

## EFFECTIVENESS OF THE EAST AFRICAN COURT OF JUSTICE AS A VANGUARD FOR REGIONAL INTEGRATION: A DOCTRINAL ASSESSMENT

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### Abstract

*This Paper seeks to navigate the exactitude of compliance and enforcement mechanisms taking place in the East African Community (EAC) through the lens of the East African Court of Justice (EACJ), with a particular focus on the efficiency of its authority and functionality. The paper extrapolates thoughts on the perceptions of legal mirages, myths and realities and the extent to which existing regional institutional frameworks shift to practical enforcement and adherence to EAC Treaty obligations. By borrowing from a deep analysis of regionalism and relevant case material, this Paper sets to and finds a gaping disconnect involving regulation and their operationalization. While the EAC Treaty provides an imperfect policy framework for operationalization and judicial enforcement, Partner States repeatedly exhibit a regular pattern of selective compliance; brushing off legal obligations by consistently bypassing mandatory regional requirements either in favor of international pursuits or jingoist alternatives seen in Globalization agendas and which have in turn led to the weakening of the effectiveness, legitimacy and authority of the EACJ and which in turn ends up limiting institutional credibility. Lastly, the Paper recommends that the East African Court of Justice should actively engage in reviewing most of its legislations, that it should broadly cooperate with Partner States, it should adopt Africa centered initiatives like Ubuntu and Ujamaa including strongly enforcing compliance all with the aim of effectively advancing the mandates of Regional Integration. As a summative call to action for regional integration, it is concluded that there exists a necessity to maintain active resource allocation, even stronger community enforcement, outright goodwill political commitment and sweeping legislative reforms in order to safeguard the EACJ's role as a vanguard of regional integration and to contribute towards a broader debate regarding regional integration as enforced by the East African Court of Justice.*

**Keywords:** East African Community (EAC); East African Court of Justice (EACJ); Regional Integration; Supranational Adjudication; Selective Compliance; Dispute Resolution

### Introduction

This Paper seeks to talk about the East African Court of Justice's (EACJ) jurisdiction including defining the scope and limits of its authority whilst deconstructing and reflecting on the binding nature and legal effects of its decisions on partner states, international organizations, regional institutions and community citizens including dissecting its enforcement capacity through a view of its history encompassing the legal and institutional mechanisms through which judgments are implemented and respected across Member States if at all- to establish that indeed, the EACJ is ineffective at its mandates and is

merely a legal mirage of Regional Integration. Moreover, the Paper will reflect on several instances of the ineffectiveness of the East African Court of Justice (EACJ) with the aim of citing those as examples to the illusion of East African regional integration.

Readers should expect a structured paper kicking off with a Literature Review that establishes the background reasons for conducting the study. This is followed by a section highlighting the Research Methodology approaches that were taken during the generation of this Paper. Moreover, this is followed by a chapter discussing the Findings that arose during research, a chapter on

Recommendations where the way forward and emerging trends are discussed. Toward the end, the paper has a Conclusion section marking the finality of the study. Lastly, the final pages of the Paper have a declarative section where the author makes several declarations on Artificial Intelligence (AI) usage, funding, Conflict of interests, authorship contributions and a referenced list listing the sources and material cited.

### *Literature Review*

This Paper is informed by the presence of scarce and inadequate newly emergent and updated Data on the effectiveness of the EACJ and is informed by Literature Review of several previously published scholarly contributions that were located through a Doctrinal Survey for material and sources obtained from utilizing the internet and library resources. The material and all references have all been attached in the Bibliography and footnotes. The literature of the study specifically on studying the EACJ's role is strong for depicting the operational structure and workings of the EAC and its organs but has a weakness of being outdated. Regardless, these have been instrumental in helping the author to narrow down to the specific topic, to search for gaps in the available outdated knowledge resources and to prove that this Paper's new study is necessary to solve emerging challenges of Regional Integration. These problems include issues regarding compliance by Partner States, questions around whether the East African Commission is over-regulated or under-regulated and how to prepare for emerging developments. All these culminate towards establishing a level of uniqueness for this study compared to other studies.

The EACJ was established under Article 9 of the EAC Treaty. The roles of the EACJ are dictated by the EAC Treaty in Article 27 as read with articles 32, 30(1), Article 23(1), 23(2) and 23(3), where it is established that the Court is a judicial body with the role of ensuring adherence to Community law in the compliance, interpretation and application of the EAC Treaty. Moreover, the Court has the jurisdiction to entertain any matter regarding Arbitration Clauses allocating jurisdiction to the EACJ. This means that International Organizations can draft Contractual Commercial Agreements with Alternative Dispute Resolution Clauses

granting the EACJ jurisdiction to handle disputes involving Arbitration. To add on to this, Article 32(b) grants the EACJ the power to hear and determine matters involving Treaty disputes between Partner States. The Court further has powers under Articles 34 and 36(1) of the Treaty to give preliminary rulings to national Courts or tribunals of Partner states that request its interpretation in matters involving the Treaty.

### *Jurisdiction of the EACJ*

One would think that the EACJ would be put to work by virtue of the jurisdictional availability and capacity of the East African Court of Justice through the EAC Treaty's Article 32(b) to entertain disputes involving Member States. However, in its first ever case involving a dispute referred by Partner States under Article 28 of the EAC Treaty; **The Attorney General of Rwanda v The Democratic Republic of Congo (DRC)**, where one would think that Partner States would take advantage of Article 32(b) and refer disputes involving Partner States to the EACJ, Burundi and Kenya-both members of the East African Community went to Washington DC in the United States to witness and sign a Peace Accord as guarantors for the end of conflict in the DRC-equally a Partner State to the EAC. The Peace Accord was instigated by America which is NOT a Community member.

Further to this, Kenya made follow up engagements through Bilateral engagements with The United States of America's Secretary of State Marco Rubio and American President Donald Trump's Advisor for Africa Massad Boulos to solidify cooperation on Sudan and the DRC which are both Partner States to the East African Community. These took place despite the EAC Treaty's Article 38(2) clearly restricting Partner States from undertaking any actions that might aggravate or be detrimental to the resolution of disputes referred to the EACJ whilst the same matter was still pending before the EACJ unless the Secretary General, a Partner State or its residents seek leave of the EACJ to intervene under Article 40 of the Treaty -leave was not sought before the matter was intervened; communicating a lack of confidence by a significant portion of the Community's own Partner States. This; followed by the Community's silence in castigating the involved Partner States equally

indicates a weakness in the jurisdictional capabilities of the Court.

The jurisdictional capacity of the East African Court of Justice (EACJ) is equally shaky and is up for grabs by violators owing to the Community's slow adoption and pronouncement on average matters such as a barrier on language. This gap is championed by Article 46 of the EAC Treaty - requiring English to function as the official language of the Court despite several new Member States that have French or Kiswahili as their official languages joining the East African Community and despite Uganda being scheduled to officially commence Kiswahili classes in a measure to foster regional integration and despite the Treaty's Article 119(d) requiring the promotion and development of indigenous languages especially Kiswahili as a lingua franca. This makes the EACJ's ability to function as an independent master of justice limited because of the possibility of legally abusing Court procedure to subvert justice. An example is seen in the matter involving **The Attorney General of Rwanda v The Democratic Republic of Congo (DRC)** where French speaking Rwanda through its Attorney General sought a Court order to strike out French speaking DRC's case without leave for amendments due to procedural technicalities when the DRC filled in Court documents that were not translated from French to English-the official language of the EAC.

### ***Research Questions***

As a consequence of the discussions above, the following research questions will be covered.

1. In which ways does the jurisdiction of the East African Court of Justice shape its capacity to function as an independent regional Court within the East African Community?
2. In which ways do existing enforcement and compliance mechanisms affect the effectiveness of the East African Court of Justice as a safeguard of Regional Integration within the East African Community?

### ***Research Methodology***

The Methods used to carry out this research were incorporated for the purposes of examining the structure, coherence and effectiveness of the East

African Court of Justice (EACJ) and to ensure that this Paper meets the highest scholarly requirements and standards of quality. These included adopting strict and thorough use of celebrated academic procedures in order to obtain detailed data analyses. High ethical considerations were put in place to ensure security of the Data during storage and the Paper has been cited using APA (7th Edition) to ensure high academic integrity.

The findings were obtained by analyzing a vast body of Doctrinal Sources in the nature of Primary and Secondary sources and through perusing and revising gathered Empirical Data obtained from past Lectures, Seminars and academic Attendances on Regional Integration. The Doctrinal aspect focused on checking Primary Legal instruments including relevant Case Laws, Statutes and regulations. Moreover, Secondary instruments of Law in the nature of Academic Books, journals, articles and internet sources were equally pursued for the sake of meeting doctrinal adequacies.

### ***Use of Comparative Legal Methods***

Comparative Legal methods of research were utilized to contrast and analyse regionalism within the East African Community (EAC) and other parts of the World. This led to the contrasting of the Community with its European, West, Central, North and Southern African counterparts namely- the European Union -represented by the European Court of Justice (CJEU), Common Market for Eastern and Southern Africa (COMESA), African Court on Human and People's Rights (AfCHPR), Economic Community of West African States (ECOWAS) Treaty, Southern African Development Community (SADC) Treaty, Treaty Establishing the African Economic Community (AEC), Treaty Establishing the Arab Maghreb Union (UMA) and the Treaty for the Establishment of the Economic Community of Central African States (CEEAC).

### ***Limitations during the research***

Despite utmost care and dedication being present during the conduct of the Research Methodology, there were minute challenges with regards to gaining access to some copyrighted Secondary material. Moreover, there still remains the challenge that this Paper is

theoretical since its practical implementation lies with the East African Community.

## Results and Discussions

**Research Question 1:** In which ways does the jurisdiction of the East African Court of Justice shape its capacity to function as an independent regional court within the East African Community legal order?

*“Jurisdiction is everything. Without it, a Court of Law has no powers to make one more step.”* At least this is the holding of the nearly four decades long famous case of **Owners of Motor Vessel Lillian S vs Caltex Oil Kenya LTD (1989) eKLR**. Moreover, in another famous nearly fifty-year-old case of **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 (the Anarita Karimi Case)** the Court established a principle that jurisdiction is very specific and therefore must equally be pleaded in specificity. These two cases give us an understanding of how jurisdiction entirely shapes the functional capacity of an independent Court.

With this understanding, we must confirm that the same to be true for other independent regional Courts. From the most famous case ever by European Union, we find the case of **Van Gend and Loos v Netherlands Inland Revenue Administration** where it was held that in order for jurisdiction to be conferred to the European Court of Justice (CJEU) such that it can make a ruling, issues raised should specifically be concerned with Treaty interpretation. As visible as day is, we see that a Court’s capacity to function independently stems from it having specific jurisdiction to act and function in a certain specific manner.

### *Conditions to be fulfilled for a Court to be ‘independent’.*

Building on the works of Savigny-a German jurist who argued for Courts to depart from strict Geographical and traditional jurisdictional approaches. Scholar Robert Lefflar argues that Courts should give real reasons for their choices rather than hide behind mechanical reasons called rules. He then proposes five factors for consideration by Courts which I argue give a Court its jurisdictional independence. These are; predictability of Laws within a legal system, the maintenance of

international and interstate legal order, the simplification of the judicial tasks at hand, the positive advancement of judicial talk and the application of “the better law” approach- usually criticized for how easy it is for each side of a discourse to claim their side as “the better” one.

### *Does the EACJ hamper its own Jurisdiction?*

In many ways, the East African Court of Justice butchers its own functional jurisdiction to enforce its directives and act as an independent regional Court. This legislative anomaly is seen in the matter of **Martha Wangari Karua v. Attorney General of Kenya & 2 Others**<sup>1</sup> where through a failure to take coercive enforcement actions, the Court failed to chastise Domestic law from claiming to supersede Treaty Law when the Supreme Court of Kenya pushed back against the EACJ’s directions through an advisory opinion declaration that set out judgements from regional Courts as being non-binding towards domestic apex Courts.

More examples can be seen stemming externally from the Court but yet- within the EAC Treaty’s Article 30(3); where the Court has failed to critically decline limits to its own functional jurisdiction by failing to chastise regulations such as those that reject Acts, Directives, Decisions and actions specifically **reserved** to domestic institutions. Moreso, in **Mwatela and Others v East African Community**, the EACJ further failed to properly regard its own jurisdictional capabilities under Article 27(1) of the EAC Treaty by inadequately exercising its interpretive jurisdiction to deal with the question of whether delegated deputy Attorneys General could exercise Sectoral Council powers.

In the matter above, faced with four pending policy-oriented bills before the EAC Assembly, a *Sectoral Council on Legal and Justice Affairs* was established from all Community states by the EAC Council of Ministers. The Attorneys General from each Partner State were appointed to be the members of the Security Council. However, at the material meeting, the Attorneys General of Kenya and Tanzania were represented by their deputies. Because of the Court’s failure to quash active jurisdictional restrictions against

<sup>1</sup>Martha Wangari Karua v. Attorney General of Kenya & 2

Others, (Reference No 20 of 2019)

it - such as those under Article 30(3) of the EAC Treaty that revoke the EACJ's jurisdiction where a Directive, Act, Regulation or Decision has been reserved to a Partner State's domestic institution; the EACJ made a finding that would be considered erroneous today by holding that via Article 119(1) and (2)(1) of the Constitution of Uganda and Section 3 of the Interpretation and General Provisions Act of Kenya, only the Attorneys General of Kenya and Uganda were Ministerial-level officials-not their deputies and that the Attorney General of Tanzania was not a Minister under Tanzanian Law. Since Sectoral Council Powers could only be procedurally exercised by Ministers, it held that the Sectoral Council was annulled. Furthermore, it concluded that Kenya and Tanzania were not properly represented in the material meeting hence that meeting was therefore a nullity *ab initio* as it lacked a quorum of representatives making the decision arrived at there a nullity as well. This is a self-sabotage to its own interpretative and functional jurisdiction regarding its capacity to interpret the Treaty and its regulations; as the EAC Treaty's Article 13(b) suggests that council membership can consist of other ministers as Partner States may determine. Moreover, there exists a procedure for the transfer and delegation of statutory powers and duties found within Sections 37 and 38 of the Interpretation and General Provisions Act of Kenya-a regulation which the EACJ itself would later cite in this very judgement but fail to regard.

To add on to, Article 27(2) limits the Court's interpretive jurisdiction from dissecting the organs of Partner States. Unchallenged procedural improprieties like this are what actively create an enabling environment for the limiting of the Court's functional capacity. The lack of jurisdictional regard by the EACJ goes against other more established regional Courts such as the European Court of Justice's (CJEU) whose determination in the case of *Flaminio Costa v E.N.E.L* (1964) held that Treaty Law supersedes Domestic Law since by establishing and accepting to be bound by a regional treaty of; unlimited duration, that has its own institutions, own personality and its own legal capacity to sue and be sued, states retrospectively agree to a limitation of their own sovereignty rights and a transfer of their powers to the regional Community. Furthermore, the choice by states to set up a regional

Treaty Agreement directly means that laws stemming from that regional Treaty Agreement cannot be inconsistent or overridden by domestic Law provisions as that would be against the basis of reciprocity, directly questioning the legal basis of the establishment of the regional Community.

Like a mirage, the CJEU judgement is illusorily reflected within Article 123 of the EAC Treaty. The reason it is a mirage is since it exists-evidently under Article 33(2) - where the Treaty states that the EACJ has precedence over national Courts. However, its application in reality is non-existent. Evidently, this leaves the East African Court of Justice at the mercy of compliance by Member States and in turn hinders the effect of its jurisdictional capacity to function as an independent regional Court because of the knowledge that Partner States and International Organizations hold regarding the existence of a lack of consequences for multiple instances of non-compliance.

#### ***How does the EACJ enforce compliance?***

Unfortunately, the execution of pecuniary obligation imposing judgements delivered by the East African Court of Justice is left to the compliance of Member States through using the rules of Civil Procedure set in place by its judicial system and is further left at the hands of the decree holder wishing the judgement be executed against a judgement debtor in line with Article 44 of the EAC Treaty. Sadly, this direction hinders the capacity of the EACJ to function as an independent regional Court within the EAC because it retrospectively means that Partner States found guilty of violations are given the chance to self-police themselves. Furthermore, individuals and regional institutions may find it difficult to enforce judgements against Partner States. This denies them justice and manifests the EACJ as being some kind of half-justice supplier that abandons its victims halfway to their realization of justice.

The EACJ's reduced jurisdictional capacity to wholly operate independently is equally reflected within the absence of its jurisdiction to function as a Human Rights Court despite the East African Community Treaty having core principles requiring Partner States under Article 6(d) to adhere to universally accepted Human Rights Standards and further despite the operationalization of

the EAC Treaty's Article 27(2) - which requires Member States to through the Community's Council of Ministers, operationalize a Protocol extending the EACJ's jurisdiction to cover Human Rights violations taking place within Member States. In what capacity shall the Court enforce the specific Treaty mandates when the citizens of its Member States cannot lodge Human Rights violations before it? Member States such as Tanzania have used legislative gaps like this as a loophole multiple times through actions like, since the year 2019, revoking its declaration with the African Court on Human and People's Rights (AfCHPR) as set out under the same Protocol's Article 34(6); in order to avoid having to regard orders by the Court and to flagrantly violate Human Rights without the possibility of consequences from the African Court.

But why is this willful act of defiance by Tanzania significant? The answer lies in the fact that this has had the effect of essentially halting the rights previously possessed by Tanzanian Non-Governmental-Organizations (NGOs) and Tanzanian citizens to directly lodge and file violation of Human Rights claims against the Tanzanian state. To this effect, the EACJ's capacity to function as an independent regional Court within the East African Community is shrunken since it relies on good will compliance and operationalization of yet to exist jurisdiction often seen through a lack of Protocol conclusion by Partner States and which does not equally guarantee freedom from an outsider's control or influence actively manipulating the EACJ's jurisdictional capabilities. Or lack thereof. A perfect example of a failure to operationalize jurisdictional force lies with the over fourteen year wait by Partner States to ratify a Draft Bill of Rights known as the East African Community Human and People's Rights Bill (2012) passed by the East African Legislative Assembly (EALA) in 2012 and which has had the effect of stalling necessary Human Rights jurisdictional and functional capacity of the EACJ.

**Research Question 2:** In which ways do existing enforcement and compliance mechanisms affect the effectiveness of the East African Court of Justice as a safeguard of regional integration within the East African Community?

Compliance mechanisms serve to encourage and to sustain the effectiveness of organizations. Sometimes

however, these very mechanisms may be adequately lacking in the foundation necessary for the prevention of their exploitation; leaving them at the mercy of being abused or misused despite their clear intentions for good. Other times, their existence equally serves no beneficial function in helping with any effectiveness whatsoever despite intending to do so. This chapter seeks to narrate how despite the availability of existing enforcement and compliance mechanisms within the East African Community (EAC), they still are inadequate in enabling the EACJ to function as an effective safeguard for Regional Integration within the EAC.

### ***Validity of enforcement mechanisms***

Despite their presence, enforcement and compliance mechanisms do not seem to be all that valid in enabling the EACJ to function as an effective safeguard of regional integration within the East African Community. Multiple examples emerge from this supposition including in **Maritime Delimitation in the Indian Ocean (Kenya v Somalia) 2021** where when faced with a maritime dispute on boundary delimitation over whether to divide the sea space using Somalia's equidistance rule or Kenya's Parallel of Latitude Rule, the matter was taken before the International Court of Justice (ICJ) despite both Kenya and Somalia being Partner States to the EAC Treaty and despite Article 6 as read with Article 32(b) on the EAC Treaty Principles calling for the peaceful settlement of disputes amongst Community Members through Arbitration.

This effect is further replicated in the Democratic Republic of Congo (DRC) conflict; where despite the DRC being a Partner State, Kenya and Burundi went to the United States of America (USA) to witness a Peace Accord before President Donald Trump - instead of the matter or Peace Accord being championed locally from home through the East African Court of Justice. Moreover, existing enforcement legal mechanisms such as the EAC Treaty's Article 124(5) obligations requiring Partner States to offer mutual assistance in the repatriation of criminal fugitives and in the handling of criminal matters are inadequate as seen in the failure by the Community to implement policies on criminal matters such as war crimes, genocide, torture, piracy and other Article 11 - Internationally Wrongful acts. The consequence of this is seen in the lack of consideration

regarding extradition by other International Courts such as the United Nations specifically when Félicien Kabuga- the key financier of Rwanda's 1994 Genocide was arrested by French authorities in the year 2020; even though Rwanda is a member state to the EAC Treaty.

### ***Effects of existing compliance mechanisms***

In order to protect its capacity to function as an independent regional Court within the East African Community, the Treaty through its existing enforcement mechanisms such as Article 43(2) seeks to protect EACJ judges by granting them immunity and requiring that its judges neither hold political office nor engage in any vocation that is likely to create an interfering conflict of interest in the position and function as an EACJ judge. The problem with this however, is that that very office as a judge is the political office and vocation through which they become nominated by their States in order to serve as a conduit conflict of interest vehicle. This is to say that the requirement for Partner States to nominate judges should be scrapped and instead replaced with a meritocratic system where professional and qualified community citizens directly apply and are vetted. The absence of a meritocratic based system directly contributes to the ineffectiveness of the EACJ as a safeguard for successful and just Regional Integration within the East African Community (EAC).

Moreover, pursuant to Section 11 of the Common Market Protocol (CMP), Partner States mutually agree to undertake the Standardization of academic and professional standards. This has led to a need for compliance with the aim of securing and advancing regional integration. Consequently, to satisfy this regulatory compliance requirement from a legal point of view, the East African Law Society (EALS) organization acts as the official Human Rights abuses watchdog, as the enforcement and compliance mechanism against Partner State repressions and as a key regional player in Policy formulation working with organs such as the East African Sectoral Councils and the Legislative Assembly (EALA). Despite the goodwill, these organizations face several structural and operational challenges including the problem of cross-border licensing and in meeting financial targets. This makes it very difficult for the EALS and EALA to compel Member States to respect pronouncements made by the East African Court of

Justice (EACJ). This actively weakens the effectiveness of the EACJ as a safeguard for regional integration within the Community.

### ***Are there Mechanisms for Justice?***

One of the justice mechanisms available from the EAC Treaty under Article 14(3)d as read with 140(6) on the Council and Article 21 involving the Sectoral Committee includes the regulatory mention of 'Court Recommendations' especially with Article 16 characterizing them as being binding in nature. However, this could not be further from the truth. Unlike decisions which are to be binding in their entirety, the true legal value of 'Court Recommendations' is that they are not binding to the extent of the outcome concerned but are only mere Court suggestions for consideration by the guilty party. This specific enforcement mechanism negatively affects the maximum effectiveness of the EACJ as a regional integration safeguard by rendering its opinions as mere considerations; defeating the purpose for the Court's involvement in the first place. This has led to considerable disregard by Partner States especially towards Recommendations by the Sectoral Committee. As long as it continues as a 'normal' *modus operandi* the effectiveness of the EACJ remains a mirage.

When it comes to environmental protection, specifically in the protection of the local environment, indigenous land and the protection of indigenous people's rights to self-determination; there is little enforcement of compliance mechanisms since only a fraction of the suggested mechanisms within the EAC Treaty exist. As a consequence, the EACJ has over the years been forced to come up with interpretations and stances that face rejection and non-compliance by Partner States for being **unprecedented**. This is shown in instances such as the Court's recent willingness to overlook doctrinal rigidities and its rethinking of the relationship between procedural and substantive approaches by integrating the purpose and motive of breaches with their material effects. Furthermore, it can be seen in the Court's readiness to issue strict remedies like declaratory judgements and permanent injunctions to stop active violations. Past examples can be seen in the Court's approach in the **Serengeti Case** where the EACJ held that Tanzania's environmental obligations under

Chapter Nineteen's articles 111-114 of the EAC Treaty were not negated by the absence of an environmental protection Protocol and that a permanent injunction and declaratory judgement were consequently issued against Tanzania's planned environmental harm of constructing a highway inside Serengeti National Park. In this matter, Tanzania actively declined to implement the Court's decision and strongly pushed back. It was only after massive international pressure that it held back.

Moreover, in the approach taken by the EACJ in the **Serengeti Case**, differs from the approach taken in a similar facts matter by the African Court on Human and Peoples Rights (AfCHPR) in the **Carbon Credit Green Grab - Ogiek Case**, where the African Court directly avoided looking at the matter from an environmental protection point of view despite Green Carbon Credits being involved and instead chose to issue comprehensive and material remedies whilst looking at the matter from an indigenous group's land restitution interest which is to say - from the victim's point of view. Moreover, the African Court consequently failed to chastise the perpetrating state- Kenya against repeating the offence. Despite the presence and availability of some existing compliance and enforcement mechanisms within EACJ regulation and policy, it would appear that these are negligible to enable the EACJ to operate at peak performance. For this reason, we are forced to come face to face with a grim reality that what we hoped would be a strong international regional institution and thought of as being ready for action, is indeed closer to an illusion than to a reality. However, it is vital to ask ourselves whether the illusion is slowly fading away into non-existence or whether it is vividly emerging and becoming a legal reality. You tell me.

### Recommendations

Faced with the realities above, it is vital that we not only be spectators to the problem but that we contribute towards solving and bettering the situation. As a consequence, it is recommended that;

- a) Alternative Dispute Resolution mechanisms available for the EACJ to take advantage of are increased beyond the EAC Treaty's Article 32 on Arbitration. These can be expanded to include;

inquiry and fact finding where investigations are done and unknown facts such as location of deceased are established as a reconciliatory means of dispute settlement, negotiation where parties consult and engage each other towards a solution, conciliation where a dispute is referred to a third party who puts forward settlement proposals, mediation and good offices where disputes with high degrees of animosity between parties are resolved through third party intervention as a frontperson to mask hostilities and inactively pursue a resolution.

- b) Reflecting on the challenges at the EACJ, we can borrow from the judgment in the matter of **Flaminio Costa v ENEL** where the European Court of Justice (CJEU) held that the European Economic Commission Treaty (EEC Treaty- (later integrated into the EU- European Union) created its own legal system such that when the EEC Treaty entered into force, it became a vital part of the legal systems of Partner States and which their Courts are duty bound to apply. For the same effect to be achieved within the East African Community, first its legal system needs to be refined further to include jurisdictional gaps that are yet to be operationalized through Partner State ratification of proposed Legislative Bills and for the Council's determination of other jurisdiction yet to be realized.
- c) Standardization is pursued with the objective of achieving higher quality, brand identity, efficiency in self-regulation and for predictability across functions of the Community. Like the Bretton Woods Agreement which is the most successful monetary unionization that led to a fixed global exchange rate pegged to the USD (\$) as the Gold standard with only the USD (\$) expressly linked to gold, EAC standardization should amongst its goals, pursue the goal of eventually standardizing currency leading to a Monetary Union as envisioned by the Treaty objectives. Furthermore, in tandem with Article 105(2)e of the EAC Treaty, the Community should pursue internationally accepted quality standards for food processing because the current inadequacy in having these

standards makes it difficult for citizens and civil societies of Partner States to pursue cases regarding food quality which in turn lowers the effectiveness of the EACJ to prosecute. A perfect example of affected members include the Democratic Republic of Congo (DRC) which is a Partner State of the EAC and where independent European Swiss watchdog - **'Public Eye'** and **the International Baby Food Action Network (IBFAN)** uncovered Health Risk double standards and disparities in the Sugar contents contained in 90% of baby formulas sold in Africa-such as *Cerelac*; where Nestle had **added honey and sugar quantities** (up to nearly two sugar cubes) in infant food products unlike in Europe where there was no **added sugar** contained in their baby formulas. The reason this is problematic is because it creates a lacuna capable of being exploited; - Nestle's Official Stance is that it is compliant with 'Local Regulations'.

- d) The EAC should pursue its Treaty Article 130(4) and cooperate with other International Organizations, bilateral and multilateral partners in order to pursue intra-African connections and Globalization with the aim of securing competitive advantages, reducing technical barriers and collaborating for its own self-improvement in technology, policies and regulations. This includes having the East African Court of Justice collaborating with other regional Courts such as the African Court on Human and People's Rights, ECOWAS Court and COMESA Court of Justice to cause the implementation of a common policy and standard on hazardous waste management in line with the EAC Treaty Article 105(2)c as read with Article 113 on illegal dumping of hazardous material and whose advancement will lead to cooperating on environmental sustainability.
- e) The current Treaty provision on environmental cooperation - Article 105(2)d excludes the EACJ from taking part in the collaborations by placing the conditional clause 'may' which requires Partner States to maybe notify each other and maybe collaborate in the notification and

provision of relevant information on human and natural activities that might have a transboundary environmental effect. This is especially challenging for the EACJ since this loophole has led to Kenya approving JW Marriott-Ritz-Carlton Safari Camp to construct luxury private hotels which actively disrupts the Mara ecosystem and Wildebeest migratory routes across the shared Kenya- Tanzania Serengeti without consulting Tanzania and without the EACJ being consulted to advise on Environmental questions.

- f) In matters health as envisioned by its Article 118(c), (d), (e), (f) and (h), the EAC through the EACJ should pursue the development of a common drug policy including reducing generics through quality control and good regional procurement so that drug registration procedures, national health standards and pharmaceutical standards can be harmonized. Moreover, the promotion and funding of research and development of herbal and alternative traditional medicines with the popularization of the consumption of indigenous foods should be undertaken by the community.

### *The way forward*

For there to be an effective East African Court of Justice going forward, idle suggestions requiring implementation and adoption must be secured. These include through;

- a) Making it known to Partner States that at inception, the mandates that became Treaty obligations do not exhaust all the powers that the East African Community (EAC) would require since the founding members could not have possibly known to predict all the functions that the organization would take upon and so in order for the avoidance of the East African Court of Justice (EACJ) acting *ultra vires* and its actions being rendered invalid due to the lack of a legal basis to act, urgent and necessary action is required of Member States of the East African Community (EAC) in order to accord the organization the powers it so requires and in

order for the East African Court of Justice to function effectively.

- b) The approaches taken by many African Economic and Pan-Continental Regional Organizations including our very own East African Community-require overhauling in order to pursue an Africa centered pedagogy and philosophical approach-like Ubuntu, Ujamaa and Yoruba philosophies on dispute settlement to be co-implemented. For example, on dispute settlement; the Economic Community of West African States (ECOWAS) Treaty (1975), Southern African Development Community (SADC) Treaty (1992), Treaty Establishing the African Economic Community (AEC) (1991), Treaty Establishing the Arab Maghreb Union (UMA) (1989) and the Treaty for the Establishment of the Economic Community of Central African States (CEEAC) (1983) all draw their inspiration from the same source- the European Community dispute settlement system.
- c) According to UN Population, the Population of Africa is the most rapidly rising and is projected to double by 2054. As a consequence, Partner States should start preparing in advance especially around opportunities since the median age of the continent is 19.5 years old. The best way that members of the EAC Community can prepare is by allowing free movement of labour and factors of production in order for innovation, competition, productivity, access and capital to positively spread. To add on to, the EAC should harmonize and maintain common employment and labour policies including those in Occupational Health and Safety in line with its Article 102(2)e as read with Article 104(3)d.
- d) Legislation and Customs that discourage or limit the equal participation of women and the youth by encouraging or maintaining discrimination should be done away with and Partner States should actively pursue and encourage a cultural shift in the perceptions of women and the youth as lesser people especially with these two groups being the majority of the population with the median age being 19.5 years old.

- e) Partner States should foster cooperation in the training and education of its citizens through reviving and enhancing activities of the Intra-University Council for East Africa as envisioned in the Treaty's Article 102(2)f including 102(2)g that calls for an encouragement to the mobility of students and teachers within the Community. This is especially important presently since Uganda has begun a Kiswahili project for its citizens to learn Kiswahili and it could use some help from Swahili speaking Partners-Kenya and Tanzania.

### ***Emerging Trends***

- a) Shift towards Intellectual Property Rights. This includes Patents, Copyright and Trademarks. For the EACJ to be an effective Court, it must be a modern player securing the Intellectual Property rights above for its citizens through regional collaboration and the establishment of a conducive environment for science, innovation and technology to thrive in line with Article 103(1) as read with articles 106, 107, 108 (a, d, e and f) and Article 112(2)n encouraging the Community to advance scientifically by securing patents in seed and animal technologies, genetics and scientific research. Because the wealth of a nation lies in its ability to feed itself, Intellectual Property security in gene technology will further lead to food sufficiency and a common Agricultural policy for food security.
- b) The rise of powerful private organizations. A global example of such an organization with reach in the East African Community is the Fédération Internationale de Football Association (FIFA) which is a Sports governing body operating and which is governed by *Lex Sportiva*-a private legal order independent of the laws of its individual Member States. These laws allow FIFA to write its own statutes, create its own regulatory bodies, build its own internal disciplinary systems, define the limits of its own governance and bind all its members towards unequivocal compliance including requiring all football players with disputes to strictly handle them at the FIFA controlled Court of Arbitration

of Sports in Switzerland. Moreover, as an International Sports federation in Switzerland, this private International Organization is tax exempt. The reason that the EACJ should watch out for the rise of such organizations is because whilst the United Nations (UN) has 193 members, FIFA has 211 which means it holds a much more powerful degree of control with Peer reviewed scholarship on the subject through the lens of Ken Foster calling this phenomenon "...a netherworld of International governance with arrogance and impunity unrivaled among International Organizations...".

- c) Seabed Mining. Deep sea mining is a newly emerging type of mining where metal and other precious metals are mined from the ocean sea bed. At the moment, little to no regulations exist on the subject which is making regional members angsty. Kenya for example has chosen to pursue the matter by calling for a halt to the mining and advocating for a global moratorium by joining 'The Moratorium Coalition'. Kenya through its Permanent Secretary for Mining- PS Harry Kimtai has expressed concerns that industrial exploitation is advancing faster than regulation and scientific understanding in the area can keep up. It is for this reason that the EACJ should step in to mediate this maritime lacuna on behalf of its Member States and as a bloc so that the bargaining advantage can be stronger. In line with this, the EAC should further consider implementing a regional maritime regulation in order to grant the EACJ direct authority to entertain such matters. The inadequacy of this regulation has in the past led to Kenya and Somalia taking their Maritime delimitation dispute to the International Court of Justice (ICJ) in **Maritime Delimitation in the Indian Ocean (Kenya v Somalia)** 2021 despite both being Partner States to the EAC Treaty.

## Conclusion

There is no doubt that Regional Integration is a reality. On whether it is a legal reality within the East African Community, the answer is that Regional Integration as seen through its legal arm - the East African Court of

Justice, is a realistic myth of a legal mirage that exists and whose rights can be seen but which cannot be touched without the pursuit looking like wishful thinking. A call to action is hence placed for regional integration experts, Regional Organisations and Partner States to invest more time, attention and care towards undoing the tangled knot that has befallen the Community Court and which reduces its utility.

## Declarations

### *Declaration of generative AI and AI-assisted technologies in the writing process*

The editor, while editing this work, utilized Google Docs for spell checking and word count refinement. Further, the author used Grok AI to convert the Manuscript's original Citations from OSCOLA Referencing to APA (7Th Edition) Reference format as required for this journal. After using these tools, the author reviewed and edited the content as necessary and acknowledges full responsibility for the publication's content.

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The author wishes to declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this Paper.

## References

- African Commission on Human and Peoples' Rights v. Kenya (Ogiek Case), App. No. 006/2012, Judgment, 2 Afr. Ct. H.P.R. 9 (May 26, 2017). (Case Law)
- African Network for Animal Welfare v. Attorney General of Tanzania, Ref. No. 9 of 2010 (EACJ, June 20, 2014). (Case Law)

- Anarita Karimi Njeru v. Republic, KLR 1272 (Kenya). (Case Law)
- Attorney General of Rwanda v. Democratic Republic of Congo, Ref. No. 33 of 2023; Consolidated App. Nos. 4 & 5 of 2024 (EACJ). (Case Law)
- Bretton Woods Agreement, United Nations Monetary and Financial Conference, July 1–22, 1944, Final Act and Related Documents, 60 Stat. 1401, 2 U.N.T.S. 39. (Treaty)
- Carothers, T. (1998). *The Rule of Law Revival*. Foreign Affairs, 77, p.95–106.
- Consolidated Version of the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13. (Treaty)
- Costa v. ENEL, Case 6/64, 1964 E.C.R. 585. (Case Law)
- Davis, K. (2004). *What can the Rule of Law variables tell us about Rule of Law Reforms?* Michigan Journal of International Law, 26, p.141–161.
- Dezalay, Y., & Garth, B. G. (Eds.). (2002). *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*. p.3-6 and p.9-11
- East African Court of Justice Rules of Procedure (2019). (Treaty Regulations)
- East African Court of Justice. (2022). Report of the 2nd Annual East African Court of Justice Judicial Conference. p.1-10
- East African Law Society. (n.d.). Regional Integration. <https://ealawsociety.org/regional-intergration/>
- Foster, K. (2019). *Global Sports Law Revisited. Entertainment and Sports Law Journal. Advance Online Publication*. p.15-19 and p.21-23
- Fédération Internationale de Football Association. (n.d.). FIFA. <https://www.fifa.com/en>
- Gorobets, K. (2020). *The international rule of law and the idea of Normative Authority*. Hague Journal on the Rule of Law, 12, p.227–254.
- Harding, M. (2013). *Conflict of Laws* (5th ed.). p.6, p.7, p.11 and p.99
- Interpretation and General Provisions Act, Cap. 2 (Kenya). (Regulation)
- Kimeu, C. (2025, November 19). Maasai Sue Marriott Over Ritz-Carlton Safari Camp. The Wall Street Journal. <https://www.wsj.com/business/hospitality/maasai-sue-marriott-over-ritz-carlton-safari-camp-6115ac1d>
- Kleinfeld, R. (2006). *Competing Definitions of the Rule of Law*. In T. Carothers (Ed.), Promoting the Rule of Law Abroad: In Search of Knowledge. p.32
- Koech, G. (2026, June 19). Kenya Joins Coalition Calling for a Halt to Deep Seabed Mining. The Star Newspaper. <https://www.the-star.co.ke/counties/coast/2026-06-19-kenya-joins-coalition-calling-for-a-halt-to-deep-seabed-mining>
- Law Africa Publishers. (2007). *Jurisprudence on Regional and International Tribunal Digest*. p.1-18 and p.354-361
- Leflar, R. A. (1966). *Choice-influencing Considerations in Conflict Law*. New York University Law Review, 41, p.267–312.
- Maritime Delimitation in the Indian Ocean (Kenya v. Somalia), Judgment, 2021 I.C.J. 211 (Oct. 12). (Case Law)
- Martha Wangari Karua v. Attorney General of Kenya & 2 Others, (Reference No 20 of 2019). (Case Law)
- Mutambo, A. (2025, December 2). US Invites Kenya, Burundi as Guarantors to Congo Peace Deal. The East African Newspaper. <https://www.theeastafrican.co.ke/tea/news/east-africa/us-invites-kenya-burundi-as-guarantors-to-congo-peace-deal-5284734>
- Mwatela v. East African Community, Case No. 1 of 2005 (EACJ). (Case Law)
- Nestlé Accused Of ‘Risking the Health of Babies for Profit’ Over Added Sugar in Cereals Sold in African Countries. (2025, November 17). The Guardian Newspaper. <https://www.theguardian.com/global-development/2025/nov/17/nestle-accused-of-risking-health-of-babies-for-profit-over-added-sugar-in-cereals-sold-in-african-countries>

- NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen, Case 26/62, 1963 E.C.R. 1. (Case Law)
- Odiko, B. (2012). Bill on Human and People's Rights is Passed by EALA (East African Legislative Assembly). <https://www.eala.org/media/view/bill-on-human-rights-is-passed-by-eala>
- Owners of Motor Vessel Lillian S v. Caltex Oil (Kenya) Ltd., eKLR (Kenya). (Case Law)
- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998. (Treaty Regulation)
- Raz, J. (2009). *The Authority of Law: Essays on Law and Morality* (2nd ed.). p.212
- Sands, P., & Klein, P. (2009). *Bowett's Law of International Institutions* (6th ed.) p.10, p.131 and p.191
- Smith, A. (1776). *An inquiry into the nature and causes of the Wealth of Nations* (9th ed.) p.341-378
- The East African Community Common Market (Mutual Recognition of Academic and Professional Qualifications) Regulations (2011). (Treaty Regulations)
- Treaty Establishing the African Economic Community (AEC), June 3, 1991. (Treaty)
- Treaty Establishing the Arab Maghreb Union (UMA), Feb. 17, 1989. (Treaty)
- Treaty Establishing the Economic Community of Central African States (CEEAC), Oct. 18, 1983. (Treaty)
- Treaty for the Establishment of the East African Community, Nov. 30, 1999 (as amended 2007). (Amm. Treaty)
- Treaty of Rome, Treaty Establishing the European Economic Community, Mar. 25, 1957. (Treaty)
- Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975. (Treaty)
- Treaty of the Southern African Development Community (SADC), Aug. 17, 1992. (Treaty)
- Trebilcock, M. J., & Daniels, R. J. (2008). *Rule of law reform and development: Charting the Fragile path of Progress*. p.1, p.12, p.29, p.37, p.66, p.119, p.156, p.156, p.175, p.236, p.252, p.289, p.318, p.332, p.341 and p.352
- United Nations. (n.d.). *Global Issues: Population*. <https://www.un.org/en/global-issues/population>
- Von Savigny, F. C. (1880). *A Treatise on the Conflict of Laws* (W. Guthrie, Trans.; 2nd ed.). p.11 and p.99
- Wa Nciko Laetitia, N. (2026). *The Jurisprudence of The African Court and The East African Court in Protecting Indigenous Land*. p.1-20 (Article)
- Worster, W. (2021). *Cases and Materials on the Law of International Organisations*. p.02, p.06, p.10, p.20, p.34, p.131, p.195 and p.369