

**Towards a 'Just' Community: The Role of the East African Court of  
Justice and National Courts in the Integration Agenda**

**By**

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## DECLARATION

I, PETRONELLA K MUKAINDO hereby declare that this research project; *Towards a 'just' Community: The role of the East African Court of Justice and national courts in the integration agenda*, is my original work and has not been submitted for an award of a degree or examination in any university. All sources used have been duly acknowledged.

.....  
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## **DEDICATION**

To the Mukaindo family;  
To which I am blessed to have been born.

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The opinions expressed in the study are however solely those of the author and any errors and omissions in the study remain the responsibility of the author.

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\* Deputy Principal Judge, First Instance Division of the EACJ & Presiding Judge, Constitutional and Human Rights Division, Nairobi Kenya.

## **ABBREVIATIONS AND ACRONYMS**

<b>ADB</b>	African Development Bank
<b>AEC</b>	African Economic Community
<b>ARIA</b>	Assessing Regional Integration in Africa
<b>AU</b>	African Union
<b>AUC</b>	African Union Commission
<b>CJEU</b>	Court of Justice of the European Union
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>CMP</b>	Common Market Protocol
<b>CUP</b>	Customs Union Protocol
<b>EAC</b>	East African Community
<b>EAC Treaty</b>	Treaty for the Establishment of the East African Community
<b>EACJ</b>	East African Court of Justice
<b>EALA</b>	East Africa Legislative Assembly
<b>ECA</b>	Economic Commission for Africa
<b>ECCAS</b>	Economic Community of Central African States
<b>ECJ</b>	European Court of Justice
<b>ECOWAS</b>	Economic Community of West African States
<b>EU</b>	European Union
<b>IGAD</b>	Inter-Governmental Authority for Development
<b>REC</b>	Regional Economic Community
<b>SADC</b>	Southern Africa Development Community
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UNECA</b>	United Nations Economic Commission for Africa

## ABSTRACT

The research study, *Towards a 'just' Community: The role of the East African Court of Justice and national courts in the integration agenda*, comes at an opportune moment as Partner States of the East African Community (EAC) immerse themselves deeper into the Community pool and oar their way towards the ultimate prize; a political federation. A departure from previous studies whose main focus has been the Court's jurisdictional limitations in areas such as human rights and commercial matters, this research study goes a step further to recognise the significant role of national courts of Partner States in EAC's integration process and their symbiotic relationship with the regional Court. The study proceeds from the premise that the East African Court of Justice (EACJ) is pivotal to the achievement of the Community's objects and that the regional Court is not an island situated at Arusha; its effectiveness being largely dependent on other actors and factors such as national judiciaries and citizens of Partner states. The same case applies to governments of Partner States without whose political good will, the institutions and organs of the Community such as the EACJ would be unable to optimally discharge their respective mandates under the Treaty, hence derailing the integration process.

The study acknowledges that jurisdiction is sometimes not everything. There are other variables that will determine the success of the EACJ in shaping Community policies and ultimately in meeting Community objects as set out under the EAC Treaty. The author for instance notes that lack of express human rights jurisdiction in the EAC Treaty has not deterred the EACJ from adjudicating on matters touching on human rights, through progressive interpretation of existent Treaty provisions in cases presented before it. Furthermore, the underutilisation of some of the already existing jurisdiction in areas such as arbitration and preliminary references implies that there is more to the equation than mere articulation of jurisdiction on paper. Sometimes the answers to bigger problems lie in simple solutions. For instance, ultimately, potential consumers of justice have to be aware of the Court's mandate and be willing to file cases before the regional Court. The Court must in addition possess the requisite capacity to process the array of legal issues in which it has jurisdiction and its Orders must be implemented and enforced for the Court to have the desired impact. The study thus explores some of the threats and challenges facing the EACJ and also some of the opportunities and possible solutions. Anchored mainly on the EAC Treaty, supplemented by case law, policy documents, papers, reports coupled with comparative perspectives and stimulating discussions, the study steers the debate regarding the role of the regional Court towards more practical issues; areas seemingly 'obvious' yet oft-overlooked.

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background

In today's rapidly globalising world and market liberalisation, integration remains an almost inevitable tool for a State that hopes to do more than just survive in the international system. In fact virtually every world State is a member of at least one supranational organisation. Regional integration has been part of Africa's strategy for economic transformation since the 1960s and one of the means through which African States could 'pick up the pieces' and determine their destiny after decades of colonial domination which had left them in a state of political and economic fragility. Leaders of African countries emerging from colonialism saw integration as a panacea to conquering the perennial challenges of development and building a stronger united continent. Regional blocs were therefore seen as strategic vehicles towards achieving development strategy for the continent.<sup>1</sup>

Several initiatives have in the past years been launched at the continental level in order to provide a platform for the integration agenda; key among these initiatives being the formation of the OAU in 1963, the 1980 Lagos Plan of Action for the Economic Development of Africa, the Treaty Establishing the African Economic Community ("Abuja Treaty") in 1991<sup>2</sup>, the Sirte Declaration of 1999, AU programme, the New Partnership for Africa's Development (NEPAD)

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<sup>1</sup> United Nations Economic Commission for Africa UNECA (2012) *Assessing Regional Integration in Africa (ARIA) V: Towards an African Continental Free Trade Area*: xv.

<sup>2</sup> The Abuja Treaty is the legal framework of the African Integration process. In its Article 6 (2), it specifies a phased out process consisting six graduated stages leading to the AEC which are to take place within a space of 34 years with a possibility of extension.

in 2000 and AU Constitutive Act of 2001.<sup>3</sup> The Abuja Treaty for instance recognised the significance of RECs in African integration and underlined the need to, '[strengthen] the existing regional economic communities and the establishment of other communities where they do not exist'.<sup>4</sup> At an international level, the United Nations Economic Commission for Africa (UNECA) is said to have, 'encouraged African States to incorporate single economies into sub-regional systems with the ultimate object of creating a single economic union for Africa'.<sup>5</sup>

Nearly all of the African States are members of Regional Economic Communities (RECs), with some belonging to more than one REC. There are currently eight RECs in Africa recognised by the AU at its seventh ordinary session of Au's assembly of Heads of States and Government in Banjul, Gambia in July 2006.<sup>6</sup> These RECs are the pillars of the African Economic Community (AEC).<sup>7</sup> The EAC has recently been assessed as the most advanced Community.<sup>8</sup> The assembly of the AU held in 2004 resolved that, 'the ultimate goal of the African Union is full political and economic integration leading to the United States of Africa'.<sup>9</sup> In the 2007 AU Summit held in Accra Ghana on 'Grand Debate on the Union Government,' the African leaders concluded that

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<sup>3</sup> For details on Africa's initiatives towards the integration process, see Kouassi, RN (2007) 'The itinerary of the African integration process: An overview of the historical landmarks' 1(2) *African Integration Review*: 1–23 available at <http://storage.globalcitizen.net/data/topic/knowledge/uploads/20100309111728579.pdf> (accessed 20 June 2014).

<sup>4</sup> Art 4(2)(a) Abuja Treaty.

<sup>5</sup> Simbyakula S (2010) *Protecting Human Rights within Regional economic integration arrangements: A case study of the SADC tribunal* (LLM dissertation, University of Cape Town) p 14.

<sup>6</sup> Following a report of the ARIA II in 2006 and the need to rationalise multiple regional integration groups and challenge of overlapping memberships, the AU put an embargo on the establishment of more RECs beyond the eight currently recognised as the AU's main building blocks. The eight formally recognised RECS are EAC, ECOWAS, SADC, COMESA, AMU, CEN-SAD, ECCAS and IGAD. See AU Doc Assembly/AU/Dec. 112(VII) July 2006. See also Economic Commission for Africa (2012), 'Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area' p xi.

<sup>7</sup> African Union Commission (2013) *Status of Integration in Africa* (SIA IV) p 9.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Assembly/AU/Dec. 90(V) as cited in AP van der Mei (2009), 'Regional Integration: The Contribution of the Court of the East African Community' 2009 available at <http://www.zaoerv.de>.

quests for continental unity must begin from sub-regional level through the RECs which will then act as the building blocks to the overall continental unity.

Formation of regional groupings has been lauded as ‘one of the most popular and best-tested models of economic development’.<sup>10</sup> There are many benefits attributed to regional integration or regionalism as it is sometimes known. According to UNECA, regional integration remains, ‘the key strategy that will enable African governments to accelerate the transformation of their fragmented small economies, expand their markets, widen the region’s economic space, and reap the benefits of economies of scale for production and trade, thereby maximising the welfare of their nations’.<sup>11</sup> Regional integration increases competition in global trade and improves access to foreign technology, investment, and ideas. By merging its economies, pooling its resources and harnessing its collective energy, the continent is able to ‘overcome its daunting development challenges’ as well as ‘ensure poverty alleviation, enhanced movement of goods, services, capital and labour, socio-economic policy coordination and harmonisation, infrastructure development as well as the promotion of peace and security within and between the regions’.<sup>12</sup>

Regionalism and the quest for economic co-operation in East Africa has a long history dating way back to 19<sup>th</sup> century with the construction of the Uganda railway.<sup>13</sup> There were also administrative integration arrangements in the colonial times such as the East Africa Court of Appeal in 1909 and the East Africa Currency Board. This co-operation blossomed over the years

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<sup>10</sup> Karega MR (2009), *Benefits experienced by ordinary citizens from East African Community (EAC) Regional Integration Final report* p 8.

<sup>11</sup> Economic Commission for Africa (2010), ‘Assessing Regional Integration in Africa IV Economic Commission for Africa African Union’ African Development Bank *Enhancing Intra-African Trade* p 1.

<sup>12</sup> *ibid* at xix.

<sup>13</sup> Kessides, IN (2012), ‘Regionalizing Infrastructure for deepening market integration The case of East Africa World Bank Policy research working paper 6113 p 5.

to include a customs union in 1917, the East African High Commission in 1948 and the East African Common Services Organization. The latter lasted from 1961 up to 1967 when the defunct East African Community was established. A decade later however, the (first) EAC collapsed.

The EAC was later reestablished following the signing of the EAC Treaty on 30th November 1999 and its subsequent coming into force on 7th July 2000.<sup>14</sup> Through co-operation and by strengthening their economic, social, cultural, political, technological and other ties, the East Africa Partner States aim to raise the standards of living of the people, maintain and enhance the economic stability, foster close and peaceful relations among African states and accelerate the successive stages in the realisation of the proposed African Economic Community and political union.<sup>15</sup> Since its re-establishment, the EAC has made gigantic steps towards accelerated socio-economic transformation of the region. In a 2014 report by the World Bank, East Africa was tagged as one of the fastest growing economic regions in the world.<sup>16</sup> The EAC has one of the most ambitious integration agenda that looks beyond the economic integration. It is the only REC whose Treaty explicitly aspires for a political federation as its ultimate goal.<sup>17</sup> The EAC adopted an ‘organic’ or ‘incremental’ integration process beginning with a customs union and a common market but with eyes set for the ultimate prize; a political federation.<sup>18</sup>

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<sup>14</sup> Treaty for the Establishment of the East African Community on 30th November, 1999. The Treaty entered into force on 7 July 2000 following its ratification by Kenya, Uganda and Tanzania the initial three Partner States.

<sup>15</sup> See Preamble to the EAC Treaty paras 15 & 16.

<sup>16</sup> World Bank (2014) *Building Integrated Markets within the East African Community*: ix.

<sup>17</sup> EAC (2011), ‘*Report of the Team of Experts on Addressing the Fears, Concerns and Challenges of the East African Federation*’ p vi available at <http://www.federation.eac.int/> (last accessed 28 June 2014). The objectives of other RECs mainly revolve around economic and social integration efforts.

<sup>18</sup> According to Article 5(2) of the treaty, the EAC aims at not just economic integration, but hopes to achieve a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation’. At the

The EAC comprises the Republics of Kenya, Uganda, the United Republic of Tanzania, Republic of Rwanda and Republic of Burundi. It is headquartered in Arusha, Tanzania. In 2007, the number of Partner States rose to five following the accession to the EAC Treaty on 18 June 2007, by the Republics of Rwanda and Burundi. The duo entrants became full Members of the Community with effect from 1 July 2007.<sup>19</sup>

Central to the regional groupings is the rising need to form regional courts to adjudicate on disputes arising from interpretation of the Treaty provisions and disputes regarding the application of treaty provisions by member states. Integration, like any relationship is bound to elicit conflicts and disagreements in one form or other. It is thus no wonder that in their wisdom, the framers of the EAC Treaty established a regional court; the East African Court of Justice (EACJ) as one of the organs of the Community. The EACJ, as an independent organ of the EAC embodies the rule of law and good governance; the linchpin for regional development and global partnership for the EAC and is mandated to foster the rule of law.<sup>20</sup> Apart from resolving disputes like any judicial body, the court has a significant role in the harmonisation of the laws of Partner States through development of jurisprudence in the Community.<sup>21</sup> Maintaining equilibrium between the need to respect the autonomy of the Member States while at the same time preserving unity and steering integration dream is a perennial issue that confronts regional courts across the world.

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time of writing this study, the first two that is a Customs union and a Common Market had been effected and the Monetary Union protocol was in the process of being signed, setting pace for achievement of the next mile stone.

<sup>19</sup> Article 3(2) of the Treaty allows for Partner States to together negotiate with any foreign country the granting of membership to or its participation in any of the activities of the Community, according to the criteria set out under the Treaty.

<sup>20</sup> Art 6 EAC Treaty.

<sup>21</sup> Ruhangisa JE (2012), 'Rule of Law and Access to Justice in East Africa: The East African Court of Justice'. A paper presented during a Premier course on the East African Community organised by the Kituo cha Katiba, Kampala Uganda, 12<sup>th</sup>-15<sup>th</sup> September, 2012 p 3.

The EACJ was inaugurated on 30th November 2001 but did not receive a case in the first four years leading some lawyers to christen it ‘an endangered species.’<sup>22</sup> However, since then, the regional Court has proceeded apace with its judicial function, but not without a couple of setbacks.

## **1.2 Problem Statement**

The EACJ faces various challenges in its operations which have hamstrung the Court in the effective discharge of its mandate. Some challenges are structural and have more to do with the capacity of the Court and its jurisdictional mandate, while others have arisen in its relations with the stakeholders. In its 2010-2015 strategic plan, the EACJ identified, ‘failure of the court to optimally discharge its mandate in the integration process’ and the ‘risk of marginalisation of the status of the Court’ as some of the critical issues facing the Court.<sup>23</sup>

The relationship of the Court and its other stakeholders has sometimes proved problematic in both the discharge and enforcement of its decisions. The EACJ is not an isolated island situated in Arusha and in order to effectively discharge its mandate requires co-operation and political support from governments of Partner states if its decisions are to be worth the paper they are written on.<sup>24</sup> However, in the past, we have had instances for example where through the Summit, the governments of the three states attempted to interfere with the security of judges of

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<sup>22</sup> Kibua, TN & Tostensen, *A Fast-tracking East African Integration – Assessing the Feasibility of a Political Federation by 2010* Christel Michelsen Institute, 2005, available at: [www.cmi.no/publications](http://www.cmi.no/publications) (accessed 10 June 2014).

<sup>23</sup> East African Court of Justice, *Strategic Plan (2010-2015)*: vii, 17. Also available at [http://eacj.huriweb.org/wp-content/uploads/2013/09/EACJ\\_StrategicPlan\\_2010-2015.pdf](http://eacj.huriweb.org/wp-content/uploads/2013/09/EACJ_StrategicPlan_2010-2015.pdf) (accessed 29 June 2014).

<sup>24</sup> Currently the EACJ for instance largely relies on national courts for enforcement of its decisions.

the Court over a contentious ruling made by the Court.<sup>25</sup> Despite the pivotal role that dispute settlement mechanisms such as EACJ would play in the promotion of regional integration, minimal and ‘half-hearted’ efforts appear to be expended towards re-engineering the institution in order to keep it in tandem with the ever-deepening dimensions of integration.<sup>26</sup>

Moreover, there is a lack of clarity and in some instances jurisdictional overlaps between the mandate of the EACJ and the national courts in Community matters which has served to undermine the role of the regional Court in shaping Community policies. This is quite apart from the persistent failure by the policy organs of the Community to expand the mandate of the EACJ to include human rights jurisdiction. Some scholars have in the past even expressed fears that unless the jurisdiction of the EACJ is expanded to include commercial disputes and human rights cases, it runs the risk of becoming moribund.<sup>27</sup> Furthermore, it has emerged that even the exercise of the existing jurisdiction has not been without its fair share of challenges. For instance, there is underutilisation of the jurisdiction of the Court in some areas such as preliminary references and arbitration, owing to lack of awareness amongst East Africans generally about the workings of the court. The tangible disconnect between the EACJ and stakeholders including national courts of Partner States have further served to derail the Court from discharging its mandate optimally in accordance with the EAC Treaty. Lack of the

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<sup>25</sup> This was the landmark case of *Prof Peter Anyang' Nyong'o and others v Attorney General of the Republic of Kenya et al* EACJ Reference No 1 of 2006. The case challenged the Kenyan rules on election of persons to the EALA as contravening the EAC treaty. The EACJ ruled that the Rules were antithetical Article 50 of the EAC Treaty. This subsequently triggered a furore and the Court was accused of interfering with national matters. What followed was an amendment to the provision on removal of Judges in order to expand the grounds of removal of EACJ judge.

<sup>26</sup> Many efforts are in top gear. For instance, at the time of writing this study, there was pending Draft Bill of Rights for the EAC, Draft document on Good Governance besides the economic and other integration efforts.

<sup>27</sup> See Kibua, TN & Tostensen, A ‘Fast-tracking East African Integration—Assessing the Feasibility of a Political Federation by 2010’, Christel Michelsen Institute, 2005, available at [www.cmi.no/publications](http://www.cmi.no/publications) p 19.



visibility of the EACJ is one amongst a host of other threats to the Court in the effective discharge of its mandate and achievement of the Court's vision. The subsequent chapters address this and other practical challenges that the Court faces and proposes possible solutions.

Expanding the jurisdiction of the EACJ as has been the clarion call of recent studies without the requisite strengthening of the capacity of the court, support on the part of stakeholders and even attitudinal shift by its potential users will not yield the desired results. The role of national courts and governments in aiding the EACJ achieve its mandate forms the primary focus of this study.

### **1.3 Justification**

It is a universally accepted principle that, 'disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law'.<sup>28</sup> A regional court such as the EACJ would not only provide a forum whereby disputes can be resolved amicably but also act as a watchdog in safeguarding the rule of law, hence ensuring everyone plays by the rules. To achieve and maintain an effective regional block such as the EAC demands more than a constellation of Partner States' interests and beyond the meeting of minds. It requires vibrant institutions that are not only the Community's building blocks but especially oars that steer the integration process towards the desired end and firmly anchor the Community in a just system. One such key organ is an independent judicial body such as the EACJ. It is only in a peaceful and stable environment that Community values and principles can infuse the integration agenda and Community objects thrive. Through ratification of the EAC Treaty, Partner States acknowledge that peace and security are prerequisites to social

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<sup>28</sup> See preamble Vienna Convention on the Law of Treaties, 1969.

and economic development within the EAC and vital to achieving EAC objectives.<sup>29</sup> Since membership is voluntary, EAC Partner States must play their role in abiding by the Treaty provisions in ‘good faith’, a universally accepted principle in international law.<sup>30</sup> In fact, much of the effectiveness of the court depends on the co-operation and good faith of the member governments including domestic courts. This is especially in respect to implementation of the Court’s decisions. It is argued that an effective regional Court will boost confidence in EAC’s Partner states and other stakeholders, stemming from the assurance that there is an available recourse for addressing any disagreements involving community matters, whether political or commercial-related matters. Moreover, Party States will be compelled to take their obligations seriously and not to renege on their Community’s responsibilities further bolstering the integration agenda.

A glean at the preamble and magnanimous objectives of the EAC Treaty reveals that the task ahead for the Community is highly ambitious just as its rewards promises to be bountiful. Much is therefore at stake and it is imperative that the integration delivers on its promises this time round. The collapse of the defunct EAC in 1977 dealt a major blow to the East African region and was widely regretted, particularly since the former Community had made huge strides and was even considered the world’s model of successful regional integration and development. At its height, many saw the EAC as, ‘all but name, a federal government’.<sup>31</sup> It is arguable that had

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<sup>29</sup> Ruppel, O (2009), ‘Regional economic communities and human rights in East and Southern Africa’ in BÖsl, A. Diescho, J (ed) *Human Rights Law in Africa: Legal perspectives on their Protection and Promotion*, Windhoek: MacMillan Education Namibia p 304.

<sup>30</sup> The principle of ‘good faith’ or *pacta sunt servanda* rule is one of the core universally recognised principles. A party to a treaty or agreement must perform its obligations in good faith (See preamble & Article 26 to the Vienna Convention on the Law of Treaties, 1969).

<sup>31</sup> Mwapachu JV (2011) ‘EAC Experience, Achievements, Challenges and Prospects: The Dynamics of Deepening Regional Integration.’ A paper presented to the 2nd EAC Symposium in Arusha, 28 April 2011 p 1-2. Available at

there been an effective regional court in place then to deal with the Partner States concerns, it would possibly have averted the process of disintegration of the first Community or at least mitigated its gravity. The Community of today cannot afford to backslide like the yester years as the aftershocks will be far-reaching and the losses to the region could be irreversible this time especially in the wake of a dynamic globalised world that is becoming ever more competitive. As aptly captured by Kamanyi, ‘opportunity knocks but once’ but for the EAC it happened to knock twice; first in 1967 and later in 1999. There is no telling whether would knock a third time should the Community (heavens forbid) disintegrate a second time round.<sup>32</sup> A strong independent regional court is vital to ensuring that the integration agenda remains on course and preserving the Community ideals in the midst of the turmoil that integration process may unleash.

It is opportune that the respective roles of the EACJ and national courts and areas of co-operation be re-examined and clarified at this moment especially as the EAC sinks its feet deeper into Community activities and the integration process is in top gear. It is crucial that all the institutions and organs of the EAC particularly the EACJ be fully empowered to effectively manage the deep ends of the integration process. As the Community plunges deeper into the economic integration, a common currency and finally political federation, matters will undoubtedly get more daunting, a situation that will put a high demand for a vibrant independent judicial body to calm the waves and hold the Community together. In fact, it is submitted that

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[http://www.eac.int/index.php?option=com\\_docman&task=cat\\_view&gid=161&Itemid=163](http://www.eac.int/index.php?option=com_docman&task=cat_view&gid=161&Itemid=163) (accessed 28 June 2014).

<sup>32</sup> Kamanyi, J (2006), then Executive Director for Kituo cha Katiba in ‘The East African Political Federation: Progress, Challenges and Prospects for Constitutional Development.’ Paper presented at the 10th Annual Sir Udo Udoma Symposium Makerere University, Kampala. Available at [http://www.federation.eac.int/index.php?option=com\\_content&view=article&id=52:askhere&catid=34:highlights](http://www.federation.eac.int/index.php?option=com_content&view=article&id=52:askhere&catid=34:highlights) (accessed 29 June 2014).

since the community is geared ultimately towards a political federation, it is imperative that the current institutions of the Community begin getting attuned beforehand to the ‘federal idea’ as they will lay the foundation and predictably form building blocks for the new institutions under the anticipated political federation. One of the initial steps to doing this is to strengthen the already existing judicial mechanism and according it the requisite place and prominence in the integration journey.

In order for the EAC to maximally reap the benefits of integration, promote good regional relations, as well as enhance peaceful co-existence there is a need for efficient and effective regional court.<sup>33</sup> By acting as custodians of the Community’s rule of law, interpreting the Community treaty and resolving disputes emanating from the application of the treaty, the EACJ occupies a vantage point in defining both the course and quality of integration. The success of the Community hinges not only on the existence of laws and protocols governing Community affairs, but especially in their sound interpretation, the efficient and effective resolution of disputes as and when they arise and most importantly the implementation of the Court’s decisions. The extent to which the EACJ decisions shape the Community policies is the ultimate yardstick as to its value. It is imperative therefore, that requisite attention is accorded the regional court. It is hoped that through the research findings and recommendations, this contribution will serve as a useful road map in re-engineering the indispensable organ of the EAC.

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<sup>33</sup> Lwaitama, AF, Kasombo. J & Mkumbo, K (eds) (2013) ‘A Synthesis Research Report on the Participation of Citizens in the East African Community Integration Process’ *Friedrich Ebert Stiftung* p 41.

Lastly, the limited awareness and literature on the subject of the EACJ and its role as an instrument of regional integration is yet another motivation for the study. As the literature review will later reveal, much homage has been paid to the political, social and economic dimensions of RECs, with minimal attention being directed towards the justice sector and especially the role of national courts in steering and shaping the Community agenda. This contribution therefore serves to fill the missing link in the Community's economic, social and political conundrum which is the judicial arm of the Community. Besides lack of adequate information about the Court, there is limited literature on the workings of the EACJ and particularly the interrelationship between the regional Court and the national courts. Through this study, the EAC Treaty and case law, past policy papers, status reports and research findings relating to the EAC generally and EACJ in particular are synthesised in one single package, providing a single compact kit for the relevant policy makers.

#### **1.4 Hypotheses**

This study turns on the premises that an effective regional court such as the EACJ is integral to the integration process and that the co-operation of national courts and the governments of Partner States bears a significant impact on the effectiveness of the Court. Specifically, the study is anchored on the following theses:

- That the EACJ is an indispensable organ in EAC's quest for integration.
- That the co-operation of national courts and governments is quintessential for a successful regional court.
- That the significance of the EACJ in EAC's integration agenda has been underplayed and underrated.

- That the challenges plaguing the regional court have been a hindrance to the successful discharge of the court's mandate and by extension in realisation of Community objects.
- That the EAC generally and the EACJ in particular wields immense untapped potential which if optimally harnessed would positively impact on the process of integration.

### **1.5 Theoretical framework**

There is vast literature on the approaches and theories of international co-operative arrangements and integration generally, most of these being offshoots of the principal schools of international relations; *the realist, institutionalism* and *liberal* theories of international relations. These theories try to explain the world system generally and the essence of international co-operation. While the theories are useful in explaining and predicting behaviour of States, the present study cannot be neatly pigeon-holed into any one of the existing theories exclusively. Thus, the research implicitly embodies a blend of approaches, biting off from each of the various theories on the international relations menu; beginning with the realists', institutionalism and liberalists' explanations of international systems, to those on regional co-operation that explain State's desire to co-operate and 'cede' part of their sovereignty to the international bodies and institutions. Additionally, there are approaches that seek to explain or justify the value addition of international tribunals or courts in the world system.

According to neo-realists theory (or structural realism) propounded by Kenneth Waltz, the international system is anarchical 'self-help' mechanism in which the actors (States) wield varied capabilities. It is the relative positions of states that form the structure of the international system and States gauge their 'well-being' relative to other states and as such, 'considerations of

security subordinate economic gain to political interests'.<sup>34</sup> Consequently, even if international cooperation could provide substantial economic benefits, States will be reluctant to enter into cooperation which demands a limit on their sovereignty, if it could mean that other states would benefit relatively more than themselves.

The functionalism/neo-functionalism and inter-governmentalism theories of international cooperation lay focus, and understandably so, on the supranational body of the time, the European Union (EU) in trying to explain or justify their philosophies. For the neo-functionalists, 'the process of community formation is dominated by nationally constituted groups with specific interests and aims';<sup>35</sup> integration therefore becomes an ideal way to satisfy these interests. Thus, the more a nation pursued national interests through the protection of these interests, the greater the integration. Central to this theory is the concept of '*spillover*' which connotes a graduated process of integration whereby levels of integration deepen and grow from strength to strength beginning from 'less political' areas such as economic to political integration, eventually resulting in unions of states with characteristics of 'domestic political system.' During this process, loyalty is gradually transferred from nation state to the higher authority/regional bloc.<sup>36</sup> The concept of 'organic' or 'incremental' integration and 'spill over' would perhaps be used to explain the EAC's incremental process of integration as envisaged under Article 5 of the EAC treaty and the AEC's phased out economic integration plan for the continent.

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<sup>34</sup> Waltz, KN (1979), *Theory of International Politics*, McGraw-Hill Inc p 107.

<sup>35</sup> See Haas, EB *The Uniting for Europe, Socio-economic Forces, 1950-1957*, Stanford University Press, 1958.

<sup>36</sup> Rosamond, B (2001), *Theories of European Integration* London: Macmillan Press Ltd in Ujupan, AS, 'Reconciling theories of regional integration: third way approach' University of Ulster p 2.

This idea has however received sharp criticism from scholars such as Hoffman who saw economic and politics as different independent variables. According to him, 'low politics' areas or areas which were more technocratic in nature and involved minimal transfer of sovereignty made integration possible.(Hoffman in Ujupan at p 3).

The *inter-governmentalists* on the other hand conceptualised integration in terms of a series of bargains between government heads in a region.<sup>37</sup> The theory argues partly that the crystallisation of interests within an external bloc were basically the interests of large states. Apart from the two theories mentioned above, other theories have been propagated including ‘*federalism*’ as an approach to the study of integration.<sup>38</sup>

The legal positivists’ theory propounded by early scholars such as Austin, Thomas and Hobbes also becomes remotely useful to understanding the nature and source of law and what gives legitimacy to the laws and propels their obedience. However, some positivist’s aspects such as Austin’s command theory of law backed by threats may be of little value in understanding the functioning of intergovernmental organisations whereby good will is paramount and is largely what drives States to co-operate and obey ‘communal’ laws as opposed to threats and punishment. The *monist* and *dualist* theories on the applicability of international law to domestic courts also become relevant in chapter three of this study whereby an indepth analysis of the application of EAC law in Partner States is presented.

Perhaps a more pertinent question to pose is this, ‘why the need for a judicial system in international co-operation?’ The reality is that conflicts are and will be inevitable in a system whereby dynamic interactions take place and there are diverse interests (and as realists would like to add, human by nature is ‘wicked,’ and ‘egoistic’ and therefore conflicts are a natural part

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<sup>37</sup> Moravcsik, A (1991), ‘Negotiating the Single European Act: National interests and conventional statecraft in the European Community,’ 45(1) *International Organization* pp 19-56, Moravcsik, A (1993), ‘Preferences and Power in the European Community: A Liberal Intergovernmental Approach’ 31(4) *Journal of Common Market Studies*: 473-523 & Moravcsik, A (1998), *The Choice for Europe* Ithaca: Cornell University Press.

<sup>38</sup> See Dosenrode, S (2010) ‘Federalism Theory and Neo-Functionalism: Elements for an analytical framework’ 2(3) *Perspectives on Federalism*.



of the system). The classical realists such as Hans Morgenthau and Machiavelli long argued that the international system is anarchic and ‘self-help’ system driven by national interests.<sup>39</sup> Such a theory would necessarily favour establishment of a neutral arbiter in the form of a regional Court in order to pacify and restore order to the anarchical system and prevent its fragmentation.

Proponents of the *institutionalism* theory have emphasised the significance of rules in reigning on anarchy observing that, ‘rules, norms, principles and decision-making procedures can mitigate the effects of anarchy and allow states to cooperate in the pursuit of common ends’.<sup>40</sup> Moreover, scholars of federalism such as Wheare and Watts recognised courts as important components of federal systems.<sup>41</sup> In acknowledging this, Choudhry and Hume observe that, ‘[n]ot surprisingly, constitutional judicial review first developed in three of the classical federations: the United States, Canada and Australia. As federalism spread to Latin America in the 19<sup>th</sup> century, judicial review came along with it’.<sup>42</sup> A potentially federalist system (such as one that the EAC ultimately desires) thus demands an umpire in the form of a court to settle disputes between the national and sub-national units (in this case the Partner states and the EAC or even citizens of Partner States).

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<sup>39</sup> Morgenthau, HJ (1973), *Politics among Nations: The Struggle for Power and Peace*, 5th ed New York.

<sup>40</sup> Slaughter, AM (1995) ‘Liberal International Relations Theory and International Economic Law’ 10(2) *American University International Law Review* 717-743 pp 724-5. See also Keohane, R (1984), *Cooperation and Discord in the world political economy* 244 & Keohane (1989) *Essays in International Relation Theory* vii.

<sup>41</sup> Wheare, KC (1964) *Federal Government* 4<sup>th</sup> ed New York: Oxford University Press & Watts, R (1966), *New Federations: Experiments in the Commonwealth*, Oxford: Clarendon Press.

<sup>42</sup> Choudhry, S & Hume, N (2010), ‘Federalism, Secession & Devolution: From Classical to Post-conflict federalism’ in Ginsburg T& Dixon R(ed), *Research Handbook on comparative Constitutional Law*: 13. Available at <http://ssrn.com/abstract=1623682>. (accessed 30 June 2014).

The optimism of some liberalists/idealists such as Emmanuel Kant make world co-operation possible, beyond the ‘selfishness’ and ‘rivalry’ that characterises the realists’ image of a modern state. They encourage States to ‘focus on the building and strengthening of a just world by enforcing suitable laws and standing for social justice’.<sup>43</sup> This ‘idealist’ goal can only be achieved through an independent and effective judicial mechanism.

Although these theories mainly focus on the European Union and international system generally, they nevertheless provide useful concepts that guide understanding of the integration process and behavioral characteristics within member states in a regional bloc such as the EAC and which ultimately impact on the functioning of its institutions such as the EACJ. An assortment of these theories provides the milieu against which the hypotheses of this research will be tested, either directly or indirectly and the main strands of argument canvassed.

## **1.6 Objectives of the Study**

### **1.6.1 Primary objective of the Study**

The primary object of this study is to put a spotlight on the ‘missing link’ in the EAC’s integration efforts; the EACJ by exploring its place in the integration process and the critical role that national courts and governments have in not only ensuring the actualisation of the mandate of the regional Court as one of the key organs of the Community, but also in abiding by their respective obligations under the EAC Treaty hence advancing the integration agenda.

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<sup>43</sup> Kant, *I Perpetual Peace; A Philosophical Essay 1795* (BiblioBazaar, 2009).

## **1.6.2 Specific Objectives**

In specific terms, the study aims to:

- i. Create an understanding of the structure and role of the EACJ as one of the organs of the EAC and establish a nexus between the EACJ and the vision of the EAC.
- ii. Create an appreciation of the relationship between the EACJ and national courts of Partner States and identify areas of co-operation.
- iii. Define the specific roles of national courts and governments in actualising the mandate of the EACJ.
- iv. Identify structural and other drawbacks that have served to weaken the standing and effectiveness of EACJ and how that has impacted on the integration agenda.
- v. Highlight the potential of the EACJ and national courts in shaping the integration agenda and draw relevant lessons from similar regional courts.

## **1.7 Research Question**

The study addresses itself to the broad question of the place of the EACJ in EAC's integration process and the role of national courts and governments as instrumental partners to ensuring an effective regional Court and realisation of Community objects. In particular, this research study answers the following six questions:

- i. What is the place and mandate of the EACJ in EAC's integration process?
- ii. What is the role of national courts in EAC's integration process?
- iii. What is the relationship between the EACJ and the national courts and governments?
- iv. How do the Community laws and those of individual Partner States interrelate?
- v. What are some of the practical threats and opportunities for the EACJ?

- vi. What are the possible solutions towards mitigating or eliminating the challenges facing the regional court while capitalising on the opportunities?

## **1.8 Literature review**

There is an accumulation of literature on the subject of international relations generally and formation of regional blocs. The following literature survey addresses itself to four thematic areas: First is the definitional question as to what constitutes integration generally. This is followed by a survey of the scholarly literature on the subject of international courts and tribunals generally, narrowing down to the East African Community and lastly works on the specific topic of research; the EACJ. The last section identifies the missing gap in the available literature.

### **1.8.1 Integration generally**

The term 'regional integration' has been defined both as a process and a stage. It is a, 'process transferring political and or economic decision making power...to a new supra-national entity'.<sup>44</sup> As an end product, regional integration has been termed as 'a stage where former independent polities have handed parts or all of their sovereignty over to a supra-national body'.<sup>45</sup> Ernst Haas, the pioneer of the neo-functionalism theory for instance defined regional integration from a political angle thus; 'Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities to a new centre, whose institutions possess or demand jurisdiction over pre-existing national

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<sup>44</sup> *Ibid* 9.

<sup>45</sup> *Ibid* 10.

states. The end result is a new political community, superimposed over the pre-existing ones'.<sup>46</sup>

Karl Deutsch on the other hand viewed integration as, 'a relationship among units in which they are mutually interdependent and jointly produce system properties which they would separately lack'.<sup>47</sup>

The substance on the various theories of integration has been briefly discussed in 1.5 above.

### **1.8.2 International courts and tribunals**

The essence of international courts and tribunals in the international system has attracted interest of several scholars.<sup>48</sup> According to Wheare, courts have a crucial role to play in federal arrangements, 'which extends beyond the mere question of determining disputes about the division of powers between general and regional governments'. He observed that through their interpretation of the whole constitution of the federation and of the ordinary law, courts 'may exercise an integrating influence which, because it is gradual and imperceptible, is of greatest importance'.<sup>49</sup>

International tribunals have been regarded as one of the 'precious few tools available to the international community to encourage compliance with international obligations'.<sup>50</sup> In discussing

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<sup>46</sup> Haas, EB (1958) p 16.

<sup>47</sup> Deutsch, KW, *The Analysis of International Relations* Prentice-Hall, Englewood Cliffs, 1968 at 159, 192 cited in Dosenrode, S (2010) *op cit* p 4-5.

<sup>48</sup> See Shapiro, M *Courts: A comparative and Political Analysis* (1981) University of Chicago Press, Helfer, LR & Slaughter, AM, 'Toward a Theory of Effective Supranational Adjudication' 107 *YALE L.J.* 273 (1997-98) & Caron D (2007) 'Toward a Political Theory of International Courts and Tribunals' 24 *Berkeley Journal of International Law* 401-423.

<sup>49</sup> Wheare, KC (1963) *Federal Government* 4<sup>th</sup> edition Oxford University Press, London at 62ff.

<sup>50</sup> Guzman, AT (2008) 'International Tribunals: A Rational Choice Analysis' 157(1) *The University of Pennsylvania Law Review* 171-235 p 234. Guzman's work provides an interesting theory as to how various variables such as independence and politics interact to ultimately affect effectiveness of tribunals. The author explains how by altering incentives, tribunals attract compliance or otherwise with the international law.

the federal theory of integration, Dosenrode observes that federal institutions such as the Court of Justice of the European Union play a vital role in preventing a federation from disintegrating and by being guardians of the federal idea.<sup>51</sup> He further notes that, *'it is often the small daily decisions which deepen the integration process, and pave way to new decisions'*. While recognising the role of federation institutions such as courts as 'guardians of the integration project,' the author is quick to warn that such federal institutions cannot develop the federation by themselves and that, 'it is dependent upon the member states supporting it'.<sup>52</sup> Guzman also observes that tribunals do not act in isolation and that while tribunals is one way to resolve a dispute, other traditional tools such as diplomacy are critical because according to him, 'even if a case is filed with a tribunal, there may be settlement prior to a ruling and, even if there is a ruling, the losing party may refuse to comply'.<sup>53</sup>

### **1.8.3 The EAC**

The EAC's integration process, just like that of other African RECs is no doubt a well-trodden path by scholars and academicians over the years. There is a wealth of literature on African integration generally and the integration of the eight formally recognised RECs.<sup>54</sup> The history on the rise and fall and rise of the EAC is also well preserved in various literature and it is for this

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<sup>51</sup> Dosenrode, S op cit at 18.

<sup>52</sup> *Ibid* at 19.

<sup>53</sup> *Ibid* at 171.

<sup>54</sup> See for instance Viljoen, F (2007) *International Human Rights Law in Africa* Oxford University Press, Ruppel O (2009) 'Regional economic communities and human rights in East and Southern Africa' in Bösl, A.; Diescho, J (ed) *Human Rights Law in Africa: Legal perspectives on their Protection and Promotion* Windhoek: McMillan Education p 304. The periodical reports of EUNECA and AUC also provide useful status updates on the integration efforts across the various RECs in the continent.

reason that this study has exercised restraint in delving into details regarding its emergence and evolution over the years.<sup>55</sup>

Viljoen advises that integration must not be pursued for the sake of it.<sup>56</sup> According to the author, the aim of regional co-operation in Africa is to undo ‘the balkanization of Africa that not only separated members of one ethnic group from another, but also severed resources in one country from human capital in another’. He points out other advantages of regional cooperation as increased competitiveness through the economies of scale and making regions more attractive to foreign investment. Additionally, integration enhances international economic bargaining power and develops the visibility of smaller states in addition to boosting the capacity of States to undertake certain reforms.<sup>57</sup> In appearing to agree with the neo-realists, Viljoen writes that weaker states are less likely to relinquish their sovereignty (both political and economic) to supranational institutions than stronger States.<sup>58</sup> The author cites lack of political will as one of the main setbacks to meaningful integration.<sup>59</sup> As shall become clear in later chapters of this study, co-operation of Partner States is quintessential for the effectiveness of the regional Court and ultimately the success of the Community, and lack of it has in fact been one of the hurdles facing the EACJ.

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<sup>55</sup> For historical evolution of the EAC and integration efforts, see for instance, Ajulu, R *The making of a Region: The Revival of the East African Community* Midrand. Hazelwood, A (1985) ‘The end of the East African Community: What are the lessons for regional integration schemes?’ in Onwuka RI *et al* (eds) *The Future of Regionalism in Africa*, Macmillan Publishers (London), 172-189. Odek, JO (2004) ‘Re-appraising the Framework for Regional Economic Integration in Africa’ 1 *The East African Law Journal*: 47-68, Gastorn, K, Sippel, H & Wanitzek, U (2011), *Processes of Legal Integration in the East African Community* Dar es Salaam University Press. Gathege, PS (2012), *Dispute settlement within the East African Community: the East African Court of Justice and its jurisdiction* (unpublished LLM dissertation, University of Nairobi) pp 15-30.

<sup>56</sup> Viljoen, F (2007), *International Human Rights Law in Africa* Oxford University Press p 485.

<sup>57</sup> *Ibid* p 486.

<sup>58</sup> According to Viljoen, reluctance of States and their leader to seriously embrace regionalism may be because of the fear that benefits of integration may be unevenly shared. (See Viljoen (2007) at 487).

<sup>59</sup> *Ibid* p 486.

#### 1.8.4 The EACJ

While there is a wealth of literature on regional integration generally and African RECs in particular, little has been written on the EACJ with the huge fraction of literature focusing on the EAC integration processes. Furthermore, the existing literature on the EACJ is focused on the jurisdiction of the Court or lack of it and in particular, the human rights jurisdiction.<sup>60</sup>

In his ‘Adventures in wonderland,’<sup>61</sup> Ojienda examines some of the jurisdictional questions surrounding the EACJ including its appellate and human rights jurisdiction. He notes that for progress to be made in the integration efforts, ‘there must be a vibrant and viable judicial arm that will make authoritative pronouncements on issues affecting member countries’. The author decries the limitation of the court’s jurisdiction to only the interpretation of treaties. He singles out ‘competence’ and ‘independence’ as the two key elements necessary for the Court to earn the respect of East Africa. On the nexus between the regional court and the national courts, the author notes that both the EACJ and national courts have concurrent jurisdiction in dealing with EAC Treaty matters. He equates the role of the EACJ to that of a constitutional court in national courts in its mandate to issue preliminary rulings under Article 34 of the treaty.<sup>62</sup>

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<sup>60</sup> See for instance, Ruppel O (2009) *op cit*, Bbosa, SB(2008), ‘A critique of the East African Court of Justice as a Human Rights Court’ in Maina, PC(ed) *The Protectors: Human Rights Commissions and Accountability in East Africa*, Kampala: Kituo cha Katiba, Fountain publishers, pp 284-299. Kibalama, E (2008), ‘Human Rights in the Region: The Community and the Members’ in Maina, PC(ed) *The Protectors: Human Rights Commissions and Accountability in East Africa*, Ebobrah S (2009), ‘Litigating human rights before sub-regional courts in Africa: Prospects and Challenges’ 17 *African Journal of International and Comparative Law* and Ebobrah S (2013), ‘Human rights developments in African sub-regional economic communities during 2012’ 13 *African Human Rights Law Journal* 178-213.

<sup>61</sup> Ojienda, TO (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 Democracy* p 94.

<sup>62</sup> *Ibid* at 96. Article 34 of the EAC Treaty is one that provides that, ‘where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the community, that court or tribunal shall; if it considers that a ruling on the question is necessary to enable it to give judgment, request the court to give a preliminary ruling on the question’.



In his subsequent article,<sup>63</sup> Ojienda examines the institutional structure and overview of the function of EACJ in the integration process. The author observes that EACJ is ‘in a position to make significant policy and legal implications for the member states.’ He notes that in order to make any progress in the integration process, ‘there must be a vibrant and viable judicial arm that will make authoritative pronouncements on issues affecting member countries’. The author takes issue with the mode of appointment of the Justices of the Court noting that such risked compromising on the legitimacy and independence of the Court.<sup>64</sup> He recommends enhanced jurisdiction of the Court on a cross-section of matters such as human rights in order to be able to holistically deal with matters affecting citizens.<sup>65</sup> While providing pertinent discussions on issues surrounding the Court, the article does not explore how the limited jurisdiction has played out in practice and the role of domestic courts in the scheme of EAC’s integration.

Gathege’s contribution examines the EACJ and concludes that inadequate jurisdiction is the cause of the Court’s ineffectiveness in promoting the regional integration and economic development within the Community.<sup>66</sup> The author prescribes enhancement of the jurisdiction of the EACJ beyond the interpretation of EAC Treaty. He also proposes a host of other measures including the harmonisation of judicial systems and structures of the five Partner states and the recognition of the EACJ in the respective Constitutions of Partner states.<sup>67</sup> Regarding enforcement of its orders, the author recommends that the Court be vested with jurisdiction to

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<sup>63</sup> Ojienda, TO (2005) ‘The East African Court of Justice in the Re-established East Africa Community: Institutional Structure and Function in the integration Process’ *East African Journal of Peace & Human Rights* (2005): 220–240.

<sup>64</sup> *Ibid* p238.

<sup>65</sup> *Ibid* p 240.

<sup>66</sup> Gathege, PS (2012) *op cit*.

<sup>67</sup> *Ibid* pp 82-5.

punish for contempt and impose penalties on Partner States that fail to implement EACJ decisions.

Unlike the present study, however, the author seems to attribute all of the Court's problems to its limited jurisdiction at the expense of other externalities. The contribution though providing a useful understanding on the general structure, jurisdiction and operation of the regional Court, does not pay much attention to the impact of other external factors on the judicial system and other practical matters that impact on the exercise of the jurisdiction. While the present study acknowledges that jurisdiction is a setback in the functioning of the Court, it recognises that this has been somewhat mitigated in recent practice especially in human rights cases, owing to Court's 'liberal' interpretation of its jurisdiction and is therefore, more a theoretical problem than a hindrance, save for commercial matters which shall be addressed in the next chapter.

Van der Mei<sup>68</sup> assesses the contribution of the EACJ in light of its interpretation of select landmark cases and concludes that the EACJ has the potential to evolve into a legally and politically powerful body and observes that it is willing to protect the rule of law against odds. The author however quickly points out that, 'there is no guarantee that it will be able to successfully shape an autonomous East African legal order'. The author attributes this partly to the Court's lack of control over the actual implementation of its decisions.

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<sup>68</sup> Van der Mei, PA (2009) 'Regional Integration: The Contribution of the Court of Justice of the East African Community' ZaoRV 69 403-425 & Van der Mei, PA (2009) 'The East African Community: The Bumpy Road to Supranationalism: Some Reflections on the Judgments of the Court of Justice of the East African Community in Anyang' Nyong'o and others and East African Law Society and others' Maastricht Faculty of Law Working Paper 2009-7.

### **1.8.5 Literature gap**

Literature on the EACJ is relatively scarce and spread far in between. Furthermore, quite some time has lapsed since the publication of some of the existing literature and therefore some of them do not necessarily reflect the recent changes and current realities on the ground hence the need for a more updated research especially at this time when the EAC is plunging deeper into the Community pool.<sup>69</sup>

Scholars and practitioners have over the years reiterated the need to strengthen the jurisdiction of the EACJ especially by conferring upon it jurisdiction to handle human rights matters. While the author accepts that lack of express jurisdiction is a limitation for the Court, the author does not see this as a major set-back in practice, at least yet, because as shall become evident in the subsequent discussions, the EACJ has been largely undeterred, adopting a more ‘liberal’ approach in terms of demarcating its jurisdiction. This study therefore looks beyond the jurisdictional confines and in addition identifies other challenges that have plagued the court ‘outside itself’ that have often been overlooked or under played in previous expositions.

Notably, the existing literature does not pay much attention to the significance of national courts in the integration process, with the focus being only on the regional Court. Much of the literature also tends to overlook the external environment in which the EACJ operates and which largely impact on the Court’s processes and ultimately its ability to fulfil its mandate in accordance with EAC Treaty. Therefore, over and above the jurisdictional questions that have been raised in the

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<sup>69</sup> For instance, the Treaty was amended in 2006 and 2007 and some of the earlier writings do not reflect these changes. There are also new Rules of Procedure for the Court, emerging jurisprudence and other subsequent research findings which all raise important issues that require redress.

past, this contribution underscores the role of the stakeholders especially in the realisation of the vision of the EACJ and other practical matters of concern to the Court.

### **1.9 Research Methodology**

The study is mainly a desktop study involving critical examination and analysis of both primary and secondary sources of material. For primary sources, the researcher relies on the EAC treaty including Protocols, Community legislation, relevant reports of the EAC, policy notes and papers, communiqués arising from the various Summit and Council meetings, case law and relevant reports from the individual Partner states of the EAC. Newspaper reports and articles also form useful sources of data. In order to obtain pertinent statistical information regarding the court, the author will consult relevant websites of the various regional courts.

For secondary sources, the author relies on books, journals, articles and other relevant material. The internet will be a useful source of mining some of the resources as well as various libraries. For comparative experience, the study makes use of available constitutive treaties and protocols of the major regional blocs that is SADC, COMESA, ECOWAS and the European Union.

## **1.10 Chapter Outline**

The study is organised in five chapters. Chapter one is the introductory chapter and provides the background to the study. The chapter highlights the essence of African regional integration generally and provides background information to the establishment of the EAC. In so doing, the chapter lays a foundation and sets the beacons for the study.

Chapter two focuses on the structural architecture of the EACJ and its mandate. The chapter begins by discussing the establishment and structural composition of the Court. It then examines the mandate of the court as encapsulated under the EAC Treaty under select thematic areas, how that mandate has been translated into practice and how that aligns with the Community's objects. The idea is to create an understanding of the institution and role of the court and appreciate its significance in the integral process.

Chapter three of the study is dedicated to examining the relationship between the EACJ and national courts as envisaged under the EAC Treaty. The chapter begins by discussing the relationship between Community laws and those of Partner States. The chapter then examines the role of national courts in the integration agenda, highlighting key areas of co-operation between domestic and the regional Courts and highlights some of the emerging issues. In so doing, the chapter draws a comparison with other regional courts. Finally, the chapter briefly examines the significance of national governments and policy organs in ensuring effective Community organs and institutions such as the EACJ.

Drawing from the findings and lessons from the previous two chapters, chapter four provides a useful link in appreciating theoretical and some practical aspects in the functioning of the EACJ. The chapter strategically addresses itself to the main challenges and opportunities for the regional Court and their bearing on the integration agenda. The chapter also identifies possible opportunities for the EACJ, which concomitantly serve as counter-measures to some of the challenges facing the Court.

Chapter five wraps up the study by distilling key findings and lessons from the research study. The chapter also suggests some of the possible solutions towards addressing the study problem.

## CHAPTER TWO

### THE ARCHITECTURE AND ROLE OF THE EAST AFRICAN COURT OF JUSTICE

#### 2.1 Introduction

The vision of the East African Court of Justice is for, ‘a world class Court dispensing quality justice for a united prosperous Community’ alongside its mission which is, ‘to contribute to the enjoyment of the benefits of regional integration by ensuring adherence to justice, rule of law and fundamental rights and freedoms through the interpretation and application of and compliance with the East African Law’.<sup>70</sup>

These noble aspirations must be read against the back drop of the objects of the EAC. The primary objective of the EAC according to the constitutive Treaty is, ‘to develop policies and programmes aimed at widening and deepening co-operation 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’.<sup>71</sup> However, that is not all; the EAC Treaty goes a step further to articulate tangible means through which the objective is to be realised:

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 and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared.<sup>72</sup>

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<sup>70</sup> East African Court of Justice, Strategic Plan (2010-2015) p 13.

<sup>71</sup> Art 5(1) EAC Treaty.

<sup>72</sup> Art 5(1) EAC Treaty. The succeeding Clause (3) of the Article goes further to enumerate a list of specific measures towards realisation of the core objective.

Is the structure and role of the Court aligned towards achievement of both the object of the EAC and the vision and mission of the EACJ? This chapter examines the structural composition of the EACJ. It also discusses the role of the EACJ as stipulated in the Treaty and its significance towards the realisation of Community objectives. The role of the EACJ in two thematic areas is highlighted, namely, the duty of the Court in the preservation of the rule of law in the Community and its role in commercial disputes.

## **2.2 Establishment and structure of the EACJ**

The East African Court of Justice (EACJ) is one of the organs established by Article 9 of the EAC Treaty; the others being the EAC Summit of the Head of States, the Council of Ministers, the East African Legislative Assembly (EALA), the Co-ordination Committee, Sectoral Committees and the Secretariat.<sup>73</sup> While the EAC secretariat acts as the executive arm of the EAC<sup>74</sup> and the EALA its legislative arm, the judicial authority of the Community rests with the EACJ.

Chapter eight of the EAC Treaty deals with the EACJ. The regional Court comprises judges who are appointed from the Partner States by the Summit. The Summit is the conglomeration of Heads of States. To be qualified for appointment as judge of the Court, one must be, ‘of proven integrity, impartiality and independence’ and must either fulfil the conditions required in their

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<sup>73</sup>Art 9(1) EAC Treaty. Under Article 9(1)(h), the Summit is also mandated to establish other organs. A line is to be drawn between organs and institutions of the community, the latter which are established under Article 9(2) of the Treaty.

<sup>74</sup> Art 71 EAC Treaty.



countries for appointment to ‘such high office’ or must be a jurist of recognised competence in their respective Partner States.<sup>75</sup>

Prior to the first amendment to the Treaty on 14 December 2006, the Court had one chamber comprising six judges, two from each of the original three Partner States, appointed by the Summit. This meant that there lacked an appeal mechanism and therefore any party aggrieved by the decision of the Court had no way of appealing.<sup>76</sup> However, following the 2006 amendment to the EAC Treaty, the Court currently has two divisions, the *First instance division* and an *Appellate Division*.<sup>77</sup> The First instance Division is to be composed of a maximum of ten judges while the Appellate Division is to have not more than five judges.<sup>78</sup> The appellate division is headed by a president of the Court assisted by a vice-president while the First instance division is headed by a Principal Judge assisted by a deputy principal judge, who are designated as such by the Summit from among the sitting judges. Their role is basically to direct the workings of the Divisions, represent the Divisions, regulate the disposition of matters brought before the Court and presiding over its sessions.<sup>79</sup> There is also a Registrar of the Court who is in charge of the day to day running of the affairs of the Court and who is appointed by the Council of Ministers.<sup>80</sup> The quorum for the First instance Division is three judges, one of whom must be either the principal judge or deputy principal judge of the Court.<sup>81</sup> However, simple applications listed under the Rules of the Court may be heard by a single judge.<sup>82</sup> Similarly, for the Appellate

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<sup>75</sup> Art 24 EAC Treaty.

<sup>76</sup> Art 35(1) EAC Treaty prior to the 2006 Amendment.

<sup>77</sup> Arts 23(2) & 35A EAC Treaty.

<sup>78</sup> Art 24(2) EAC Treaty.

<sup>79</sup> Art 24(4), (5),(6) & (7) EAC Treaty.

<sup>80</sup> Art 45(1) EAC Treaty. See also Rule 5 EACJ Rules of Procedure and Practice, 2013 for powers of Registrar.

<sup>81</sup> Rule 59(1) EACJ Rules of Procedure, 2013.

<sup>82</sup> Rule 59(2) *ibid.*

Division, a minimum of three judges are to hear a matter, one of whom must be the President or Vice-President.<sup>83</sup> Simple matters may nevertheless be disposed of by a single judge.<sup>84</sup>

The judges are appointed for a *seven year term* which is non-renewable. To ensure continuity of the Court's business, the tenure of these judges however varies so that the term of one third of the inaugural judges appointed to the Court expired at the end of five years; the other one third was to expire at the end of six years and the remaining one third at the end of seven years.<sup>85</sup> Perhaps in a bid to ensure fairness and equality of the sovereign member State, the Treaty also makes it clear that a Partner State cannot recommend more than two judges for the First instance division or more than one for the Appellate Division.<sup>86</sup> Concerns have been raised regarding the seven year tenure for the EACJ judges with some expressing the view that it is short a period for effective functioning of the Court. In his paper, the President of the Appellate Division at one time remarked as follows;

The current arrangement where the Judges work on a non-renewable seven years term does not help the Court or the Community and has to be re-visited. The Court is slowly becoming a training ground for Judges to undergo intensive capacity building with a view to preparing them for effective discharge of their mandate, but before they can deliver, their terms come to an end.<sup>87</sup>

Other regional Courts have fixed terms of service which are renewable, and just like the EACJ, the initial appointments were staggered. The judges of the COMESA Court of Justice, for instance, are appointed for a period of five years which term is renewable for another five year

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<sup>83</sup> Rule 102(1) *ibid*.

<sup>84</sup> Rule 102(2) *ibid*.

<sup>85</sup> Art 24(2) EAC Treaty. According to the Treaty, the criteria for determining the judges whose term is to expire at the different periods was to be by way of lot drawn by the Summit immediately after their first appointment.(Art 2(3)).

<sup>86</sup> Art 24(1)(a)(b) EAC Treaty.

<sup>87</sup> Justice Harold R. Nsekela (2011), *Overview of the East African Court of Justice*, A Paper for Presentation during the Sensitisation Workshop on the Role of the EACJ in the EAC Integration in Kampala, Uganda 1st – 2nd November, 2011 available at <http://eacj.huriweb.org/wp-content/uploads/2013/09/Overview-of-the-EACJ.pdf> (accessed 20 June 2014).

term.<sup>88</sup> The same case applies to members of the SADC Tribunal who are appointed for a five-year period and may be reappointed for another five years.<sup>89</sup> ECOWAS Community Court of Justice consists of seven judges appointed for a term of five years and are eligible for reappointment for another final term.<sup>90</sup> It appears the maximum tenure of other regional judges is ten years.

The EACJ works on an *ad hoc* basis in their temporary seat in Arusha Tanzania meaning that the Judges do not have a permanent seat but convene at particular times to transact Court business. According to the Court's *Rules of Procedure*, however, the Court may hold its sittings at a place other than the seat of the Court.<sup>91</sup> Nonetheless, in July of 2012, the heads of the two divisions; the President and Principal Judge began working on a full time basis following a decision by the Council of Ministers of November 2011. The issue of *ad hoc* judges might prove impracticable as the Community becomes more and more entangled in the integration dynamics. This and other challenges are discussed in chapter 4 of this study.

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<sup>88</sup> Art 21(1) COMESA Treaty.

<sup>89</sup> Art 6(1) SADC Protocol on SADC Tribunal and Rules of Procedure (Legal Notices Supplement No. 1 *East African Community Gazette No. 7 of 11th April, 2013*). Available at <http://www.sadc-tribunal.org/?instruments=tribunal-and-rules-of-procedure>. The SADC Tribunal is established under Article 9 of the SADC Treaty. It is to consist of a minimum of ten members, five who regularly seat, and the other five who constitute a pool from which may be drawn replacement in case a regular member is not sitting (see Article 3(1) (2) SADC Protocol on Tribunal). The first appointment is to be staggered such that two of the regular members and two of the additional members are appointed for a three year term.

<sup>90</sup> See Arts 3(2) & 4(1) of the Protocol on the Community Court of Justice. Initial appointments to the Court were also staggered so that four of the judges' terms expired after three years and the remaining three after five years. The Community Court is established under Article 11 of the main Treaty however, just like the SADC Tribunal, the composition and workings of the Court are later determined through a separate Protocol.

<sup>91</sup> Rule 6(1), East African Court of Justice Rules of Procedure Rules, 2013.

### **2.2.1 Access to the Court**

The other pertinent question concerns who may access the EACJ? The EAC Treaty provides access to the following persons: Partner States, the Secretary General, National courts and natural or legal persons.<sup>92</sup> It is notable however, that for one to institute a case in the EACJ, they must be resident in the Partner State.<sup>93</sup> This has in the past raised discontent with some seeing it as limiting of foreign investors. Such argument however tends to confuse the terms ‘resident’ and ‘citizen’ which are not synonymous.

Notably, unlike the SADC Tribunal, there is no requirement for a party to first exhaust local remedies before approaching the Court.<sup>94</sup> However, the proviso to Article 27 and Article 30(3) of the EAC Treaty puts a somewhat unclear caveat over what matters the Court can entertain in as far as the provisions stipulate that the EACJ lacks jurisdiction on matters over which the Treaty has reserved for a Partner State. This is discussed in more detail in the next chapter where a detailed exposition is made on the interaction between the EACJ and national courts of Partner States.

### **2.2.2 Timelines for filing references**

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<sup>92</sup> Arts 28, 29, 30 & 34 EAC Treaty.

<sup>93</sup> Art 30(1) EAC Treaty.

<sup>94</sup> In *Attorney General of the Republic of Rwanda v Plaxeda Rugumba* [2012]eKLR Crim Appeal 1 of 2012; The EACJ held that the continued detention of a citizen by Rwandan Authorities was in breach of the EAC Treaty and rejected the defence that local remedies had not been exhausted. In the judgment delivered on 22 June 2012, the Court upheld the decision of the First Instance Division stating at para 39(4) that, ‘(4) Unlike other legal regimes in this field, the EAC Treaty provides no requirement for exhaustion of local remedies as a condition for accessing the East African Court of Justice’. Decision also available at <http://kenyalaw.org/caselaw/cases/view/84925>.

The EAC Treaty requires that matters by natural or legal persons be filed before the EACJ *within two months* of the cause of action. The issue of time has become a common ground for raising preliminary objections before the Court. Article 30(2) of the EAC Treaty reads as follows:

**The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.**

The EACJ has given strict interpretation to this provision, declining to allow for time extensions. In the *IMLU case*<sup>95</sup> for instance, the Appellate Division of the Court underlined the importance of the time limitation provision noting that the short time limit was critical in ensuring, ‘legal certainty among the diverse membership of the Community’. The Court also found that Article 30(2) did not allow for extension of time holding that, ‘there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2)’.<sup>96</sup> The Appellate Division also found that, ‘[the] Article does not recognise any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit’.<sup>97</sup> Regarding continuous violations or chain causes of action, the Appellate Division of the EACJ in *Attorney General of the Republic of Uganda & another v Omar Awadh & 6 others*<sup>98</sup> clarified that time started to run on the day when it is first effected and not on the day the act complained of ended. In the words of the Court:

[T]he Respondents’ argument that when the act complained of is a continuous detention, the starting date for computation of its limitation time is the day when it ceases is erroneous. It is erroneous in terms of the East African Community Treaty, and of the economic and social interests of the Community. Moreover, the principle of legal certainty requires strict application of the time-limit in Article 30 (2) of the Treaty. Furthermore, nowhere does the

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<sup>95</sup> *Attorney General of the Republic of Kenya v Independent Medico Legal Unit* Appeal No 1 of 2011. Delivered on 15 March 2012 (“*IMLU case*”)

<sup>96</sup> See *IMLU case* pp 16, 17.

<sup>97</sup> See *IMLU case* p 17.

<sup>98</sup> Appeal No 2 of 2012. Delivered 15 April 2013.

Treaty provide any power to the Court to extend, to condone, to waive, or to modify the prescribed time limit for any reason (including for “continuing violations”).<sup>99</sup>

### 2.3 Role of the EACJ

The primary mandate of EACJ is to, ‘ensure the adherence to law in the interpretation and application of and compliance with [the] Treaty’.<sup>100</sup> The Court interprets and determines the application of the Treaty.<sup>101</sup> It is worth noting that the term ‘Treaty’ encompasses not just the Treaty constitutive document but also any annexes and protocol to the Treaty.<sup>102</sup> The Treaty provides for extension of the interpretative jurisdiction. At the time of writing, the draft Protocol for extending the human rights jurisdiction of the Court had not yet been put to force. Notably, the jurisdiction of the Court to interpret the Treaty is not exclusive of the national courts.<sup>103</sup>

It is worth noting that as opposed to the defunct East African Court of Appeal<sup>104</sup> which did not entertain matters relating to the Treaty, confining itself to appeals against decisions of the national courts, the EACJ is squarely vested with ‘original’ jurisdiction of interpreting the EAC treaty and **does not** sit on appeal over court decisions of Partner States. Appeals to the Appellate Division of the Court are limited to decisions emanating from the First Instance Division of the Court.<sup>105</sup>

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<sup>99</sup> Para 59. For more pronouncements on the time limitation, see *Mbugua Mureithi Wa Nyambura v The Attorney General of the Republic of Uganda and the Attorney General of the Republic of Kenya* EAC Ref No 11 of 2011, *The Attorney General of the Republic of Rwanda v Plaxeda Rugumba*, Appeal No. 1 of 2012, *The Secretary General of the East African Community v Angella Amudo* EAC Reference No 15 of 2012.

<sup>100</sup> Art 23(1) EAC Treaty.

<sup>101</sup> Art 27 EAC Treaty.

<sup>102</sup> Art 1 EAC Treaty.

<sup>103</sup> Arts 27(1) & 33(2), EAC Treaty.

<sup>104</sup> The Court of Appeal for Eastern Africa was established in 1909. The Court’s initial jurisdiction covered Aden, Kenya, Seychelles, Somalia, Tanganyika, Uganda and Zanzibar but with time restricted to Kenya, Tanganyika, Uganda and Zanzibar. The Court was later renamed the Court of Appeal for East Africa. However, the court collapsed with the collapse of the defunct East African Community in 1977.

<sup>105</sup> See also *Honorable Sitenda Sibalu* EACJ Reference No 1 of 2010.

The EACJ has jurisdiction to hear *arbitration matters*. Such a dispute could arise in contracts or agreement in cases which the Community or any of its institutions is a party and in which the contract confers the Court such jurisdiction. It can also entertain contractual disputes between parties in a commercial matter to which the parties confer on the EACJ jurisdiction.<sup>106</sup> The Court could also arbitrate over a dispute between Partner States regarding the Treaty if submitted to the Court.<sup>107</sup> There is in place the East African Court of Justice Arbitration Rules, 2012 which are to guide the Court in arbitration. The arbitration jurisdiction of the Court has however not been utilised. In a past presentation, the President of the Court expressed his exasperation over this state of affairs as follows:

In the decade ahead of us, Partner States should see the need for utilizing the Court's facility as an arbitral tribunal. The Court on its part is ready and prepared to handle any arbitration matter. Judges have been trained and familiarized themselves with international commercial arbitration principles and practices. The Court has already reviewed its rules of arbitration to measure up to international standards, but ten years down the road, no dispute has been referred to the Court for arbitration. The founding judges of the Court have all retired without handling an arbitral matter and training is under way for the new crop of judges.<sup>108</sup>

With such underutilisation of even the available jurisdiction, there is no telling that expansion of the Court's jurisdiction will by itself ensure a human rights culture in the community; there is thus need for more including attitudinal shift and awareness among potential users.

The EACJ can also render *advisory opinions*. In this case, only the Summit, the Council or a Partner State may submit a request for an advisory opinion to the Court regarding a legal

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<sup>106</sup> Art 32(a)(b) EAC Treaty.

<sup>107</sup> Art 32(c) EAC Treaty.

<sup>108</sup> Justice Harold R. Nsekela (2011), *Overview of the East African Court of Justice*, A Paper for Presentation during the Sensitisation Workshop on the Role of the EACJ in the EAC Integration in Kampala, Uganda 1st – 2nd November, 2011. Available at <http://eacj.huriweb.org/wp-content/uploads/2013/09/Overview-of-the-EACJ.pdf> (accessed 20 June 2014).

question arising from the Treaty and which affects the Community.<sup>109</sup> Therefore, individual persons cannot approach the Court for advisory opinions. Under the EACJ Rules of Procedure, 2013 a request for such an advisory opinion is to be lodged in the Appellate Division of the Court.<sup>110</sup> This is yet another area where there is not much ‘traffic’ in terms of requests. Advisory opinions could in some cases be a useful device for Partner States to prevent the more confrontational approach of filing references.<sup>111</sup>

The EACJ also has the mandate to hear *preliminary rulings* on references made to it by national courts under Article 34 of the EAC Treaty. The preliminary references must be lodged in the Appellate division of the Court according to the Rules of the Court.<sup>112</sup> This jurisdiction has also been underutilised, something that is attributable to lack of sufficient knowledge on the workings of Court.<sup>113</sup> The succeeding chapter of this study delves in detail on the issue of reference by national courts in addressing the relationship between national courts and the EACJ.

Finally, the EAC Treaty also clothes the EACJ with industrial court powers with respect to Community employees. The Court wields jurisdiction to hear and determine disputes between the Community and its employees that arise out of terms and conditions of employment or application of staff rules and regulations.<sup>114</sup>

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<sup>109</sup> Art 36.

<sup>110</sup> See rule 75(1) EACJ Rules of Procedure, 2013.

<sup>111</sup> See similar argument by Viljoen on advisory jurisdiction of the African Court of Human and People’s Rights (Viljoen, F (2012) *International Human Rights Law in Africa* Oxford University Press 2<sup>nd</sup> ed p 446).

<sup>112</sup> Rule 76 EACJ Rules of Procedure, 2013.

<sup>113</sup> In his presentation titled, *Rule of Law and Access to Justice in the East African Community* during the Premier Course on the East African Community held in Kampala, Uganda in September 2012, Hon Ruhangisa, registrar of the Court observed that only one case had been referred to the Court for a Preliminary ruling. He suggested that, ‘this could be an indication that the East African Community law is not sufficiently known within the region, even by the Judicial Community’.

<sup>114</sup> Art 31 EAC Treaty.



In the following section, the role of the EACJ is discussed under two thematic areas which are pivotal to the success of any integration namely, rule of law and commercial transactions.

### **2.3.1 EACJ and maintenance of rule of law**

It was Aristotle who remarked that the rule of law was preferable to that of any individual.<sup>115</sup> However, as to what constitutes rule of law (not rule by law) remains contestable.<sup>116</sup> Chesterman compresses the meaning of rule of law as, '*a government of laws, the supremacy of the law, and equality before the law*'.<sup>117</sup> Two key elements embody the rule of law; first 'preference for law and order within a community rather than anarchy, warfare and strife'. Secondly, that 'government must be conducted according to law, and that in disputed cases what the law requires is declared by judicial decision'.<sup>118</sup> Chesterman further distilled three elements of the definition of the term 'rule of law': First, that State power must not be arbitrarily used. Secondly that law must apply also to the sovereign and instruments of State with an independent judiciary to apply the law to particular cases and finally, that law must apply to all persons equally, offering equal protection without discrimination. The law must also be applied consistently.<sup>119</sup>

International law long recognised the value of the rule of law in maintaining order and preventing anarchy in the world order.<sup>120</sup> The World Bank considers rule of law a critical

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<sup>115</sup> Aristotle, 'The Politics (Benjamin Jowett trans; Nuvison (2004)(350BC), III.16) in Chesterman S (2008) 'An International Rule of Law?' 56(2) *AM. J. COMP. L* p 4.

<sup>116</sup> See Chesterman (2008) p 15.

<sup>117</sup> *ibid* p 15.

<sup>118</sup> Bradley, AW & Ewing, KD (1997) *Constitutional Administrative Law* 105 (12<sup>th</sup> ed.) in Chesterman (2008) pp 15-6.

<sup>119</sup> Chesterman (2008) *op cit*.

<sup>120</sup> The preamble to the Universal Declaration of Human Rights (UDHR) for instance recognises that, 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. Additionally, the preamble to the Charter of the United

ingredient and catalyst for spurring economic growth and development.<sup>121</sup>The United Nations has defined rule of law as:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>122</sup>

One of the golden threads running through the EAC Treaty and indeed part of the EACJ's mission is the observance of the rule of law by Partner States. Under the EAC Treaty, Partner States, 'undertake to abide by the principles of good governance, including adherence to the principles of democracy, *the rule of law*, social justice and the maintenance of universally accepted standards of human rights'.<sup>123</sup> Further, rule of law is one of the fundamental principles of the Community and also one of the principles that Partner States are to take into account in considering a State for admission into the Community.<sup>124</sup> Rule of law is also listed among the objectives of common foreign and security policies between the Community and Partner States.<sup>125</sup> As one of the fundamental principles of the Community, Partner States undertake to observe 'peaceful settlement of disputes'.<sup>126</sup> Thus, once the EAC Partner States ratified the Treaty, they deemed the rule of law an indispensable principle in the integration agenda and took

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Nations stipulates that of the aims of the United Nations is, '*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*'.

<sup>121</sup> [http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html#rule\\_of\\_law](http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html#rule_of_law) (accessed 29 June 2014).

<sup>122</sup> See 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' dated 23 August 2004 para 6. Available at [www.unrol.org/files/2004%20report.pdf](http://www.unrol.org/files/2004%20report.pdf).

<sup>123</sup> Art 7(2) EAC Treaty.

<sup>124</sup> Art 3 EAC Treaty.

<sup>125</sup> Art 123(2)(c) provides one of the objectives of the common foreign and security policies as being to, 'develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms'.

<sup>126</sup> Art 6(c) EAC Treaty.

to abide by it. They opted for a judicial mechanism whereby disputes emanating from the EAC Treaty could be settled peacefully. As Van der Mei notes, binding themselves to the Treaty terms, the Partner States recognised that in order for the integration agenda to succeed, ‘the rule of law ought to prevail over power politics’.<sup>127</sup>

The EAC Treaty bestows the EACJ the authority of preserving the rule of law providing that, ‘the Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application and compliance with this Treaty’.<sup>128</sup> A court is an embodiment of the rule of law and amongst its core responsibilities is to act as guard and preserve the rule of law. It must do so ‘impartially’, and without fear or favour. Parties who fail to abide by the provisions of the Treaty must be held accountable. The Court however does not act on its own motion, it must be moved by an aggrieved Party; whether a Partner State, Secretary General or individual persons or companies. This means that the members of the Community by themselves have to be proactive and willing to submit to the EAC’s jurisdiction. A Partner State may refer a matter to the Court alleging that another Partner State, Organ or institution of the Community is in breach of a Treaty provision.<sup>129</sup> The following subsection examines various tenets of the rule of law as embodied by the EACJ:

### ***EACJ’s power of review***

One of the means through which EACJ ensures adherence to the rule of law is by exercising its judicial review powers over decisions and directives, Acts or regulations of the Community to

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<sup>127</sup> Van der Mei AP (2009) ‘Regional Integration: The integration of the Court of Justice of the EAC’ 69 ZaoRV 403-425 p 425.

<sup>128</sup> Art 23(1) EAC Treaty.

<sup>129</sup> Art 28(1) EAC Treaty.

ensure that they conform to the dictates of the Community law. The grounds listed for review are; *ultra vires* (where an act is done outside the powers of a particular body or person), where the impugned acts are unlawful or infringe on the Treaty or rule of law, or where the act or directive amounts to an abuse of power.<sup>130</sup>

No one is immune from this jurisdiction so long as the matter falls for determination under the Treaty. Under Article 28, a Partner State may refer a matter to the Court if it considers that a Partner State, an institution or organ of the Community has infringed on a provision of the Treaty. It may also refer for determination of the Court the legality of any Act or decision on the ground that it is *ultravires*, unlawful or an infringement of the Treaty provisions or any rule of law relating to its application, or if the act or decision amounts to abuse of power. That way, the Court is well positioned to check on the exercise of the legislative or executive power of the Community or its other organs. The Court has on various occasions been called to exercise its review powers. By doing so, the Court keeps the various stakeholders in check ensuring that they act within the law hence protecting the integration agenda.

Though rich in appearance, these provisions as noted earlier are not ‘self-executing’ and at the end of the day will depend on the Community members’ vigilance.

### ***Independence of the Court***

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of the right to a fair trial.<sup>131</sup> The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties

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<sup>130</sup> Art 28(2) EAC Treaty.

<sup>131</sup> Principle 1, The Bangalore Principles of Judicial Conduct 2002.

are respected.<sup>132</sup> Independence not only connotes freedom from external influence but also that a judge is independent of his judicial colleagues and must observe this independence in respect of decisions which the judge is supposed to make independently.<sup>133</sup> Judicial independence requires the judiciary to decide matters before them impartially and ‘on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason’<sup>134</sup>.

With regard to appointment and training, the UN Basic Principles on the Independence of the Judiciary also recommend a method of judicial selection which safeguards against judicial appointments being made for improper motives. As such, discrimination of any form whether based on race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status is forbidden. However, according to the Principles, a requirement that a candidate for judicial office must be a national of the country concerned does not amount to discrimination.<sup>135</sup>

While the EACJ has been lauded on occasions for exercising its independent authority undeterred, the manner of appointing the Judges has remained questionable.<sup>136</sup> The Summit not only exercises control over the appointment of the judges but also designates the President and

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<sup>132</sup> Art 6 *United Nations Basic Principles on the Independence of the Judiciary*. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Copy available at <http://www.unrol.org/doc.aspx?d=2248> (accessed July 1 2014).

<sup>133</sup> Para 1.4 Bangalore Principles.

<sup>134</sup> Principle No 2, *United Nations Basic Principles on the Independence of the Judiciary*.

<sup>135</sup> Principle No 10 *ibid*.

<sup>136</sup> See for instance Ojienda, TO (2005), ‘The East African Court of Justice in the re-established East African Community: Institutional Structure and Function in the Integration Process’ 11(2) *East African Journal of Peace & Human Rights* 220-240 pp 230-4. Oloka-Onyango J, *Who owns the East African Community?* Occasional paper series, HURIPEC Makerere University p 5.

Vice President of the Court. The Summit also exercises power over removal of judges. It is also the Summit which initiates and appoints a tribunal for purposes of investigation.<sup>137</sup> Scholars have argued that this state of affairs does not leave the judges ‘independent of all fetters’, and that the mode of appointment and structure of the Court are key factors that risk compromising on the independence of the bench.<sup>138</sup>

What is the practice on appointment of judges in other regional Courts? For the SADC Tribunal, each Member State nominates a candidate and the Council then selects members from the list of candidates presented to it. The summit finally appoints the members based on the recommendation of the Council.<sup>139</sup> Unlike the EACJ whereby the summit elects the heads and deputies of the Court, members of the SADC tribunal elect their own President for a term of three years.<sup>140</sup> This is similar to the EU whereby the President of the Court of Justice is elected from judges and by the judges for a renewable term of three years.<sup>141</sup> The mode of appointment to the Court of Justice of the Common Market is similar to the EACJ’s as the ‘Authority’ (equivalent of EAC’S Summit) appoints the members and the President of the Court.<sup>142</sup>

### ***Uniform application of Community law***

One of the tenets of the rule of law as identified earlier is that of consistent implementation of law and the ability to offer equal protection. In the case of the EACJ, the Court has the task of setting jurisprudence and ensuring uniformity in interpretation and application of Treaty matters.

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<sup>137</sup> Art 26 EAC Treaty.

<sup>138</sup> Ojienda(2005), *op cit* pp232-3.

<sup>139</sup> Art 4 SADC Tribunal Protocol.

<sup>140</sup> Art 7 *ibid*.

<sup>141</sup> See Article 253 TFEU.

<sup>142</sup> Art 20.

The Treaty puts in place mechanisms to facilitate this in two ways. First, although both the national courts and EACJ have concurrent jurisdiction on Treaty matters, the decisions of EACJ override those of the national courts.<sup>143</sup> This promotes consistency, predictability and guarantees uniform application of Community Treaty. Another measure towards harmonisation of the EACJ jurisprudence is the requirement that national courts submit to the EACJ matters for preliminary rulings. Article 34 of the Treaty provides that;

Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.

The next chapter shall discuss the above issues concerning co-shared jurisdiction and the Article 34 preliminary procedure in greater detail, in the context of examining the interactions between the EACJ and domestic courts of Partner States.

### **2.3.2 Role of EACJ in commercial matters**

Resolution of commercial disputes is one of the key roles through which the EACJ can play a pivotal role in shaping the business environment for the Community which is critical for spurring economic growth, an objective of the Community. A conducive, peaceful environment is vital for attracting and maintaining business investments and expanding markets in the region. Investors are also more confident when they know that there is in place effective mechanisms of dispute resolution, should any arise. A peaceful environment that safeguards rights, rule of law and good governance is a fundamental prerequisite for economic development.<sup>144</sup>

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<sup>143</sup> Art 33 EAC Treaty.

<sup>144</sup> Ruppel (2009) *op cit* p 279.

As already mentioned earlier in the chapter, the EACJ has express jurisdiction to conduct arbitration where parties to a contract submit to its jurisdiction. However, the Court's jurisdiction with regard to commercial disputes is curtailed in certain commercial matters. For instance, in case of the Customs Union Protocol<sup>145</sup>, a separate mode of dispute resolution is set up.<sup>146</sup> The Protocol does not provide for appeal to the EACJ from substantive decisions of the Committee.<sup>147</sup> While there is no express provision in the main document of the Treaty giving the EACJ exclusive power to interpret the Treaty, it is arguable that in view of the fact that Protocols fall under the definition of 'Treaty' under Article 2, this state of affairs has effectively taken away by another hand the jurisdiction already vested in the EACJ under Article 27(1). Introducing parallel jurisdictions and multiple centers of dispute resolution not only serves to diminish the role of the Court, but also adds unnecessary costs on the Community budget. With regard to matters arising under the Common Market Protocol (CMP)<sup>148</sup>, these have been primarily reserved for National courts and therefore another diversion for matters that may have been exercisable by the EACJ.<sup>149</sup> However, it is worth pointing out that the proviso to Article 27(1) opens a Pandora's box on the possible curtailing of the EACJ jurisdiction, as it reads that;

The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

**Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States. [Emphasis added]**

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<sup>145</sup> Protocol for the Establishment of the East African Customs Union.

<sup>146</sup> See Art 41(2) & Annexe IX to the Protocol. Apart from providing for alternative mode of resolution, the Protocol provides for East African Committee on Trade Remedies which is established under Article 24 of the Protocol to handle the disputes.

<sup>147</sup> Para 6(7) of Annexe IX to the Customs Union Protocol. The EACJ is only called to deal with challenges to the decision of the Committee on grounds of fraud, lack of jurisdiction or other illegality.

<sup>148</sup> Protocol on the Establishment of the East African Community Common Market.

<sup>149</sup> Art 54 (2) Common Market Protocol.



This provision suggests that the power of the EACJ over the interpretation and application of the Treaty is not exclusive and may be shared with organs of Partner States including courts of partner states; an issue that is of concern to this study and which is explored in finer detail in chapter three of the study.

## **2.4 Conclusion**

The foregoing chapter has examined the establishment, composition and role of the EACJ and compared some of its defining features with that of other regional courts. It has laid the legal basis for the exercise of the mandate by the EACJ. It has further examined the place of the regional Court in furtherance of Community objects with special emphasis on its role in preserving the rule of law within the Community; a quintessential for the realisation of the Community's objects.

The next chapter widens the scope of the discussion on the role of the Court by bringing into fore important actors towards realisation of the Court's mandate, namely, national courts and governments. This is in recognition of the fact that the EACJ cannot singly meet its vision and that of the Community but requires co-operation from other stakeholders in order to fully discharge its mandate in terms of the EAC Treaty. The succeeding chapter in particular seeks to explore the interrelationship between the EACJ and national Courts of Partner States and the emerging issues.

## CHAPTER THREE

### ROLE OF NATIONAL COURTS AND GOVERNMENTS IN EAC's INTEGRATION AGENDA

#### 3.1 Introduction

The previous chapter examined the roles of the EACJ as stipulated under the EAC Treaty and to what extent the mandate furthers the Community objects. EACJ's core role emerged as that of ensuring adherence to law in the interpretation and application of and compliance with the EAC Treaty.<sup>150</sup> It also emerged that the EACJ lacks exclusive mandate in interpreting the EAC treaty; being a shareable role with national courts.<sup>151</sup> The chapter also mentioned instances whereby the regional court and national judiciaries are required to work in collaboration with each other; one of the key ways being by way of preliminary references, whereby national courts have the discretion to make references to the EACJ for preliminary findings on matters involving interpretation of the Treaty or related matters.<sup>152</sup> National courts in their own right thus occupy a central place in the integration process. Through adjudication of disputes arising from Partner States and 'provision of a conducive judicial environment', national judiciaries complement the EACJ's role in maintenance of the rule of law within the Community generally; a vital ingredient to the success and sustainability of the integration process.<sup>153</sup> The effectiveness of the EACJ therefore, to a great extent depends on its relationship with the national Courts.<sup>154</sup>

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<sup>150</sup> Art 23(1) EAC Treaty.

<sup>151</sup> See proviso to Art 27 EAC Treaty.

<sup>152</sup> Art 34 EAC Treaty.

<sup>153</sup> See also remarks by acting Chief Justice of Uganda, Hon. Justice Kavuma during the workshop on regional judiciaries held in Kampala, 2014. Reported at [http://www.judicature.go.ug/data/news/105/East\\_African\\_Judiciaries\\_Meet\\_to\\_Map\\_Strategy\\_on\\_Regional\\_Integration.html](http://www.judicature.go.ug/data/news/105/East_African_Judiciaries_Meet_to_Map_Strategy_on_Regional_Integration.html) (accessed 1 August 2014).

<sup>154</sup> See also remarks by President of the Court, Justice Emmanuel Ugirashebuja during the East African Court of Justice national judicially judges' workshop held on 2 July 2014 in Arusha. Reported on <http://eacj.org/?p=2248> (accessed 10 August 2014).

This chapter explores the role of the national courts in the integration process. Towards the end, the chapter also highlights the role of governments of Partner States as important players in the integration process. With regard to the role of national courts, the chapter examines in depth the balance between the exercise of jurisdiction by the national courts over the Community's affairs; in other words, where does the jurisdiction of national Courts begin and where does it end in relation to Community matters? What are the areas of concurrency between the national courts and the EACJ? What are the areas of co-operation? In so doing, the discussion takes two dimensions; first, is the role that national courts play in exercising their 'original jurisdiction' in the interpretation and application of the EAC Treaty and Community laws. The second part deals with the shared 'co-operative' role between the national courts and the EACJ. Before delving into these two matters, it is pertinent to first examine the relationship between Community laws and those of Partner States in the EAC.

### **3.2 The relationship between EAC law and National laws**

#### **3.2.1 The doctrine of supremacy**

What is the hierarchy of laws between Community and national laws? What happens when laws of the Community and those of Partner States on the same subject matter clash? The EAC Treaty is categorical that EAC laws take precedence over similar national ones 'on matters pertaining to the implementation of [the] Treaty'.<sup>155</sup> This is unlike the EU scenario whereby the supremacy doctrine has developed through jurisprudence as an unwritten rule of Community law

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<sup>155</sup> Article 8(4) EAC Treaty. It is worth noting the qualifier, '*on matters pertaining to the implementation of the Treaty*'.

given that EU Treaties are silent on the order of precedence.<sup>156</sup> Nevertheless, the EU has consolidated the principle that laws of the Community take precedence over conflicting laws of the Member States. In its three earlier landmark cases of *van Gend en Loos*,<sup>157</sup> *Costa*<sup>158</sup> and *Simmenthal*,<sup>159</sup> the ECJ affirmed the precedence of Community law over that of its Member States. Similarly, in *Handelsgesellschaft*<sup>160</sup>, the Court stated that Community law took precedence over all national law regardless of their legal status, including constitutions of Member States. As such, validity of Community law cannot be called to question on the basis that it violates some rights vested under national law. Later in *Factortame*<sup>161</sup>, the ECJ reaffirmed its earlier decision in *Simmenthal*, holding that directly applicable provisions of Community law make any conflicting provision of national law inapplicable.<sup>162</sup>

The EAC Treaty expressly provides for the primacy of EAC institutions and laws over those of Partner States with regard to Community affairs. Article 8(4) of the EAC Treaty is categorical that, **‘Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of [the] Treaty’**. By the same token, it means that a national court judge, just as in the EU<sup>163</sup> cannot declare invalidity of a Community law. The question that arises then regards the effect of a conflict between the EAC Treaty and Community laws and those of Partner States. Given, national laws and institutions must give way

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<sup>156</sup> Stiernstrom, M (2005) *The Relationship Between Community Law and National Law* Jean Monnet/Robert Schuman Paper Series Vol.5 No. 33 p 2. Available at [www6.miami.edu/eucenter/Stiernstromfinal.pdf](http://www6.miami.edu/eucenter/Stiernstromfinal.pdf) (accessed 25 July 2013).

<sup>157</sup> *Algemene Transporten Expeditie Onderneming van Gend en Loos vs. Nederlandse Administratie der Belastingen* Case 21/63 [1963] ECR 1.

<sup>158</sup> *Flaminio Costa vs. ENEL* [1964] Case 6/64 [1964] ECR 585.

<sup>159</sup> *Amministrazione delle Finanze dello Stato vs. Simmenthal* Case 106/77 [1978] ECR 629.

<sup>160</sup> *Internationale Handelsgesellschaft mbH vs Einfuhr-und Vorratsstelle fur Getreide and Futtermittel* Case 11/70 [1970] ECR 1125.

<sup>161</sup> *R v Secretary of State for Transport, ex parte Factortame Ltd and Others* Case C-213/89 [1990] ECR.

<sup>162</sup> Cited in Stiernstrom, M (2005) *The Relationship Between Community Law and National Law* p 9.

<sup>163</sup> See also *Foto-frost v. Hauptzollamt Luebeck-Ost*, Case 314/85, ECR 1987.

to those of the Community but what is the ultimate fate of these laws? Do they automatically become null and void to the extent of the conflict or do they only become inoperative? Does the EAC Treaty and Community law serve as some sort of regional Constitution as to render laws in conflict with them “unconstitutional” or ‘anti-EAC’ hence null and void? Or could it be argued that the practical effect of either of these declarations is ultimately one and the same hence irrelevant? It is not however within the scope of the present study to venture into these eventualities.

The EACJ has pronounced itself on a number of cases regarding the standing of EAC law *vis a vis* the national courts, reaffirming the precedence of the regional laws over the latter. In clarifying the nature of the relationship between Community institutions and Partner States, the question of ceding sovereignty by Member States to the regional institutions has often taken centre stage under both the EACJ and the ECJ. In the celebrated case of *Prof. Peter Anyang’ Nyong’o and others v Attorney General of the Republic of Kenya et al*<sup>164</sup> for instance, the EACJ maintained the supremacy of the Community law holding in part that the very nature of Community objectives demands that each Partner State cede some amount of sovereignty to the Community and its organs.<sup>165</sup> In other words, Partner States cannot eat their cake and have it.

The EACJ has subsequently pronounced itself more on the place of the EAC law in relation to those of Partner State in subsequent decisions with the resonating principle being the overall supremacy of the Court over the interpretation and application of the EAC Treaty as a key

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<sup>164</sup> Reference No 1 of 2006 delivered on 30 March 2007. Available at <http://www.eac.int/en/rulings.html>.

<sup>165</sup> See *Anyang’ Nyong’o and others* p 44.

ingredient in ensuring harmony and certainty.<sup>166</sup> In so doing, the EACJ has exorcised the ghosts in the earlier case of *Okunda v Republic*<sup>167</sup> where the then Court of Appeal for East Africa subordinated then Community law to national law.<sup>168</sup>

### 3.2.2 Direct effect doctrine

The pertinent question here is, are EAC laws directly applicable to citizens of Partner States? Put another way, can individual citizens invoke provisions of Community law in cases they file before domestic courts in their respective Partner States? These questions have elicited mixed answers with some denying the application of the doctrine of direct effect in the EAC while others acknowledge its existence.<sup>169</sup>

Arguments against direct effect doctrine in EAC however seem to lose sight of the fact that Partner States have through their constitutions or legislation incorporated the EAC treaty and community laws into their national systems. Take for instance the case of the Republic of Kenya whose Constitution directly incorporates international instruments into the country's body of national laws.<sup>170</sup> In terms of domestication, Partner States have given the EAC Treaty and Acts

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<sup>166</sup> See for instance *The East African Law Society and 4 Others v The Attorney General of Kenya and 3 Others* EACJ Reference No 3 of 2007.

<sup>167</sup> *Okunda v Republic* [1970] E.A. 453.

<sup>168</sup> The Court held in part that, 'the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict'.

<sup>169</sup> Opongo was of the view that the Community Laws have direct effect on the EAC Partner States. (See, Opongo RF (2007) 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' 30(2) *Fordham International Law Journal* 296-345. See also Byamukama, D 'The EAC Treaty has the force of law in Uganda' *New Vision Online*. Available at <http://www.newvision.co.ug/news/146-blog-the-eac-treaty-has-the-force-of-law-in-uganda.html>.

<sup>170</sup> See Article 2(6) Constitution of Kenya, 2010 which states that, 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. It would be interesting to see how the Courts interpret this provision in light of Article 2(4) of the same Constitution which reads that, 'Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'. Does the phrase 'any law' include international instruments already incorporated so that any inconsistency (a situation rather unlikely) would invalidate EAC law? Arguably not, as

of the Community<sup>171</sup> the force of law in their respective countries effectively making them applicable as domestic legislation. This in essence means that the Community laws stand incorporated into the respective countries' body of laws and nothing stops a citizen from invoking their provisions before national courts as any other domestic law. Section 8(1) of Kenya's Treaty for the Establishment of the East African Community Act, 2002<sup>172</sup> which is the Act of Parliament giving effect to provisions of the EAC Treaty provides that, 'The provisions of any Act of the Community shall, from the date of publication of that Act in the Gazette, have the force of law in Kenya'. Similarly, Section 3(2) of the East African Community Act, 2002 of Uganda states that, '... all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the treaty and all remedies and procedures from time to time provided for by or under the treaty, shall be recognized and available in the law and be enforced and allowed in Uganda'.<sup>173</sup>

Acts of the Community come into force on the date indicated on them as the date of commencement or if not, on the date of their publication in the official *Gazette*.<sup>174</sup>

The EU case of *van Gend & Loos* is a landmark on direct application of Community Law in EU Member States. In addressing the question as to whether citizens of a Member State could lay claim to individual rights by invoking Community law before national courts, the ECJ had this to say:

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going by the jurisprudence, law would include any law however formulated including Constitutions of Partner States.

<sup>171</sup> The term "Act of the Community" means a law made by the East African Legislative Assembly (EALA) (See section 2 of *Acts of the East African Community Act*, No. 5 of 2004).

<sup>172</sup> Act No 2 of 2002.

<sup>173</sup> See also Tanzania's Treaty for the Establishment of East African Community Act, No. 4 of 2001.

<sup>174</sup> See section 10 *Acts of the East African Community Act*, 2004.

*[T]he Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to center upon them rights which come part of their national heritage. Those rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*

International law theories explain that the process by which a Treaty or Agreement becomes binding upon a State depends on whether a state is monist or dualist in which case provisions of international agreements become part of municipal law through incorporation or transformation respectively. Under the monist theory, international law and municipal law both form part and parcel of the same legal system. As such, treaties become part of national law upon ratification by states without need for any further action. According to the dualists, international law and municipal law form two independent legal systems and in order for them to become applicable at the national level, there has to be a process of domestication of the instrument so as to transform it into national law.<sup>175</sup>

The Vienna Convention on the Law of Treaties provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith (the principle of *Pacta sunt servanda*).<sup>176</sup> Through ratification, a state signifies consent to be bound by the provisions of the Treaty.<sup>177</sup> Thus, international treaties do not impose mere moral obligation but a legal one. A party may not invoke the provisions of its internal law as justification for its failure to perform a

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<sup>175</sup> See Oppong, (2007) p 297. Application of these theories in practice however is not always clean cut. See Tshosa O (2001) *National Law and International Human Rights Law. Cases of Botswana, Namibia and Zimbabwe* cited in Viljoen F (2007) *International Human Rights Law in Africa* Oxford University Press p 530.

<sup>176</sup> See Article 26, Vienna Convention on the Law of Treaties, 1969.

<sup>177</sup> Art 14(1) Vienna Convention 1969.



treaty.<sup>178</sup> As such, a state that contracts a valid international obligation is under an obligation to modify its national legislation in conformity with its international undertakings. By their inherent nature, treaties limit or restrict the absoluteness of sovereignty and through voluntary ratification or accession to treaties, nations ‘trade’ some aspects of their sovereignty in exchange for greater benefits granted by or derived from a convention or pact.<sup>179</sup> In the words of Xavier Forner,

[S]overeignty transfer is a necessary attribute of any real integration process . . . . Without it regional grouping would amount to little more than a loose association of countries- [sic] no more than a club or forum where governments might engage in discussions on matters of common interest and might issue statements and non-binding recommendations only to rush into unilateral decisions that might end up being counter to the spirit if not the letter of the joint statements.<sup>180</sup>

In citing Article 27 of the Vienna Convention on the Law of Treaties, the EACJ in *Anyang’ Nyong’o* also emphasised that, it cannot be lawful for a state that with others voluntarily enters into a treaty by which rights and obligations are vested, not only on the state parties but also on their people, to plead that it is unable to perform its obligation because its laws do not permit it to do so.<sup>181</sup>

The above discussions all point in favour of the argument for direct application of Community law to Partner States in EAC. It is however not that straightforward. Besides the obvious perennial question of sovereignty of individual Partner States and the urge to jealously guard the stature of national laws and the national legislatures, two other issues become relevant. First, is the question of perceived legitimacy of the legislative arm of the Community, in this case the

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<sup>178</sup> Art 27 *ibid.*

<sup>179</sup> Public International Law(2008) LEI Notes: 4.

<sup>180</sup> Xavier, F (2001) *Harmonising Commercial Law in Africa: The OHADA*, *Juris Periodique* in Oppong (2007) ‘Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa’ 30(2) *Fordham International Law Journal* 296-345p 329. See also *Attorney General v Unity Dow* 1994 6 BCLR 1 Per Ammisah JP at Pages 27-30 and Aguda JA at pages 43-47, The Botswana Appeal Court.

<sup>181</sup> See *Anyang Nyong’o* p 41.

East African Legislative Assembly (EALA). Questions have been raised regarding the manner of election of the EALA members with some suggesting that the Community's legislative body be directly elected by the citizens of the respective countries to bolster ownership, transparency, participation and ultimately legitimacy.<sup>182</sup> Such direct participation would also be a sure ingredient to 'enhancing popular awareness'.<sup>183</sup> Generally, people are likely to be more enthusiastic invoking the Acts of Community before national courts if they perceive the source of these laws to emanate from institutions they impute as having the legitimacy and authority to make them.

The second issue has more to do with the stature of the EACJ itself. Allowing indiscriminate direct application of EAC Treaty and all Community laws in enforcement of individual claims before national courts paradoxically tends to 'steal the thunder' away from the regional court, denying it an opportunity to trail-braze the jurisprudential path in Community affairs. This is the case since the moment Community law is invoked by the parties before national courts, they will, in essence, be calling on domestic courts to interpret and apply the Community. The saving grace would then remain the preliminary procedures if they became an active forum of intra-judicial dialogue between the two judiciaries that is aggressively pursued by the respective States. The positive side of the coin to this argument would be that direct effect ultimately allows for the infusion of Community values and principles in national courts, which is good in

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<sup>182</sup> See for instance Lwaitama AF, Kasombo J & Mkumbo K (eds) (2013) *A Synthesis Research Report on the Participation of Citizens in the East African Community Integration Process* Friedrich Ebert Stiftung pp 7-8, 18-9, 32-3. See also Oluoch, LO Constitutionalism in the East African Community in 2012 in Mbazira, C (ed)(2012) *The Annual State of Constitutionalism in East Africa 2012* Fountain Publishers Kampala 12-35 p 34.

<sup>183</sup> Lwaitama, Kasombo & Mkumbo (eds) (2013) p 39.

preserving the rule of law in the Community right from the domestic courts which form vital Community building blocks.

### **3.3 Role of National Courts in EAC Integration**

This segment explores the role of the National courts as far as interpretation of Community treaty and laws are concerned.

#### **3.3.1 Interpretation of EAC Treaty**

National courts of Partner States *per se* have an original jurisdiction in the interpretation of the Community Treaty. As seen in the preceding chapter, the EACJ's core mandate of Treaty interpretation and application does not extend to cases where the Treaty reserves to some other national organs the power to do so. In other words, the Court's power of interpretation is not exclusive but is shareable with organs of Partner States. The proviso to Article 27 providing for the jurisdiction of the EACJ states that the Court's jurisdiction to interpret '*shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States*'. The provision further finds grounding in Article 33(1) of the EAC Treaty which states that, '**[e]xcept where jurisdiction is conferred on the Court by this 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**'.

The proviso to Article 27(1) and the Article 33 has in the past raised discontent and suspicion with some viewing it as indication that the Partner States were keen to 'cling' to their sovereignty and were unwilling to let go when it comes to the Community institution. They view this as a recipe for legal uncertainties and discordant judicial pronouncements on

Community affairs. In its interpretation of the import of provisions of Article 33, the EACJ in *Professor Anyang' Nyongo case* while acknowledging that the Article 33(2) of the Treaty obliquely envisaged interpretation of the Treaty provisions by national courts, emphasised the supremacy of the regional Court noting that, read together with provisions of Article 34 left 'no doubt about the primacy if not the supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty'.<sup>184</sup> The Court in this case however seemed to further suggest that the EACJ and national courts are not on the same wavelength when it comes to entertaining matters relating to the interpretation of the treaty terming the exercise by national courts of the interpretative role as "only incidental." The Court observed that, '[t]he article [33(2)] neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national Court. Nor is there any other provision directly conferring on the national Court jurisdiction to interpret the Treaty'.

The holding adds a different twist to the role of national courts in interpretation of the treaty and appears to discount the direct effect argument. In *Samuel Mukira Muhochi*,<sup>185</sup> the Court declared that the EACJ had jurisdiction to interpret and apply any and all provisions of the Treaty save those excepted by the proviso to Article 27.

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<sup>184</sup> See *Anyang' Nyong'o case* p 20.

<sup>185</sup> *Samuel Mukira Muhochi v The Attorney General of Uganda* EACJ Reference No 5 of 2011.

### 3.3.2 Quasi-judicial dispute settlement mechanisms

Questions have been raised regarding the establishment of parallel bodies to deal with disputes emanating from two Protocols; the Common Market Protocol (CMP) and the Customs Union Protocol (CUP). Articles 75 and 76 of the EAC Treaty empower Partner States to establish a Customs Union and the Common Market Protocol respectively. The CMP was concluded on 20 November 2009, while on 3 March 2004, the Partner States concluded the CUP.<sup>186</sup> Under Article 54 of the CMP, the power to settle disputes emanating from the implementation of the Protocol lies on the courts and tribunals of Partner States which are to rule on the rights in accordance with their Constitutions, national laws and administrative procedures.<sup>187</sup> It is notable however, that under Article 54(1), disputes between Partner States over the interpretation of the Treaty remain the preserve of the EACJ. This would mean that the Protocols do not completely oust the jurisdiction of the Court.<sup>188</sup> **Article 24(1)(e)** of the CUP establishes the East African Community Committee on Trade Remedies and vests in it the jurisdiction for dispute settlement in accordance with the East African Customs Union (Dispute Settlement Mechanism) Regulations.

The parallel dispute settlement mechanisms have been subject of Court decision. After an apparent falter in *Modern Holdings*<sup>189</sup> where the EACJ expressly divested itself of jurisdiction to entertain Customs matters, the jurisprudence has since been on a linear scale affirming the Court's jurisdiction to entertain these matters. In *East African Centre for Trade Policy and*

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<sup>186</sup> The Protocol came into force on the 1 January, 2005.

<sup>187</sup> Article 54(2) CMP.

<sup>188</sup> See *The East African Centre for Trade Policy and Law* para 78. See also *East African Law Society* p 22.

<sup>189</sup> *Modern Holdings (E.A.) Limited v Kenya Ports Authority*, EACJ Reference No 1 of 2008.

*Law*<sup>190</sup> the germane issue was whether the parallel dispute settlement mechanism introduced by the Customs Union Protocol and the Common Market Protocol contravened the EAC Treaty provisions. The Applicant had argued that the amendments to the Treaty<sup>191</sup> and the dispute settlement mechanisms provided for in the two Protocols denied the EACJ original jurisdiction to handle disputes emanating from the Protocols contrary to the Treaty. The EACJ stated that although the introduction of the amendments to Articles 27 and 30 of the EAC Treaty, '*did not take away or oust the jurisdiction of the EACJ*', they nevertheless '*undermined the supremacy of the EACJ as the judicial body whose responsibility is to ensure adherence to law in the interpretation of the Treaty as per Article 23*'.<sup>192</sup>

Earlier on, the First Instance division of the Court in *The East African Law Society case*<sup>193</sup> had reaffirmed the Court's jurisdiction in entertaining disputes arising from the Treaty observing that, '*it is not necessary to first extend the jurisdiction of this Court...in order for it to have jurisdiction over disputes arising from the interpretation of both Protocols*'. The Court in making reference to Articles 75 and 76 reiterated the supremacy of the Community law underlining the fact that the Treaty did not provide for setting up of judicial mechanisms to the exclusion of the Court but only institutions that the Council deemed necessary to administer the CUP and the CMP. EACJ in this case recommended that the impugned amendments to Article 27 and Article

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<sup>190</sup> *The East African Centre for Trade Policy and Law v The Secretary General of the East African Community* EAC Reference No 9 of 2012 delivered on 10 May 2013. Available at <http://eacj.org/?cases=the-east-african-centre-for-trade-policy-and-law-vs-the-secretary-general-of-the-east-african-community> (accessed 9 August 2014).

<sup>191</sup> The provisos to Article 27(1) and Article 30(3) of the Treaty which allow for the involvement of national courts in the resolution of disputes arising from Treaty were brought about by amendments of 14 December, 2006 and 20 August, 2007 by Partner States.

<sup>192</sup> *Ibid* paras 57, 72.

<sup>193</sup> *The East African Law Society and Others v Attorney General of Kenya*, EACJ Ref. No. 3 of 2007.

30 '*be revisited at the earliest opportunity of reviewing the Treaty*', sentiments it subsequently adopted in *East African Centre for Trade Policy and Law*.<sup>194</sup>

The proviso to Article 27 and Article 30(3) suggest that the EACJ is not the only repository of power when it comes to EAC Treaty interpretation and application. As pointed out in the previous chapter, the term 'treaty' encompasses any annexes and protocols.<sup>195</sup> The provision of parallel dispute settlement mechanism no doubt is a limitation on the part of the Court's jurisdiction as it 'shares' out what could otherwise have been the exclusive mandate of the EACJ absent the impugned provisos. There is however another positive dimension to the co-shared jurisdiction. The good news is that diverting some of the disputes to other bodies saves the Court from being overwhelmed with all manner of disputes, some which may be purely technical in nature. This could prove opportune as integration gets deeper and more disputes sprout especially if this is not accompanied by the requisite capacity building of the Court. The EACJ has acknowledged this reality noting that, the dispute resolution mechanisms provided under the Protocols, '*are merely alternative dispute resolution mechanisms intended for the speedy and effective resolution of trade disputes by experts in technical and specialized areas. Otherwise, the Court would be bogged down with the nitty gritty of disputes such as those in the area of trade, customs, immigration and employment that are bound to arise on a regular basis as the integration process deepens and widens as a result of the implementation of the Protocols*'.<sup>196</sup>

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<sup>194</sup> See *East African Centre for Trade Policy and Law* para 68.

<sup>195</sup> See Arts 1 & 51(4) EAC Treaty. See also definition of Protocol under Article 1 EAC Treaty.

<sup>196</sup> See *The East African Centre for Trade Policy and Law* para 80 and *East African Law Society* p 22.

Therefore, while the concerns raised regarding the diverted jurisdiction are not without validity, it would appear that building the capacity of EACJ to handle the much sought-after jurisdictional mandate and enhancing the Court's visibility should be a priority, rather than frets over diverted jurisdiction. A counter-argument to this, however, is that the capacity or otherwise of the Court can only be assessed after the Court is accorded the requisite jurisdiction and not before it has been entrusted with the mandate in the first place; a 'chicken-egg' scenario, what comes first?

Another argument in favour of co-shared jurisdiction is that allowing national courts the room to co-share the interpretative jurisdiction not only strengthens national institutions but also ensures easier access to justice by nationals of Partner States by offering convenience for redress of Community law.<sup>197</sup> Furthermore, fears that divergent interpretations from the Partner States could ultimately choke Community jurisprudence are partly redressed through preliminary reference mechanism since the procedure also applies in the interpretation of the two Protocols.<sup>198</sup>

The express provision guarding the supremacy of EACJ decisions<sup>199</sup> and the absence of strict rule on exhaustion of local remedies before approaching the Court not overlooking the fact that the Court still retains jurisdiction over disputes concerning Partner States also means that nothing is lost after all by the shared jurisdiction. The regional Court ultimately wields the upper hand in shaping the substance of jurisprudence on the Community affairs. Thus, while conferring on the

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<sup>197</sup> With the EACJ's temporary seat situate at Arusha, though with sub-registries across the Partner States, there is no telling that an ordinary citizen in a rural area of a different Partner State would prefer to incur added logistical costs in pursuing a claim at the regional court as opposed to the proximate national courts if guarantee for relief is eminent in both fora.

<sup>198</sup> See *The East African Centre for Trade Policy and Law* para 83.

<sup>199</sup> Article 33(2) of the EAC Treaty states that, 'Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter'.



EACJ exclusive jurisdiction would be a ‘neater’ approach to ensuring harmonised jurisprudence for the Community, it is by no means the only avenue through which the same destination can be reached even though through a winding road.

### ***Interpreting Treaty provisions***

The Vienna Convention on the Law of Treaties sets out general Rules with regard to interpretation of treaties namely that, a treaty is to be interpreted in good faith, ‘in accordance with the ordinary meaning to the terms of the treaty in their context’ and ‘in the light of the object and purpose of the treaty’.<sup>200</sup> These principles have been applied by the EACJ in various cases including *Anyang’ Nyong’o*,<sup>201</sup> *East African Centre for Trade Policy and Law*<sup>202</sup> and *Among A. Anita*.<sup>203</sup>

### **3.3.3 Interpretation of Community law**

Apart from Community Treaty and Protocols which form part and parcel of the Treaty,<sup>204</sup> there are several community Acts which govern various matters. These are the laws passed by the EALA as the legislative arm of the Community. As mentioned earlier, the laws have been incorporated by Partner States in which case they are interpreted as though they are part of domestic law of Partner States. Indeed, it is one of the undertakings by Partner States to ‘confer upon the legislation, regulations and directives of the Community and its institutions ... the force

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<sup>200</sup> Article 31(1) Vienna Convention on the Law of Treaties.

<sup>201</sup> *Anyang’ Nyong’o* p 10.

<sup>202</sup> *East African Centre for Trade Policy and Law v The Secretary General of the East African Community*, EACJ Reference No 9 of 2012, p 13.

<sup>203</sup> *Among A. Anita v Attorney General of Uganda and another* EACJ Reference No 6 of 2012 p 18.

<sup>204</sup> See interpretation of the term ‘Treaty’ under Article 1 as read with Article 151(4) EAC Treaty.

of law within its territory'.<sup>205</sup> Applying the doctrine of supremacy discussed earlier on, any inconsistency between the laws adopted at the Community level and those at the national level on similar issues should then be resolved in favour of the former, as per the dictates of the Treaty.<sup>206</sup> Some Community Acts have even incorporated into themselves supremacy clauses over national laws; for instance, the East African Community Customs Management Act, 2004.<sup>207</sup>

### 3.3.4 Preliminary Procedures

Preliminary procedures or references are mechanisms through which national courts or tribunals of member countries submit questions touching on the interpretation and application of the treaty or validity of Community regulations and undertakings that arise in the course of conducting hearings before them to the Community court for interpretation. As the name suggests, they are preliminary in nature, and ultimately, it is for the national Court to make the substantive decision based on the facts of the case; with respect to the preliminary ruling given. The jurisdiction for preliminary references under the EAC finds legal impetus under Article 34 of the Treaty which reads as follows;

**Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.**

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<sup>205</sup> Art 8(2)(b) EAC Treaty.

<sup>206</sup> Art 33(2) EAC Treaty.

<sup>207</sup> Section 253 of the said Act expressly states that the Act, 'shall take precedence over the Partner States' Act to take laws with respect to any matter to which its provisions relate'. For some of the Community Laws see [http://www.eac.int/legal/index.php?option=com\\_docman&Itemid=227](http://www.eac.int/legal/index.php?option=com_docman&Itemid=227). See also <http://kenyalaw.org/kl/index.php?id=4206>.

Preliminary references are, ‘a fundamental mechanism of East African Community Law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Partner States’.<sup>208</sup> This presents an important avenue through which the EACJ can bring about legal unity within the Community through the uniform interpretation and application of law in all the Partner States laws and take its place in further development of jurisprudence. So far, this procedure has been dormant, with the EACJ having received only one case to date,<sup>209</sup> more than a decade since the Court’s inception. The dormancy is attributable to ignorance about existence of the mechanism by members of the Partner States including the national courts themselves. Another possibility could be the lack of clarity on logistical procedures governing the process. This state of affairs is a great contrast with the ECJ system whereby the preliminary ruling procedure has become a dominant part of the European law interpretation.<sup>210</sup>

### ***Preliminary Procedures under the EU***

These present an important avenue of judicial co-operation between the ECJ and the national courts. They have served to ensure the utmost uniformity in the application of Community law and to establishment of effective cooperation between the Court of Justice and national courts.<sup>211</sup> Under Article 177, the ECJ has jurisdiction to issue preliminary rulings concerning the validity and interpretation of community law as may be requested by the national courts of the number

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<sup>208</sup> Guideline No 1 *Guidelines on a reference from national courts for a preliminary ruling* (“Preliminary Guidelines”). Available at [http://eacj.org/?page\\_id=67](http://eacj.org/?page_id=67) (accessed 9 August 2014).

<sup>209</sup> *In the Matter of Said Rosemary (On behalf of the subject: Christopher a.k.a Hussein Hassan Agade) v The Commissioner of Police, The Commandant Anti Terrorism Police Unit and the Honourable Attorney General of Kenya* EACJ Reference No 1 of 2011.

<sup>210</sup> See generally Dausen M (1986) ‘Practical considerations regarding the Preliminary ruling procedure under article 177 of the EC treaty’ 10(3) *Fordham international law journal* 538. For earlier statistics relating to preliminary references before the ECJ, see also Sweet, AS & Brunell, TL (1998) ‘The European Court and the national Courts: A statistical analysis of preliminary references, 1961-95’ 5(1) *Journal of European Public Policy*, pp 66-97.

<sup>211</sup> See Case C-221/88 *Busseni* [1990] E.C.R. I-495, para 13.

states. In cases where the ECJ is requested to review the validity of Union law, the requesting court has to state the reasons why the legal instrument in question might be invalid.<sup>212</sup> Unlike in the case with the ECJ, there is no obligation under the EACJ to refer matters for preliminary hearings by the courts of last instance. Only questions concerning the interpretation and the validity of EU law may be referred for a preliminary ruling. The Union Court restricts itself to matters concerning the Union law and not national matters. It is also not for the Court to delve into the merits of the dispute at hand, for that remains the preserve of the national judge. The preliminary rulings are binding on the national court.<sup>213</sup> The national court to which it is addressed then decides the dispute before it, bound by the interpretation given. It is worth noting that the rulings of the ECJ on preliminary references operate *erga omnes* meaning that they not only bind the national court making the referral but also other national courts before whose matter a similar issue may arise.<sup>214</sup> Through its preliminary procedures, the ECJ has been able to establish key principles governing application of Union law key among them being the principles of supremacy, direct effect and state liability.<sup>215</sup>

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<sup>212</sup> See generally, 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01)'. Available at <http://www.aca-europe.eu/index.php/en/jurisprudence-en/9-uncategorised/384-guide-to-preliminary-ruling-proceedings-before-the-european-court-of-justice> (Accessed 6 August 2014).

<sup>213</sup> Chalmers, D, Davies G, Monti G (2010) *EU law, cases and materials*, Cambridge, Cambridge university press p 160.

<sup>214</sup> House of Lords Paper 163 (2013) 'Workload of the Court of Justice of the European Union: Follow-Up Report': p 30. Tridimas G & Tridimas T (2004), 'National courts and the European court of Justice: A public choice analysis of the preliminary reference procedure', 24(2) *International review of law and economics* p 128.

<sup>215</sup> Prechal, S. & Van Roermund, B *The coherence of EU law: the search for unity in divergent concepts*, Oxford, Oxford university press, 2009, p 507 in Van der Haegen Olivier, 'The preliminary reference procedure: The National judge and the application of the European Law.'

### *Other regional courts*

For the major RECs, the question of preliminary procedures is either discretionary, as is the case with the ECOWAS or EAC for example or compulsory, as in the case of the SADC tribunal. For ECOWAS, the Protocol on the Community Court of Justice (CCJ) provides that domestic courts may seek a preliminary ruling to the CCJ if the question relates to the interpretation of the ECOWAS Treaty, its Protocols and some secondary law. In the case of the SADC tribunal, the reference procedure is obligatory and requires all domestic courts and tribunals to refer matters to it for preliminary procedures.<sup>216</sup> Unlike the COMESA court, preliminary references to the EACJ are made directly from courts and tribunals of first instance and not the court of last instance.<sup>217</sup> As already seen, under the EU, preliminary referrals are in some cases discretionary while it is mandatory for courts of last instance.<sup>218</sup>

### *Preliminary references before the EACJ*

From the provisions of Article 34 cited earlier, it is clear that a national court or tribunal has wide discretion in deciding whether or not it ought to raise a question before the EACJ. The Treaty requires two things; first, that the subject of reference must concern the interpretation or application of the Treaty or the validity of the regulations, directives, decisions or actions of the Community and secondly, that the ruling must be one that the national judge **considers necessary** to enable it to give judgment.<sup>219</sup>

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<sup>216</sup> See Article 16 of the Statute and Rules of Procedure.

<sup>217</sup> See Virzo R (2011), 'The Preliminary Ruling Procedures at International Regional Courts and Tribunals' 10 *The Law and Practice of International Courts and Tribunals* 285–313 p 305. Also available at [https://www.academia.edu/972755/The\\_Preliminary\\_Ruling\\_Procedures\\_at\\_International\\_Regional\\_Courts\\_and\\_Tribunals](https://www.academia.edu/972755/The_Preliminary_Ruling_Procedures_at_International_Regional_Courts_and_Tribunals).

<sup>218</sup> Article 267 Treaty on the Functioning of the European Union (TFEU).

<sup>219</sup> See Article 34 EAC Treaty.

With no clear guidelines on how this discretion is to be exercised, one can only hope that it will become clearer as more preliminary references begin to trickle to the regional Court and as precedent is established by the Court.

According to the *Rules of the Court*, preliminary references must be lodged in the Appellate division of the EACJ by way of a case stated.<sup>220</sup> Owing partly due to the fact that this jurisdiction is largely untested, there are no clear rules emanating from jurisprudence for referral of preliminary hearing cases. Nevertheless, EACJ recently adopted ‘*Guidelines regarding references from National Courts for Preliminary Ruling procedures*’<sup>221</sup> which are meant to serve as an information guide to the national courts and other stakeholders on the procedures. The Rules are modelled along similar lines to the recommendations of the CJEU on preliminary rulings.<sup>222</sup>

Regarding the timing, a national court or tribunal may refer a question to the Court for a preliminary ruling *as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment.*<sup>223</sup> Preferably, however, a decision to seek a preliminary ruling by a national court should be taken when proceedings before the national court have reached a stage at which it is possible to define the factual and legal context of the question, so that the EACJ has available to it all the information necessary to check that

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<sup>220</sup> See Rule 76 *The East African Court of Justice Rules of Procedure 2013*.

<sup>221</sup> Available at <http://eacj.hurweb.org/wp-content/uploads/2012/08/Guidelines-Reference-for-Preliminary-Rul...>

<sup>222</sup> See ‘Guide to preliminary ruling proceedings before the Court of Justice of the European Union’ Available at <http://www.aca-europe.eu/index.php/en/jurisprudence-en/9-uncategorised/384-guide-to-preliminary-ruling-proceedings-before-the-european-court-of-justice> (Accessed 8 August 2014).

<sup>223</sup> See Guideline No.16.

Community law applies to the main proceedings.<sup>224</sup> It may also be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard.<sup>225</sup> It is worth noting that while national courts, ‘may reject pleas raised before them challenging the validity of regulations, directives, decisions or actions of the Community’, the EACJ has exclusive jurisdiction to declare such regulations, directives, decisions or actions invalid.<sup>226</sup> A national court bears the duty to explain why the interpretation sought is necessary to enable it render judgment.<sup>227</sup>

Worth noting here, the guidelines categorically provide that ‘any court, ‘regardless of the cadre and does not confine preliminary procedures to last instance courts as is the case with say, COMESA. Article 34 of the Treaty in fact makes reference to ‘court or tribunal’. Thus, the opportunity is open to even the tribunals exercising quasi-judicial authority.

Once a national court has referred a matter for preliminary ruling, then it must stay the national proceedings before it until the EACJ has given its ruling. The national judge could however grant protective measures.<sup>228</sup> As mentioned earlier, the role of the EACJ in the preliminary ruling is to provide an interpretation of EAC law or to rule on its validity but **not to apply that law to the factual situation of the matter in question** as that remains the task of the national judge. ‘It is not for the regional Court either to decide issues of fact raised in the main proceedings or to resolve difference of opinion on the interpretation or application of rules of national law.’<sup>229</sup>

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<sup>224</sup> Guideline No. 17.

<sup>225</sup> *Ibid.*

<sup>226</sup> Guideline No 13.

<sup>227</sup> Guideline No 12.

<sup>228</sup> See Guidelines Nos 23, 24.

<sup>229</sup> Guideline No 7.

### *Matters arising in preliminary procedures*

As mentioned above, the preliminary procedure jurisdiction under EAC is underutilised even dormant, something that has been attributed to lack of sufficient knowledge on the workings of the Court.<sup>230</sup> This goes further to bolster the argument that there is more to effectiveness of the Court than grant of jurisdiction or lack of it and that other factors come into play. The preliminary ruling jurisdiction would especially play a key role in ensuring uniformity in the application of the law. The awareness gap regarding existence of preliminary references and underutilisation however remains a major challenge and requires concerted efforts by the EACJ and the Community at large to create awareness on its institutions and mandate. However, it is not all grim; the experience of the EU indicates that it took time before the process became popular and major source of ‘traffic’ for matters making their way before the Court. As the integration gains momentum even further and as stakeholders become more enlightened and willing to embrace the procedure, more preliminary references will likely flood the Community court. Domestic courts and tribunals of Partner States remain focal points to the optimal utilisation of this mandate.

It is however anticipated that with time, springing of preliminary ruling procedures from the various national courts and tribunals may necessitate clearer rules relating to the exercise of discretion by national courts and tribunals in making referrals to the EACJ. These would specifically state the circumstances under which a national judge may exercise discretion. For example, what criteria does a judge apply in coming to a conclusion that, ‘*a ruling on the*

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<sup>230</sup> Ruhangisa, JE (2012) *Rule of Law and Access to Justice in the East African Community*.



*question is necessary to enable it to give judgment'* within the wording of Article 34 EAC Treaty?

There is also a related issue which is seldom raised regarding the fine line of independence of the judges of the national courts from the regional ones in such preliminary rulings. Put another way, might the quest for uniform jurisprudence unconsciously trample on the very core pillar of judicial independence at the national level? Or is this intrusion one would say is 'permitted' in the spirit of integration?<sup>231</sup> This issue may become especially pertinent for the EAC considering that, the EAC Treaty already expressly provides for supremacy of the laws, decisions and even institutions of the EACJ on Community matters. Could this be another avenue for forging harmony beyond the preliminary ruling procedure which may sometimes compromise on expeditious disposal of matters concerned, while adding costs? This is especially so given that there is no stipulated timeframe within which the rulings may be given or provision for expedited or urgent preliminary ruling procedures as in the case with the EU,<sup>232</sup> and owing to other competing substantive cases requiring the Court's attention. Whatever the case, preliminary procedures remain one of the avenues through which legal integration could be achieved across Partner States and one of the roles national courts would do well to enthusiastically undertake as indispensable compatriots in the integration process.

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<sup>231</sup> This considering that the rulings though not touching on substantive merits of the case before the national Judge are nevertheless binding and ultimately influence the outcome of the case. Notably, Principle 1.4 of the Bangalore Principles define judicial 'independence' to include independence of a judge from his colleagues.

<sup>232</sup> See Articles 105 -110 Rules of procedure of the Court of Justice. Available at [http://eur-lex.europa.eu/legal-content/EN/ALL/ELX\\_SESSIONID=HRHpTpOMC8vFzO4cgpL9Ln6JLZ4BFPyq2hXC6OJmvPbKS62OV8GT!2064651424?uri=CELEX:32012Q0929%2801%29](http://eur-lex.europa.eu/legal-content/EN/ALL/ELX_SESSIONID=HRHpTpOMC8vFzO4cgpL9Ln6JLZ4BFPyq2hXC6OJmvPbKS62OV8GT!2064651424?uri=CELEX:32012Q0929%2801%29). (accessed 12 August 2014).

### 3.3.5 Enforcement role

Implementation of the Court decisions is as important as the decision itself. As observed in *Katabazi*, '[a]biding by the court decision is the cornerstone of the independence of the judiciary which is one of the principles of the observation of the rule of law'.<sup>233</sup> National courts play a significant role in the enforcement of decisions of the EACJ. The EACJ lacks its own mechanism of enforcing its own decisions and relies heavily on the good will of States. This is unlike some of the regional courts which have their own mode of enforcement. The COMESA Treaty for instance allows the court to punish any party who fails to obey its decisions.<sup>234</sup> The Court may however only impose a financial penalty and not imprisonment.<sup>235</sup>

The demarcation of jurisdiction also means that the EACJ *prima facie* lacks jurisdiction to grant effective remedies in certain cases, confining itself to declarations of invalidity of the impugned law or action of the Partner state. For instance, in land matters where the Court has found land to have been unlawfully acquired by government, the Court has refrained from making declarations regarding ownership of land and restitution of the land to the Applicant, reserving that jurisdiction for the national courts. In *Venant Masenge*<sup>236</sup> for instance, the Applicant sought to hold the government of Burundi vicariously liable for failure by its Minister for Home Affairs to

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<sup>233</sup> EACJ Ref No 1 of 2007 para 54. The Court in this case found that, the act of intervention Uganda's armed security agents in a bid to prevent the execution of a lawful court order, 'violated the principle of the rule of law and consequently contravened the Treaty'.

<sup>234</sup> Article 34(4) COMESA Treaty.

<sup>235</sup> Rule 58.4 of the COMESA Court Rules.

<sup>236</sup> *Venant Masenge v The Attorney General of the Republic of Burundi* EACJ Reference No 9 of 2012, Delivered 18 June 2014. See also *The East African Center for Trade Policy and Law v The Secretary General of the EAC* EACJ Appeal No.1 of 2012 and *The Attorney General of Rwanda v Plaxeda Rugumba* EACJ Ref. No 1 of 2007. A similar situation holds true for other matters such as in declaration of elections Rules under Article 50 of the EAC Treaty where the Court has reserved declarations of elected nominees and annulment of the same to the national courts (See for instance *Christopher Mtikila v Attorney General of Tanzania and Others* EAC Reference No. 2 of 2007 and *Peter Anyang' Nyong'o & others v The Attorney General of Kenya & others*; EACJ Ref. No. 5 of 2011).

respond to complaints regarding illegal encroachment of the applicant's private property by certain individuals. The Court declined to grant the prayers seeking declaration that the land in dispute belonged to the Applicant and also refrained from ordering the demolition of structures thereon, noting that it lacked the jurisdiction to grant those orders as they fell outside the regional Court's jurisdiction by virtue of Articles 23, 27 as read together with Article 30 of the Treaty.<sup>237</sup> This is inspite the finding in favour of the Applicant's ownership of property and the holding that the failure by relevant authorities of the Republic of Burundi to ensure the protection of the applicant's land property rights, 'was fundamentally inconsistent with Burundi's express obligations under Articles 6(d) and 7(2) of the Treaty to observe the principles of good governance including in particular, the principles of adherence to the rule of law, and the promotion and protection of human rights'.<sup>238</sup>

The absence of substantive orders can be frustrating and tedious for parties who then seek to have enforcement of the Court's declarations through substantive reliefs in domestic Courts and rely on the goodwill of the 'violators' to make good their claim. Realising the fruits of the judgment will thus largely depend on procedures of enforcement in the national Courts. Even in case of substantive judgments by the Court, the enforcement mechanisms will depend on co-operation and good will of national courts and governments. Whereas rulings of the EACJ on the merits are implemented by the Partner States and the Community's policy Organs, execution of EACJ judgments imposing a pecuniary obligation are governed by the rules of civil procedure in force in the Partner State in which execution is to take place.<sup>239</sup> This state of affairs also serves

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<sup>237</sup> See *Venant Masenge* p 21.

<sup>238</sup> *Venant Masenge* p 19.

<sup>239</sup> Art 44 EAC Treaty. See also *Ruhangisa* (2012) p 18.

to demonstrate the repercussions of the amendments introduced to Articles 27 and 33 in adjudication of disputes and grant of reliefs.

Partner States and the Council have a duty to implement the Court's judgments. Article 38 of the EACJ treaty providing for the acceptance of the Court decisions states that:

**A Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court. When it comes to implementation of decisions, those of the EACJ regarding the interpretation and application of the Treaty take precedence over those of national court.**<sup>240</sup>

National Courts and governments therefore play a vital role in giving true meaning to the Court's decisions. With regards to punishing for contempt of its Orders, the First Instance Division of the EACJ in *Hon. Sitenda Sebalu v The Secretary General of the East African Community*<sup>241</sup> came short of punishing one of the Community's organs for contempt of court where it observed that, 'the failure by the Council of Ministers/Sectoral Committee on Legal and Judicial Affairs to implement the Judgment of the Court in Reference No 1 of 2010 and Taxation Cause No. 1 of 2011 is an infringement of Article 38(3) of the Treaty and a contempt of Court'.<sup>242</sup> The EACJ cited the Secretary General of the Community (the respondent) for contempt on behalf of the Partner States but declined to punish for contempt, instead giving the respondent an opportunity to purge the contempt since the respondent had not, 'flagrantly disrespected the order since he [had] made an effort to convince the Council...'.<sup>243</sup>

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<sup>240</sup> Art 33(2) EAC Treaty.

<sup>241</sup> *Hon. Sitenda Sebalu* EACJ Reference No 8 of 2012. Delivered in November 2013. Available at <http://eacj.org/?cases=hon-sitenda-sebalu-vs-the-secretary-general-of-the-east-african-community> (accessed 10 August 2014). See also *Sitenda Sebalu v The Secretary General of the East African Community, The Attorney General of the Republic of Uganda, Hon. Sam Njuba and the Electoral Commission of Uganda* Reference No. 1 of 2010.

<sup>242</sup> *Ibid* para 84.

<sup>243</sup> *Ibid*.

The above case concerned the delay in vesting the EACJ with appellate jurisdiction and the applicant had argued that there was a contravention of the doctrines and principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally acceptable standards of human rights enshrined in the Treaty. It was argued that despite the Court's earlier ruling in *Reference No. 1 of 2010*<sup>244</sup>, the Secretary General to the Community had failed to ensure that the Council abided by the Court's Order.

It has been suggested that in order to give the Court teeth, it should be given express jurisdiction to punish for contempt.<sup>245</sup> Outside the danger of involving the EACJ in superintending over the minutiae of implementation of the Court's decisions which could plunge the Court into murky political waters and saddle it with executive functions, there is nothing stopping the Court from ensuring compliance with its judgments by punishing for their disobedience. Article 23(1), of the Treaty already mandates the EACJ to '*ensure the adherence to law in the interpretation and application of and compliance with this Treaty*'. As the custodian of the Community's rule of law, the Court would be within its mandate in ensuring compliance with the law and its decisions. For this reason, the Court could adopt such measures as are necessary within the existent provisions and be able to punish for contempt.<sup>246</sup> Nonetheless, the holding in the *Hon Sitenda Sebalu case* above suggests that this would be the least of the Court's worries and it would, where appropriate, embrace punishment for contempt as a tool for enforcing compliance with the rule of law despite the absence of express jurisdiction. Even so, the effectiveness of the EACJ's decisions especially with respect to governments of Partner States ultimately rests on the

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<sup>244</sup> *Sitenda Sebalu v The Secretary General of the East African Community, The Attorney General of the Republic of Uganda, Hon. Sam Njuba and the Electoral Commission of Uganda* Reference No. 1 of 2010.

<sup>245</sup> See Gathege PS (2012) pp 83-4.

<sup>246</sup> Article 42 EAC Treaty could for instance be invoked in making rules governing contempt proceedings.

good will of Partner States in abiding by what they committed themselves to undertake under the Treaty, including adherence and respect for the rule of law.

The preceding part has examined the role of national courts in integration. The next segment deals with the role of governments generally in meeting the objects of Integration.

### **3.4 Role of National Governments**

#### **3.4.1 Political good will**

The role of governments of Partner States in the quest for integration cannot be gainsaid. Without political good will, achieving the integration milestones would remain a pipe dream. Political will and commitment predate economic integration. Invariably, it has been pointed out that political will is an important pillar for successful and effective economic integration.<sup>247</sup> Indeed, ‘lack of strong political will’, was identified as one of the reasons that led to the collapse of the initial EAC.<sup>248</sup>

Given the advantage that national governments especially the Heads of State have over the members of the Community that they govern, they occupy a vantage point in shaping the pace and tenor of integration. From the more formal participation in the Community affairs through the various organs such as the Summit and Council, to the more daily business such as state addresses to their respective Nations, the government leaders can play a significant role in driving the integration agenda by marshalling and stirring the East African spirit among the

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<sup>247</sup> Sippel, H (2011) ‘Regional Integration in East Africa: A legal Historical Overview; and Mchome, S., The Treaty of the EAC: Is It the Equivalent of a National Constitution? in Gastorn, K. *et al*, *Processes of Legal Integration in the EAC*, TGCL Series 2 pp 41 & 101-102.

<sup>248</sup> See Preamble to the EAC Treaty.

citizens of East Africa and other stakeholders towards the ‘one people one destiny’ mantra. It is no wonder that the Treaty included, ‘mutual trust, *political will* and sovereign equality’ as one of the fundamental principles of the Community.<sup>249</sup>

### **3.4.2 General undertaking by Partner States**

Under Article 8 of the EAC Treaty, Partner States give a general undertaking towards implementation of the provisions of the Treaty. In particular, Partner States bind themselves to undertake the following:

- (a) plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty;
- (b) co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and
- (c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.<sup>250</sup>

The Partner States bind themselves to secure the enactment and effective implementation of legislation necessary to give effect to the Treaty within a period of twelve months from the date of signing of the Treaty.<sup>251</sup> Further, Partner States to the EAC Treaty undertook;

- (a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and
- (b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.<sup>252</sup>

Other undertakings of the Partner States toward the implementation of the EAC Treaty include the designation of a Ministry with which the EAC communications may be made,<sup>253</sup> transmission to the Secretary General copies of all relevant existing and proposed legislation and its official

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<sup>249</sup> See Art 6 EAC Treaty. Emphasis added.

<sup>250</sup> Art 8 (1) EAC Treaty.

<sup>251</sup> Art 8 (2) EAC Treaty.

<sup>252</sup> Art 8(2)(a)(b) EAC Treaty.

<sup>253</sup> Art (8)(3)(a) EAC Treaty.

gazettes; and exchange of any information and copies of such information with another Partner State to the Secretary General when required.

### **3.4.3 The Summit**

This is one of the organs of the Community established under Article 9 of the EAC Treaty. As mentioned in the previous chapter, the Summit consists of the Heads of State or Government of the Partner States<sup>254</sup> and plays a pivotal role to ensuring the realisation of the integration dream. Under Article 11 of the EAC Treaty, the Summit has various functions including giving ‘general directions and impetus as to the development and achievement of the objectives of the Community’. The Summit also appoints Judges to the EACJ, admits new Members and grants Observer Status to foreign countries as well as assenting to Bills. The Summit must exercise its mandate in accordance with the objects of the Community. Separation of powers between the organs calls for exercise of restraint in performance of its duties.

### **3.4.4 EAC’s Council of Ministers**

Through the Council, national governments play a significant role in the integration process. The Council is the core organ of the Community as it is the main policy organ of the community.<sup>255</sup> The Council consists of Ministers responsible for East African Community affairs of each Partner State, such other Minister of the Partner States as each Partner State may determine and the Attorney General of each Partner State.<sup>256</sup> The Council is tasked with a number of vital roles among them, ‘[making] policy decisions for the efficient and harmonious functioning and development of the Community’, initiating and submitting bills to the Assembly, considering the

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<sup>254</sup> Art 10(1) EAC Treaty.

<sup>255</sup> See Art 14(1) EAC Treaty.

<sup>256</sup> Art 13 EAC Treaty.



Community budget and making regulations, issuing directives, making recommendations and giving opinions.<sup>257</sup> Through these roles, the Council is vested with the enormous and noble task of steering the Community's integration agenda forward.

Partner States must abide by their undertakings towards the implementation of the EAC Treaty which includes planning and directing their policies and resources, 'with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty'.<sup>258</sup> Partner States also undertake to adhere to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

### **3.5 Conclusion**

The Chapter has explored the role of national courts of Partner States in shaping the EAC integration and the areas of collaboration between the EACJ and national Courts. It becomes apparent that national courts play a central role in the integration process and cannot be wished away. They do not only play an 'assistive' role to the EACJ, they are not mere 'flower maidens' in the integration journey, national courts have specific 'original' role under the Treaty and their effectiveness will ultimately impact on the achievement of Community objects.

The duty to interpret the EAC Treaty appears to be a shared responsibility by both the EACJ and National Courts under Articles 27 and 33 of the EAC Treaty. From the foregoing discussion, it also emerges that the vesting of the interpretive role in other quasi-judicial bodies, though

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<sup>257</sup> See generally Article 14(3) for a list of the functions. For the limitation on application of the Council directives on certain organs of the community, see Article 16.

<sup>258</sup> Art 8(1)(a) EAC Treaty.

thinning the EACJ's jurisdiction, does not oust the jurisdiction of the Court since the EACJ still retains the upper hand and its decisions remain supreme to those of national courts in respect to Community affairs. Apart from the co-shared duty of interpreting Community law, national courts have a role in the implementation of the decisions of the EACJ. They also participate in the integration process through interpretation and application of Community Acts. Furthermore, preliminary references are useful mechanisms through which the regional and national judiciaries collaborate and platforms to harmonising community jurisprudence. Undoubtedly, therefore, national Courts of EAC Partner States are an indispensable part of the equation not only in bolstering the effectiveness of the EACJ, but in their own right and in a big way, national courts take part in shaping the integration agenda.

Not to be left behind are national governments who through providing leadership and by creating a conducive environment for the various actors<sup>259</sup> and providing resources for the Community to thrive, not to mention the much needed political will, they are a key determinant in success of the EAC and its organs and institutions, including the EACJ. Through participation in Community organs and Affairs, the national governments, in particular Heads of States are drivers of the integration process and must thus zealously discharge their duties as stipulated in the Treaty while jealously guarding the objects and principles of the Community. The next chapter addresses some of the practical threats and opportunities for the EACJ.

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<sup>259</sup> See Article 127 EAC Treaty on role of Partner States in creating an enabling environment for private sector and civil society.

## **CHAPTER FOUR**

### **EMERGING ISSUES: THREATS AND OPPORTUNITIES FOR THE EACJ**

#### **4.1 Introduction**

The previous chapter focused on the role of national courts and governments in the integration process. A few gaps emerged in the relationship between domestic courts and the EACJ. These gaps have posed a challenge to the effective workings of the regional Court. This chapter discusses some of the practical challenges facing the EACJ in the discharge of its mandate. Some of these challenges and opportunities are distilled from the findings in the previous chapters, making them an extension of the previous chapter's discussions. While the chapter by no means intends to be an exhaustive discourse on the challenges facing the Court, it brings to fore some of the challenges that are least discussed and sometimes overlooked if not forgotten.

The chapter begins by assessing implication of the co-shared jurisdiction between EACJ and national Courts on Community matters and the legal and practical challenges emanating therefrom. Other challenges highlighted are the lack of visibility of the Court, multiple memberships of EAC Partner States to other RECS and its implication on the judicial process, lack of capacity of the Court and finally political will. The chapter also presents some of the opportunities which, if exploited, could serve to mitigate if not eliminate the challenges.

## 4.2 Receding, uncertain Jurisdiction

A critical assessment of the nature of the shared jurisdiction with regards to the interpretation of the EAC Treaty and Community laws examined in the previous chapter<sup>260</sup> reveals an apparent lack of clear jurisdictional boundaries between the regional Court and domestic courts of Partner States. This is especially the case given the generous share that national courts wield in the interpretation and application of the Treaty and Community laws. The fact that Partner States have incorporated Community laws allows them to exercise original jurisdiction in the interpretation and application of both the Treaty and Community laws. This is aggravated by the lack of the requirement for the rule of exhaustion of local remedies before approaching the regional Court which further blurs the jurisdictional divide between matters falling for determination by the regional courts and those squarely for national judiciaries.

While giving the primacy to EAC laws and decisions, the law fails to fully bestow the Court with exclusive jurisdiction in virtually any key area, leaving national courts with more ground, at least on paper (though less stature) in Community affairs. The fact that the Court does not act as an appellate Court over decisions of Partner States,<sup>261</sup> and that the law does not demand preliminary references from last instance courts does not ameliorate the situation. **Table 4.1** below represents a summary sketch on the jurisdiction status of the two judiciaries; national and the regional courts on Community affairs:

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<sup>260</sup> Refer to 3.3.1 above.

<sup>261</sup> See *Honorable Sitenda Sibalu* EACJ Reference No 1 of 2010; delivered 30 June 2011. The First Instance Division of the Court held that under Article 27 of the EAC Treaty, the Court lacked jurisdiction to entertain appeals from courts of Partner States and that the Appellate Division was meant to strictly deal with appeals from First Instance Division.

Nature of jurisdiction	Relevant Treaty provision	Forum seized with jurisdiction		Comments
		NATIONAL COURTS	EACJ/EAC	
<i>Interpretation of EAC Treaty</i>	Arts 27(1), 33(1)	YES	YES	Provisions give leeway for the sharing of the interpretation role of Treaty to Organs of Partner States. The fact that a Community organ is a party to the dispute does not necessarily preclude national courts.
<i>Disputes arising from CMP and CUP</i>	Arts 27(1)(2), 75 and 76 S 54 CMP, S 24(1)(e) CUP	YES	YES	EACJ only retains <b>original</b> jurisdiction over disputes between Partner States
<i>Acts of the Community</i>	Arts 8(2), 27	YES	YES	Community laws incorporated into national regime. Community laws directly enforceable in domestic courts
<i>Preliminary references</i>	Art 34	-	-	Referral of preliminary questions by National Courts to the EACJ discretionary.
<i>Advisory Opinions</i>	Art 36	NO	YES	-
<i>Arbitration Jurisdiction</i>	Art 32	NO	YES	-
<i>Industrial matters involving staff of the Community</i>	Art 31	NO	YES	-
<i>Supremacy of laws</i>	Articles 8(4) 33(2)	-	YES	EAC laws take precedent but on matters pertaining to implementation of the Treaty
<i>Supremacy of Court decisions</i>	Article 33(2)	-	YES	Decisions of EACJ on interpretation and application of EAC Treaty take precedence over national ones.

Table 4.1

Source: Author.

As the table above portrays, only the ‘less contentious’ areas of advisory opinions, arbitration and the industrial matters are not shareable with the national judiciaries. But these are the areas for which there is even ‘less traffic’ in terms of inflow and lesser impact in terms of shaping key milestones in the Community such as the rule of law and human rights, common market and free movement of persons. While allowing for flexibility may be good for the sake of access to justice, it begets the unintended consequence of forum shopping or duplication of matters in both

courts leading to abuse of judicial process at both levels. The end result is likely to be an inconsistently scattered jurisprudence across the Partner States.

It would be desirable, therefore to have a clear demarcation on the matters falling within the exclusive jurisdiction of the EACJ and areas of co-shared jurisdiction or some sort of ‘checklist’ for national courts before admitting Community-related disputes. The rule on exhaustion of local remedies like is available in other regional courts such as the ECOWAS or the African Court on Human Rights would provide an escalation mechanism, and to some extent, a ‘tidier’ judicial system. Such an approach also has the advantage of injecting predictability on the exercise of jurisdiction by both the national and regional judiciaries as opposed to the seemingly ‘either or’ scenario.

#### **4.3 Invisibility of the Court**

The EACJ suffers from lack of adequate visibility on its mandate and operations. While physical visibility has been enhanced through establishment of sub-registries across the Partner States, a lot more needs to be done in terms of its functional visibility.<sup>262</sup> The Court is still not well known amongst the stakeholders and its potential users despite its spirited efforts through sensitisation workshops to reverse the situation.<sup>263</sup> It is no wonder then that raising visibility of the EACJ ranks high among its strategic objectives for the years 2010-2015.<sup>264</sup>

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<sup>262</sup> See EACJ Strategic Plan (2010-2015) April 2010 p 18.

<sup>263</sup> See African Development Bank (ADB) & African Development Fund (ADF) (2011) ‘Eastern Africa Regional Integration Strategy Paper 2011-2015 p 48.

<sup>264</sup> EACJ Strategic Plan (2010-2015) April 2010 pp viii, 17-19, 24.

The Community institutions and organs established under the Treaty are meant to serve its members towards realisation of a common dream of the Community. However, if the Community's activities and services persistently remain unknown to the larger populace, it is a draw back to the integration process as a whole. A study conducted a few years ago revealed information gap by citizens of Partner States on affairs of the Community.<sup>265</sup> Subsequent surveys have also confirmed the same state.<sup>266</sup> The underutilisation of the Court's existing jurisdiction as discussed in previous chapters has a lot to do with ignorance among the potential court users on the workings of the court, resulting in the dormant jurisdiction for instance in reference to preliminary hearings and arbitration procedures, which by extension is a waste of valuable resources.<sup>267</sup>

However, knowledge of the Court's services is only part of the equation. As far as the work of the Court is concerned, there is more to the equation than mere knowledge of the existing jurisdiction. Awareness must go hand in hand with the willingness and confidence among the potential court users to file their cases before the regional Court. This confidence is something that the Court would need to continue to cultivate through its emerging jurisprudence and the effectiveness and efficiency through which its decisions and court Orders are enforced and implemented. Private investors indeed a litigant would likely be 'drawn to' a forum whereby the

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<sup>265</sup> See generally Karega RGM (2009), 'Benefits experienced by ordinary citizens from East African Community (EAC) regional integration' Final report.

<sup>266</sup> See for instance, Lwaitama AF, Kasombo J & Mkumbo K (eds) (2013) 'A Synthesis Research Report on the Participation of Citizens in the East African Community Integration Process' *Friedrich Ebert Stiftung*.

<sup>267</sup> Hon Justice Nsekela, President of the Court in his remarks during sensitisation workshop for instance decried that despite the Court having reviewed its rules of arbitration to measure up to international standards and further training its Judges on international commercial arbitration, no dispute had been referred to the Court for arbitration in ten years after inauguration. He laments that the founding judges of the Court had all retired without handling an arbitral matter. (Hon. Justice Nsekela's remarks, during the Sensitization Workshop on the Role of the EACJ IN Kampala, Uganda November 2012).

time between filing and realisation of fruits of judgment is shorter and the likelihood of a substantial remedy outweighs any costs and ‘logistical discomfort’ incurred in the process. Other factors such as amount of court fees and simplification of court procedures may also influence whether individuals opt to pursue the domestic courts or the regional courts, given that national courts too have a wide berth in interpretation of the Community law.

The Court has undertaken various measures such as sensitisation workshops in a bid to raise awareness. These measures, though noble are not effective in reaching out to the grassroots and creating the much needed awareness among the ordinary citizens of Partner States who are also its potential users. Therefore, more needs to be done in order to reach out to the ordinary citizens and small companies in Partner States. This requires co-operation from Partner States in informing its citizens. Additionally, more enduring measures geared towards leaving a more lasting imprint of the Court and its activities should be considered. The segment below highlights some of the modes through which the EACJ can enhance its visibility and confidence in a more lasting manner.

#### **4.3.1 Official reporting of judicial decisions**

Timeous dissemination of relevant information and indeed court decisions is an important avenue for creating awareness and raising the confidence levels among stakeholders.

The drafters of the EAC Treaty were conscious of the place and significance of law reporting in the integration puzzle. In the spirit of co-operation, the EAC Treaty provides for revival of the



‘publication of the East African Law Reports’ or ‘similar law reports and such law journals’.<sup>268</sup> This is calculated to promoting the ‘*exchange of legal and judicial knowledge and enhance the approximation and harmonisation of legal learning and the standardisation of judgments of courts within the Community*’.<sup>269</sup> The defunct East African Law Reports dealing with judgments arising from the East African Court of Appeal no doubt had a huge impact in developing jurisprudence even at the national levels. These reports increasingly became an indispensable companion for the lawyers, thanks to their persuasive jurisprudence on which litigants and lawyers anchored their cases before national judges who enthusiastically applied them. This way, the Court’s pronouncements and Community values are gradually and effortlessly infused into the national jurisdictions, taking roots.

Some of EAC’s Partner States already have in place advanced law reporting mechanisms.<sup>270</sup> The idea is to tap into these and engineer a collaborative mechanism of reporting of judicial decisions and all related laws at the Community level across all Partner States in easily accessible formats. Although the EACJ has endeavoured to maintain an up to date website from which cases and other legal information can be obtained,<sup>271</sup> publication of law reports would be a crucial tool for building jurisprudence especially given the current internet access challenges in parts of Partner States. However, owing to the modest number of decided cases, law reports staggered over a reasonable period of time, depending on the outflow but complemented by real time electronic reporting, are critical to ensuring that no jurisprudence is lost. A joint comprehensive database of

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<sup>268</sup> Article 126 (2)(c) EAC Treaty.

<sup>269</sup> *Ibid.*

<sup>270</sup> For instance the Kenya Law Reports ([www.kenyalaw.org](http://www.kenyalaw.org)) <http://kenyalaw.org/kl/> and Uganda’s Legal Information Institute (ULII) (<http://www.ulii.org/>).

<sup>271</sup> See <http://eacj.org/>.

all decisions, and relevant information touching on Community law by both judiciaries at the National and regional level would be useful to streamlining jurisprudence and monitoring divergence in community law interpretation. This extends to the relevant laws of both the Community and individual Partner States.

Dissemination of journals on the workings of the Court and emerging jurisprudence is yet another avenue that the Court would utilise so as to keep itself in the public eye. This is a key step towards harmonisation of national laws and judgments appertaining to the Community as envisaged under Article 126(2)(b) of the EAC Treaty. The more people are in touch with the Court's jurisprudence, the more likely its impact is felt and the more credibility levels also likely rise. Apart from augmenting its visibility, this will result to harmonised jurisprudence ultimately leading to a more integrated Community.

#### **4.3.2 Media**

The media can have a great influence on the publicity of the Court. A one off dissemination of information though is unlikely to achieve the desired effect. The Court and indeed the Community needs to more proactively utilize the availability of media in order to raise awareness regarding its services across Partner States, this is through television, newspapers and even internet platforms. A recent study however reveals some gap in the number and frequency of ordinary citizens able to access news regarding the EAC through the various sources,<sup>272</sup> hence the need for strategy in dissemination. The CMP on the free movement of people and services would be assistive in allowing journalists and other media crew to move freely.

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<sup>272</sup> Karega RGM (2009), 'Benefits experienced by ordinary citizens from East African Community (EAC) regional integration p 42-4.

### **4.3.3 EAC Curriculum**

The Partner States would do better to inculcate the spirit of East Africa in institutions of learning through conscious integration of a subject focused of EAC Community matters as part of the school curriculum.<sup>273</sup> Making EAC law as a subject of study is beneficial in more ways than one. The European law has become a course of study and shaped careers for many a professional. As a medium term and more enduring measure, institutionalisation of EAC and by extension EACJ in schools will not only instil the knowledge on the EAC functioning and other related matters but also inculcate patriotism, towards the Community. It will see sprouting of a new crop of minds, encourage further research and steer the integration process forward while inspiring generations to come. This calls for more training and material on the EAC. It also requires that the Community consciously secures and safeguards all its information resources as these will become key not only for reference and research purposes but also vital to preserving the Community history for the present and future generations.

### **4.3.4 Physical presence and other measures**

The current situation whereby Court sub registries are tucked away in main High Courts in capital cities of Partner States does little to increase the Court's physical presence with the larger populace. The Community in partnership with Partner States needs to as far as practical expand its physical presence in Partner States through an increase in sub-registries in order to broaden the court's physical presence and aid accessibility of its services.

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<sup>273</sup> The EAC Community Anthem also needs to be taught among the young minds alongside their national ones.

Other avenues the Community as a whole would do well to pursue apart from the direct engagement with stakeholders would include engaging in and organising social events such as the annual inter-university debates that is already on course. Additionally, activities and symposiums including hosting events and activities such as moot courts competitions, internships and exchange programs are all small ways through which the Court could impact on Community affairs while consolidating its position as the integral judicial arm of the Community.

As mentioned in previous chapter, the significant role of Heads of State and indeed line ministries in steering the integration process forward right from the localities of individual Partner States cannot be gainsaid. They have a role in motivating, indeed initiating programs and policies at the grass root level in their respective countries with the aim of permeating the EAC agenda.

#### **4.4. Multiple memberships**

The institutional proliferation of RECs in Africa has led to their being metaphorically equated to a ‘spaghetti bowl’ to illustrate their twirled nature as far as their number and mandate is concerned; and all in one Continent (bowl). The EAC has been described as the ‘thickest’ of the spaghetti or most established.<sup>274</sup> The RECs in Africa are basically geographically placed or ‘neighbourhood arrangements’. East Africa region has been assessed to have the largest concentration of RECs and intergovernmental regional bodies.<sup>275</sup> The five Partner States of the

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<sup>274</sup> Plenk, SJ & Maximilian, L (2013) ‘The Uniting of East Africa and the Uniting of Europe?’ 4(2) JIOS p 39.

<sup>275</sup> See African Development Bank (ADB) (2011) ‘Eastern Africa Regional Integration Strategy Paper 2011-2015’ p 2.

EAC also have memberships in one or more of other recognized RECs in Africa which also have regional courts. **Table 4.2** below depicts membership of the five EAC Partner States to recognised RECs and the relevant court:

<b>EAC Partner State</b>	<b>EAC (EACJ)</b>	<b>COMESA COMESA Court of Justice (CCJ)</b>	<b>SADC (SADC Tribunal)</b>	<b>ECCAS (Court of Justice of the Community)</b>	<b>AFRICAN UNION (African Court on Human and Peoples' Rights)</b>
<b>Burundi</b>	Yes	Yes	-	Yes	Yes
<b>Kenya</b>	Yes	Yes	-	-	Yes
<b>Uganda</b>	Yes	Yes	-	-	Yes
<b>Rwanda</b>	Yes	Yes	-	-	Yes
<b>Tanzania</b>	Yes	-	Yes	-	Yes

Table 4.2 Source of data: Respective RECs' websites. Table: Author.

As can be gleaned from the above table, all EAC Partner States are also members of at least one or more other regional groupings. Rwanda, Kenya Uganda and Burundi are all members of COMESA while Tanzania is a member of SADC. Burundi also holds membership in Economic Community of Central African States (ECCAS). Additionally, the Partner States are tied to other smaller groupings such as the Regional Integration Facilitation Forum (RIFF) and the Inter-Governmental Authority for Development (IGAD)<sup>276</sup> not to mention diverse development finance institutions. Furthermore, in terms of human rights jurisdiction, all the five Partner States

<sup>276</sup> Van Niekerk, LK, 'Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience' World Bank p 4. Only Uganda and Kenya are member states of IGAD.

have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.<sup>277</sup>

If left unchecked such membership web risks undermining the objectives of the EAC owing to the divided attention and tangled conflicting obligations.<sup>278</sup> As the ADB Strategy Paper notes, the multiple membership leads to 'duplication of resources and conflicting goals and policies'.<sup>279</sup> The larger picture is that such intertwining may derail the pace of the African integration. With regard to matters judicial, membership overlaps complicate the dispute resolution mechanism especially where the alternative forums differ with the EACJ's mechanism in terms of ground rules and remedies. The result is confusion, forum shopping and diverted jurisdiction that would otherwise have been exercised by the EACJ.<sup>280</sup> The worst case scenario would manifest itself if, heavens forbid, judgments on similar issues emanating from the parallel Courts clash.

#### **4.5 Capacity of the Court**

The Court suffers from inadequate capacity which affects the delivery of its mandate.<sup>281</sup> This ranges from lack of adequate human and material/financial capacity needed to effectively perform its functions as an independent organ of the Community.<sup>282</sup> Without the requisite capacity of the regional Court to undertake the existing and the much sought after jurisdiction, integration process will be slackened and the objectives of the Community become elusive.

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<sup>277</sup> See <http://www.achpr.org/instruments/court-establishment/ratification/> (accessed 18 August 2014).

<sup>278</sup> See also Oluoch, LO Constitutionalism in the East African Community in 2012 in Mbazira, C (ed)(2012) *The Annual State of Constitutionalism in East Africa* p 28.

<sup>279</sup> African Development Bank (2011) 'Eastern Africa Regional Integration Strategy Paper 2011-2015' (2011) p 2.

<sup>280</sup> See however Viljoen's argument on the likely overlaps. He is optimistic that there are mechanisms in which the African Court and other judicial and quasi-judicial bodies can co-exist and complement each other and such overlaps avoided. (Viljoen, F (2007) *International Human Rights Law in Africa* Oxford University Press pp 459-63).

<sup>281</sup> See also EACJ Strategic Plan (2020-2015) p 18.

<sup>282</sup> African Development Bank (2011) p 49.

Partner States must be willing and ready to invest in Community's organs and institutions as these are the pillars that hold the Community together. This is especially so for the judicial organ, the EACJ. Provision of adequate financial and human resource capacities and independence is vital to enabling the Court run as an independent Organ of the Community. As integration widens and deepens, more capacity will be required on the part of the EACJ to handle the ever increasing workload. Increasing jurisdiction of the Court without a requisite increase in the capacity of the Court might be uneventful.

Related to the issue of capacity is the *ad hoc* manner of working of the EACJ judges. This state of affairs contributes to the invisibility and may affect efficiency of the Court as more references swam the Court. Furthermore, the current situation whereby we have EACJ Judges also serving Judges in the respective judiciaries of Partner States is not ideal and needs to be revisited. This will ensure that the Judges are not overly burdened with responsibilities from both judiciaries and give them more focus on the workings of the Community. Other practical questions may also arise with such an arrangement; for instance, in the case of preliminary references, how is a national judge, who is also a Judge of the EACJ to refer cases before the same Court for a preliminary determination?

The other 'lesser' issue which nevertheless raises concern relates to the yet to be determined permanent seat of the Court. About a decade after its inauguration, Arusha is still referred to as the 'temporary' seat of the Court. Since integration is here to stay and so are its institutions, perhaps it is high time the tentative statuses were erased and the Partner States conclusively determined the permanent seat of the Court. Having a seat on rotational basis, it is submitted would be problematic and an unnecessary expense. It would also serve to disrupt the workings

and stunt growth of the Court. ‘Decentralising’ the Court’s sub-registry services further in Partner States followed by publicising would mitigate the problem of physical presence.

#### **4.6 Lack of political will**

As discussed in previous chapters, political good will is pivotal for the success of the EACJ and indeed other organs of the Community. Political good will is the fulcrum that will wheel the integration agenda forward and its significance in all dimensions, whether economically, socially and politically cannot be overemphasised.

The failure by the Council to extend the human rights jurisdiction of the EACJ despite several calls to do so, for instance, points to half-hearted efforts towards reinforcing the Court to optimally discharge its mandate as envisaged under the Treaty. Despite the fact that the draft Protocol for the extension of the jurisdiction of the Court in human rights matters was concluded several years back, the same is yet to be brought into force. The subsequent references brought before the EACJ to fast track the extension of the Court’s jurisdiction<sup>283</sup> and subsequent contempt proceedings for failure to comply with the initial judgment of Court towards the extension of the Court’s mandate<sup>284</sup> are all tell-tale signs of half-hearted efforts towards the strengthening the Court’s in core matters.

It is however encouraging to note that despite the absence of express jurisdiction, the EACJ has “innovatively” invoked other Treaty provisions on principles guiding the Community and obligations of Partner States under the Treaty to adjudicate disputes involving human rights

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<sup>283</sup> Refer to *Hon. Sitenda Sibalu* EACJ Reference No 1 of 2010. Delivered 30 June 2011.

<sup>284</sup> *Hon. Sitenda Sebalu* EAC Reference No 8 of 2012. Delivered in November 2013.



violations. By invoking the fundamental and operational principles of the Community under Articles 6 and 7 of the EAC Treaty, the Court has been able to play its role in safeguarding fundamental rights.<sup>285</sup> In the oft-cited case of *James Katabazi & 21 other others* for instance, while observing that the Court would not assume jurisdiction on human rights issues, it nevertheless was categorical that, ‘it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation’.<sup>286</sup> Similarly in *Sitenda Sebalu*,<sup>287</sup> the Court found that failure to extend the human rights jurisdiction violated the applicant’s legitimate expectation and was contrary to the principle of good governance enunciated under Article 6 of the EAC Treaty.

The case of *Anyang Nyong’o* remains a reference point on the effect lack of political could have on the workings of the Court or Community generally. As a reaction to the Court’s ruling in the case, the EAC Heads of State in their joint Communiqué of the 8th Summit of EAC Heads of State held on 30 November 2006 in Arusha, Tanzania, directed, ‘the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty’ and that, ‘a special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard’.<sup>288</sup> This was a move seen to be geared towards ‘punishing’ and clipping the independence of the Court.

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<sup>285</sup> See Arts 6(d) and 7(2) EAC Treaty.

<sup>286</sup> *James Katabazi & 21 other others v Secretary General of the East African Community & another* EACJ Reference No 1 of 2007 p 16.

<sup>287</sup> *Hon Sitenda Sebalu v The Secretary General of the East African Community, The Attorney General of the Republic of Uganda, Hon. Sam Njuba and the Electoral Commission of Uganda* EACJ Reference No 1 of 2010.

<sup>288</sup> See Joint Communiqué of the 8th Summit of EAC Heads of State held on 30 November 2006 in Arusha, Tanzania. Available at [http://www.eac.int/news/index.php%3Foption%3Dcom\\_docman%26task%3Ddoc\\_view%26gid%3D139%26Ite.](http://www.eac.int/news/index.php%3Foption%3Dcom_docman%26task%3Ddoc_view%26gid%3D139%26Ite.)

The governments of Partner States and the policy organs must be willing to support the institutions and organs of the Community if the integration agenda is to progress apace. The remarks by Hon Harold Nsekela, President of EACJ are captivating in this regard:

If East Africans are serious about meaningful regional integration, they must be willing and prepared to invest in it, particularly in institutions that will make people develop with dignity. A fully-fledged East African Court of Justice with all its attendant jurisdictional roles is one such institution. East African leaders cannot expect a strong East African Community unless they invest in institutions that will guarantee its existence. We should not expect to reap where we have not sown.<sup>289</sup>

#### **4.7 Conclusion**

The foregoing chapter has tackled some of the practical issues facing the regional Court. It emerges that the EACJ faces a wide range of challenges that threaten to retract the large strides already accomplished by the Court and Community so far. But all is not grim; there are also opportunities within the EACJ's disposal through which, with the support of the Community the Court can harness in order to bolster its standing and effectiveness in the integration process.

Notably, most of the proposals require resources and support of other Community Organs and Partner States in order to implement them. The next and final chapter concludes this study and presents more possible solutions towards building more effective regional and national judiciaries in the East African Community.

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<sup>289</sup> Hon Mr Justice Harold Reginald Nsekela, president EACJ, 'The role of the East African Court of Justice in the Integration Process' Presentation made during the 3<sup>rd</sup> East African Community Media Summit Kampala Uganda, 21<sup>st</sup>-22<sup>nd</sup> August 2009 p 14. See also Nsekela HR, 'The performance of the East African Court of Justice in Respect of Achieving Regional Integration' in Gastorn K, Sippel H & Wanitzek U (2011), *Processes of Legal Integration in the East African Community* Dar es Salaam University Press p 143.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

The EAC is quickly becoming a thriving and vibrant REC to reckon with in the continent and the progression of integration within the Community is generally encouraging. EAC has an ambitious plan, with its ultimate goal being the political unification of its constituent Partner States. Just like many RECs, the EAC Treaty established the East African Court of Justice (EACJ) as an international Court for the region to ensure adherence with the Community laws and peaceful settlement of any disputes that may arise under the integration. EACJ is one of the Organs of the Community<sup>290</sup> and is a major player in EAC's quest for the sequenced integration culminating in the ultimate prize; a political federation.<sup>291</sup> While the Court has generally been progressive and forceful in the exercise of its mandate, some challenges abound and there have emerged gaps especially with regard to its relationship with national Courts.

The present research study set out to examine the role of the EACJ and national courts in achieving the objects of the EAC. The study also set out to investigate some of the practical challenges facing the regional Court and possible opportunities that could be exploited towards bolstering the effectiveness of the Court in the discharge of its mandate under the EAC Treaty. This concluding chapter presents a brief summary of the study and highlights key research

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<sup>290</sup> Art 9(1) EAC Treaty.

<sup>291</sup> Refers to EAC's graduated integration process of establishing a Common Market, Customs Union and Monetary Union and ultimately a political federation (See Article 5(2) EAC Treaty).

findings and lessons that can be drawn from the findings. It also offers some of the recommendations on the way forward.

## **5.2 Summary**

The study examined the structure and workings of the EACJ in chapter two. The chapter also discussed the role of the regional Court as stipulated under the EAC Treaty and made a comparison with similar regional courts. The centrality of EACJ in preserving the rule of law of the Community was emphasised. Adherence to the rule of law by Partner States is the glue that will hold the Community together amidst fierce waves that may threaten to rock the Community pool. The EACJ undoubtedly remains an integral pillar in the integration process. However, the EACJ cannot singly discharge its onerous task effectively and requires co-operation and the support of various parties. Chapter three of the study went to great depths in examining the relationship between the national judiciaries and the regional court and identifying areas of ‘collaboration’ between the two judiciaries. The role of national courts in interpreting the EAC Treaty and Community laws, matters under the CMP and CUP, preliminary references and enforcement of Orders of the EACJ were given greater consideration. Various gaps in the discharge of the respective roles were also identified and discussed. These are summarised in 5.3 below.

Chapter four presented a candid and practical assessment on some of the emerging issues that serve to derail the effective discharge of the mandate of the Court towards the realisation of Community objects. The chapter also highlighted some of the proposed responses to these threats which also make up for the opportunities that the Court and indeed the Community can leverage on towards achievement of the Community objects.

### 5.3 Key research findings

The study identified some structural weaknesses in the composition of the Court. With regards to the appointment of judges of the Court, it was noted that they are appointed by the Summit of Heads of State which also appoints the Principal Judge and the deputy and the President and Vice-president to head the First Instance and the Appellate Division respectively.<sup>292</sup> The Summit also wields an upper hand with regard to removal of the Judges of the Court.<sup>293</sup> Although the Court so far has been seen to be unshaken and has withstood political pressure and perceived intimidation by Partner States as evidenced in the *Anyang Nyong'o* and subsequent cases, some critics still view this as problematic in terms of 'perceived independence' of the Court. Credibility is a key tool of trade for any judiciary and the process of appointment should as far as possible be seen to be open and free from interference by the executive arm of the Community. Furthermore, the mode of appointment makes it tricky in terms of consideration of important variables such as gender balance as there are no specific guidelines on the process in that line.<sup>294</sup> Moreover, the lack of uniformity on qualifications of judges in the five Partner States<sup>295</sup> is an issue that requires to be revisited and qualifications standardised across board.<sup>296</sup>

As regards the functioning of the Court, the fact that Judges of the Court also serve in their respective judiciaries shackles them with additional national responsibilities and this is bound to impact on the effectiveness of the Court in the long run when more references flood the Court.

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<sup>292</sup> Article 24(5)(6) EAC Treaty.

<sup>293</sup> Refer to Article 26 EAC Treaty.

<sup>294</sup> Article 9(5) requires observance of gender balance in all appointments to the Community Organs and Institutions.

<sup>295</sup> Refer to Article 24(1) EAC Treaty.

<sup>296</sup> See also Article 126 EAC Treaty on Partner States' obligation to co-operate in judicial and legal matters.

Furthermore, the functioning of the Court on an *ad hoc* basis does not augur with the standing of the Court as a core and permanent organ of the Community.

With regards to the status of Community laws *vis a vis* national laws of Partner States, it is the finding of this study that the Community laws and decisions override national ones. But this is not *carte blanche*; it is strictly with regard to matters pertaining to the implementation of the Treaty.<sup>297</sup> Both the EAC law and jurisprudence are unequivocal that the laws, decisions and institutions and organs of the Community take precedence over national ones in matters concerning the Community. This supremacy doctrine has been applied and taken roots in other jurisdictions such as the EU and appears to trigger little contention at EAC. The same degree of closure cannot, however, be said of the direct effect doctrine in the EAC; whether Community provisions may be raised and directly applied before national courts; in exercising their original jurisdiction. This is made complex by the incorporation of Community laws into the body of laws of Partner States making them part and parcel of the domestic regime. The introduction of the amendments to the Treaty<sup>298</sup> further adds to the mix of confusion as they divest the EACJ of the exclusive role of Treaty interpretation and application; giving a leeway for co-sharing with National Courts. Sure enough, these provisions have found expression in the passing of the Protocols that vest jurisdiction in other bodies apart from the EACJ.

In respect to the mandate of the EACJ, it was noted that the same is unclear and the jurisdictional divides between it and the national courts blurry. The study uncovered that national courts have a wide berth in the interpretation and application of the Treaty owing to the provisions of Articles

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<sup>297</sup> Refer to Article 8(4) EAC Treaty.

<sup>298</sup> Amendments to Articles 27 and 33 EAC Treaty.

27 and 33 of the EAC Treaty. Consequently, the boundaries are hazy as to what Community matters squarely fall under EACJ's exclusive mandate. The 'unclaimed' territories within the EACJ's jurisdiction such as the advisory opinions, industrial matters involving Community staff and arbitration also happen to be the least contentious areas. The amendments introduced to section 27(1) and 33 allowing the involvement of the national courts in the interpretation of Community law leaves the regional Court with only the window of preliminary references through which it can, to a certain extent, direct jurisprudence applied by the national courts on Community matters. The preliminary ruling procedure is however not even mandatory but is at the discretion of the presiding national judge. The nature of this co-shared jurisdiction has had the undesirable consequence of limiting the nature of reliefs that the EACJ can grant, with some of the substantive issues being left to the respective national courts to deal, since they have the jurisdiction.

With regard to the commercial Protocols, it was the finding of the study that the introduction of quasi-judicial bodies under the CMP and CUP, though not ousting EACJ's jurisdiction nevertheless serves to further thin out even the little of the EACJ's exclusive jurisdictional area and further contributes to the 'untidiness' in the Community's judicial mechanism. The benefits of diversion of these matters to alternative dispute resolution however should not be ignored in the debate. These matters are sometimes technical and require technocrats to deal with them. Furthermore, it ensures that the Court is not encumbered by all manner of disputes that may eventually choke it, absent concomitant capacity building. Still on the brighter side, the Court still wields an upper hand in terms of the precedence of its decisions. Furthermore, if the preliminary reference mechanism is fully embraced, the EACJ would still have an influence on

the consolidation of jurisprudence even on matters diverted to national courts and other tribunals. What is paramount is that in all this, sight must not be lost of the ultimate goal which is the preservation of Community values and principles and the realisation of Community objects. Thus, whichever forum is seized of the jurisdiction, it must be guided by the beacons of the Community principles and objects.<sup>299</sup>

Through the study, it became clear that national courts have a significant and ‘original’ role to play in the integration agenda alongside the regional Court. They are a force to reckon with in the integration process and their contribution to the integration process cannot be wished away. The study however unraveled a number of gaps in the relationship between the regional court and the national judiciaries. The preliminary ruling procedure, which would be an influential tool in shaping the Community jurisprudence especially at these nascent stages, has been underutilised. One can only hope that with more awareness creation and springing of more disputes as integration deepens, the national courts will be able to seize the opportunity in being Partners in the creation of regional jurisprudence by making references to the EACJ for preliminary rulings. A foggy area concerning preliminary references however remains the manner of exercise of discretion by the national judiciaries given that the national courts have wide discretion on whether or not to refer questions to the EACJ. These are matters that may however be ironed out by the Court itself through setting precedents on the threshold for questions submitted to it for preliminary rulings.

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<sup>299</sup> For objects and principles of the Community, see Articles 5, 6 and 7 EAC Treaty. For general rules regarding interpretation of Treaties, see Article 31 Vienna Convention on Law of Treaties.



Through the study, it further emerged that the EACJ lacks its own mechanism for enforcement of its decisions. In the absence of enforcement of Court's decisions, the rule of law becomes elusive and integration process regresses. Through enforcement of EACJ's judgments, national judiciaries play vital role in ensuring the effectiveness of the Court in accordance with **Article 44** of the EAC Treaty. However, as experience has shown, a great deal of good will by governments of Partner States remains pivotal to the implementation of the Court's decisions. This brings to fore another critical finding; the centrality of political good will to the effectiveness of the Court and the Community at large. National governments play a pivotal role in shaping the tone and tenor of the integration process. Under the Treaty, Partner States commit themselves to various undertakings towards the implementation of the Treaty.<sup>300</sup> Through their involvement in the Community affairs as policy organs of the Community, particularly the Summit and the Council and even through their engagement with the citizens they lead, the leaders occupy a vantage point in agenda setting and steering the Community towards achievement of its objectives.

The Court's lack of visibility also emerged prominently in the discussions as one of the key threats to the Court's effective discharge of its mandate and potential hindrance to achievement of Community objects. It is the lack of awareness on the procedures and functioning of the Court that has led to the underutilisation and even dormancy of some of the available mandate such as preliminary references and arbitration. Although the Court has put up spirited efforts in a bid to sensitise the stakeholders on its working, more still needs to be done to reach out to the wider populace even in the remotest part of the Partner States. The lack of awareness is not just

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<sup>300</sup> See generally Article 8 EAC Treaty.

confined to the workings of the Court but extends to the overall functioning of the Community generally. This is something that undoubtedly requires concerted support from other policy organs of the Community and Partner States as well as other stakeholders such as the civil society, community based organisations and the media.

The capacity of the Court has been somewhat hushed even as demands on the widening of the Court's jurisdiction have reached a crescendo. Without adequate capacity in human, material and financial resources, even the exercise of the much sought after jurisdiction will prove difficult. The regional court should be financially independent to enable it fully carry out its mandate effectively and independently.

Finally, it also emerged that apart from the parallel fora for dispute resolution, the Court has to contend with competing jurisdiction from other international courts for which Partner States are also Members. This could prove to be problematic as it introduces avenues for forum shopping and brings a risk for further inconsistent judgments on similar matters before the Courts.

#### **5.4 Recommendations**

There is need for greater clarity and certainty on what only the EACJ as EAC's regional Court can do. This necessitates demarcation of clear boundaries between what Community matters exclusively fall for determination by the EACJ and those that national courts can deal with. The current state of affairs where it appears to be a matter of choice for the litigants, while encouraging access to justice, is not healthy in pursuing a common Community integration agenda. This state of affairs also fails to provide the necessary predictability and certainty in

terms of the appropriate judicial forum. Carving out areas for which the regional Court has exclusive jurisdiction is desirable. As a starting point, Articles 27 and 33 need to be redefined.

It must be emphasised here that the idea however is not to completely block out national courts in Community disputes. Being important building blocks for the Community, vibrant national judiciaries remain important tributaries and distributaries of the Community jurisprudence and require strengthening as well. What is key is to demarcate clear boundaries in the Treaty. Having an ordered mechanism of escalation of Community related disputes from national judiciaries and requirement for exhaustion of local remedies could inject some tidiness in the Community's judicial system. Another approach to the jurisdictional maze, in the absence of Treaty amendment, is for the regional Court to adopt purposive interpretation to already existent provisions of the EAC Treaty. An example would be to interpret the provisions that provide for precedence of Community laws, institutions and Organs<sup>301</sup> as requiring that the EACJ as an organ of the Community be accorded priority in filing matters relating to interpretation of the Treaty. Under such an interpretation, matters presented before national judiciaries of Partner States are directly referred to EACJ for determination, as the institution having preeminence in the Community's 'judicial pecking-order'. Partner States would then be obliged to through legislation require citizens to refer Community-related matters directly to the EACJ under Article 8(5) of the EAC Treaty, being the judicial organ that takes precedence over national judiciaries on Community affairs.<sup>302</sup>

This obviously has its downside and raises serious questions such as whether the EACJ in its current form has the capacity to entertain practically all matters touching on Community,

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<sup>301</sup> See Article 8(4)(5) EAC Treaty.

<sup>302</sup> Under this provision, the Partner States undertake to, 'make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones'.

howsoever framed in the Partner States or should there be some sort of selective criteria? The other issue would be the implication on the incorporation of the laws on the Partner States. In other words, how and to what extent are Partner States not to be required to apply and interpret laws that they have incorporated into their body of laws and in view of Article 8(2)<sup>303</sup> on undertakings by Partner States? Would this cause more disarray in the system or is there a bigger risk of overstepping the sovereignty bounds? Underlying all this is the whole question of access to justice and whether such a move, in its active pursuit of jurisdictional tidiness and legal integration would not likely compromise on the right to access justice by citizens of Partner States.

In terms of enforcement of EACJ's decisions, there needs to be concerted effort in ensuring that the judgments of the Court are implemented to the letter. It is suggested that, in the absence of express mandate, that the Court gives a broad interpretation to the existing Treaty provisions especially ones requiring it to ensure compliance with the rule of law and be able to punish for contempt. This still remains tricky especially where it is a Partner State's government officials involved which may immerse the Court further into undesirable murky political waters.

On the question of grant of effective remedies, *follow-ups* may be desirable in order to encourage compliance by Partner States. Declarations in judgments that demand further action for substantive realisation of the fruits of judgment could, as matter of practice, include a follow-up mechanism, say, require that the affected Partner States report to the Court after a certain period of time to confirm compliance or steps taken to rectify the infringement. This is not a new

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<sup>303</sup> Article 8(2) EAC Treaty is one that requires each Partner State to, 'secure the enactment and the effective implementation of such legislation as is necessary to give effect to [the] Treaty' and in particular, '*to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory*' (see Article 8(2)(b)).

phenomenon; follow-up procedures have occasionally been ‘subtly’ used in domestic courts and more commonly by international bodies especially in Communications concerning international human rights.<sup>304</sup> This might, predictably, raise concerns as to whether such a move would not amount to ‘micromanaging’ or overstepping the executive or ‘investigative’ functions not to mention the thorny issue of ‘sovereignty’ of the concerned Partner States. All in all, the essence of the Court and the objects of the Community will amount to naught if parties are allowed to decide whether and when they will comply with judicial decisions, and if members cannot be guaranteed of the protection of the Treaty provisions and enjoyment of the fruits of judgment. A tangible solution thus ultimately needs to be found to ensure compliance.

As regards the functioning of the Court, Judges of the Community should be full time members of the Court and have longer terms of service. This is a step not only in bolstering effectiveness, but is also recognition of the centrality and stature of the regional Court as a core and permanent organ of the Community and key player in integration process. Put simply, the EACJ is not established as an *ad hoc* or seasonal body and the workings of the Court should accordingly be full time.

In a bid to increase the visibility of the Court, various measures have been proposed in chapter four of the study. It is submitted that the Court needs to embrace mechanisms of publicity that leave more imprint while advancing the work of the Court. Measures such as timely law reporting of decisions in easily accessible formats are positive steps towards not only publicising the Court but ‘selling out’ its jurisprudence and building further credibility. A collaborative

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<sup>304</sup> For information on follow up of decisions emanating from African Commission communications for instance, See Viljoen (2012)*International Human Rights Law in Africa* 2<sup>nd</sup> ed Oxford University Press pp 340-2.

electronic system of law reporting on decisions touching on Community matters and laws generally in collaboration with Partner States will create vital awareness platforms. This would in turn prove useful in facilitating judicial learning in addition to hastening legal integration within the Community. Such a measure would also ensure that no jurisprudence is lost or spills on the path towards integration. The available electronic law reporting mechanisms in some Partner States are ready avenues which the Community and EACJ could easily tap and leverage on without incurring unnecessary communal burden.

Moreover, the Partner States need to move with a sense of urgency in addressing the areas of co-operation in legal and judicial matters as encapsulated under **Article 126** of the EAC Treaty. This includes standardisation of legal training and judgments within the Community and harmonisation of all national laws relating to the Community. This is a key foundation to attaining true legal integration within the Community as envisaged under the EAC Treaty.

With regard to enhancing the co-operative role between the national judiciaries and the EACJ, more collaborative forums of judicial sharing and Community judicial colloquia are some of the initiatives that would create platforms towards judicial learning and harmonisation of Community laws and jurisprudence.

Much, if not all of the success of the Community is ultimately dependent on the good will of Partner States and their governments. In the words of John Moore, integration should be seen as *'a win-win policy and not a zero-sum game.'*<sup>305</sup> While a certain amount of caution is justified

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<sup>305</sup> Remarks by John Moore, then Director, Canadian International Development Association (CIDA-Tanzania) during conference to celebrate the achievements of the EAC in Arusha, Tanzania, on February 27–28, 2012 as cited in Davoodi, HR (ed) *The East African Community After Ten Years Deepening Integration* p 12.

indeed sometimes necessary, phobias and ‘sovereignty syndrome’<sup>306</sup> however ought not be allowed to stand in the way of a vibrant and accelerated integration process. The Partner States need to ‘let go’ of sovereignty fears for the integration to progress apace.

The need for attitudinal shift for EAC stakeholders is something that may not be tangible enough to attract legislation but nevertheless bears significant influence on the integration process. While laws and policies may be changed and new ones put in place, it becomes even difficult to change the attitudes of a people. Ultimately, the success of integration rests primarily on each and every member of the Community, indeed all East Africans. This will call for attitudinal shift from old ‘nationalistic’ ways of doing things and a refocus towards the East African ‘communal’ spirit and embracing the wave of integration in every way possible.

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<sup>306</sup> Phrase borrowed from Ruhangisa (2012) p 28.

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