Cambridge, 1991.; United Nations, *Handbook on the Peaceful Settlement of Disputes Between States*, New York, 1992.

²¹⁶ *Op cit.*

²¹⁷ Visit http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm. (last visited on 10/10/2012).

commercial transactions inevitably provide a potential ground for trade disputes and conflicts. As such, those who commit themselves to commercial transactions within a region must be assured that an efficient dispute resolution mechanism is in place. It is for this reason that Amaza A. Asouzu (1994) Comments as follows: -

“It should be noted that commercial transactions are becoming increasingly complex, making occasions for conflict common and inevitable. However, disputes are a normal part of any legal relationship, much more, those involving money and national policies. The occurrence of disputes puts all the vital interests and stakes implicated in commercial transactions at risk. Disputes are sources of mistrust and ill feeling. They may accordingly have diverse consequences on the good faith and confidence which are useful ingredients in commercial transactions.”²¹⁸

The EAC, therefore, must first assure all commercial stakeholders that the EACJ is a body that will efficiently resolve disputes that may arise in their commercial endeavours. The challenge upon the EAC in general and the EACJ in particular is not to entirely eliminate disputes but to offer expedient solutions when they occur.²¹⁹ In this regard, Amaza A. Asouzu writes thus: -

“Since disputes are inevitable in commercial relationships, the challenge of international commerce is how to provide for a fair, just and effective mechanism for the resolution when they arise. Effective dispute management is ultimately a prerequisite for an orderly growth of international trade and investment. The certainty, predictability and neutrality of forum assure this.”²²⁰

As stated,²²¹ even before admitting the first dispute, the court was already faced with a number of hurdles which need to be surmounted for it to be able to serve as an effective dispute resolution forum for the member countries.

²¹⁸ Asouzu, A. A. (1994) “ *Considering Arbitration as an Incident of Trade and Investment in a African Setting*” in a paper presented to the Sixth Annual Conference of the Africa Society of International and Comparative Law, 5-8 Sep in Kampala, Uganda.

²¹⁹ See e.g. Lauterpacht, H. (1933) *The Functions of Law in the International Community*, Oxford University Press, London, 19-20.

²²⁰ Asouzu, A. A. “*Arbitration as a factor of Integration within the African Economic Community*” in a paper presented to the 8th Annual Conference, 2-4 Sept, 1996, Cairo, Egypt.

²²¹ *Op cit*, note 193.

3.8 Factors Limiting the Efficiency and Effectiveness of the EACJ

The EACJ faces many challenges in its structure, composition and jurisdiction. As underscored elsewhere in this chapter²²² the provisions relating to the making of the Court operational have been long in implementation. The EAC has until now failed to establish a protocol expanding the jurisdiction of the EACJ in terms of Article 27(2) of the Treaty. Therefore it is unable to expediently resolve trade disputes and other conflicts. The 2nd EAC Development Strategy (2001-2005)²²³ anticipated that by the end of the strategic period a functioning EACJ would have been in place.²²⁴ This may be said to have been achieved on 30th November 2001, the day that saw the inauguration of the Court by the Summit and the swearing in of the judges and the registrar. In the 3rd EAC Development Strategy (2006-2010), the operations of the Court were shown to be still ad hoc and it had received one case.²²⁵ At this stage the Protocol for the Establishment of the EAC Customs Union had been put in place but had strangely established alternative dispute settling mechanisms outside the Court's structure.²²⁶ The 3rd EAC Development Strategy (2006-2010) still had in its development objective for the East African Court of Justice to have, "an effectively operational EACJ."²²⁷ In the 4th EAC Development Strategy (20011-2015), even though it is acknowledged that the court had handled 23 references and applications, it was still working on an ad hoc basis and has as a development objective to enhance the capacity of the Court.²²⁸ The Court cannot therefore be said to be adequately and efficiently be in operation when it lacks the pertinent powers to discharge very important matters in the region such as trade disputes resolution.

²²² See discussion on the jurisdiction of Court above.

²²³ See note 176 *supra*.

²²⁴ Page 32 of the East African Community Development Strategy 2001-2005.

²²⁵ Page 21 of the East African Community Development Strategy 2006-2010.

²²⁶ See Article 41 of the Protocol on the Establishment of the East African Customs Union.

²²⁷ Page 50 of the East African Community Development Strategy 2006-2010.

²²⁸ See pages 48 and 70 of the East African Community Development Strategy 2011-2015.

3.9 The Narrow Jurisdiction of the Court

Currently the Court only has jurisdiction to deal with matters that relate to the interpretation and application of the Treaty.²²⁹ This is so narrow a jurisdiction to address the complexities of modern trade. The East African countries in a bid to achieve the purposes for which they formed the community must enter into commercial transactions with international corporations and multinationals. The Court cannot also deal with disputes arising from the Customs Union which was implemented in 2005.²³⁰ When such corporations and multinationals enter into contracts with the East African countries, they do so in the hope that in case they fall into a dispute then a speedy and efficient remedy will be provided. They must be assured of the *locus standi* to approach not only the national courts of these countries but also the EACJ.

However, in relation to commercial transactions, the EACJ can only determine matters arising out of an arbitration clause contained in a contract or an agreement, which confers such jurisdiction on the court to which the community or any of its institutions is a party.²³¹ This poses several problems. First, unless the Community or any of its institutions is a party to the contract, then the jurisdiction of the court may not be invoked. This means that those corporations, which have neither entered into commercial agreement with the community nor any of its institutions, may not find redress in the EACJ. Further any disputes related to the Customs Union cannot also be referred to the Court and the Custom Union in itself is a potential dispute generating area. The import of such a provision is that many of the corporations or multinationals that may be willing to invest in East Africa are discouraged from doing so for the region lacks an efficient dispute resolution mechanism.

It is further noteworthy that the jurisdiction of the court is limited to the interpretation of the Treaty provisions only.²³² It does not extend to legislation made under the authority of the Treaty.

²²⁹ Article 27.

²³⁰ *Op cit* note 226.

²³¹ Article 32.

²³² Article 27.

This may lead to technical problems when the court is called upon to adjudicate on a matter arising from laws, regulations or directives made pursuant to the Treaty.

3.10 Appellate Jurisdiction

The Treaty allows domestic courts of the member states to hear and determine matters concerning the Treaty.²³³ However, it does not confer to the Community Court the requisite jurisdiction to deal with appeals from such national courts.

This is in contrast with the earlier East Africa Court of Appeal.²³⁴ This deficiency has a negative effect on the development of trade and the economy of the member states of the East African Community. It is always the expectation of an international corporation or multinational, countries or individuals that in case the national courts of a country in which they are residents or have invested in have not remedied a dispute favourably to them, then they will seek redress to a regional or international court. Current and future Corporations, individuals, countries and multinationals lack this privilege under the EAC framework. The lack of the appellate jurisdiction of the EACJ therefore stands as an impediment towards achieving the objectives of the EAC.

3.11 Human Rights Jurisdiction

The court has no jurisdiction over human rights issues.²³⁵ The economy, investment and trade have a close link with the factors that surround the concept of human rights.²³⁶ Trade can only thrive in a region where the human rights of the populace respected, promoted and protected.²³⁷ One cannot divorce trade from the people who facilitate the trade; otherwise trade will come to a

²³³ Article 33.

²³⁴ The defunct East African Court of Appeal was a court of appeal from decisions of the National Courts on both civil and criminal matters except constitutional matters and the offence of treason for Tanzania.

²³⁵ The Draft Protocol to the Treaty makes provisions for the operationalisation of the Court's human rights jurisdiction.

²³⁶ See for example the view of the EU Court in *Stauder v City of Ulm* [1969] E. C. R. 419.

²³⁷ See Onyango, J. O. and Udagama, D. (2001) "[*Globalization and its impact on the full enjoyment of human rights*](#)", ECOSOC, New York. A progress report submitted in accordance with [United Nations Economic and Social Council Sub Commission Resolution E/CN.4/Sub.2/2001/10](#).

standstill. It is on this account that Carste Thomas Ebenroth and Chris Maina Peter (1996) observe as follows: -

“Over and above the existence of the proper legal framework guaranteeing protection to investments, investors are interested in a political climate that will be conducive for their business. No one invests in a jurisdiction which does not respect the rule of law and fundamental rights and freedoms of the people both local and foreign.”²³⁸

In addition to its lack of jurisdiction over human rights, the Treaty limits itself to human rights only yet it is universally accepted that the concept of rights goes beyond human rights and embodies other fundamental rights and freedoms.²³⁹ Human rights can only be claimed by natural persons. This, therefore, means that artificial or juristic persons e.g. companies etc. who are involved in trade with the Community or the East African Countries cannot invoke the jurisdiction of the Court when their fundamental rights and freedoms are infringed.

It can be noted however, that even where the Court would have the human rights jurisdiction, the nature of the court itself may preclude it even with such a jurisdiction from effectively adjudicating on human rights abuses.²⁴⁰ Respect for human rights and fundamental freedoms must definitely form an integral part of the general principles of law protected by the East African Court of Justice.²⁴¹ This must be and is indeed ensured within the framework of the structure and objectives of the Community.²⁴² The court should be able to respond to such requirements.

3.12 Requirement of Residence for access to the Court

The Treaty provides for reference by legal and natural persons of disputes before the courts but casts one major limitation.²⁴³ The import of the above provision is that the legal or natural person seeking the audience of the Court must be a resident in any of the five partner states of the

²³⁸ Ebenroth, C. T. and Maina C. P. (1996) “*Protection of Investment in Tanzania: Some New Issues from Zanzibar*” 8 *African Journal of International and Comparative Law*, 4.

²³⁹ See Renteln, A. D. (1988) “*The Concept of Human Right*” 83 *Anthropos*, 343 – 364.

²⁴⁰ But see the comment of the European Court of Justice in *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] E. C. R. 1125.

²⁴¹ See Articles 6 and 7 of the Treaty.

²⁴² *Ibid.*

²⁴³ See Article 30.

Community. Science and technology has facilitated trade in the contemporary world such that transactions are executed across the seas with the click of buttons. Many corporations and persons who are currently or intend to carry on business in East Africa are not necessarily residents in the region. This means that in the event they fall into a trade dispute, then they may not be in a position to seek the redress of the EACJ. This limitation has a direct negative effect on the Community's endeavours to realize her objectives. According non-residents who are involved in business in East Africa, the *locus standi* before the EACJ will go a long way in attracting more investors in the East African region.

3.13 Execution of the judgments of the Court

The court is conferred with Treaty-power to ensure that Member States implement its judgments. It does not have the power to impose any sanctions in case of non-compliance. The court has no criminal jurisdiction whatsoever neither does it have the power to commit for contempt any entity or person who fails to comply with its judgments.²⁴⁴ This makes it difficult both for the parties approaching the court and itself as there is no assurance that the judgment of the court will bear any fruits.

3.14 The EACJ and the Member State's National Laws and Courts

One of the major handicaps of the former East Africa Court was its apparent lack of superiority over the national courts of the member states.²⁴⁵ Coupled with this was the subordination of the Community law to those of the constitutions of the member states by the decision in *Okunda and Another v Republic*.²⁴⁶ The East African Court of Appeal in striking out the appeal filed by the East African Community made the following observation obiter:-

“...it is quite clear that the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or of any other country which has been applied in Kenya, which is in conflict with the

²⁴⁴ See for example comments by Brown, L. N. And Jacobs, F. G. (2000), *“The Court of Justice of the European Communities.”* 5th Edition, Sweet and Maxwell, London, 285.

²⁴⁵ See Barnett, H. (2004) *Constitutional & Administrative Law*, 5th Edition, Cavendish Publishing Limited, London 253-264.

²⁴⁶ [1970] EA 453.

Constitution is void to the extent of the conflict... If the provision of any treaty having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void.”²⁴⁷

The Treaty does not cure these two defects. In fact, it appears that the decisions of the EACJ may not have any impact over the national courts of the member courts on matters touching on or incidental to community law. It must be emphasized that one major reason for establishing a regional treaty based court like the EACJ is to secure the uniformity in interpretation and application of the community law.²⁴⁸ Lack of clear provisions entrenching the position of the Community law and the court against those of the member states will not only put the court at collision path with the member state’s courts but will also lead to uncertainty as to the law to be applied and a multiplicity of interpretations to a single treaty provision.²⁴⁹

3.14 The Role of the Court in Promoting Investment

The vision of the regional integration embodied in the EAC is to create wealth, raise the living standards of all people of East Africa and enhance international competitiveness of the region. It is hoped that this vision will be achieved through increased production, trade and investment into the region.²⁵⁰

For the EAC to attract more investors then it must create incentives that will encourage them to invest in the region. The judicial system within the region is one such impetus that may guarantee the attraction of investors. Investors can only invest in a region or regime where they are assured of an expedient dispute management system. It has been observed that the ability to attract investment projects is largely a function of the relationship between the host state or region and the investor. In this regard Carste Ebenroth *et al* write as follows: -

“The relationships between investors and host states have not always been smooth. It is a relationship that is surrounded by uneasiness, suspicion and to some extent distrust. However in the final analysis, it is a relationship of inter-dependence. Investors on the one hand, would

²⁴⁷ *East African Community v Republic* [1970] EA 457 at 458.

²⁴⁸ *Op cit*, note 171.

²⁴⁹ *Op cit*, note 244 at p. 251.

²⁵⁰ Preamble of the Treaty.

like to gain a reasonable and appropriate profit from their capital and to achieve this they would like to have a free hand in their business with very little, if any, control by the governments of their host countries. The host governments on the other hand would like to ensure that the investment made is useful for the development of their national economy as a whole. In their exercise of sovereign rights, host states feel that they have a duty to control each and every activity taking place within their borders. For developing countries, this issue takes even a more serious and wider dimension. Presence of powerful investors within their jurisdiction is perceived as a danger threatening their very existence as states.”²⁵¹

With such a fragile relationship between the host states and the investors attributed to their competing interests, conflicts are bound to occur. This, therefore, calls for a proper mechanism for addressing such conflicts. As it has been argued above, the EACJ has a limited capacity to attract investors in the region. There is thus a dire need to expand the jurisdiction of the court if more investors are to be attracted in this region and hence meet her objectives as embodied in the Treaty.

It has so far been argued herein that the EACJ has a great role in promotion of the objectives of the EAC, however, it has been submitted too that the EACJ lacks the capacity to adequately fulfil this role. There is thus a need to reconsider the status of the court to make it relevant in fulfilling the objectives of the community.²⁵²

²⁵¹ *Op cit*, note 238.

²⁵² See Ellis, E. and Tridimas, T. (1995) *Public Law of the European Community: Text, Materials and Commentary*; London, Sweet and Maxwell.

CHAPTER 4: BENCHMARKS

4.1 Introduction

The rejuvenation of the East African Community comes at a time when a number of regional economic and trade arrangements have been around, with some registering appreciable levels of success.²⁵³ The new East African Community is therefore not alone in fostering the agenda of economic development through regional integration. The Eastern and Central Africa has The Common Market for Eastern and Southern Africa (COMESA), the Southern Africa has the Southern Africa Development Community (SADC). The Intergovernmental Authority on Drought and Development (IGADD) and the Indian Ocean Commission add to the growing number of regional organisations. In the West, the European Union and its principal organ the European Community has been a remarkable success where pursuit of regional economic advancement through integration is concerned. Chapter two of this thesis examined the legal and jurisdictional status of the East African Court of Justice. Having been set up as a regional court, the ability of the court to achieve its agenda in fostering regional economic, social and political growth and cohesion much depends on its ability to utilise the powers conferred upon it judiciously and strategically. The experience of other regional courts with similar agenda and mandate is therefore invaluable to the EACJ's efficacy and effectiveness. For the purposes of the current discussion the COMESA Court of Justice and the European Court of Justice will be used to provide comparative studies and experiences on the operations and workings of regional courts. The studies will be instrumental in furthering the overall objective of the discussion and in making recommendations and creating best practices for reinvigorating and strengthening the inactive EACJ.

²⁵³ Kiplagat, P. K. (1995) "*Jurisdictional Uncertainties and Integration Processes in Africa: The Need for Harmony*" *Tulane Journal of International and Comparative Law*, 43.

4.2 The Common Market for Eastern and Southern Africa

In 1993, the Authority of the Preferential Trade Area for Eastern and Southern Africa (PTA), in compliance with the Treaty Establishing the Preferential Trade Area for Eastern and Southern Africa²⁵⁴ agreed to transform the PTA into the Common Market for Eastern and Southern Africa (COMESA).

The COMESA Treaty,²⁵⁵ like the East Africa Community Treaty,²⁵⁶ makes the object of attaining sustainable growth and development by promoting a more balanced and harmonious development among its members a major focus. Whereas the COMESA treaty provides for the creation of sub-regional common market with the ultimate objective of forming into an economical community,²⁵⁷ the East African Community treaty contemplates the establishment of customs union and a common market followed by a monetary union with the ultimate objective of merging into a political federation.²⁵⁸

That the East African Community has benefited from the COMESA and its establishing Treaty is not a matter of speculation. The need for and motivation towards economic co-operation is evidenced in the formulation of their treaties. Co-operation in trade liberalization, development and creation of customs union is a common theme and is captured in near common terms in both their treaties.²⁵⁹ In both, members are called upon to co-operate in investment and industrial development,²⁶⁰ monetary and financial measures,²⁶¹ development of infrastructure and services,²⁶² development of agriculture,²⁶³ free movement of persons, labour and services,²⁶⁴ environment and

²⁵⁴ Article 29.

²⁵⁵ Article 3.

²⁵⁶ Article 5.

²⁵⁷ See Chapter six generally.

²⁵⁸ Articles 5 (2), 75 and Chapter Eleven generally.

²⁵⁹ Compare Chapter six of the COMESA Treaty and Chapter Eleven EAC Treaty.

²⁶⁰ Chapters 12 of both Treaties.

²⁶¹ Chapter ten COMESA Treaty and fourteen EAC Treaty.

²⁶² Chapter Eleven COMESA Treaty and chapter fifteen EAC Treaty.

²⁶³ Chapters Eighteen COMESA of both Treaties.

²⁶⁴ Chapter Twenty Eight COMESA Treaty and Chapter Seventeen EAC Treaty.

natural resources,²⁶⁵ health, social cultural activities,²⁶⁶ tourism²⁶⁷ and science and technology,²⁶⁸ among others. Co-operation on political matters including the promotion of peace, security and stability among the member's states with a view to enhancing economic development is emphasized within both blocs.²⁶⁹

To further augment the thesis that the East African Community has much to share with the COMESA it may be instructive to mention that the organs of the two institutions are identical. Save for the names, the Summit within the East African Community has similar functions as those of the Authority under COMESA.²⁷⁰ The foregoing is true about the Council and the various committees and other organs set under the two treaties.²⁷¹

It is not intended to compare the treaty provisions or the objectives of COMESA and the EAC in this thesis. However, a brief run down on the two as done above reveals a number of synergies between the institutions under revision to warrant a further analysis of the dispute resolution mechanisms i.e. the courts of justice established within their legal frameworks. Indeed, the use of precedents, if done within reasonable bounds and without being slavish, has proven to be a valuable technique within the common law legal systems. The benefits of earlier existence and hence experience commends the juxtaposition of the workings of the COMESA Court of Justice against those of the East African Court of Justice in an attempt to improve the younger East African Court of Justice.

The COMESA Court of Justice has admitted a number of disputes from which valuable experiences may be drawn for the sake of this study. It is the comparison of the workings of the two courts that the first part of this chapter now turns.

²⁶⁵ Chapter Sixteen COMESA Treaty and Chapter Nineteen EAC Treaty.

²⁶⁶ Chapters Fourteen and Twenty One COMESA Treaty and Chapter Twenty One EAC Treaty.

²⁶⁷ Chapter Nineteen COMESA Treaty and Chapter Twenty EAC Treaty.

²⁶⁸ Chapter Seventeen COMESA Treaty and Chapter Sixteen EAC Treaty.

²⁶⁹ Chapter Twenty Seven COMESA Treaty and Chapter Twenty Three EAC Treaty.

²⁷⁰ Chapter Four Article 8 COMESA Treaty and Chapter Four EAC Treaty.

²⁷¹ See generally chapter four of the COMESA Treaty and chapters three through ten of the EAC Treaty.

4.3 The COMESA Court of Justice and the EACJ

The EAC is modelled along the lines of the Common Market for Eastern and Southern Africa (COMESA). The creation of the EACJ is based on almost identical reasons for that of the COMESA.²⁷² The COMESA Court of Justice is an organ for the adjudication of any matter over which it has jurisdiction.²⁷³ The important factors that will be taken into account when comparing the two courts are the composition of the Courts, the jurisdiction of the Courts, the applicable jurisprudence and the affected Member States and legal and natural persons.

The Composition of the COMESA Court of Justice

The composition of the COMESA Court is limited to seven judges from seven²⁷⁴ out of the twenty Member States of COMESA. The COMESA imposes on the COMESA Court the responsibility of being seen by all Member States and other users of the Court, to be a fair and trustworthy judicial institution. As is usual in respect of international courts, the judges of the COMESA Court should be persons of impartiality and independence who fulfil the condition required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognised competence.²⁷⁵ They are appointed for a period of five (5) years renewable for another period of five years.²⁷⁶

These provisions of the COMESA Treaty have their genesis not only from Treaty Establishing the European Community,²⁷⁷ but also the Statute of the International Court of Justice.²⁷⁸ They are also captured with near equanimity in the East African Community Treaty as regards the appointment of Judges.²⁷⁹ However, the East African Community limits the number of judges to six for up to a period of seven years²⁸⁰ whereas the COMESA provides for the appointment of

²⁷² Compare Articles 3-6 of the COMESA Treaty and Articles 5-8 of the EAC Treaty.

²⁷³ Article 23 COMESA Treaty.

²⁷⁴ Article 20 (1) COMESA Treaty.

²⁷⁵ Article 20 (2) COMESA Treaty.

²⁷⁶ Article 21 (1).

²⁷⁷ *Supra* Chapter 4.

²⁷⁸ Articles 2 and 13 (1) of the Statute of The International Court of Justice.

²⁷⁹ See Article 24 EAC Treaty and Article 21 COMESA Treaty.

²⁸⁰ Art. Articles 24 (2) and 25 of the EAC Treaty.

seven judges for a period of five years with the COMESA Authority reserving the authority to appoint additional judges.²⁸¹

What the foregoing provisions illustrate is the concept that in the application of international law which is essentially what the COMESA Court is to interpret and apply, the judges need not only be persons who qualified to be appointed judges in their own countries but also those who are recognized legal academics.²⁸² The very nature of the role of an international court in the application of the ever evolving principles of international law necessitates the inclusion of jurists who may have no experience of hearing cases or appeals in national courts, as members of international courts.²⁸³ The provisions relating to the tenure of office of judges of the COMESA Court however, do not ensure continuation in office as all the judges may be replaced at the end of their first five years of contract.²⁸⁴ The EAC Treaty, as compared to its COMESA counterpart has elaborate provisions on transitional retirement of judges coupled with a fairly well captured framework for continuity.²⁸⁵

Jurisdiction of the COMESA Court

The COMESA court has jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this treaty.²⁸⁶ This gives the COMESA court a wide jurisdiction and this is the major departure from the narrow jurisdiction given to the EACJ.²⁸⁷

The COMESA Court's primary function like its EAC counterpart is to uphold the operation of the Treaty establishing COMESA. It has to ensure the adherence to law in the interpretation and application of the COMESA Treaty.²⁸⁸ Their general jurisdiction is to adjudicate as well as to give

²⁸¹ Article 21 COMESA Treaty.

²⁸² See Akiwumi, A. M. (1997) *"The Role of the COMESA Court of Justice"* Unpublished. Paper presented at the Publicity Workshop for COMESA Court of Justice. (Article obtained from the personal library of Hon. Justice (Rtd.) Akilano Akiwumi).

²⁸³ *Ibid.*

²⁸⁴ Compare Article 21 of the COMESA Treaty with Article 25 EAC Treaty.

²⁸⁵ Article 24 (2) EAC Treaty.

²⁸⁶ Article 23 of the COMESA Treaty.

²⁸⁷ See Chapter 3 *supra*

²⁸⁸ Article 19 COMESA Treaty and Article 23 EAC Treaty.

advisory opinions²⁸⁹ upon all matters which may be referred to it under the COMESA Treaty. Such matters include those itemised and elaborated upon below.

Reference by member states

The bases of jurisdiction of the East African Court of Justice have been discussed in Chapter two. The EACJ seems to have borrowed heavily from the COMESA Court of Justice on the foregoing discussion. Both Courts have power to hear matters brought by member States against one another or against the Council in the event of failure by a Member State or the Council to fulfil an obligation under the Treaty or in the event of an infringement by a Member State or the Council of provisions of the Treaty.²⁹⁰ A Member State can also refer, for the Court's determination, the legality of any act, regulation, directive or decision of the Council on the grounds that such act, regulation, directive or decision is beyond its powers or unlawful or constitutes an infringement of the provisions of the COMESA Treaty or any rule of law relating to its application or is tantamount to a misuse or abuse of power.²⁹¹

Reference by the Secretary General

The Secretaries General of both the COMESA and the EAC have power to bring actions before their respective courts if they consider that a member has failed to fulfil an obligation under the treaties.²⁹² They may also refer an issue to the court upon the direction of the Council.²⁹³

References by Legal and natural persons

The COMESA Court just like the East African Court of Justice²⁹⁴ can further hear a matter brought by a legal or natural person who is resident in a Member State concerning the legality of any act, regulation, directive or decision of the Council of Ministers or of a member State on the grounds that such act, regulation, directive or decision is unlawful or constitutes an infringement

²⁸⁹ Article 32 COMESA Treaty and 36 of EAC Treaty.

²⁹⁰ Article 24 (1) COMESA and 28 EAC Treaty.

²⁹¹ Article 24 (2) COMESA and 28 (2) EAC Treaty.

²⁹² Article 25 (1) COMESA and (2) and 29 EAC Treaty.

²⁹³ *Ibid.*

²⁹⁴ Article 26.

of the provisions of the COMESA Treaty so long as that person has first exhausted local remedies in the national courts or tribunals of the member State concerned.²⁹⁵ The COMESA Court reiterated the requirement for exhaustion of local remedies in its recent comprehensive judgement in the case of *The Republic of Kenya and The Commissioner of Lands v Coastal Aquaculture Limited*.²⁹⁶ In that case, the Respondent sued for damages in the High Court of Kenya in respect of the compulsory acquisition of his land, withdrew that suit before it was finally determined and then sought redress from the COMESA Court. The COMESA Court after considering the provisions of Article 26 of the COMESA Treaty which deals with Reference to the COMESA Court by legal and natural persons, held that the Respondent being a legal person resident in a Member State may have the requisite *locus standi* to refer proceedings to this Court for determination only if it has exhausted all local remedies in the national courts or tribunals of Kenya.²⁹⁷

Other significant features of the COMESA Court

The COMESA Court is to ensure the maintenance of the rule of law within the Common Market through the just resolution of disputes and thereby facilitate and strengthen economic integration that would augur well for the enhancement of trade efficiency, cost effectiveness and resultant general socio-economic well being in the COMESA region.²⁹⁸

The COMESA Court like the EAC Court of Justice and the national courts of the Member States is established under the COMESA Treaty as an independent organ in the exercise of the judicial functions conferred on it under the two Treaties. The independence of the COMESA Court is reflected in its hierarchical standing as shown in the COMESA Treaty.²⁹⁹ The independence of the COMESA Court is further fortified by Treaty provisions that make the court not amenable to

²⁹⁵ Article 26.

²⁹⁶ Reference No. 3/2001 (unreported).

²⁹⁷ Akiwumi, *op cit*, note 282.

²⁹⁸ *Op cit*, note 286.

²⁹⁹ Article 7.

directions or orders of the Authority, Council or any other organs of the COMESA.³⁰⁰ The foregoing independence provisions are not captured as well under the EAC Treaty.³⁰¹ The Court does not have its independent budget borne by member states as is the case with the COMESA Court.³⁰²

The COMESA Court has the power to determine every reference made to it under the COMESA Treaty and can deliver its judgement which, subject to review by it, is final.³⁰³ In this regard, the COMESA Court has made Rules for the review of its judgements by a dissatisfied party. Also, to emphasize the independence and supremacy of the COMESA Court in the exercise of its jurisdiction, the COMESA Treaty imposes on Member States the duty to refrain from any action which might be detrimental to the resolution of a dispute before the COMESA Court, or which might aggravate the dispute, and also to take without delay, the measures required to implement the judgement of the COMESA Court.³⁰⁴ The EA Court of Justice has similar powers conferred upon it under the Treaty.³⁰⁵

In the recent decision of the COMESA Court in the case of *Standard Chartered Financial Services Ltd. A.D Gregory and C.A Cahill v Court of Appeal of the Republic of Kenya*,³⁰⁶ the COMESA Court, resorting to the provisions of Article 34.2 of the COMESA Treaty and in respect of a decision of the Court of COMESA Court, held that in terms of paragraph 2 of Article 34 of the COMESA Treaty, no execution could be levied in respect of the judgement of the Court of Appeal of the Republic of Kenya which is the subject matter of the appeal between the Companies and the applicants, pending the final determination of reference. The suit which was before the COMESA Court and which was not by way of an appeal from the decision of the Court of Appeal of Kenya, was based on the allegation that the Republic of Kenya, a Member

³⁰⁰ See Articles 8.3, 9.2 (c) and 42.1 of the Comesa Treaty.

³⁰¹ Article 14 (3) (c),

³⁰² Article 42 (1) COMESA Treaty.

³⁰³ Article 31 (1).

³⁰⁴ Article 34 (2), (3).

³⁰⁵ Articles 35 and 38.

³⁰⁶ Reference No. 4/2002 (unreported),

State of COMESA, had through its judicial organ, the Court of Appeal of Kenya, infringed the COMESA Treaty rights of the Applicants in the suit before the COMESA Court, in that, one of the judges of the Court of Appeal who sat on the appeal before that court should not have done so because of his partisan relationship with successful appellant in the Court of Appeal. After the making of the order by the COMESA Court already referred to, suspending the execution of the judgement of the Court of Appeal, the successful Appellant in the Court of Appeal applied to the Court of Appeal to approve an order for the execution of its judgement. The judge of the Court of Appeal who heard this application, was not only clearly aware of the provisions of Article 34.2 of the COMESA treaty which as already shown, provides that where any questions concerning the application or interpretation of the COMESA Treaty is raised in a matter pending before a national court of a Member State, like the Court of Appeal of Kenya and against whose judgement there is no national judicial remedy, that court shall refer the matter to the COMESA Court. The learned Judge of the Court of Appeal appears not to have considered fully the import of the provisions of Articles 30.2 and 34.2 of the COMESA Treaty which required him to refer the application for the approval of an order of execution of the judgement of the Court of Appeal. This is so, because since the COMESA Court had already made an order in the case then pending before it in which it had suspended the execution of the judgement of the Court of Appeal, the question that arises is whether the Court of Appeal can validly make such an order. This question is an issue that relates to the application or interpretation of the COMESA Treaty. That being so, it appears that the judge of the Court of Appeal is bound by Article 30.2 of the COMESA Treaty to refer the question to the COMESA Court. However, the Judge of the Court of Appeal went on and also seemingly ignoring the principles of international law emanating from the ratification of the COMESA Treaty by the Republic of Kenya, to state the following rather unacceptable dictum.³⁰⁷

“It is manifestly clear that the respondents are aggrieved by the judgement of this court delivered against them on October 4, 2002. in their desperate attempt to ward it off, the respondents have conceived

³⁰⁷ See Akiwumi, *op cit*, note 282.

the existence of a loftier court to sit on appeal against the decisions of this Court. I need not dilate here that at the moment, the Court of Appeal for Kenya is the highest and final court in the Republic of Kenya and when it delivers its judgement, that judgement is, so far as the particular proceedings are concerned, the end of litigation. It resolves in respect of the parties to the particular dispute their final legal position. Certainly, the appeal before this Court did not involve a dispute concerning the interpretation or application of the Treaty establishing the COMESA. It did not either concern failure by any of the parties to the dispute to fulfil any obligation under the Treaty. The subject matter of the appeal before this Court was different. It concerned an alleged breach of a contractual relationship lawfully entered into in Kenya by the parties resident in Kenya in or about 1980s. In my view, the current judicial system adopted by the Republic of Kenya does not permit this Court in the particular circumstances of the case which gave rise to this application to submit itself to the COMESA Member States, have transferred their sovereign rights together with all their domestic disputes to the COMESA Court of Justice at Lusaka.”

In view of the *Okunda Case*³⁰⁸ discussed earlier, it would be interesting to see how the EACJ would handle a similar case.

Another decision of the Court of Appeal of Kenya which offended³⁰⁹ the provisions of Article 30.2 of the COMESA Treaty occurred in the case of *Tononoka Steel Limited and the Eastern and Southern Africa Trade and Development Bank*.³¹⁰ The Trade and Development Bank had granted a loan to Tononoka Steel. The latter failed to repay the loan, and fearing that the Trade and Development Bank might seek the sale of its charged premises, applied to the High Court of Kenya for an order restraining the sale. The Trade and Development Bank opposed this application on the grounds that it was, an institution of COMESA and of which the Republic of Kenya was a Member, immune from suit and legal process in accordance with the Privileges and Immunities (Eastern and Southern African Trade and Development bank) Order, 1991, promulgated under the Privileges and Immunities Act cap.179 of Kenya. The High Court Judge accepted the submissions made on behalf of the Trade and Development bank and dismissed with costs Tononoka Steel’s suit and application.

³⁰⁸ *Op cit* Chapter 2.

³⁰⁹ Akiwumi, *op cit*, note 282.

³¹⁰ Civil Appeal No. 255 of 1998(unreported).

Tononoka Steel Ltd not surprisingly, appealed to the Court of Appeal of Kenya against whose judgement there was no national judicial remedy under the laws of Kenya then. And rather surprisingly, the three judges of the Court of Appeal in their individual judgements, all held in summary, that the Trade and Development Bank being an institution engaged in commercial activities, was not entitled to the immunity from suit and legal process. The Trade and Development Bank was an institution of COMESA. They also ignored the following provisions of Article 174 of the COMESA Treaty which deal with the continuance in force of certain institutions and agreements. There was before the Court of Appeal of Kenya, an issue which involved the application and interpretation of the COMESA Treaty and that being so, the Court of Appeal should have in compliance with Article 30.2 of the COMESA Treaty, referred the matter before it to the COMESA Court.

This is also another reason why the national courts of the Member States of COMESA should familiarise themselves with the role of the COMESA Court. The permissive references by national courts, not being courts from whose decision there is no appeal, for preliminary rulings by the COMESA Court the COMESA Treaty³¹¹ concerning the application or interpretation of the COMESA Treaty, and the compulsory reference on such matters, by national courts from whose decision no appeal lies, to the COMESA Court, enables the COMESA Court to ensure a uniform interpretation of COMESA Community law. The EACJ can utilize the similar provision under the EAC Treaty.³¹²

Another important power granted to the COMESA Court under the COMESA Treaty but which is not conferred upon the EACJ, relates to right of the Court to impose on a party who defaults in implementing the decision of the Court, such sanctions as it considers necessary.³¹³ This provision is also related to Article 40 of the COMESA Treaty which provides that, “The execution of a

³¹¹ Article 30 (1).

³¹² Article 34.

³¹³ Article 34 (4).

judgement of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Member State in which execution is to take place...”

The sanctions referred to in Article 34.4 of the COMESA Treaty do not include imprisonment for contempt of court. The court may only impose a financial penalty.³¹⁴

The COMESA Court and the European Court of Justice

A comparison of the COMESA Treaty provisions establishing the COMESA Court and those establishing the Court of Justice of the European Communities, reveals that those establishing the COMESA Court are almost the same as those establishing the latter.³¹⁵ There is also no doubt that the European Court of Justice which is an international court, and one conceived as a judicial organ within the European continental legal system rather than the common law legal system, has only certain defined jurisdiction which is not open ended in character like for example, that of the English High Court which has certain inherent jurisdiction. As the French jurist will say, the COMESA Court, like the Court of Justice of the European Communities, has only a *competence d'attribution*, namely, only such jurisdiction as is expressly conferred upon it by the COMESA Treaty. The Court of Justice of the European Communities had no powers to secure the effective compliance of its judgements by member States until 1992, when by means of the Maastricht Treaty, the following new paragraph which empowered that Court of justice to impose a lump sum or penalty payment on Member States which had not complied with its decision, was added to Article 228 (ex) 171 of the European Communities Treaty, “If the Court of justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.”

This power to impose a financial penalty, like that of the COMESA Court,³¹⁶ however, is not a power to commit to jail for contempt. As regards the power of the COMESA Court to enforce its own decisions, the Court of Justice of the European Communities has no powers of its own to

³¹⁴ Rule 58.4, COMESA Court Rules.

³¹⁵ See discussion on European Court of Justice below.

³¹⁶ Under Rule 58.4 of its Rules.

enforce its judgements. It has no criminal jurisdiction whatsoever, nor does it have the power to commit for contempt.³¹⁷

Whilst for instance, Article 46 of the East African community Treaty provides that the official language of the Court shall be English, a different situation applies to the COMESA Court. The legal jurisdiction of the Member States of COMESA namely, Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe, vary a great deal. The national courts of Kenya, Uganda, Malawi, Seychelles, Zambia and Zimbabwe for instance, apply the English common law; the national court of Francophone member States such as Rwanda, Burundi, the Democratic Republic of Congo and Madagascar apply the continental judicial system; the national courts of Arabic speaking Egypt and Sudan apply different system of law and so do the national courts of Ethiopia and Eritrea which are all Member States of COMESA. The official languages of the COMESA Court are English, French and Portuguese.

The COMESA Court is, after the Court of Court of Justice of the European Community, the second Court established within a trading bloc in the world and it is not surprising that the jurisdiction of the former is substantially based on that of the latter. Similarly, the Rules of the COMESA Court were inspired by those of the Court of justice of the European Community. Not only are the objectives of the European Community similar to those of COMESA, but the membership of the former is as diverse in national legal jurisprudence and languages as COMESA.³¹⁸

The pertinent Rules of the COMESA Court effecting trial practices are influenced by the multi-jurisprudential and multilingual factors already referred to. With respect to procedure, originally Rule 37 provided that, after the filing of pleadings, a judge designated by the President, shall

³¹⁷ Brown, L. N. And Jacobs, F. G. (2000) *“The Court of Justice of the European Communities.”* 5th Edition, Sweet and Maxwell, London, 285.

³¹⁸ EU’s membership currently stands at 27 with up to 8 different languages.

present a preliminary report as to whether a preparatory inquiry or any other preparatory steps should be taken or whether the matter be referred to the full Court. This Rule, which is indicative of the applicable Rule of the Court of Justice of the European Community, where a preliminary report is to be prepared by an Advocate-General, was initially amended to make it optional. The Rule was subsequently deleted altogether as this was a function for an Advocate-General. The office of the Advocate General is a common office in the European continental legal procedure system but does not exist in the COMESA Court. Apart from that, the Judges of the COMESA Court who are from different legal systems, including the continental one, nevertheless, were of the opinion that the Rule imposed unnecessary hardship on them. The reinstatement of these Rules might be considered when full time Judges of the COMESA Court are appointed. The Rules have also been amended so that only lawyers entitled to practice before a court in a member state may represent a party in proceedings before the COMESA Court. Previously, this did not apply to parties who were Member States or institutions of COMESA. Another rule that should be highlighted is Rule 19. This Rule provides that the deliberation of judges who were present at oral proceedings shall be held in closed session and that the conclusions reached by the majority of Judges after final deliberations shall be the decision of the COMESA Court. The East African Community Treaty, on the other hand, allows that whilst the East African Court of justice shall deliver one judgement in respect of every reference to it, which shall be the judgement of the Court reached in private by majority verdict, a Judge may deliver a dissenting judgement.

The concept of the direct effect of COMESA law and the principle that Member States may be held financially liable to individuals for breaches of COMESA law is something which will contribute greatly to the protection of citizens' COMESA Community law rights. It is proposed that the principle should be extended to apply in the case of East African Community with concomitant powers conferred upon the East African Court of Justice.³¹⁹

³¹⁹ Article 35 of the EAC Treaty

4.4 The EACJ and the European Court of Justice

The East African countries shared and were brought together by their colonial history.³²⁰ The European Union with the European Community as its largest component on the other hand was brought together by the effects of the two world wars, which devastated them economically, politically and socially.³²¹ As discussed earlier, the need for the harmonious and peaceful economic and political development is underscored by the European Community Treaty and most of the latter day economic blocs.³²² The desire to attain some form of harmony in order to guarantee peace and rebuild Europe is cited to have been the motivation for the integration of the European countries.³²³

The original aim³²⁴ of the European Economic Community, later renamed the European Community (EC), was to establish a common market and an economic and monetary union. By implementing the activities of the community the EC would promote a harmonious and balanced development of economic activities. For over a half a century, the European Union has been building this integration capacity to achieve its aims. The European Union has already been tested with the European sovereign debt crisis (often referred to as the Eurozone crisis). This is a financial crisis that has made it difficult or impossible for some countries in the euro area to repay or re-finance their government debt without the assistance of third parties.³²⁵ This has led to a realisation that a currency union cannot work without sufficient fiscal convergence if there is not a high degree of economic integration.³²⁶

³²⁰ See Chapter 2 of this thesis.

³²¹ Barnett, H. (2004) *Constitutional & Administrative Law*, 5th Edition, Cavendish Publishing Limited, London, 203.

³²² See Haas, E. B. (1961) “*International Integration: The European and Universal Process*” 15 (3) *International Organisation* (366-392) at 389 and also Odek, J. O. (2004), “*Re-appraising the Framework for Regional Economic Integration in Africa*”, 1 *The East African Law Journal* 47-68.

³²³ *Ibid.*

³²⁴ Resolution of Foreign Ministers of the European Coal and Steel Community and at Article 2 of the EC Treaty.

³²⁵ Belke, A., (2011) “*The Euro Area Crisis Management Framework: Consequences for Convergence*” 26 (4) *Institutional Journal of Economic Integration*, 672-704.

³²⁶ *Ibid*

With the exception of the European Commission³²⁷ the other organs and committees of the East African Community are created on near identical bases as those of the European Community. These include the European Council, European Parliament,³²⁸ the European Court of Justice and Raisons committees.

Having regard to its long time existence and the gradual yet progressive development of its role and relevance with the European Community, The European Court of justice being a court set up within an economic integration framework provides a suitable case study for the fortification of the East African Court of Justice.

The discussion below focuses on an analysis of the European Court of Justice in comparison with the East African Court of Justice.

The European Court of Justice (ECJ) just like the two regional courts discussed above, is established to ensure the observation of the law in the application and interpretation of the European community treaty.³²⁹ It consists of 25 judges³³⁰ and 8 Advocates-General,³³¹ though these numbers may be increased at the request of the Court of Justice to the Council.

Appointment of Judges

The judges are chosen from persons whose independence is beyond doubt and like with the East African Court of Justice they possess qualifications required for appointment to the highest judicial office in their respective countries or who are jurists of recognized competence.³³² They are appointed by the common accord of the governments of the member states for a term of six years. As compared to the East African Court of Justice,³³³ the European Court of Justice Judges are partially replaced after every three years.³³⁴

³²⁷ Articles 211-19 EC Treaty.

³²⁸ Article 189 EC Treaty.

³²⁹ Article 164, European Community Treaty.

³³⁰ Article 165.

³³¹ Article 166.

³³² Article 167.

³³³ Article 24.

³³⁴ *Ibid.*

The judges of the ECJ elect the President of the Court from among their number, who serves for three years and is eligible for re-election.³³⁵ Under EACJ, the President is appointed by the summit from among the judges.³³⁶ The Vice-President of the EACJ is likewise appointed by the summit.³³⁷

Advocates General

In their work the judges of the ECJ are assisted by eight advocates general whose duty is to make reasoned submissions on cases brought before the ECJ.³³⁸ The qualifications of the Advocates General are the same as those for judges.³³⁹ The Advocates General's opinion, which must be presented publicly, independently and impartially, though most of the time in fact followed, does not bind the court.³⁴⁰

Jurisdiction of the European Court of Justice

The European Court of Justice has jurisdiction to hear and determine direct actions brought before it, to give preliminary rulings and deliver opinions when requested.

Direct Actions

The jurisdiction to determine direct actions by the ECJ just like most international courts and tribunals depend on entities allowed to approach the court and on the matters upon which such entities may approach the court. Direct actions to the ECJ lie from the following: -

- (a) Failure to fulfil an obligation under the European Union law

³³⁵ *Op cit*, note 333.

³³⁶ Article 24 (4).

³³⁷ *Ibid*.

³³⁸ Article 166.

³³⁹ Article 167.

³⁴⁰ *Op cit*, note 338.

Also known as enforcement proceedings. This happens where the European Commission³⁴¹ or a member state³⁴² starts an action against a member state in the belief that the latter is failing or has failed to fulfil its obligations under the treaty or some related European Community law.

(b) Actions for Annulment

This jurisdiction is akin to that of the municipal courts judicial review jurisdiction. A member state of the union, the European Council, the Commission or Parliament may commence an action for the annulment of a community Act which they consider illegal, not properly adopted or sometimes not based on the treaty or other EU law.³⁴³

Private individuals may also bring an annulment action if a particular EU law or action directly and adversely affects them as private individuals.³⁴⁴

The grounds for an action for annulment may range from lack of competence on the decision making authority, through the infringement of a procedural requirement, infringement of the EU treaty or EU law to misuse of powers by any of the institutions and bodies.³⁴⁵

Pursuant to this jurisdiction, it has been held that all acts of the EC institutions that are intended to produce legal effects are subject to review. This was judicially underscored in *E.C. Commission v E.C Council*.³⁴⁶ The act complained of must further be binding upon the applicant with the capability of altering distinctively, the applicant's legal position.³⁴⁷ It must be noted that the EACJ lacks such explicit jurisdiction.

(c) Action for failure to Act

³⁴¹ Article 169.

³⁴² Article 170.

³⁴³ Article 173.

³⁴⁴ *Ibid*

³⁴⁵ *Op cit*, note 343.

³⁴⁶ Case 22/70, *Commission of the European Communities v Council of the European Communities* [1971] E.C.R., 263.

³⁴⁷ See for example *IBM V. E.C. Commission* [1981] ECR 2639 and *Automec v E.C. Commission* [1990] II ECR 367.

The EC treaty places upon the European community institutions certain obligations in actualizing the objectives of the union where the institution, European, parliament, council or the commission fail to act in disregard to treaty provision, any of the community institutions, EU member state or legal and natural persons may approach the court to have the infringement established and the body concerned comply.³⁴⁸

This jurisdiction is important, though difficult to access, in that it enables member states and the union's institutions to check and balance each other. With strict application, it can be used to achieve uniformity and timely action by the body's institutions. It has some similarities with the references by the Secretary General with the EACJ.

Where the court finds that an institution has failed to act, it may require the institution to take the necessary measures to ensure compliance with the judgment of the court.

Over and above the foregoing matters the court has further jurisdiction to hear such direct actions concerning; Application for compensation for damage arising from the non-contractual liability of the community;³⁴⁹ Disputes between the community and its servants;³⁵⁰ Applications concerning contractual liability.³⁵¹ These however are pursuant to an arbitration clause in a contract concluded by the community. Without such an arbitration clause, jurisdiction lies with the national courts;³⁵² Jurisdiction conferred by the member states to the ECJ by a special agreement, on a subject matter of the Treaty.³⁵³

Preliminary Rulings

The national courts in each EU member country are responsible for the application and interpretation of EU law in their countries. However, the possibility of different interpretations by different national courts necessitates uniformity in interpretation of such laws. The treaty

³⁴⁸ Article 175.

³⁴⁹ Article 178.

³⁵⁰ Article 179.

³⁵¹ Article 181.

³⁵² Article 183.

³⁵³ Article 182.

confers upon the ECJ the jurisdiction to give preliminary rulings concerning the validity and interpretation of community law as may be requested by the national courts of the member states.³⁵⁴

Where a question as to the interpretation of the treaty, the validity and interpretation of the acts of institutions of the community, or of statutes of bodies established by an act of Council; is raised before my national court or tribunal of a member state, and where that court considers the determination of such a question necessary for the judgment of the case, then that national court may and sometimes must ask the Court of justice to give a ruling thereon.³⁵⁵

Far from achieving uniformity in the application of community law, the preliminary ruling jurisdiction also ensures the unity of the community legal order and the coherence of the system of judicial remedies established under the Treaty³⁵⁶. It can also and actually does play an important role in facilitating access to justice. Citizens of the member states can enforce their community rights in the national courts, through the principles of direct effect and primacy of community law.³⁵⁷

It is worth noting here that the preliminary ruling jurisdiction also extends to recommendations or acts which cannot be strictly described as acts of the institutions of the community.³⁵⁸

Advisory Jurisdiction of the ECJ

In their executory or implementation mandate, the institutions of the community especially the court and the commission may enter into arrangements, agreements or pacts with other institutions, governments or unions. In such situations it may be and is always proper that the institution concerned gets legal opinion on the compatibility of the agreements envisaged with EU Treaty.³⁵⁹

³⁵⁴ Article 177.

³⁵⁵ *Ibid*

³⁵⁶ National courts do not have the jurisdiction to declare a community act invalid, see case no. 314/85.

³⁵⁷ See Case 26/62 *Van Gend en Loos* and 106/77 *Simmenthal*.

³⁵⁸ *Haegeman v Belgium* [1974] ECR 449.

³⁵⁹ Article 228.

A member state of the community may also seek the opinion of the court before proceeding in similar matters.

The jurisdiction is borne on among others the fact that the agreements concluded by the community or its institutions may extend jurisdiction to hear disputes arising from any such agreements. In exercising the advisory jurisdiction the court does not perform a judicial function but only delivers an opinion not a ruling, on an abstract question of law. The opinion of the court is binding in as far as it affects the EU and a finding that any act or agreement is incompatible with the EU Treaty, may mean that such an agreement cannot enter into force unless the treaty is itself amended.³⁶⁰

The Court of First Instance

The ECJ has grown over time, with its workload doubling by the day. In 1988 the European Council took a decision to establish the Court of First Instance, herein CFI.³⁶¹

The aim of establishing the court was double fold: to ease the Court's work load and to facilitate access to the European Justice system by accelerating the procedures.³⁶² The burden of work at the ECJ appeared to be a threat to the quality of judicial protection of individual interests and the judicial task of ensuring the uniform interpretation of community law, the main mandate of ECJ.³⁶³

The ability of the court to protect individual interests depends on its ability to effectively discharge cases that involve the examination of complex facts. The Council indeed recognized this truism in making its decision. The cases the ECJ is seized of sometimes involved complex fact-finding, a task the ECJ does not have the time and the facilities to undertake. The CFI

³⁶⁰ See for example *Export Credits* [1975], E.C.R the Court on its advisory function.

³⁶¹ Established under Article 168a of the Treaty on the European Union.

³⁶² See the Preamble to the Council's decision establishing the Court of First Instance and Council decision 88/591, 1988.

³⁶³ Lenaerts, K. (1990-1997), "*The Development of the Judicial process in the European Community after the Establishment of the Court of the First Instance*" 1 (2) Collected Courses of the Academy of European Law.

enables the greater examination of such facts and in detail, providing stronger safeguards and fairer procedures that would not be available within the major ECJ.³⁶⁴

The court of first instance has the jurisdiction to hear and determine cases as the ECJ except where an act of the community provides otherwise. Any party that is dissatisfied with its decisions can appeal to the ECJ.³⁶⁵

The Court of First Instance is not competent to hear and determine questions referred for preliminary rulings under Act 177 of the EU Treaty, this is primarily so as to ensure the uniform interpretation of community law.

It is must be mentioned that the CFI plays a major role in hearing disputes involving the community and its staff.

Appellate Jurisdiction of the European Court of Justice

Following the establishment of the CFI, the ECJ has effectively acquired appellate jurisdiction. Parties appearing before the CFI have a right to appeal to the ECJ. This right is not discretionary; it does not depend on leave from the CFI. These appeals are limited to points of law, being on grounds of lack of competence of the CFI, a breach of procedure before the CFI, or the infringement, of community law by the CFI. The ECJ can therefore be said to have final say on all judicial/legal matters or as regards judicial protection within the community.

The role of the CFI can in no case be over-emphasized. It has no doubt improved the efficiency of the ECJ and widened access to justice within the community.

A comparison of the EAC Treaty provision establishing the East African Court of Justice and those of the European Court of Justice from the exposition above reveals a lot of similarities in the formulation and functioning of the two courts. The ECJ having grown over time offers, with the benefit of longevity, some useful insights which may be of importance for the EACJ.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

Right from the mode of appointment and rotation of judges and Advocates General through jurisdiction to the Court of First Instance, the ECJ offers a classical example of a comparatively successful regional court. The jurisdiction of the ECJ is purposely wide and allows for judicial reviewing of the actions of the community institutions. The ECJ unlike the EACJ, has since 1992, the power to enforce its own judgment and to ensure compliance thereof. It may impose a lump sum or a penalty payment on a member state who does not comply with its judgment.

Direct applicability of EAC law and its principles within the Member states may have more benefits to the citizens of the member state if like with both COMESA and ECJ; the community law has a direct effect in the member state.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

From the historical analysis, examination of the current EACJ and comparison of the EACJ with that of the Comesa Court and the European Court of Justice, a number of conclusions can be drawn.

The existence of a reasonably comprehensive legal framework for business activities and a properly functioning legal order are required to provide predictability and stability.³⁶⁶ In addition, well functioning administrative infrastructures are necessary to ensure the effective implementation of the legal framework.³⁶⁷ Indeed one of the main reasons for countries forming International and Regional Economic Institutions is the need to have a dispute settlement mechanism. Existence of such a dispute settlement mechanism has the effect of reducing tension between countries and also making them avoid recourse to force to resolve any trade disputes. This enabling environment can only be created when there is a uniform and clear dispute settlement mechanism applicable to all the Partner States. The EACJ is one of the organs established under Article 9 of the EAC Treaty to assist the Community in the achievements of its objectives the main one being to realise a fast and balanced regional development by creating an enabling environment in all the Partner States in order to attract investments and allow the private sector and the civil society to play a leading role in the socio-economic development activities.³⁶⁸ One of the fundamental principles of EAC is to achieve peaceful settlement of disputes.³⁶⁹

The EACJ was dormant from its inception until December 2005, when it received its first case. This landmark first case was brought by the Assembly for a determination of the legality of actions of the Council and the Secretariat in assuming control over Assembly-led Bills and delaying their presentation to the House.

³⁶⁶ UNCTAD, Division on Transnational Corporations and Investment; World Investment report 1994, Transnational Corporations, Employment and the Workplace, (UN New York and Geneva, 1994), p. xxix.

³⁶⁷ *Ibid.*

³⁶⁸ See the Preamble of the EAC Treaty at page 5. Expounded in Article 5.

³⁶⁹ Article 6 of the EAC Treaty.

This first case came on the heels of great concern over the lack of cases brought to the Court. As at end of September 2012 the Court had rendered 24 Judgments, 17 rulings on applications, 6 taxation rulings and one advisory opinion. However in the East African Community Development Strategy 2011 -2015³⁷⁰ it is acknowledged that the Court still faces difficulty in performing its mandate as a judicial organ of the EAC.

The reason attributed to this lack of cases is a number of shortcomings in its jurisdiction, procedures, structure and composition.

The jurisdiction of the Court is limited to the interpretation and application of the EAC Treaty.³⁷¹ The Treaty provides that a protocol shall be concluded to operationalise the Court's original, appellate, human rights and other jurisdiction as will have been determined by the Council.³⁷² Although a protocol has been concluded³⁷³ to operationalise this extended jurisdiction, the same is still very much inadequate.

Deliberations by the EA Legislative assembly also recognize the need to extend the jurisdiction of the EACJ and the need of putting the Draft Protocol through further scrutiny.³⁷⁴

5.2 Structure and Composition of the Court

The Provisions of Article 26 (4) contradict those of Article 26 (7) in as far as the latter allows the Summit to appoint a temporary President where the President disqualifies himself from a case disregarding the former which allows the Vice President to act in the President's capacity under certain conditions. The functions of the Vice President are not clearly spelt out hence leading to this contradiction. Further the requirement that the summit do concern itself with each and every occasion where the President of the EACJ disqualifies himself will lead to a bureaucratic process

³⁷⁰ *Op cit, note 195.*

³⁷¹ Article 27 of the EAC Treaty.

³⁷² *Ibid.*

³⁷³ Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice.

³⁷⁴ http://www.eala.org/key-documents/doc_details/57-29-september-2005.html. (last visited on 10/10/2012).

whereby cases have to wait for the Summit to be convened should the President disqualify himself.

Article 25(1) provides that the Judges of the Court shall be appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognized competence, in their respective Partner States. The Treaty does not spell out what should happen in the event that these qualifications cease to exist. As was seen in Chapter 2 above, a controversial situation has arisen where the former President of the EACJ, Justice Moiwo Ole Keiwua was suspended from the Kenyan judiciary in 2003 in what was dubbed a radical surgery to rid the Judiciary in Kenya of corrupt judicial officers. Justice Ole Keiwua continued in his position as a Judge of EACJ despite the fact that he was suspended from Kenya's Judiciary. Questions were raised in an application filed at the EACJ asking the Judge to disqualify himself in view of his suspension from the Kenyan Judiciary.³⁷⁵ The Court in its ruling where the Judge also contributed declined to disqualify the Judge from hearing the reference and dismissed the application. The EAC Treaty is silent on how this should be treated. Article 26(1) only allows for removal of a Judge from office for misconduct or for inability to perform the functions of his or her office due to infirmity of mind or body. In this situation, Kenyans was in a precarious position where they did not have confidence in any bench of the EACJ constituted with Ole Keiwua being a member of it.

5.3 Procedures

Any person (Legal or Natural) who is Resident in any of the Partner States may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the EAC Treaty.³⁷⁶ This requirement provides a limit as to the persons who can have access to the EACJ.

³⁷⁵ *Attorney General of Kenya v Anyang' Nyong'o & 10 others* [2010] eKLR.

³⁷⁶ Article 30 of EAC Treaty

This shuts out any person who may not be resident in any Partner states but may still have or may have had transactions with the Governments of or other persons who are resident in the Partner States although may not be resident in any of the Partner states. This will deter investors who may have one off transactions or who may be transacting with the Governments or EAC residents without being resident themselves.

Partner States or the Council are required to take, without delay the measures required to implement a judgment of the court. There is however no provision as to what happens if a Partner State declines or fails to implement a judgment of the court. There is no penalty in the event the Judgment is not implemented. This will lead to a situation where a judgment of the court can be disregarded or ignored and the successful party will have no recourse.

There is no requirement that one exhausts the local remedies prior to filing a reference to the EACJ. The Treaty actually provides that except where jurisdiction is conferred on the court by the Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States. This creates the potential of parallel proceedings.

5.4 Jurisdiction

The Jurisdiction of the EACJ is stated to initially be over the interpretation and application of the treaty.³⁷⁷ This jurisdiction is very narrow as it limits what disputes can be referred to the EACJ. The Jurisdiction is confined to the interpretation and application of the formal Treaty document however nothing is said about the Jurisdiction of the EACJ on legislation made under its authority i.e. by the EA Legislative Assembly.

Article 27(2) provides that the Partner States shall conclude a protocol to operationalise the extended jurisdiction to cover other original, appellate, human rights and other jurisdiction as will be determined by the Council.

³⁷⁷ Article 27 (1) of the EAC Treaty.

The draft protocol³⁷⁸ covers the general jurisdiction in article 2 and provides that the Court shall have original jurisdiction in all matters of the Community in general. This is still inadequate as it locks out disputes which may not be a Community matter but may still fall within the Treaty. Article 2 (2) (e) and (3) of the Draft Protocol, amounts to circumventing the procedure of extension of the jurisdiction provided for in Article 27 (2) of the Treaty.

The EACJ is not conferred with any jurisdiction as regards Human Rights. However Article 27(2) of the Treaty provides for the activation of this jurisdiction through a Protocol. It must be noted that the treaty does not have a catalogue of human rights to be protected. However, lack of a catalogue of human rights should not preclude the court from exercising its human rights jurisdiction. Like has been applied within the European Union framework, the protection and respect for fundamental rights and freedoms should form an integral part of the general principles of law protected by the court. The protection of human rights, even without the protocol, would also spring from and be inspired by the constitutional traditions of the member states.

The draft protocol referred to above intends the East African Court of Justice to exercise its human rights jurisdiction in all cases and disputes submitted to it concerning the interpretation and application of universal instruments for the promotion and protection of human rights. This may be well but the context in which the universal instruments referred to above are entered into and made must be understood. Most of the international human rights instruments establish within themselves, dispute resolution mechanisms like tribunals, commissions and courts. Indeed disputes arising from the international covenant on civil and political rights, international covenant on economic, social and cultural rights, convention on the rights of the child, among others will most of the time go through the respective commissions under each instrument before invariably ending at the International Court of Justice. Disputes arising from the European Convention on Human Rights will go through the Human Rights Commission and end up at the European Court of Human Rights. Disputes arising within the context of African Charter on

³⁷⁸ Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice published by the EAC Secretariat in May 2005.

Human and People's rights for Human Rights will go through the African Commission for human rights and end up at the African Court for Human and People's rights. The basis upon which the East African Court of Justice will exercise jurisdiction over the human rights protected under these instruments are not clear.

It must be mentioned that there is no relationship between the EACJ and the other international courts of the same character. There are no jurisdiction sharing or complementary pacts between these courts. Exercise of jurisdiction, even in interpreting and applying these instruments will not have any legal basis. The EACJ will be usurping or indeed *stealing* jurisdiction from the bona fide courts established under the separate regimes.

The basic foundation of international law lies in respect for states' sovereignty and the states' ability to incur obligations under international law through their due consent. It is doubtful if a member state may in any matter be restrained from claiming lack of jurisdiction on the part of the court where the rights being litigated are sounded from non- East African Community Instrument. Less still will it be guaranteed that a declaration or indeed a judgment by the court on a right or freedom protected by the universal instruments referred to will preclude the litigants from accessing the avenues set up under the different systems. Far from breeding duplication of cases in the different international and regional courts, such jurisdiction will simply raise unwarranted uncertainty in the law of the community.

It is accepted that in exercising its lawful human rights jurisdiction the EACJ, its interpretation of the law must be consistent with internationally recognized human rights. The extent to which such a proposal may limit the courts ability to develop germane East African judgments to uniquely East African human rights circumstances is a possibility that must be contemplated. It is submitted that if for no other reason, the jurisdiction of the court should not be unduly limited by such ambiguous provisions.

Article 14 of the Draft Treaty titled Exhaustion of Local Remedies requires parties alleging violations of human rights to first refer such matters to the EACJ before making reference to any

other relevant regional or international court. It has been noted that the EACJ does not have a complementary nor subsidiary relationship or jurisdiction to the so called other regional or international courts. There is nothing to stop such latter courts from hearing a case referred to it without necessarily inquiring as to whether the same has been referred to EACJ or not. The rule on exhaustion of local remedies relates only to domestic jurisdiction not international jurisdiction. Indeed, the enforcement of such a proposal can only be possible if the other possible courts to which a case from EACJ may be referred are seized of such a jurisdiction to enquire into compliance with such a rule. It is furthermore debatable whether recourse to EACJ would constitute availing oneself to a local remedy.

The Treaty allows domestic courts of the member states to hear and determine matters concerning the Treaty.³⁷⁹ However, it does not confer to the EACJ the requisite jurisdiction to deal with appeals from such national courts.

The desire to have the court exercise such jurisdiction, though prone to institutional and legal difficulties, is captured in Article 27 of the EAC Treaty. The draft protocol proposes to confer on the EACJ jurisdiction to hear and determine appeals from the Courts of each Partner State. It is instructive to note early enough that any such proposals informed with the workings of the former East African Court of Appeal have problems in more than one way. The EACJ is an emanation of a Treaty, with original jurisdiction on matters of interpretation and application of the EAC Treaty. It has no direct relationship with the national courts of the member states. The basis upon which it may exercise jurisdiction cannot be compared to that basis upon which the former EACA exercised appellate jurisdiction.

Over time, the judicial structures of the five countries have undergone fundamental changes. Any such protocol can therefore not merely apportion appellate jurisdiction without the harmonization of the Court systems and the judicial structures of the member states.

³⁷⁹ Article 33.

The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18 June 2007 and became full members of the Community with effect from 1 July 2007.³⁸⁰ These two countries have legal systems which are not identical to those of Kenya, Tanzania and Uganda. The appellate jurisdiction will as a matter of course extend to them. Again without proper consultations and consideration of the foregoing issue may lead to legal technicalities which can with foresight, be conveniently avoided.

It must be emphasized that the ability of the court to exercise appellate jurisdiction would be plausible. However, such conferment of jurisdiction must be grounded on sound legal principles that would ensure effective exercises of such powers. Before proffering a recommendation a brief note on the treatment of appellate jurisdiction for the EACJ by the Draft protocol may be necessary.

The protocol bestows the EACJ with the jurisdiction to hear and determine appeals from the courts of each partner states. The member states may also appeal to the court any dispute arising under the protocol on the establishment of the East African Community Customs Union, but on specified grounds only of fraud, lack of jurisdiction or illegality. The local courts of the partner states have jurisdiction to hear and determine disputes arising from the customs law of the country but in case a party thereat is dissatisfied such a party may appeal to the EACJ.

The exercise of appellate jurisdiction on matters under the customs law may be in order as these are issues with a direct emanation from the Acts of the community and may not require the uniformity of the legal systems. This will also involve the obligations of the member states under the community law.

Problematic are the Draft provisions conferring jurisdiction to hear appeals from the courts of the partner states. Firstly, there is no clear definition of a “Commercial Court” that would be common to all the partner states. Secondly, where there are such so called commercial courts like in Kenya, they are subordinate to the Court of Appeal. Appeals from them necessary lie to the

³⁸⁰ *Op cit*, note 17.

court of Appeal and not to the EACJ. Such a provision will therefore be inconsistent with the requirement for exhaustion of local remedies. The non-harmonious structure of the court systems of the partner states need not be over emphasized in this regard.

In exercising its appellate jurisdiction the Draft protocol proposes that the court have powers of and thereby can exercise jurisdiction of the Court of original jurisdiction, where the appeal emanated. What the proposal implies can be discerned from the following example. A case is started by a Kenyan citizen in the chief magistrate's court, whose decision is appealed to the High court and subsequently to the Court of Appeal and eventually the Supreme Court on constitutional issues. The Civil Procedure Act provides that an appeal from the magistrate's court to the High Court should be on points of fact and law. The Appeals from the High Court will lie to the Court of Appeal on questions of law, failure to determine some material issue of law, and on grounds that a substantial error or defect in the procedure provided by the Act has produced error or defect in the decision of the case upon the merits. The appeal to the Supreme Court would only be on issues of interpretation of the Constitution. This means that, the lower courts or precisely courts of first instances, be it the magistrates court or the High court are left to try facts, their findings on facts are therefore not open to appeal in civil cases. It follows from the foregoing that the High court or the Court of Appeal in exercising appellate jurisdiction cannot purport to make factual enquiry or at any rate open the case afresh. It is open to the appellate court, instead of trying facts to refer the case back to the original court for retrial, frame issues and refer them for trial, take additional evidence, or order a new trial. The appellate court will not open the case a fresh.

The Draft protocol in extending the Appellate jurisdiction of the EACJ to include descending to the jurisdiction of the court from where the appeal emanated, is making the EACJ a court of reviewing the facts on appeal. The reasons for the creation of the Court of the First Instance within the European Union judicial protection framework have been discussed. It was revealed that the nature of a regional court like the ECJ precluded it from effectively protecting the rights

of individual citizens because it did not have the capacity and time to try the complex and always intricate and demanding issues of facts. Fact finding indeed is at the core of every trial and a community court at its vintage position may not be relied upon to exercise original jurisdiction.

Secondly, the appeals from the CFI to the ECJ are conventionally restricted to points of law, not facts. Clearly if not for the fact that there will be a multiplicity of appeals, which will take a long time to determine, there is no legal basis for conferring upon the EACJ original jurisdiction, possessed only by the courts of first instance.

Another issue that arises on the Appellate jurisdiction is on the judges that will be sitting at the EACJ. Currently a person qualified to be a judge of the High Court in any of the Partner States can be appointed to the EACJ. This will in effect mean that a High Court Judge would be sitting on Appeal of matters from a court of his peers.

5.5 Constitutional Issues

The EACJ as an institution of the EAC has not been recognized in the Constitutions of the partner States where the court systems of the respective states have been created. Article 33(2) of the Treaty provides that the decisions of EACJ on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter. Should there be a conflict between say a decision of a High Court of a Partner State and the EACJ, a constitutional challenge is likely to see the decision of the High Court of a partner state being favoured over that of the EACJ as the same is not recognized in the Partner States' constitutions. Quite clearly the issues that arose from *Okunda v Republic*³⁸¹ have not been addressed.

5.6 Recommendations

Article 26 (7) should be deleted from the Treaty to avoid contradicting Article 26 (4). The Vice President will thus be able to step in in situations where the President of the Court is unable to perform his functions or disqualifies himself from hearing certain cases. Only where the President

³⁸¹ See Chapter 3.

is unable to resume his duties permanently should the Summit and other organs of the Community step in to appoint a replacement. This will achieve two things. Firstly the independence and autonomy of the Court will be maintained i.e. the Court will not have to rely on the Summit to appoint a temporary President when the President is unable to perform his duties only temporarily. Secondly the Court will save time by the Vice President automatically filling in for the President in case of a temporary absence or disqualification from a case. This will ensure that there are no delays in prosecuting cases and carrying out the duties of the Court.

Article 25(1) should be amended to give a proviso that where the integrity of a person appointed as a Judge is the subject of an inquiry or the person has been convicted by a competent tribunal or court of an offence(s) which touch on his integrity, then such a person should automatically be relieved of his duties at the EACJ. In the event of an inquiry then the person should stand suspended until such a time as the inquiry is complete and the same has absolved him/her. This will avoid an embarrassing situation like the current one where the current EACJ President is facing an inquiry on allegations of graft while still sitting as the President of EACJ.

The Judges should also be required to relinquish any public positions that they hold in their respective countries.

Article 30 of the Treaty should be amended to allow references to be made by any person (Legal or Natural) who is aggrieved and not necessarily a person who is resident in one of the Partner States. This will allow for investors who may not be resident in any of the partner States but who have and/or have had transactions in any of the Partner states to have access to the EACJ.

The EACJ should be empowered to impose penalties on Partner States that fail to implement the decisions of the Court. In execution of its judgments, the court of justice is not empowered under the treaty to either impose a penalty or punish a default by way of contempt proceedings. The ability of the court to function effectively undoubtedly lies on the enforceability of its orders and judgments. It is therefore proposed like the draft protocol provided that the EACJ be seized of the power to punish for contempt over and above being able to impose a lump sum or penalty

payment on any party that fails to comply with its judgment. This will ensure compliance with the decisions of the Court.

Parties should be required to exhaust the local remedies prior to referring a matter to the EACJ. Alternatively where the EACJ has been seized of a matter, the national courts should be excluded from exercising jurisdiction on the same. This will avoid a scenario where there are parallel proceedings and a potentially embarrassing situation where there are conflicting decisions.

The Court should have a general jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the Treaty.

The human rights jurisdiction should be exercised within the structure and objects of the community. It is a truism that certain human rights under international law are now regarded as universally obligatory and form part of customary international law. For such rights e.g. the prohibition of torture, genocide, slavery and non discrimination, the court should not wait for a protocol to be able to adjudicate. Most of these rights alongside other treaty protected rights raise obligations *erga omnes* for the State Parties and their respect and observance do not depend on any international instrument.

It is proposed that like it is the case with the ECJ, the exercise of the Human rights jurisdiction should be exercised in the wider context of the objectives of the community. It will not be an understatement to note that human rights are not at the core of the objectives of the community. This does not mean that it should be ignored. The same should however not be used to overshadow the other noble objects of the community. Such jurisdiction should therefore be exercised as an integral part of the general principles of law protect able by the court.

For the protection of the particular rights and freedoms, the courts will have to draw much from constitutions of the member states, customary international law and such other corpus of law as may have arisen from member state's obligations *erga omnes* emanating from other human rights instruments. The court can however not rely on the national constitutions of the member states as this may undermine the status of the community law *vis- a vis* that of the member states.

It may be necessary in the long run, if the human rights jurisdiction of the court is to be augmented, to have a catalogue of human rights protected, either as part of the envisaged protocol or through a convention or treaty. The institutions of the community in their dealings may violate or be the subject of human rights violations. There must be a way of protecting the rights of the community institutions against abuse and making the institutions to account where they are alleged to have violated human rights.

For the Appellate jurisdiction of the EACJ to be effectively implemented, it is imperative that the judicial systems and structures of the five Partner states are harmonised. The five Partner states should firstly give recognition to the EACJ in their respective Constitutions. This will avoid Constitutional issues arising especially when it comes to recognition and enforcement of judgments from the EACJ.

Divisions of the respective Courts in the Partner States should also be harmonized. Thus where there is reference to “Commercial Courts”, it is imperative that all the Partner States have a similar “Commercial Court”.

It may be possible that appellate jurisdiction be exercisable where the dispute is commercial and touches on one or may of the community’s laws, rules, or directives but not where the issues involved are purely of a municipal nature. Assuming even then that an appeal may lie on grounds of an issue of community law, the national courts may deal with this or have recourse to the preliminary rulings jurisdiction of the EACJ.

As regards the Alternative Dispute Resolution jurisdiction, the same should be separated from the EACJ. The EAC should strive to create a separate and distinct East African Arbitration Centre. The same should have its own structures, seat, arbitrators and staff. This will ensure impartiality and efficiency. This will also encourage a flexible and less rigid approach to dispute settlement as compared to if the jurisdiction was vested in the Court. In the event there is a challenge to the award, then references can be made to the Court.

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