

**THE EAST AFRICAN COURT OF JUSTICE: TEN YEARS OF OPERATION**

*(ACHIEVEMENTS AND CHALLENGES)*

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1

## **1. Introduction**

The East African Court of Justice (The Court) will mark its 10th year since inauguration on 30th November 2011. This period of its existence offers the Court special opportunity to take stock of its performance which inevitably is characterised by successes and challenges for the future. The first Ten Years of the Court's life have seen the Court born as a baby, stumble from teething problems of infancy, and then begin to grow into adolescent stature and status.<sup>1</sup>

In this paper I wish to take a chronological and sequential approach by first examining the successes which the Court has marked and then look at the challenges facing it, before concluding the discussion.

## **2. Achievements**

During the period under consideration the Court has made remarkable headways in various areas of its mandate as a judicial arm of the Community. Such achievements include the following:

### **(a) Rules of Procedure and Arbitration**

Formulation of the Rules of Procedure and the Rules of Arbitration was the first activity that the Judges embarked on immediately after being sworn in. This was so because the Court considered it very critical for the stakeholders/litigants to know the procedure of approaching the Court. In formulating the rules governing litigation in the Court, due regard was paid to the provisions of the Treaty, the international character of the Court itself, the need to make the rules user friendly and tried to avoid common problems facing litigation in national courts. It was against this background that these rules were circulated to a wide range of stakeholders for comments which comments were taken into consideration before the Court adopted them.

#### ***(i) Accessibility of the Court:***

Before actual litigation is commenced by a party through formal presentation of a case to the Court, a litigant has to identify a competent Court where such a case should be filed. He has to satisfy him/herself whether a particular Court has jurisdiction over the

<sup>1</sup> See “The East African Court of Justice: Tenth Year Report”, November 2011, p. 36.

2

subject and whether there are preliminary requirements that he should first satisfy.

Most of the International Courts are not directly accessible by litigants but one has first to channel his case through Member States which upon being satisfied with the matter at issue can competently present that case on behalf of the aggrieved national<sup>2</sup>.

The Treaty provides that, “any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty”<sup>3</sup>.

The Court is therefore accessible by a range of stakeholders from State level to that of a simple individual. The following have expressly been given access to the Court by the Treaty:

- *Partner States*: when a Partner State considers that another Partner State or Community organ has failed to fulfill Treaty obligation, or that there is need for determination by the Court on legality of any Act, regulation, directive, decision or action on ground of being *ultra vires* the Treaty <sup>4</sup>
- *Secretary General*: where he considers that a Partner state failed to fulfill its

obligation or breached the Treaty<sup>5</sup>,

- *National court*: where national courts refers to the Court for preliminary ruling question of Treaty interpretation or determination of legality of a Community law or action<sup>6</sup>,
- *Legal/ natural persons residents of East Africa*: on legality of any Partner State/Community Act, regulation, directive, decision or action as *ultra vires* the Treaty<sup>7</sup>

<sup>2</sup> See for example African Court of Human and Peoples' Rights....., SADC Tribunal ..... <sup>3</sup> See Article 30 of the Treaty. <sup>4</sup>See Article 28 Ibid. <sup>5</sup> See Article 29 Ibid. <sup>6</sup> See Article 34 Ibid.

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Individual litigants therefore can access the Court directly on their own or through legal representation<sup>8</sup>. However, where a party wishes to access the Court through legal representation by an advocate, and where an advocate wishes to appear before the Court, such advocate is required to file with the Registrar a certificate that he or she is entitled to appear before a superior court of a Partner State.<sup>9</sup> As you may be aware, legal practicing certificates are renewed annually in all the five judiciatures of East Africa. This requirement in EACJ Rules of Procedure originates from the Treaty which provides that:

*“Every party to a dispute or reference before the Court may be represented by an advocate entitled to appear before a superior court of any of the Partner States appointed by that party.”<sup>10</sup> (Emphasis added)*

It goes without saying that, only advocates holding national valid practicing licences can appear before the East African Court of Justice dressed “in their national

professional dress.”<sup>11</sup> Proceedings and all other records of the Court are in English which the Treaty recognises as the official language of the Court.<sup>12</sup>

### ***(ii) Hearing***

Sessions and sittings of the Court are conducted in Arusha where the Court is located for the time being until the Summit determines the permanent seat of the Court.

However, if the Court considers it desirable can conduct its activities at a place other than the seat of the Court and if such activities involve hearing of a case the Court will direct the parties accordingly.<sup>13</sup> This arrangement aims at bringing justice nearer to the people for it would be difficult a person resident in Uganda or Kenya or Mtwara for example, to easily access the Court which is geographically located very far from him thereby constituting a barrier to its accessibility. This flexibility allows the Court to

<sup>7</sup> See Article 30 Ibid. <sup>8</sup> Rule 15 (1), of the East African Court of Justice

Rules of Procedure. <sup>9</sup> Rule 15 (5), Ibid. <sup>10</sup> Article 37 (1) of the Treaty. <sup>11</sup>

Rule 83, Ibid. <sup>12</sup> See Article 46 of the Treaty. <sup>13</sup> See Rule 6, Op cit

4

consider such situations and direct that all or part of the proceeding in a case be held at a place other than where the seat of the Court is located. As a matter of policy, whenever a case involves parties who come from the same area (country) the Court holds hearing and delivers Judgment in the Capital of that Partner State.<sup>14</sup>

### ***(iii) Delay of Justice***

Delay of justice has taken many different forms in our region but at trial level the common ones include: granting of *ex-parte* orders by the Court, unnecessary

adjournments of hearing, and unlimited period within which to pronounce the judgment after concluding the hearing. The Court has taken into considerations all these concerns when formulating its rules of procedure that govern litigation in it.

The Court encourages both sides to present their cases in Court in the presence of each other such that no motion can be heard without notice to the parties affected by the application. However, if the Court is satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable injustices, then it may hear the motion and make any *ex parte* order upon such terms as to costs or otherwise.<sup>15</sup> This interlocutory order has been subject of abuse by unscrupulous lawyers and litigants such that it is commonly blamed for delaying justice. A safeguard against such abuse was contemplated by the Court by fixing time limit. This is reflected in the rules where it is made mandatory for the Court upon making *ex parte* order to set down the application for *Inter partes* hearing within thirty days of *ex parte* order.<sup>16</sup> It is categorically stated that an *ex parte* order in the East African Court of Justice can be granted only once and cannot be extended.

In a bid to curb abuse of adjournments, the East African Court of Justice makes it also mandatory for hearing of evidence to continue from day to day until all the witnesses in

<sup>14</sup> In August 2010, the Appellate Division of the East African Court of Justice held a session in Nairobi and delivered a Judgment in Appeal No..... Prof. Peter Anyang'Nyong'o and ..... Others v. ....<sup>15</sup> See Rule 17 (2), Ibid <sup>16</sup> See Rule 17 (3) and Rule 71 (2)

attendance have been examined unless the Court finds it necessary to adjourn for

reasons to be recorded.<sup>17</sup> If a case comes for hearing following adjournment and any party fails to appear the Court may proceed to dispose of the matter in any of the modes specified under the Rules of Procedure.

An order by the Court for “judgment on notice” has been tagged with specific time within which the Court must pronounce the judgment and cannot therefore put the parties on hold without pronouncing the judgment beyond the prescribed period. In the East African Court of justice, much as the decision is by majority in a quorum of three or five<sup>18</sup> with right to dissent among the sitting judges, a judgment should be delivered within sixty days from the conclusion of the hearing except where the Court is unable to do so.<sup>19</sup>

#### ***(iv) Witnesses***

It is the responsibility of a party to bring witnesses in support of his claim or defence and the said party will also be responsible for the witnesses’ expenses but the Court can only facilitate the summoning of that particular witness by issuing a summons.<sup>20</sup> It is only where the Court summons a person to give evidence or produce document when in its opinion such evidence is essential for determination of a matter before it, that the expenses of such witness shall be born by the Court.<sup>21</sup>

#### ***(v) Execution of Judgment***

Like any other International Court, the East African Court of Justice due to lack of execution machinery of its own, relies on the procedure obtaining in the country where the Court decree/order is to be executed. This is more so where a judgment of the Court

imposes a pecuniary obligation on a person. Execution of such judgment of the Court

<sup>17</sup> Rule 64, see also Rule 29. <sup>18</sup>

Rule 5 <sup>19</sup> Rule 66 <sup>20</sup> Rules 55

(1) and 56 (1) <sup>21</sup> See Rules 55

(3) and 56 (6)

6

will be governed by the rules of civil procedure in the Partner State in which execution is to take place.<sup>22</sup> What the Court does through Registrar is to append the order for execution to the authentically verified judgment of the Court. Thereafter the party in whose favour execution is to take place may proceed to execute the judgment, normally after lodging it with respective High Court.

#### ***(vi) Alternative Dispute Resolution***

Since some cases with assistance of the Court, may be amicably settled without necessarily going through trial, the East African Court of Justice considered this alternative and thought it health to give parties an opportunity to explore this possibility provided it is done under supervision of the Court. Against this background, the East African Court of Justice rules of procedure provide for Court annexed Mediation and the guidelines thereof.<sup>23</sup> Where mediation or other form of settlement succeeds, the Court records the settlement order, which is taken to be an order of the Court, but where mediation or other form of settlement fails, the matter has to proceed to trial.

#### ***(vii) Costs and Fees***



In the East African Court of Justice as is the case with the rest of the courts, costs follow the event unless the Court for good reasons orders otherwise. However, “if it appears to the Court that costs were incurred improperly or without reasonable cause by reason of any misconduct or default of the party and or advocate, may call on the advocate by whom such costs had been incurred to show cause why such costs should not be borne by the advocate personally.”<sup>24</sup>

Since there is a possibility for a person failing to file his case in the Court on ground of impecuniosities, such person is required to file an application to the Court for relief

<sup>22</sup> See Rule 72 (2) and Article 44.

<sup>23</sup> See Rule 53 (1) <sup>24</sup> Rule 75

from fees. If the Court is then satisfied that the applicant lacks means to pay the required fees and that the claim has a reasonable possibility of success, may by order direct that the claim may be lodged without prior payment of fees, or on payment of any specified amount less than the required fees. However, when a party permitted to sue as a pauper succeeds, the Court may by order direct the losing party to pay the Court fees which would have been payable.

### **(b) Opening of Sub-registries**

In tandem with the philosophy of accessibility and desire to bring services near the people, is the room in the Rules of Procedure to establish sub-registries of the Court at such places in the Partner States as the President of the Court may from time to time

direct,<sup>25</sup> and a proviso that:

*“where the Court is sitting or about to sit in any place other than the seat of the Court, then, for the purposes of any application to be heard in that place, the Registry shall be deemed to be situate in that other place”<sup>26</sup>,*

This kind of arrangement has proven to be very efficient with the Caribbean Court of Justice where Supreme Court registries of the member states are *ipso facto* its sub-registries. Thus Council of Ministers in November 2010 approved the Court’s request to establish the Sub-registries, one in each capital of the Partner States. The process is actively under way with arrangements reached between the EACJ and the national Judiciaries providing space for those Sub-registries. Recruitment of the necessary personnel to staff the Sub-registries is expected to be completed by the end of November 2011.

### **(c ) Arbitration**

<sup>25</sup> See Rule 8 (2), Ibid

<sup>26</sup> Rule 8 (1), Op cit.

The East African Court of Justice uniquely can constitute itself into an arbitration tribunal. This arbitration power is vested in the Court by the Treaty when it states that:

*“The Court shall have jurisdiction to hear and determine any matter:*

*(a) arising from an arbitration clause contained in a contract or agreement which*

*confers such jurisdiction to which the Community or any of its institutions is a party; or*

*(b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or*

*(c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.”<sup>27</sup>*

In order to discharge this mandate, the Court formulated the rules to govern arbitration proceedings along with the rules of arbitration and sought its major stake holders comments before adopting them. These rules have been reviewed by the Court to conform with the international commercial arbitration practices. As you may be aware, no arbitrator can arbitrate any matter unless the parties in their commercial relationship appoints him or includes a clause in the agreement to the effect that in case of dispute they agree submit themselves to a certain arbitrator for arbitration. Although the East African Court of Justice as arbitrator has many advantages against other arbitrators, no one has appointed it and if any has there has not been any dispute to lead the parties to the Court for arbitration. Even the five Governments of the Partner States have not been able to utilise the free services of the Court as far as arbitration is concerned but find it easier to go to France, London or Hong Kong for exorbitant arbitration and leave out an institution of their own creation. We are gratified to hear that the Republic of Uganda has made a bold step to convince the Company to which Uganda Railway was concessioned and included an arbitration clause in the agreement to the effect that in case of dispute the two sides will submit themselves to the East African Court of Justice

<sup>27</sup> Article 32 of the Treaty

for arbitration. We look forward to seeing lawyers doing the same by advising their clients accordingly.

### **(c) Development of Regional jurisprudence**

While the legislative and executive organs are working towards the creation of enabling environment for the political integration to be a reality by enacting community laws and adopting policies of the implementation of these laws, the judicial organ of the Community is playing the crucial role of interpreting the Treaty and other Community laws and in ensuring respect for the founding principles of the Community.

The Court has discharged its obligation under the Treaty and contributed to the EAC integration process through adjudication of disputes as its core function. As at end of September 2011 the Court had rendered 14 Judgments, 29 rulings and one advisory opinion thereby contributing directly and significantly to the Community law and regional jurisprudence as well as to the integration process as mandated by the Treaty.

#### ***(i) Interpretation role***

In interpreting the laws, courts play an important role complementing that of legislators in as far as they give clear and detailed explanations of the content of laws. The judicial interpretation of the community laws assists the policy makers to have a common understanding of these laws as they take informed decisions during the implementation stages. The East African Court of Justice has actively played this role as can be deduced from its jurisprudence.

In the first ever case brought before the EACJ, *Callist Andrew Mwatella & 2 others vs.*

*EAC. Reference No. 1 of 2005*, the applicants challenged the legality of the actions of the Council of Ministers and the Secretariat in assuming control over Assembly-led Bills.

The Council had purported to withdraw four private members' Bills from the Assembly. The application questioned the right of the Council to delay the presentation of the Bills to the House. It also challenged the validity of the meeting of the Sectoral

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Council on Legal and Judicial Affairs (the Sectoral Council) held on 13<sup>th</sup> to 16<sup>th</sup> September 2005 and the decisions taken by it about Bills pending before the EALA, including the recommendation to legalize decisions through protocols not Community Acts. The application sought an order by the Court that the report of the Sectoral Council meeting held on 13<sup>th</sup> to 16<sup>th</sup> September 2005 was null and void *ab initio* and enjoined court to find that all decisions, directives and actions contained in or based on it were null and void.

The Court found that the Sectoral Council on Legal and Judicial affairs was not constituted per Treaty, in particular Art. 14 which provides that the Council of Ministers shall '***establish from among its members' only*** Sectoral Councils and that Sectoral Council members are restricted to 'ministers' as defined by the Treaty. Court found that Kenya and Tanzania were represented by non-ministers (including Attorneys General) at the disputed meeting of 13th to 16th September 2005, therefore the meeting was not properly constituted and did not amount to a lawful Sectoral Council meeting. In this regard, its decision regarding the two Bills was *ipso facto* invalid. However, the Court employed a prospective annulment principle as opposed to

retrospective annulment in order not to take the community back to square one on matters that such improperly constituted meeting had already decided earlier on. It was this particular decision of the Court that led to the amendment of the Treaty thereby validating participation of Attorneys General in such Sectoral Council for Legal and Judicial Affairs.<sup>28</sup>

On another issue the Court found that under Art. 59 (1) any Member of the Assembly may introduce a Bill. Council does not have exclusive legislative initiative to introduce Bills in the Assembly. It held that the Assembly owns all Bills once in the Assembly, whether they came initially by way of private members Bills or Community Bills. As such, permission of the Assembly would be required for withdrawal of any Bill. Such approval must be sought and obtained through a motion passed by the Assembly. The

<sup>28</sup> See Article 3 (c) of the Treaty

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Court found that the Bills were already in the Assembly, so could not be withdrawn by the Council of Ministers as purportedly done. All the Council could do was to delay the debate.

The Court found on the issue on relationship of the Council and the Assembly on legislation that decisions of the Council even on policy issues have no place in areas of jurisdiction of the Summit, Court and the Assembly (Art. 14 (3) (c) & Art. 16). It held that the Assembly is a creature of the Treaty like the other Organs of the Community and its competence is only on matters conferred upon it by the Treaty as with all Community organs. In this regard, the Assembly could only legislate on matters on

which the Partner States had surrendered sovereignty to the EAC.

By interpreting these Articles of the Treaty, the Court dutifully discharged its functions under the Treaty and provided guidance for future operations of the affairs of the Community by its organs. Without fear or favour the Court boldly told the Ministers and Attorneys General that they had overstepped their boundaries and that was not acceptable in any democratic institution. However, having made that finding, in order not to cripple the activities of the Community, the Court invoked in the doctrine of prospective annulment.

In the case of *Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community*<sup>29</sup>, the applicant was contending that the East African Court of Justice had jurisdiction to hear cases involving questions as to membership of the East African Legislative Assembly under Article 52 (1) of the EAC Treaty. The Court did not feel shy to state it clearly that it had no jurisdiction over the matter that the complainant had presented to it. Giving more precise meaning to the proviso to Article 52 (1), the Court held that:

<sup>29</sup> Reference No. 2 of 2007

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*“the declaration that two persons were improperly elected and that they are not Members of the (East African) Legislative Assembly is the domain of the High Court of Tanzania and not this Court.”*<sup>30</sup>

Another significant case brought to EACJ was *Prof Peter Anyang' Nyong'o & others vs. AG of Kenya & 5 Others, Reference No. 1 of 2006*. The main contention in this reference was whether Kenya's process of electing the nine persons deemed to be its EALA members and the rules of Kenya National Assembly for EALA elections infringed Art. 50 of the EAC Treaty.

The EACJ considered the possible meanings of the expression "the National Assembly 'shall elect' " (Art. 50), and found it can only mean "shall choose by vote" taking the ordinary meaning of the phrase, reference to 'democratic election of persons to political office' as understood to mean election by voting. Further, that this interpretation of the meaning of 'elect' is borne out by the practice in each partner states of electing the Speaker and Deputy in the National Assembly through voting. In all Partner States, the National Assembly executes the function of electing Speaker & Deputy Speaker by voting in one form or another, and the extent of discretion of the National Assemblies is to determine what procedure should be applied for the voting. The Court held that the bottom line for compliance with Article 50 of the Treaty is that the decision to elect is a decision of and by the National Assembly not another caucus.

Finally, on whether the Kenya rules complied with Art. 50, it held that the election rules partially comply with Article 50 in so far as they provide for proportional representation of political parties. However, there was a significant degree of non-compliance in the failure to provide for gender and other special interests representation. The major deviation found in the Kenya rules was the non-provision for *election*: The Court held that the election rules and actual process was the antithesis of an election, as the rules 'deemed' the nine elected in order to circumvent the express



Treaty provision.

<sup>30</sup> *Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community*, Reference No. 2 of 2007, p. 12 (Unreported)

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***(ii) Respect for founding principles of the Community***

As mentioned earlier, the EAC has adopted fundamental and operational principles that govern the achievement of the objectives of the Community<sup>31</sup>. The EACJ is playing the role of ensuring that these principles are followed by the different stakeholders of the Community.

➤ ***Peaceful settlement of disputes;***

The functionalist approach to integration departs from the assumption that violence and power become obsolete as a means by which to achieve ends and aspirations.<sup>32</sup> It claims that group conflict is not inherent in humans once they realize that everyone shares common social goals and values.<sup>33</sup>

The establishment of courts of justice within regional groupings follows from this approach to integration and therefore always responds to the need for a mechanism of peaceful settlement of disputes when they occur.

Arguably, in this regard the jurisdiction conferred upon the EACJ is wide enough to enable the peoples of East Africa to access the justice mechanism put in place by the EAC Treaty. It was mentioned earlier that the Court's jurisdiction includes, advisory and arbitral jurisdiction and any such jurisdiction that may be conferred upon it any

time by the Council of Ministers.

However, the wideness of the Court's jurisdiction and access to it as provided for under the Treaty are not enough to make the Court the forum through which disputes within the region are settled. The Court needs to build users' confidence in its justice through fair and impartial decisions. It has included in its rules of procedure a requirement for

<sup>31</sup> These principles as articulated under Articles 6 and 7 of the treaty includes: peaceful settlement of disputes, Adherence to the principles of democracy, the rule of law, promotion and protection of human and peoples' rights among other things. <sup>32</sup> J. L. Kent "Effectiveness of the European Court of Justice and its role in the Process of Integration", paper presented at the Second International Conference on "The Challenges of a New European Architecture: Implications for the European Community's Internal and External Agendas", 22-24 May 1991, George Mason University, Fairfax, Virginia, pp 6-7. <sup>33</sup> Ibid.

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the parties to explore first the possibility for reaching settlement out of court before the matter can be fixed for hearing. This is normally done during scheduling conference.<sup>34</sup>

The Court has so far proved to be an independent and impartial body. Indeed, the Court has experienced and survived what can be termed as apparent intimidation while discharging its noble duty as the Temple of Justice. This can be ably demonstrated by what transpired soon after delivery of one ruling on a matter that was before the Court. In their joint Communiqué of the 8<sup>th</sup> Summit, being a reaction to the Court's ruling and temporary injunction in *Anyang' Nyong'o case* the EAC Heads of State directed, among other things:

*“ that the procedure for 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. ”*<sup>35</sup>

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>36</sup>

Within a short time the Treaty was then amended accordingly. Among the said Treaty amendments, as said earlier, was one concerning removal of Judges from office.<sup>37</sup> This included a situation where a ‘judge who holds judicial or public office in a Partner State is removed from that office for misconduct or inability to perform the functions of the office for any reason, or the judge resigns from that office following allegations of misconduct... or a judge is convicted of an offence under any law in force in a Partner State involving dishonesty, fraud or moral turpitude’.<sup>38</sup> It is noted that in these scenarios there is no requirement for the Summit to refer the question of the Judge’s removal from office to an *ad hoc* tribunal. It appears from the foregoing interventions that the security of tenure for EACJ Judges was seriously put at risk by creation of

<sup>34</sup> See Rule 53 of the EACJ Rules of Procedure. <sup>35</sup> Joint Communiqué of the 8<sup>th</sup> Summit of EAC Heads of State, 30 November 2006, Arusha, Tanzania, p. 12. <sup>36</sup> Ibid. <sup>37</sup> See Article 26 of the Treaty <sup>38</sup> See Article 26 (1) (b) (c) (d) Ibid

automatic consequences. However, this unfortunate reaction of the Summit did not deter the Judges from acting impartially and independently as it transpired in the subsequent decisions of the Court. Arguably this makes the EACJ an exemplary model of the Court that stands to propel the integration process as provided for in the EAC Treaty. Indeed Judges are committed to do justice without fear or favour as required by their judicial oath.

In my view Article 26 of the Treaty as amended should be reconsidered. The article proposed for reconsideration is the provision that if a Judge of the Court, who also holds judicial or other public office in a Partner State, is removed or, as the case may be, resigns following allegations of misconduct or inability to perform the functions of office for any reason, from the office in the Partner State, shall *ipso facto* be removed.

There is no doubt that this provision will become redundant when the Judges of the Court cease to work on *ad hoc* basis. However, as long as the provision remains in play, it has the potential of causing disparity in the standards applicable to Judges of the Court from the different Partner States, unless and until the national laws and standards of the Partner States governing the removal and resignation of Judges from office are synchronized.<sup>39</sup> In the reference challenging the validity of the 2006/07 amendments to the Treaty, the Court observed:-

*“The introduction of automatic removal and suspension on grounds raised or established in the home State, and applicable to only those in judicial or public office, makes possibilities of applying un-uniform standards to Judges of the same court endanger the integrity of the Court as a regional Court”<sup>40</sup>*

➤ ***Adherence to the principles of democracy, the rule of law, promotion and protection of human and peoples’ rights***

<sup>39</sup> See Mulenga J.N “The Role , Function and Structure of the East African Court of justice in a Common Market Integration Phase”, A Paper Presented during The Workshop on Institutional Reforms for the Establishment of an Effective Common market, Held at Sheraton Hotel, Kenya, 26 – 27 January 2009, p. 11. <sup>40</sup> See p. 45 of the Judgement of the Court in The East African Law Society Case (Unreported)

The regional cooperation put in place under the EAC Treaty is people-centered and market driven.<sup>41</sup> If democracy means the rule of the people by the people, and is one of the fundamental principles of the EAC, then the EAC working strategy must focus on participation of all social groups from the bottom to the top. As Janet L. Kent put it,

*“For integration to be a valid concept (...), individuals must be affected by the policy decisions of the supranational institutions and they must have some input into the decision making process.”<sup>42</sup>*

In order to get proper answers to the Court’s performance to ensure respect for the principle of democracy, one should look into its jurisprudence in this regard.

Asked to consider if by reason of failure to carry out wide consultations within Partner States on the proposals for the amendments, the process constituted an infringement of the Treaty in any other way, the Court found that:

*“It is common knowledge that the private sector and civil society participated in the negotiations that led to the conclusion of the Treaty among the Partner States and, as we have just observed, that they continue to participate in the making of Protocols thereto. Furthermore, as we noted earlier in this judgment, Article 30 entrenches the people’s right to participate in protecting the integrity of the Treaty. We think that construing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression to the situation lamented in the preamble of “lack of strong participation of the private sector and civil society” that led to the collapse of the previous Community.”<sup>43</sup>*

The Court went on to conclude that:

*“failure to carry out consultation outside the Summit, Council and the Secretariat*

*was inconsistent with a principle of the Treaty and therefore constituted an infringement of the Treaty (...)*".<sup>44</sup>

<sup>41</sup>Article 7 (1) (a) of the Treaty, Op cit. <sup>42</sup>J. L. Kent, p 4. <sup>43</sup>*East Africa Law Society and 4 others v. Attorney General of Kenya and 3 others*, Reference No 1 of 2007, p.30 (Unreported). <sup>44</sup>Ibid, p. 31.

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On the question of the role of the Court in ensuring that there is respect of rule of law at Community level the case of *James Katabazi and Twenty One Others v. The Secretary General of the East African Community and the Attorney General of the Republic of Uganda, Reference No. 1 of 2007*, is very relevant. In order to appreciate the issues involved I will give the facts in detail form.

The story of the claimants is that: During the last quarter of 2004 they were charged by the Government of Uganda with treason and misprision of treason and consequently they were remanded in custody. However, on 16<sup>th</sup> November, 2006, the High Court granted bail to fourteen of them. Immediately thereafter the High Court was surrounded by security personnel who interfered with the preparation of bail documents and the fourteen were re-arrested and taken back to jail.

On 24<sup>th</sup> November, 2006, all the claimants were taken before a military General Court Martial and were charged with offences of unlawful possession of firearms and terrorism. Both offences were based on the same facts as the previous charges for which they had been granted bail by the High Court. All claimants were again remanded in prison by the General Court Martial.

The Uganda Law Society went to the Constitutional Court of Uganda challenging the

interference of the court process by the security personnel and also the constitutionality of conducting prosecutions simultaneously in civilian and military courts. The Constitutional Court ruled that the interference was unconstitutional.

Despite that decision of the Constitutional Court the complainants were not released from detention and hence this reference with the complaint that since the rule of law requires that public affairs are conducted in accordance with the law and decisions of the Court are respected, upheld and enforced by all agencies of the Government and citizens, the actions of a Partner State of Uganda, its agencies and the second respondent were in blatant violation of the Rule of Law and contrary to the Treaty.

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The Court held that the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty. It emphasised that:

*“...Abiding by the court decision is the corner stone of the independence of the judiciary which is one of the principles of the observation of the rule of law.”*

As regards, the principle of promotion and protection of human and peoples' rights, Janet L. Kent argues that for the European Court of Justice (as any other regional court) to be seen as an integrating institution, it has *inter alia* to facilitate the integration process through the recognition of the rights of individuals.<sup>45</sup>

Although explicit human rights jurisdiction is yet to be conferred upon the Court, the latter has been courageous enough to ensure that basic rights of individuals are

respected. At more than one occasions, the Court has had to consider preliminary objections from defendants alleging lack of *locus standi* by individuals and legal persons. The Court consistently upheld that individuals and legal persons have access to the Court under article 30 of the Treaty,<sup>46</sup> which is a basic right to the regional justice mechanism enabling the peoples to “participate in protecting the integrity of the Treaty.”<sup>47</sup>

#### **(d) Relationship with stakeholders (national courts and lawyers)**

As I pointed out earlier, among the major stakeholders of the Court, are national courts and members of the bar. It is important to point out that one aspect of the Court’s jurisdiction is to hear and determine cases referred to it for preliminary ruling by the national courts. This is one of the rare opportunities where national courts, at all levels, are given a chance to interact with an international court through litigation. When faced with a case requiring the application or the interpretation of the Treaty or any other East

<sup>45</sup> J. L. Kent, p 2. <sup>46</sup> See Cases *Prof. Peter Anyang’ Nyong’o and others v. Attorney General of Kenya and others; Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community and East Africa Law Society and 4 others v. Attorney General of Kenya and 3 others.* <sup>47</sup> *East Africa Law Society and 4 others v. Attorney General of Kenya and 3 Others.*

African Community law, the national courts are required to refer the matters to the EACJ for preliminary rulings<sup>48</sup>.

#### **(i) References for preliminary rulings**



On references for preliminary rulings we are guided by Article 34 of the Treaty which provides 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.”*

The implementation of this provision requires the national judge before referring the issue to the EACJ to first satisfy himself that the following two conditions are fulfilled:

- 1) A question concerning the interpretation or application of the Treaty or a question concerning the validity of the regulations, directives, decisions or actions of the Community must be raised in a case before him;
- 2) A ruling on the question must be necessary to enable the national judge give judgment.

***(ii) A question must be raised...***

The national court is solely entitled to appreciate whether or not a particular case raises a question of interpretation or application of the Treaty or a question concerning the validity of the regulations, directives, decisions or actions of the Community.

The Treaty is silent as to who should raise this question. In my view, the question could be raised by any party to the case before the national judge or by the judge himself/herself.

<sup>48</sup> See Article 34 of the Treaty for the Establishment of the East African Community

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However, it follows from the second condition that not all questions concerning the interpretation of the Treaty or Community law must be referred to the EACJ for preliminary rulings. It is only those questions that are necessary for the national court to give its judgment.

***(iii) Necessity of the preliminary ruling***

It has been established above that the obligation to refer a matter to the EACJ for preliminary ruling is not automatic whenever a question of interpretation or application of the Treaty or a question concerning the validity of the regulations, directives, decisions or actions of the Community arises. The preliminary ruling should be **necessary** to enable the national court give its judgment.

This vests in the national court a very wide discretion to ascertain whether a decision on a question of Community law is necessary to enable it give its judgment. In the exercise of this discretion, the national courts must be guided by a number of principles which the Treaty does not provide for. In that case we may probably borrow from the jurisprudence of the European Court of Justice which has established in the case *CILFIT and Lanificio di Gardo vs Ministry of Health, Case 283/81* that:

*“a court or tribunal [...] is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of*

*Justice or that the correct application of the Community law is so obvious as to leave no scope for any reasonable doubt”.*

The Court added that:

*“The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community”.*

The above persuasive finding of the European Court of Justice is very relevant to the EACJ and to the national courts. The validity of this argument is also cemented by the

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fact that, pursuant to Article 33 (2) of the Treaty, the “decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.”

Once the question has been referred to the EACJ by the national court, the latter shall respond to the preliminary question and forward to the national courts its finding/interpretation of the matter under reference, for continuation. The EACJ will not implement its findings on any matter that will be referred to it by a national court. The national courts upon receipt of the EACJ finding are required to adopt it and proceed with determination of other issues. It means therefore that the EACJ finding on any reference from the national courts aims at assisting the national courts in making a decision on a matter that may be right before it. Hence, the interaction of the EACJ and the national courts through references for preliminary rulings is essential in making community law effective and development of uniform jurisprudence in the region.

Much as the reference mechanism is crucial to the application of the Community law at

the national level, to date this mechanism has not yet been tested in the EACJ. This is an indication that the East African Community law is not known within the region, even by the Judicial Community. If this mechanism were utilized, there is no doubt that the legal integration in the region would be faster. The utilization of this mechanism would also create more awareness on the rights flowing from the Treaty and the Partner States' obligations pertaining to these rights. The national courts are therefore in a better position than any other EACJ stakeholders to advance the construction of the East African Community law.

The foregoing exposition is likely to raise fundamental questions of its legality and the status of the Treaty vis-à-vis national Constitutions and other laws. This concern finds answer in Article 8 (2) of the Treaty which imposes obligation on the Partner States by providing that:

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*Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular -*

*(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.*

In compliance with the foregoing Treaty provision, Partner States, through their

respective Legislatures enacted laws that domesticated the Treaty for the Establishment of the East African Community.

The foregoing exposition explains the extent of unawareness on the part of national courts judges, magistrates and lawyers. This is evident from the fact that ten years down the road only the High Court of Kenya has recently referred a matter to the East African Court of Justice for a preliminary ruling. The East African Court of Justice needs to work in more close collaboration with national courts as the two do not compete but complement each other in the integration process. This is a very critical strategy especially now following the coming into effect of the protocol for common market whose operationalisation is expected to generate more disputes than before.

Being mindful of this important relationship and being aware of the possibility of lack of procedure as factors behind national courts failure to refer matters for preliminary ruling, EACJ has recently formulated the guidelines for use by national courts. These guidelines which can be found on the Court's web site will be forwarded to the national courts for input before they can be adopted by the Plenary.

The Court worked very closely with the members of the bar both at national and regional levels through their respective professional associations. Occasionally we receive invitations to attend their meetings or workshops and make presentations about the Court, among other things.

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### **3. Challenges:**

***(a) Working on an ad hoc basis***

The fact that the Court works on an *ad hoc* basis is an element that undermines its efficiency. None of the ten (10) judges composing the Court resides at the seat of the Court, including the President. It has proven difficult to compose the panel of Judges to seat on a number of cases due to their commitments within their respective home countries. In order to manage the increasing workload the Court has had to resort to planning hearings by way of Sessions whereby Judges of First Instance come to Arusha to hear cases every last week of the month, hoping that then the judges would have a chance to come to Arusha to dispose matters taking into account the fact that these same judges still serve in the judiciaries of their respective Partner states. This in turn occasions delay in the disposal of cases and hinders efficiency. It is also a sad reality that in an attempt to fill the void, the judicial work of the Court is mainly organized by the Registrar instead of the Court's President or Principal Judge.

While we await the Council to determine the period when the Court will become fully operational, the Court strongly feels that time has now come for at least the President of the Court and the Principal Judge, to start with, to be permanently resident in Arusha.

Put briefly, while acknowledging that the initial work load of the EACJ did not require all the Judges to reside permanently at the seat of the Court, the situation has now changed. The First Instance Division of the Court has enough work to engage the Judges on full time basis before the backlog builds up and be the cause for delay of justice. It is high time that the President of the Court and the Principal Judge are allowed to work on full-time basis in order for them to organize the administrative and

judicial works of the Court.

For the President to perform his administrative and supervisory functions as envisaged by Article 24 (7) (a) read together with Article 45 (4) of the Treaty for the Establishment of the East African Community, it is necessary that he be resident in Arusha. An *ad hoc*

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President can hardly perform the administrative mandate of heading and leading the Court effectively and efficiently, giving it the guidance it deserves especially during these formative stages; and also attending high-level meetings with the Secretariat and sister organs. The current position where the Registrar is attempting to fill the void is inappropriate. Under the Treaty the headship of the Court is duly vested in the President of the Court. The Registrar is the Accounting Officer. He cannot give policy direction for the Court. The President cannot effectively discharge his functions under the Treaty by remote control.

Likewise, for the Principal Judge to direct the work of the First Instance Division, represent the Division and regulate the matters brought before the Court as provided for in Article 24 (8) of the Treaty, it is necessary for him to be full time present at the seat of the Court.

This argument is buttressed, as stated earlier in this paper, by the fact that the Court workload has increased and also on the anticipation that it will increase more with the implementation of various Protocols of the Community

The African Court on Human and People's Right which is also based in Arusha has its

President and Registrar resident in Arusha working on full time basis. The nature of the operations of this court is similar to that of the East African Court of Justice. The Judges of the African Court on Human and People's Rights also serve on *ad hoc* basis but for effective operations of the court the President of the Court resides in Arusha and work on full time basis.

We feel that time has come for the President of the East African Court of Justice, an Organ of the Community, to concentrate, focus and direct his energy and planning towards the efficiency, growth and progress of the Court as a Regional Court, so that it can play its rightful role as envisaged in the Treaty and as expected by the citizens of EAC. An absentee leadership, for ten years, has clearly been a handicap to strategic growth and progress of the Court. We know that other major programs of the

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Community (customs union, common market, political federation, etc) have gained momentum and are in high gear. If the Court lags behind in preparedness to guide application and interpretation of protocols governing these programs, it will be bad for us all.

***(b) Slowness of the process of adoption of the Protocol extending the Court's jurisdiction to appellate and human rights***

The decision of extending the jurisdiction of the Court to include appellate and human rights jurisdiction was taken in November 2004, but a Protocol that is meant to be the legal framework for this extension is yet to be concluded. This denies the Court opportunity to play a very important role in addressing the violations of human rights



in East Africa at regional level. It should be noted that a regional jurisprudence in human rights is required as the Court will be called upon to decide on common market related matters such as free movement of people, right of establishment etc which have human rights elements.

People of East Africa particularly the business community and law societies have been agitating for appellate jurisdiction of this court so that it becomes the apex court in the region. Albeit for different reasons, the East African Magistrates and Judges Association (EAMJA) has also joined EALS the Bar Association to demand for the East Africa Court of Appeal. These clear demands can be found in the speech by President of the East African Magistrates and Judges Association during the association's Annual General meeting held in Dar Es Salaam in January 2004 when he said:

*'We in the EAMJA believe that in order to fulfill the objective of the Community, especially those under Article 126 (c) of the Treaty which include, inter alia "... the harmonization of legal learning and the standardization of judgments of courts within the Community," the formation of the East African Court of Appeal is a necessary and overdue step. We need a court of the highest resort in East Africa whose decisions bind all our national courts. The world trend now is to use international norms and standards to interpret national laws ... And further delay in establishing the East African Court of Appeal will just leave us behind while other regions forge ahead'.*

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In a very recent decision<sup>49</sup> the EACJ had a chance to pronounce itself on the frustrations being felt by the people of East Africa as a result of this delay. Honourable Sitenda Ssebalu from the Republic of Uganda being dissatisfied with the decision of the

Ugandan Courts wanted to take the matter before the EACJ. Knowing that the Court had no jurisdiction to entertain the same he asked the Court to make a judicial pronouncement that the delay was inordinate and a breach of the principle of good governance that the Partner States took themselves to adhere to. The Court agreeing with the Applicant said inter alia:

*“It has taken over six years since the consultative process on the draft protocol began after adoption of the draft but the outcome of that process is yet to be made manifest notwithstanding acknowledgement by the Sectoral Council way back in 2004 that in view of the growing scope of the Community’s integration process, the jurisdiction of the EACJ ought to be extended.....The delay of the Council of Ministers has a negative effect on good governance, democracy, rule of law and human rights in East Africa”<sup>50</sup>*

***(c) Establishment of Parallel EAC Dispute Resolution Mechanisms (Quasi Judicial Bodies)***

Much as the EACJ is the main judicial organ of the Community that has been tasked with the resolution of disputes arising out of the Treaty and other Community laws, the EAC continues to establish other quasi-judicial bodies or mechanisms with the same mandate as the EACJ. The Customs Union and Common Market Protocols are an example where such parallel mechanisms have been established with potentialities of making EACJ redundant or be a cause for conflicting and confusing decisions in the region.

<sup>49</sup> Reference No 1 of 2010, *Hon Sitenda Ssebalu v. The Secretary of the EAC and 3 Others*, available at [www.eacj.org](http://www.eacj.org) <sup>50</sup>

Ibid

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***(i) Customs Union Protocol***

The dispute resolution mechanism put in place by the EAC Customs Union Protocol is in Annex IX of the same.<sup>51</sup>

The mechanism consists of a possibility for an amicable settlement through good offices, conciliation and mediation to be arranged by the parties themselves<sup>52</sup> as well as proceedings before the East African Committee on Trade Remedies established under Article 24 of the Protocol (Committee). It is provided under the Customs Union Protocol that the Committee shall handle all matters pertaining to:

- (a) rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules, specified in Annex III to the Protocol;*
- (b) anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in Annex IV to this Protocol;*
- (c) subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to this Protocol;*
- (d) safeguard measures provided for under the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol;*
- (e) dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to this Protocol; and*
- (f) any other matter referred to the Committee by the Council.*<sup>53</sup>

As if the foregoing was not enough the Protocol goes on to tie the note against the East

African Court of Justice by stating that the decision of the Committee on these matters shall be final.<sup>54</sup>

It is important to note that the EACJ is left out and therefore denied a role in all this process under the Customs Union Protocol except if any party challenges the decision

<sup>51</sup> Article 41 (2) of the Customs Union Protocol. <sup>52</sup> Regulation 5 (1) and Regulation 6, Annex IX to the Customs Union Protocol. <sup>53</sup> Article 24 (1) of the Customs Union Protocol. <sup>54</sup> Regulation 6 (7) of Annex IX of the Customs Union Protocol.

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of the Committee on grounds of *fraud, lack of jurisdiction or other illegality*,<sup>55</sup> in which case such party may refer the matter to Court for review in accordance with Article 28(2) of the Treaty and any other enabling provision of the Treaty.<sup>56</sup>

Interesting enough, the review provided for under this provision can only be requested by Partner States as Article 28 of the Treaty referred to provides **only** for references by Partner States not by any other person.

From the aforesaid one would wonder whether the EACJ was established to play any significant role in the integration process of the East African Community. If the Court's main mandate is to ensure the adherence to law within the Community, would one conclude that the Customs Union Protocol is not part of the EAC law? I would not agree with that. The EAC Customs Union is part of the Community law whose application, interpretation and compliance therewith would have naturally come to the Court. The establishment of the above mentioned Committee with exclusive jurisdiction on matters arising out of Customs Union and the ousting of the jurisdiction of the East

African Court of Justice is in my view, contradictory and illegal.

We may not be surprised why up to now, five years since Customs Union Protocol became operational, EACJ has received no single case on Customs Union. There was an attempt by one person whom for lack of a better word I prefer to call him “a risk undertaker” who filed a reference in the East African Court of Justice to test the waters<sup>57</sup>. However, the case did not even take off as the Court dismissed it on the preliminary objection ground which was raised by the Respondent that the Court had no jurisdiction.

Apparently the dismissal of this case by the Court for lack of jurisdiction was a big blow especially to the Business Community which had been urging for enhancement of the jurisdiction of the East African Court of Justice. The Court was taken to have shot itself on the foot by joining the Partner States in taking away the jurisdiction which according

<sup>55</sup> Emphasis added. <sup>56</sup> Regulation 6 (7), *Ibid.* <sup>57</sup> See *Mordern Holdings v.*

*Kenya Ports Authority*, Reference No 1 of 2008.

to the Treaty is supposed to be that of EACJ. Perhaps the Court should have played a more proactive role and hear the matter by ruling that it had jurisdiction, but we should appreciate the fact that it is not for the Court to confer to itself the jurisdiction that has been categorically taken away. As far as implementation of Customs Union Protocol is concerned we should not expect the miracle on the part of the Court unless the question of jurisdiction is addressed in the Protocol with necessary amendments, much as the judges may be proactive.

It may be of interest also to investigate whether the East African Committee on Trade Remedies that is being referred to under Article 24 of the Protocol have been formed. To the best of my knowledge no such Committee has been formed to date. This means, the people of East Africa have nowhere to present their disputes that arise out of Customs Union. Consequently the chances of EACJ receiving appeals under its limited jurisdiction are also not there unless the Committees are formed to generate work for the Court.

***(ii) Common Market Protocol***

The Common Market Protocol does not establish a new dispute resolution body. However the mechanism it has put in place does not give to the EACJ the powers that would have naturally come to it. Jurisdiction to entertain Common Market related disputes has mainly been given to national courts as it flows from Article 54 (2):

*“In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:*

- a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall enjoy the right of recourse, even where this infringement has been committed by persons exercising their official duties; and*
- b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is making the appeal”.*

It is clear from the foregoing provision that an individual, whose rights accruing from

the Common Market Protocol may be violated, shall take the matter to his/her national courts and shall have no immediate recourse to the EACJ. Unless a national court seized with a Community law related matter feels a need for interpretation and refers it to the EACJ in accordance with Article 34 of the Treaty, the EACJ shall never entertain a Common Market-related matter. The role of the EACJ in the realization of Common Market solely depends on the extent of its Judges in being proactive and on the discretion of the national courts judges to refer the matters for interpretation by the EACJ.

This introduces us to the fundamental question of the relationship of EACJ and national courts. Indeed among the stakeholders of the EACJ, are national courts. As I said earlier, one aspect of the EACJ's jurisdiction is to hear and determine cases referred to it for preliminary ruling by the national courts.

When faced with a case requiring the application or the interpretation of the Treaty or any other East African Community law, the national courts are required to refer the matter to the EACJ for preliminary ruling. This is a Treaty requirement. However, the obligation to refer a matter to the EACJ for preliminary ruling is not automatic whenever a question of interpretation or application of the Treaty or a question concerning the validity of the regulations, directives, decisions or actions of the Community arises. The preliminary ruling should be **necessary** in the opinion of the national court judge to enable the national court give its judgment.

This of course leaves to the national court a very wide discretion to ascertain whether a decision on a question of Community law is necessary to enable it give its judgment. It means therefore that the EACJ finding on any reference from the national courts aims at

assisting the national courts in making a decision on a matter that may be right before it. The interaction of the EACJ and the national courts through references for preliminary rulings is essential in making community law effective and development of uniform jurisprudence in the region. We hope that national courts will always

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remember that according to the Treaty “decisions of EACJ on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter.”<sup>58</sup>

It is important to note that much as the reference mechanism is crucial to the application of the Community law at the national level, to date this mechanism has not yet been used. This could be an indication that the East African Community law is not known within the region, even by the Judicial Community. If this mechanism is utilized, there is no doubt that the legal integration in the region would be faster. The utilization of this mechanism would also create more awareness on the rights flowing from the Treaty and the Partner States’ obligations pertaining to these rights.

From the foregoing discussion, it can be confirmed that although Article 54(1) of the Common Market Protocol refers any dispute amongst Partner States arising from the Protocol to “the procedure for the settlement of disputes stipulated in the Treaty”, the likelihood of Partner states taking each other to Court is very little if at all. The individuals and body corporate would have been the ones to make the EACJ play a significant role in the realization of the Common Market. It should always be understood that the Court was not established for the sole and exclusive use of the



Partner States and EAC Institutions. The main reason why it was put in place was indeed to assist the Community achieve its objectives through respect of the principles of rule of law, democracy, good governance and human rights which are very well enshrined in the Treaty.

***(d) “No Jurisdiction” and “Sovereignty” syndromes***

It has increasingly become a standard practice and routine matter in the Court whenever a matter is filed against any of the EAC Partner States that the Attorneys General raise preliminary objections on the jurisdiction of the Court to entertain the matter. Except in the *Modern Holdings* and *Mtikila* cases where the Court held that it had no jurisdiction, such objections have been dismissed and the Court held that it has

<sup>58</sup> See Article 33 (2) of the Treaty

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jurisdiction. At one time, the Court’s ruling that it had jurisdiction<sup>59</sup> led to the amendment of the Treaty to categorically state that:

*“the Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.”<sup>60</sup>*

It appears that the Partner States still wish to remain sovereign while they subscribe to the integration objectives that require them to cede a certain amount of their sovereignty. This state of uncertainty being expressed by the Partner States is not healthy to the integration agenda. Partner States cannot eat their cake and at the same time demand to have it. Some of the issues which appear to be sensitive at national level may be less sensitive at regional level.

***(e) Combined role of a Court of Justice and Human Rights***

One of the major challenges is that the East African Court of Justice combines the role of a Court for the East African Community as well as a human rights and appellate Court.

There is therefore need to ensure that the totality of the provisions of the Treaty as well as the Protocol encompass these various jurisdictional roles.

As an example, the European Community has two separate Courts. The European Court of Justice deals with disputes arising from the functioning of the Treaty of the European Union, the Treaty establishing the European Community, and the European Atomic Energy Community Treaty. On the other hand, the European Court of Human Rights (ECHR) established under the European Convention on the Protection of Human Rights (ECPHR) as amended by various Protocols, deals specifically with human rights violations under the ECPHR. Compared to the above two Courts, the East African Court of Justice has very wide jurisdiction and the paltry number of Judges might not be sufficient to handle the work that the enactment of the Protocol is likely to generate.

<sup>59</sup> It was the Ruling of the Court in Prof. Peter Anyang' Nyong'o and 10 Others v. Attorney General of Kenya and Others, Application No. 1 of 2006 <sup>60</sup>

See Article 30 (3) of the Treaty

***(f) Concurrent Jurisdiction with the African Court on Human and Peoples' Rights***

Whereas under AU there is another dispute settlement organ, the African Court on

Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights,<sup>61</sup> the Treaty for the Establishment of the East African Community also vests in the East African Court of Justice, jurisdiction on human rights.<sup>62</sup> The Draft Protocol comes in to operationalise this particular jurisdiction on the part of East African Court of Justice. In effect, it means therefore, that the citizens of East African Community Partner States have option to take their human rights cases to any of the said two Courts which have concurrent jurisdiction on human rights. It is not clear whether East African Court of Justice will be one of local remedies that the citizens of East Africa may have to exhaust first before taking their cases to the African Court on Human and Peoples' Rights.<sup>63</sup> It is very interesting to note that the African Court on Human and Peoples' Rights whose permanent seat has been located in Arusha, Tanzania where East African Court of Justice is located, also intends to perform the overlapping functions, which were otherwise being performed by the African Commission on Human and Peoples' Rights

### **3. Conclusion**

This presentation on the role of EACJ as a regional judicial body in the integration opens new intellectual space. It provides a concept that allows us to discuss the role of the Partner States and other stakeholders have in making the Court function. The role to define and interpret regional legal instruments rests on the regional Court. For integration process to succeed in East Africa there has to exist independent and free

<sup>61</sup>See Article 1, Protocol to the African Charter on Human and Peoples' Right on the Establishment of the African Court on Human and Peoples' Rights, 1998. <sup>62</sup>see Article 27 of the Treaty for the Establishment of the East African

Community, 1999<sup>63</sup> For more discussion on multiplicity of regional courts in Africa with overlapping jurisdiction and the need for harmonization, read John Eudes Ruhangisa, “The East African Court of Justice vis a vis African Courts of Justice and Other Initiatives”, in Rok Ajulu, Ed, *The Making of a Region*, Institute of Global Dialogue, Midrand, South Africa, 2005, pp 95-110.

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system that will remedy violations and above all political willingness of those in power to abide by decisions of those given the sacred duty of redressing injustices.

From the foregoing examination, it is evident that some important stakeholders still do not sufficiently appreciate the crucial role that has been entrusted to the Court by the Treaty. The Court should not be seen as an opponent to the policy makers whenever they are not happy with any of its rulings. The Court interprets and applies the Treaty provisions for the achievement of the EAC objectives and not for purposes of pleasing any of the interested stakeholders.

It is very important that Partner States build trust and strengthens the EACJ the regional judicial body charged with determination of community disputes in the region.

The discussion in this paper has shown how the EACJ has performed its functions and the potentialities it has in ensuring adherence to the rule of law but it is not given sufficient jurisdiction and in some instances the little jurisdiction it has is systematically taken away. The Court of Justice of the European Communities which, since its inception, has been playing a crucial role in the European integration process has, from January 2000 to November 2009, determined more than four hundred (400) cases related to Customs Union and Common Market.<sup>64</sup> This is what a fully fledged Community Court is capable of achieving and the EACJ has the potential of doing the same. All it needs is support from the EAC Policy Organs.

It should be understood that the attempt to introduce parallel dispute resolution mechanisms with the EACJ is not an asset to the EAC integration process for the following reasons among others:

Firstly, there will be different interpretations of the Community Law that will create a vicious circle of endless litigation. Secondly the process of harmonization of the national

<sup>64</sup> The cases finalized by the Court of First Instance are not included. See data existing at [http://ec.europa.eu/taxation\\_customs/resources/documents/common/infringements/case\\_law/List\\_of\\_cases\\_6th\\_VAT\\_directive\\_a2\\_fr.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/List_of_cases_6th_VAT_directive_a2_fr.pdf) and [http://ec.europa.eu/taxation\\_customs/resources/documents/common/infringements/case\\_law/court\\_cases\\_direct\\_taxation\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/court_cases_direct_taxation_en.pdf) both websites accessed on 20 January 2010.

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laws will take too long thereby delaying the whole integration process. If we don't take action now, the integration process will soon be a fertile ground for breeding conflicting decisions and confusion. We have to act now.

Let me conclude by emphasising that it is important that the Partner States appreciate the role of the Court in the regional integration process if the same has to have meaning to the people whom the integration seeks to integrate.

I have not made an exhaustive discussion on the topic but due to time constraint I have just raised issues to engage you in the discussion of this important topic

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